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DIPLOMATIC INTERCOURSE AND IMMUNITIES

Summary of observations received from Governments and conclusions of the Special Rapporteur

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CHAPTER I

Introduction

1. At its ninth session, the International Law Commission had on its agenda the subject "Diplomatic intercourse and immunities"; the author of this document was appointed Special Rapporteur. The Commission studied and discussed the subject on the basis of the report submitted by the Rapporteur and adopted provisionally the draft articles with commentary reproduced in chapter II of the report covering the work of its ninth session.[1/]

2. In conformity with articles 16 and 21 of its Statute, the Commission decided to transmit the draft articles, through the Secretary-General, to Governments for their observations.

The following remarks accompanied that decision:

"The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume other forms that might come under the heading of "ad hoc diplomacy", which covers roving envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report to it at its next session. The Commission will thus be able to discuss that part of the subject simultaneously with the present draft and any comments on it submitted by Governments.

"Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. These matters are, as regards most of the organizations, covered by special conventions.[2/]"

Sixteen Governments have communicated their observations on the draft[3/], and three others have stated that they had no comments to make.

On receipt of the observations from Governments, the Rapporteur prepared a fresh report dealing with them.[4/] On the other hand the Rapporteur regrets to say that he has not had the time to prepare and submit a report on other forms of diplomacy.

1/ Official records of the General Assembly: twelfth session, Supplement No.9 (A/3623).

2/ Ibid., paragraph 13

3/ These observations are reproduced in documents A/CN.4/114 and A/CN.4/114/Add.1.

4/ The Governments of Finland and Italy submitted their observations on the draft after the preparation of this report. For that reason, the Rapporteur has been unable to take their observations into consideration in the report.

CHAPTER II

Summary of observations received from Governments and conclusions of the Rapporteur

A. General appreciation of Commission's report

Australia[1/]

Expresses its appreciation of the work done on the subject and the provisional Draft, which appears to cover in a comprehensive manner all aspects of the subject.

Japan[2/]

Is deeply appreciative of the contribution made by the International Law Commission.

Belgium[3/]

The provisions of the draft are on the whole in accordance with Belgian usage.

Jordan[4/]

Considers the provisions of the draft articles as covering the requirements.

Luxembourg[5/]

On the whole, the Luxembourg Government can fully approve the draft. The Commission's work is a distinguished contribution to the unification and development of international law.

Sweden[6/]

On most points, the Government can accept the draft articles. They seem on the whole to correspond to internationally accepted practice.

1/ Observations of Governments on the draft articles concerning diplomatic intercourse and immunities (A/CN.4/114), page 6.

2/ Ibid. page 19

3/ Ibid. page 8

4/ Ibid. page 23

5/ Ibid. page 24

6/ Ibid. page 33

Argentina[1]

The clauses are on the whole acceptable.

Netherlands[2]

The Government is of the opinion that the draft articles form an excellent basis for codification.

United Kingdom[3]

The Government expresses its high appreciation of the painstaking study which the Commission had devoted to this subject, and expresses its broad agreement with the rules and principles embodied in the draft articles, subject, however, to certain detailed comments it has made and to others that may be made in respect of certain of the draft articles which are still under consideration.

Chile[4]

The Government considers that the draft has been prepared according to sound juridical criteria and that it has been carefully developed from the technical point of view. It embodies fundamentally the same principles as those stated in the Convention of Havana, with modifications to adapt them to the new conditions brought about by changes in certain aspects of diplomatic relations. Many rules, which had lent themselves to differing interpretations, have been clarified and defined; new regulations have also been established to supplement existing ones or to repair omissions when necessary. The Chilean Government conveys its congratulations for the Commission's commendable achievement.

Austria, Ghana and India stated that they had no observations to make.

United States of America

See under following heading.

1/ Ibid., page 4.

2/ Ibid., Add.1, page 11

3/ Ibid., Add.1, page 21

4/ Ibid., Add.1, page 3

B. Form of the Codification

United States of America[1/]

The common observance by all Governments of existing immunities is to be desired, but Governments are not always in agreement as to the requirements of international law. Accordingly, a codification by the International Law Commission on the subject should materially contribute to the improvement of relations between States.

Some of the proposed articles cannot, however, be considered as a codification of existing principles of international law. In a number of respects, the draft articles appear to represent an amendment and extension of existing international law, and appear to lay down certain new rules at variance with existing rules.

The United States Government is opposed to the suggestion that the draft articles be submitted to the General Assembly in the form of a convention.

Its principal objections are as follows:

1. It is unlikely that a significant number of Governments would become parties to a multilateral convention of this character. Governments have consistently shown a reluctance to enter into multilateral treaties on the subject.

2. Adoption of such multilateral conventions by some Governments and not by others would result in disagreement and confusion.

3. Adoption of a convention along the lines of the draft articles would tend to freeze the status quo and would prevent normal development of desirable diplomatic practices.

4. Adoption of such a convention would require changes in existing national laws and regulations with respect to many matters which have to date sensibly been left to the discretion of the States concerned and have not been regulated by international law.

5. A number of articles apparently represent an effort to reconcile the conflicting views of Governments as to what a particular rule should be. The result is too frequently a vague or ambiguous statement, obscure in meaning and susceptible of different interpretations. The United States Government believes that unless a rule can be stated simply and with clarity, the Commission should merely note that, on the issue involved, the law is unsettled.

1/ Ibid., page 50

The United States Government further observes that the draft articles would have greater application than appears to have been contemplated. The draft is expressly confined to permanent diplomatic missions, thereby excluding the general subject of international organizations. However, acceptance by the United States of the draft articles would also have an effect on the treatment accorded to representatives to certain international organizations and members of their staffs (cf. e.g., section 15 of the Agreement between the United States and the United Nations regarding the Headquarters of the United Nations, 26 June 1947). The Government further observes that the draft articles appear to reflect inadequate consideration of the principle of reciprocity, which at present underlies much of the practice of Governments. While certain rules of conduct should be observed by all Governments without discrimination, other rules need apply only on the basis of reciprocity.

The United States Government therefore recommends that the Commission should not undertake to revise the draft articles in the form of a convention, but should, rather, undertake to prepare a codification of existing principles of international law on the subject. Such a codification should restate those principles of international law and rules of practice which have become so clearly established and so well recognized that common observance by all Governments may be expected.

Switzerland[1/]

None of the other Governments has opposed the idea of preparing a convention, but the Swiss Government makes certain observations which recall the comments of the United States Government.

Thus, it is said in the Swiss memorandum that the most urgent task is to arrive at a satisfactory wording of the rules existing already, which would form the groundwork for future development. Consequently, the comments concentrate on describing the legal situation as it now exists in Switzerland. (But the Swiss Government does not reject the idea of a convention; rather, it leaves it to be presumed that the draft will be in the form of a convention).

1/ Ibid., page 36

The Swiss Government notes that the draft deals only with permanent missions, leaving aside special and temporary missions and delegations, diplomatic conferences, and - a very important subject - international organizations and the permanent and temporary delegations to those organizations, as also the status of their officials. The Government adds: "Nevertheless, when the rules laid down in the draft are again considered, account should be taken of the effects which this convention is bound to have on other branches of law which are yet to be codified."

Netherlands[1/]

The Government agrees with the Commission that the subject constitutes a suitable topic for codification, and expresses the opinion that the draft articles form an excellent basis for such codification. It then refers to the different aspects of the subject, which should be dealt with in separate conventions.

Belgium[2/]

There is no objection to the use of the draft articles as the basis of a convention.

Japan[3/]

The Government hopes that the International Law Commission will continue to exert still further efforts with a view to concluding a multilateral treaty on the subject.

The other Governments also seem to accept the idea of a convention, or at least do not oppose it.

1/ Ibid., Add.1, page 11

2/ A/CN.4/114, page 13

3/ Ibid., page 19

The Rapporteur is not convinced by the arguments of the United States Government.

If there is one topic which might have a chance of rallying sufficient support to form the subject of a convention, it is surely this particular topic. Admittedly, there are differences of opinion, but essentially these relate to minor points which do not affect the major interests of the Powers as do, for example, the subjects recently discussed at Geneva. What is involved is the grant, in favour of a certain group of aliens, of certain exceptions to the treatment accorded by a State to its own nationals; but after all, that State receives the benefit of the same advantages extended to its own nationals belonging to the same group in other States.

Besides, it is of some advantage both to States and to diplomats that conditions should be uniform in all countries.

The arguments upon which the United States Government has relied may be dealt with as follows.

1. The Rapporteur does not know whether Governments have shown less reluctance to enter into multilateral treaties concerning subjects other than this. In general, the conclusion of multilateral treaties has not been an easy matter, but his impression is that the community spirit has become stronger and that today States are more prepared than they were in the past to make concessions affecting their sovereignty. This, he admits, may be the illusion of an optimist.

2. The adoption of a convention by a few Governments only might or might not result in disagreement and confusion, but this contingency could always be guarded against by means of a stipulation requiring a certain number of accessions and ratifications as a condition governing the entry into force of the convention.

3. It is difficult to say what development is looked for in diplomatic practice. The acceptance of the draft - always on the condition that a large number of States accede - would, however, signify an advance, at least in the sense that thereafter it would cease to be a matter of discussion whether certain privileges are granted according to law or out of pure courtesy.

4. In any case, the draft is provisional only and can still be modified in such a way as to leave States free to regulate by municipal law what they are reluctant to regulate by an international instrument. In the final analysis, the crucial question in this as in every international codification is this: Is the benefit offered by international regulation worth the price the State pays in surrendering part of its sovereignty?

5. The United States Government's observations in paragraph 5 can be discussed more profitably in connexion with particular provisions. Already at this point, however, the Rapporteur wishes to state that relationships exist where both sides have conflicting and justified interests and where a solution cannot materialize except by an appraisal of the circumstances of the specific case and by compromise. Even so, it may be desirable that a legislative text should contain a general clause providing that, as a rule, the interest should be taken into consideration.

The Commission realizes, of course, that the rules it is preparing concerning diplomatic intercourse between States through permanent missions may have an influence on other related topics, such as ad hoc diplomacy, relations between States and international organizations, and others. According to its plans, the rules concerning those other relations will be studied after the completion of the present draft, and at the same time a final revision of the draft will become necessary from the point of view of the interdependence of the different sets of rules.

Nor is the Commission unmindful of the potential rôle of the principle of reciprocity. This question will be dealt with below, in connexion with an observation by another Government.

C. Other general observations

Netherlands[1/]

Application of the articles in time of war. The Government is of the opinion that, in principle, the draft articles are only intended for the regulation of diplomatic intercourse in time of peace and that certain provisions, such as those of article 31, paragraph 2, and of article 35, govern the transition from peace-time to war-time conditions (see article 36). The relations between belligerents are governed by the law of war, whereas the draft articles continue to apply to the relations between belligerent and neutral States and between neutral States themselves. The Government thinks it advisable that a paragraph dealing with this problem should be inserted in the commentary to the relevant article.

The Rapporteur agrees. The observation will be considered again under article 36.

1/ Ibid., Add.1, page 11.

Reciprocity. Although it will not be possible to adhere to the principle of reciprocity in its strictest sense, this principle is nevertheless the keynote of any regulations of this kind. The Netherlands Government therefore wonders whether it would not be appropriate to insert a general provision embodying the principle of reciprocity without, however, making the observance of a strict reciprocity a condition for diplomatic intercourse. Such a provision should in particular serve as a basis for a satisfactory application of article 7.

The Rapporteur considers that, if a codification in the form of a treaty is contemplated, then reciprocity is to a large extent guaranteed by the treaty. Reciprocity may, however, be conceived of as a condition governing the grant of advantages more extensive than the minimum laid down as obligatory. If it is the intention to give expression to this idea, then either a special provision may answer the purpose or else a clause may be added in each article in which the question of reciprocity arises. If the draft does not take the form of a convention, the question of reciprocity will become more important. Preferably, a decision should be postponed until after the articles have been reviewed, by which time it will be clearer whether a reciprocity clause is necessary.

Reprisals. The Netherlands Government takes the view that the articles of the draft do not interfere with the possibility of taking reprisals in virtue of the relevant rules of general international law.

The Rapporteur agrees. Perhaps the question ought to be mentioned in the commentary.

Emergencies. The Netherlands Government is of the opinion that privileges and immunities do not preclude the taking of special measures by the receiving State in emergencies. In particular, such cases may occur in connexion with the application of articles 16 and 22, and hence it is advisable to insert an observation to this effect in the commentaries to these articles.

The Rapporteur agrees, but notes that the commentary to article 22 refers to emergencies. The commentary may be expanded and a reference added also in the commentary to article 16.

Relationship between the convention and the commentaries thereto. The commentaries have no force of law. The principles mentioned therein which should be accorded force of law should be embodied in the articles themselves. The Netherlands Government suggests that the Commission review its text in this respect.

The Rapporteur observes that cases contemplated in article 16 and paragraph 4 of the commentary thereto, may be mentioned as examples. These will be discussed in the proper context below.

Terminology. The Commission has not always been consistent in the terminology used. It uses without distinction the expressions "member of the mission" and "member of the staff of the mission", "immunities" and "privileges and immunities". In the articles it refers to "immunity from jurisdiction", in the commentary to article 24 to "exemption from jurisdiction". The draft would be much clearer if a uniform terminology were used.

The Rapporteur will deal with this question in his remarks concerning the text of the articles below.

The draft not exhaustive

Luxembourg[1]

It would seem essential to indicate clearly (e.g., in the preamble to the convention which will give definitive form to the subject-matter) that the articles do not represent a complete and exhaustive regulation of all the questions which may arise in actual practice. This would prevent the exclusion of recourse to general principles of law, to international custom and to the judicial and administrative practice of States (e.g., the domicile of the diplomatic agent). The Luxembourg Government proposes that an additional article concerning social security contributions should be inserted in the section relating to exemption from dues and taxes.

Switzerland[2]

The Swiss Government makes a general observation on much the same lines as that of the Luxembourg Government, viz., that the proposed articles are in part "a codification of existing international law", which does not exclude the application of customary law in cases not settled by the convention.

The Rapporteur thinks that the commentary might state that the draft is not intended to settle every question.

Czechoslovakia[3]

The Czechoslovak Government proposes the adoption of several additional provisions. These proposals will be examined in their proper context.

Japan[4]

The foregoing remark applies equally to a proposal of the Japanese Government that the Commission should deal also with the question of the delivery of diplomatic passports and the granting of diplomatic visas.

D. Structure of the draft

Switzerland[5]

The Swiss Government proposes that the arrangement of the draft should be modified in several respects.

The Rapporteur considers that, preferably, these proposals should be examined after all the articles have been reviewed.

1/ Ibid., page 24
2/ Ibid., page 38
3/ Ibid., Add.1, page 10
4/ Ibid., page 22
5/ Ibid., page 37

E. Observations on the different articles of the draft

Definitions

Netherlands[1]

The Netherlands Government proposes that the draft articles should be preceded by a defining clause in these terms:

"Definitions

"For the purpose of the present draft articles, the following expressions shall have the meanings herewith assigned to them:

(a) the 'head of the mission' is a person authorized by the sending State to act in that capacity;

(b) the 'members of the mission' include the head of the mission and the members of the staff of the mission;

(c) the 'members of the staff of the mission' include the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) the 'diplomatic staff' consists of the members of the staff of the mission authorized by the sending State to engage in diplomatic activities proper;

(e) a 'diplomatic agent' is the head of the mission or a member of the diplomatic staff of the mission;

(f) the 'administrative and technical staff' consists of the members of the staff of the mission employed in the administrative and technical service of the mission;

(g) the 'service staff' consists of the members of the staff of the mission in the domestic service of the mission;

(h) a 'private servant' is a person in the domestic service of the head or of a member of the mission."

1/ Ibid., Add.1, page 13.

The Netherlands Government suggests certain drafting changes to be made in different articles if this proposal should be adopted. These will be dealt with later in their context.

Other Governments have made similar observations.

Japan[1]

It would be desirable to have the "members of the diplomatic staff", the "members of the administrative and technical staff" and the "members of the service staff" and "private servants" more precisely defined; in establishing these definitions it would be necessary to take into consideration both the status of a member under the laws of his own country and the functions actually performed by him in a mission. In this connexion, it is noted that persons who perform low-grade duties, such as janitors and chauffeurs, are government officials under Japanese law.

United States of America[2]

The United States Government also suggests definitions for the various groups of personnel and emphasizes that clear distinctions should be made between officer and subordinate staff personnel. In this connexion, it refers to the commentary following article 6, which states that the practice of appointing nationals of the receiving State as members of the diplomatic staff has now become fairly rare. This is true if the diplomatic staff is deemed to include only officer personnel.

It adds that the article containing the definitions should also make reference to military, naval and air attachés and their staffs.

The Rapporteur observes that, although the definitions proposed by the Netherlands Government deal only with what is self-evident, he does not object to the insertion of an article containing these definitions. When the subject was studied by the Commission at its ninth session, several members recommended such an article.

In sub-paragraph (d) of the provision proposed by the Netherlands, the following passage might be added: "including military, naval and air attachés and other specialist attachés". This addition would meet the request of the United States Government.

1/ Ibid., page 19.

2/ Ibid., pages 54 and 55.

SECTION I

Czechoslovakia[1]

The Czechoslovak Government considers it desirable that the draft express the principle that all States enjoy the right of legation.

The Rapporteur notes that in his original draft he had proposed an article concerning the right of legation, but the Commission considered such an article undesirable. The Czechoslovak Government does not give any reasons for its proposal. In any case it could not be accepted without particulars of the conditions to be satisfied in order that a State may possess the right of legation.

ARTICLE 1

United States of America[2]

An additional paragraph might well be added dealing with situations where the head of a mission and perhaps other officials of the mission are accredited also to one or more other States. In that case the sending State should first obtain the consent of each receiving State.

The Rapporteur agrees in principle, but is not sure where the additional provision should be inserted. Perhaps the best place would be after article 5. A reference in the commentary might perhaps also be considered, particularly as regards members of the staff.

Text proposed for an article 5(a):

> "With the consent of each receiving State, a head of mission may in addition be appointed head of mission in one or more other States."

ARTICLE 2

Australia[3]

The Australian Government proposes that the words "the Government [of]" should be omitted since diplomatic missions generally represent heads of States.

Luxembourg[4]

Makes a suggestion to the same effect. The function of the diplomatic mission is not only to represent the Government of the sending State, but to represent the

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1/ Ibid., Add.1, page 10.
2/ Ibid., page 53.
3/ Ibid., page 6.
4/ Ibid., page 25.

State as a whole. It is this notion which is expressed in the traditional formula that diplomatic agents represent the heads of States.

The Rapporteur has no objection.

Chile[1]

With regard to paragraph (b), the Government of Chile considers that diplomatic protection should be exercised only after the ordinary remedies in the courts of the receiving State have been exhausted. In so far as the sending State's nationals are concerned, protection should consist rather in obtaining for them a guarantee of access to the ordinary courts of the country. Denial of justice alone can justify diplomatic protection. The Government of Chile therefore considers the unqualified statement of this protection in the said paragraph somewhat inadequate.

The Rapporteur considers that protection extends far beyond the cases in which an alien is required first to exhaust the ordinary remedies in the courts. This observation does not call for any action.

Czechoslovakia[2]

The Czechoslovak Government recommends that, for the sake of completeness, the article should be supplemented by a provision concerning activities serving the promotion of friendly relations among States and the development of their economic, cultural and scientific relations, and by a provision conserving consular activities in those cases where official consular relations are non-existent between States.

United Kingdom[3]

It is for consideration whether the functions specifically enumerated should include a reference to cultural activities. This seems in modern times to be one of the acknowledged functions of a diplomatic mission. The United Kingdom Government notes, however, that it may be that a specific reference to cultural functions is unnecessary.

1/ Ibid., Add.1, page 4.

2/ Ibid., Add.1, page 10.

3/ Ibid., Add.1, page 22.

United States of America[1]

The functions listed are obvious, and admittedly not exhaustive. It is therefore probably not practical to define the precise functions which a diplomatic mission may perform.

Switzerland[2]

Fortunately, the list of functions is not exhaustive, and will therefore not stand in the way of future development.

The Rapporteur, uncertain whether the United States observation was a criticism or an expression of approval, decided to regard it as an approving comment. He too considers that a fuller enumeration should not be attempted, for the longer the list - and it could be very long - the more one will ask why it does not mention some particular function.

When the question was discussed at its ninth session, the Commission decided that only the most important functions should be mentioned.

The functions mentioned by the Czechoslovak and United Kingdom Governments are of course important, but the Rapporteur agrees with the United Kingdom Government that it is unnecessary to add anything to the list, and that it is even better not to do so.

Netherlands[3]

In the commentary to this article attention should be paid to the position of a foreign trade representation. In the Netherland Government's view the question whether or not a trade representation belongs to the diplomatic mission must be answered in the light of the internal organization of the mission concerned; the receiving State should rely on the information given by the sending State in this respect, unless it is clear that the information supplied is completely fictitious and that the person concerned can in actual fact in no way be regarded as having a diplomatic function.

The Rapporteur has no objection.

1/ Ibid., page 53.

2/ Ibid., page 38.

3/ Ibid., Add.1, page 14.

ARTICLE 3

United States of America[1]

This article sets forth the general practice of States, including the United Stat

Chile[2]

The agrément is only required for ambassadors and ministers, since in practice it is not necessary for chargés d'affaires. The wording of the article might be changed by replacing the words "head of the mission" by the words "ambassador or ministers"; alternatively, the following sentence might be added: "This provision shall not apply to chargés d'affaires."

In the Rapporteur's opinion, these observations do not call for any amendment of the text.

ARTICLE 4

United States of America[3]

The intent and probable effect of this article are uncertain, both because the draft articles do not define with sufficient clarity the various categories of person which compose the staff of the mission, and because the commentary following articles 5 - 7 is in some respects inconsistent with the provisions of the articles. In any event, the United States Government is of the view that this article should be revised to recognize the right of every State to refuse to receive in its territory any member of the staff of a diplomatic mission whom it considers unacceptable. Unde United States immigration laws, some form of acceptance by the United States Governme is a condition precedent to the visa applicant's classification as a foreign governme official or employee.

The Rapporteur considers that there is probably a misunderstanding underlying this observation. Perhaps the expression "freely appoint" has been interpreted as meaning more than in fact it does. He will attempt to expand the commentary to indicate the appointment does not dispense with the visa if a visa is required.

1/ Ibid., page 53.

2/ Ibid., Add.1, page 4.

3/ Ibid., page 53.

Netherlands[1]

If the definitions clause is adopted the word "other" before "members" should be deleted.

The Rapporteur agrees.

Moreover, the Netherlands Government is of the opinion that it should be made obligatory on the sending State to notify the receiving State of the arrival and departure of any member of the mission (see proposed definitions) and of personnel, even in the case of local personnel. Such an obligation would be consistent with the practice existing in various countries. The Netherlands Government proposes that the following should be added to article 4:

> "The arrival and departure of the members of the mission together with the members of their households, shall be notified to the Ministry of Foreign Affairs of the receiving State. Similarly, a notification shall be required for members of the mission and private servants engaged and discharged in the receiving State".

The Rapporteur has no objection (see paragraph 10 of the commentary to article 28).

ARTICLE 5

Netherlands[2]

If the definitions clause should be adopted, the words "diplomatic agent" could be used instead of "members of the diplomatic staff".

The Rapporteur agrees.

United Kingdom[3]

It is not the normal practice of the United Kingdom Government to grant such express consent as is contemplated in this article.

Switzerland[4]

Articles 3 - 6 are in conformity with customary law and, in particular, with the practice of Switzerland.

1/ Ibid., Add.1, page 14.

2/ Ibid., Add.1, page 13.

3/ Ibid., Add.1, page 22.

4/ Ibid., page 38.

With regard to article 5, the Swiss Government states that it appears prudent to make a rule which leaves it to the discretion of the receiving State to accept, by giving its express consent, its own nationals as members of the diplomatic staff of the sending State. In Swiss practice, the nationals of the receiving State are accepted as diplomatic agents only in exceptional cases and are accorded only the minimum privileges and immunities essential to enable them to exercise their functions. This practice is in accordance with article 30.

It may be concluded, ex contrario, from the text of article 5 that a State is free to appoint nationals of the receiving State to the non-diplomatic staff of the mission without previously obtaining an authorization from that State. This, for linguistic and other reasons, is necessary for the proper function of the mission.

United States of America[1/]

The article might be amended to provide that diplomatic agents may be appointed from among nationals of the receiving State except in cases where that State expressly objects. The United States declines to recognize one of its own nationals as a diplomatic officer of an embassy or legation in Washington, but ordinarily has no objection to the inclusion in the mission staff of American citizens employed in other capacities.

Chile[2/]

It would perhaps be better to state that members of the diplomatic staff must be nationals of the sending State and may be nationals of the receiving State in exceptional cases only.

The Rapporteur considers that, in view of the practice in e.g. the United Kingdom, the following words should perhaps be added at the end of the article: "unless it has waived this condition".

Union of Soviet Socialist Republics[3/]

An additional clause should be added to provide that the receiving State may stipulate that members of the administrative, technical and service staff of

1/ Ibid., page 54.

2/ Ibid., Add.1, page 4.

3/ Ibid., Add.1, page 20.

diplomatic missions also may be selected from among the nationals of the receiving State only with the consent of that State. (cf. the statement of the United States Government quoted above: "but ordinarily has no objection to the inclusion in the mission staff of American citizens employed in other capacities").

The Rapporteur considers that it is probably a long-standing practice to recruit locally a large part of the staff to which the Government of the USSR refers. Moreover, it must be admitted, as the Swiss Government remarks, that for various reasons this practice is essential for the proper functioning of the mission. If this right did not exist a conflict would arise with article 19 of the draft (which provides that the receiving State shall accord full facilities for the performance of the mission's functions). The Rapporteur agrees with the Swiss Government's view. As the question has been raised, perhaps the text of the draft should be more explicit.

United States of America[1]

The United States Government raises the question of persons with dual nationality.

That Government is of the view that once a receiving State has validated for entry purposes as a member of the mission a passport issued by the sending State to a person considered by the sending State to be one of its nationals, whether native-born or naturalized, the receiving State is precluded from thereafter attempting, prior to termination of such person's appointment and expiration of a reasonable time for his departure, to assert jurisdiction over such person on the ground that he is a national of the receiving State. This situation differs, of course, from the case of an individual possessing dual nationality but residing in the receiving State and subject to its jurisdiction at the time of his appointment to the staff of the mission. The United States Government suggests that the problem of exercise of jurisdiction, solely on the basis of nationality, by the receiving State over dual nationals who are members of a diplomatic mission should be dealt with in a separate article.

The Rapporteur thinks that the problem raised is perhaps more pertinent to the application of the articles dealing with privileges and immunities than to the application of article 5.

1/ Ibid., page 55.

Whether the receiving State can exercise jurisdiction in respect of a diplomatic agent possessing its nationality in addition to another nationality is a question which should, if it comes before an authority of the receiving State, normally be decided according to the law of that State, including its rules of private international law. The United States Government seems to agree with this principle, at least in those cases where the diplomatic agent is resident in the receiving State and subject to its jurisdiction at the time of his appointment. But it distinguishes the case where the receiving State has given to the diplomatic agent a visa on a passport issued to him by the sending State as to a person of its /the sending State's/ nationality. In this case, according to the United States Government, the receiving State is precluded from claiming that person as its national prior to the termination of his employment and the expiration of a reasonable time for his departure.

It is very uncertain how far the Governments of other countries would be prepared to accept the United States Government's view in this latter case.

Such a case is bound to be very rare, however, if indeed it has ever occurred, and the question is really rather one for the administrative or judicial procedure of the receiving State.

In these circumstances, despite its interest as a point of law, the problem does not appear to require a solution in the draft.

Australia[1]

Some further consideration may be required to take account of the special position of members of the Commonwealth of Nations in their mutual diplomatic relations.

The Rapporteur considers that, in the absence of further explanation, it is difficult to understand what is intended. If the expression "Commonwealth of Nations" means "the British Commonwealth" it is conceivable that the question raised is that of dual nationality. In any event, this question is probably dealt with by legislation or by case-law in the countries concerned.

1/ Ibid., page 6.

ARTICLE 6

Argentina[1]

The wording of paragraph 1 is ambiguous because of the phrase "according to circumstances" (selon le cas). There are no circumstances that can alter the situation.

The Rapporteur points out that insufficient attention has been paid to the commentary, especially the final passage in paragraph (4). The French expression "selon le cas" is perhaps less open to misinterpretation than the English "according to circumstances". The English expression might be replaced by "as the case may be", and a further explanatory note might be added.

United States of America[2]

With regard to paragraph 2, the Government agrees in principle to a reasonable time for departure, during which time the person continues to enjoy the immunities attached to his person. However, in aggravated circumstances, or where national security is involved, the receiving State may demand his immediate departure, and refuse to recognize him thereafter as a member of the mission for the performance of official functions.

The Rapporteur considers that what is said in the United States memorandum is implicit in the expression "within a reasonable time", but this may be explained in the commentary.

Switzerland[3]

The Swiss Government states that the article is based on the general principle that the appointment of all members of a diplomatic mission is subject to the consent of the receiving State. According to paragraph (4) of the commentary, to oblige the receiving State to give reasons for declaring an agent persona non grata would be an infringement of its sovereignty. Nevertheless, it might be desirable to include in article 6 an explicit provision to the effect that the receiving State is not obliged to give reasons for its decision not to accept a diplomat. The statement of its reasons might cause greater friction than a decision for which no reasons were given.

1/ Ibid., page 4.

2/ Ibid., page 54.

3/ Ibid., page 39.

The Rapporteur points out that this question has already been discussed. In his original draft there was a provision to that effect, but a reference in the commentary was regarded as sufficient. Although he still likes the idea, he is reluctant to reopen the discussion, particularly since the Swiss Government's proposal is in very tentative terms.

ARTICLE 7

Australia[1]

The Australian Government reserves its position with regard to the whole of this article.

PARAGRAPH 1

United States of America[2]

As a restatement of a general principle the language used in this provision is, perhaps, as much as Governments will agree upon. However, the article is silent as to how to determine what is "reasonable and customary" under the circumstances and what are the "needs" of the mission. Accordingly, its application will solve neither the problem of inordinate increase to a size palpably unnecessary for the purpose of the announced functions of the mission, or the problem of arbitrary demands by the receiving State for the reduction of personnel.

In the absence of agreement among Governments as to a criterion by which these questions are to be determined in particular cases, the United States Government considers it impractical to frame a rule on the subject.

Switzerland[3]

Paragraph 1 of this article is both felicitous and well advised and confirms the practice of recent years.

Japan[4]

It is hoped that a statement will be inserted in the commentary to the effect that the missions exchanged should in principle be of corresponding size.

1/ Ibid., page 6.

2/ Ibid., page 56.

3/ Ibid., page 39.

4/ Ibid., page 20.

In the Rapporteur's opinion the Commission's text indicates the criteria which are acceptable and which ought to be applied. They must necessarily remain vague because it is the circumstances of each particular case which are decisive. One cannot stipulate that the missions exchanged should in principle be of corresponding size (as the Japanese Government has suggested). The decisive factor is the need of each of the two parties, and the two may have very different needs. To follow the Japanese Government's recommendation would amount to reducing missions to an inadequate minimum.

Although the criteria are vague, it is nevertheless desirable to state the principle that there are limits to the size of the staff of the missions exchanged. In the case of disagreement, the draft provides that the dispute may be referred to the International Court.

Netherlands[1/]

The Netherlands Government states that the words "reasonable and customary" (raisonnable et normal) refer to two criteria that may come into conflict with each other. The decisive criterion is not what is customary but what is reasonable. The words "and customary" should therefore be deleted.

The Rapporteur understands the criticism as far as the English word "customary" is concerned: what is in conformity with custom may cease to be reasonable in changed circumstances. So far as the French text is concerned (which employs the word normal) the position is slightly different. The contradiction disappears; but is not the normal an element of the reasonable? The Rapporteur feels that even if this is the case it is perhaps desirable to stress that element, and he accordingly proposes the replacement of the word "customary" in the English text by the word "normal"

PARAGRAPH 2

United States of America[2/]

The United States Government strongly opposes the adoption of this paragraph which appears objectionable for a number of reasons. It goes beyond existing principles of international law, and, in some respects, would seem to sanction present practices of certain countries against which the United States and other Governments have protested. It not only fails to mention the principle of reciprocity but apparently contemplates that the receiving State must treat all foreign missions alike, without regard to how the sending State treats representatives of the receiving State.

1/ Ibid., Add.1, p.14

2/ Ibid., page 56.

Again, the United States Government would not object to a provision that the receiving State is entitled to decline to receive a particular category of officials to perform a function which may be performed only as a matter of privilege and not as a matter of right. However, once the sending State is granted the right of legation, such State is entitled to staff its mission with all categories of persons necessary to the performance of those functions implicit in the right of legation. Also the sending State and the receiving State concerned alone are in a position to determine the circumstances and conditions which may affect the size and composition of their respective missions in the territory of the other.

The United States Government does not require agréments for military, naval or air attachés except on the basis of reciprocity. Since certain Governments require them for top service officers, the United States Government reciprocates and requires a similar agrément. This procedure is not, however, followed in the case of assistant attachés.

Netherlands[1/]

The principle of non-discrimination is a general principle on which the application of all the draft articles should be based. The impression might be created by this paragraph that this principle applies only or in particular to certain individual cases, which would be contrary to the general nature of this principle. The words "and on a non-discriminatory basis" should therefore be deleted.

Switzerland[2/]

The Swiss Government endorses the principle laid down, which completes the preceding provision. Nevertheless, it suggests that the second sentence be replaced by the last sentence of paragraph (3) of the commentary, viz: "In the case of military, naval and air attachés, the receiving State may require their names to be submitted beforehand for its approval".

Such a procedure would protect the sending State from the rebuff it would suffer if the receiving State were to refuse to accept persons already appointed.

United Kingdom[3/]

The United Kingdom Government does not require its previous agrément to be sought to the appointment of military, naval or air attachés to foreign diplomatic missions in London.

1/ Ibid., Add.1, page 14.

2/ Ibid., page 39.

3/ Ibid., Add.1, page 22.

The Rapporteur thinks it would be of interest to know what are the practices of those Governments to which the United States Government refers and against which it and other Governments are said to have protested.

His impression is that the United States Government has not taken sufficiently into account the words "within similar bounds", which refer back to the passage in paragraph 1 "/a size/ exceeding what is reasonable and customary, having regard to the circumstances and conditions in the receiving State, and to the needs of the particular mission". In the Rapporteur's view, paragraph 2 does not differ in substance from the statement in the United States Government's observations that the State is "entitled to staff its mission with all categories of persons necessary to the performance of those functions implicit in the right of legation".

Possibly, the article might be revised on the basis of the exact words of the United States comment, but, if so, would not the provision become more vague than it is in its present form?

If the paragraph is maintained, the Rapporteur supports the amendments proposed by the Netherlands and Swiss Governments (deletion of the words "and on a non-discriminatory basis", and redrafting of the last sentence).

Netherlands[1/]

The Netherlands Government states that article 7 should be supplemented by a provision to the effect that the sending State may not - prior to the consent of the receiving State - establish offices in places other than the place where the mission is established. Such a provision would be in conformity with the practice of various countries.

The Rapporteur thinks that this question settles itself because it is in the mission's own interest to be established near the receiving State's Government and near other missions. On the other hand there may be circumstances where difficulties arise (e.g. Bonn, Ankara). He doubts whether the provision is necessary (cf. The United Kingdom proposal concerning article 11).

ARTICLE 8

The following express a preference for the first alternative (notification of arrival and presentation of a true copy of credentials):

Luxembourg, Sweden, United States of America, Denmark, Chile, United Kingdom.

1/ Ibid., Add.1, page 14

The following express a preference for the second alternative (presentation of letters of credance):

Australia, Belgium, Japan, Switzerland, Argentina.

Netherlands[1]

In view of the fact that practice differs from State to State and that both systems have their merits and demerits, the Netherlands Government would suggest that it should be for the receiving State to decide which of the two methods should be adopted.

Sweden[2]

The practice in Sweden has been that described in the alternative text, but the Government is willing to accept the text with the alteration of the words "and presented a true copy of his credentials to the Ministry for Foreign Affairs" to "and a true copy of his credentials has been accepted by the Ministry for Foreign Affairs".

Belgium[3]

In the event of his own prolonged absence or illness, the head of the State instructs the Minister of Foreign Affairs to receive credentials.

United States of America[4]

This is largely a matter of protocol. The Government refers to existing practice.

Argentina[5]

The date of commencement of the functions of the head of the mission depends on the date on which he presents his letters of credence.

Denmark[6]

The remittance to the Ministry of Foreign Affairs of a true copy of his credentials should be sufficient. For practical reasons, the receiving State should enable the head of mission to take up his functions in relation to the receiving State as soon as possible after his arrival.

1/ Ibid., Add.1, page 15.

2/ Ibid., page 34.

3/ Ibid., page 8.

4/ Ibid., page 57.

5/ Ibid., page 4.

6/ Ibid., page 18.

Chile[1]

The Government of Chile is in agreement with the practical considerations given in the Commission's commentary. Experience has shown that a head of mission may find himself obliged to act immediately. Article 8 is a great improvement, but the point mentioned needs clarification and the proposed alternative should consequently be rejected.

The Rapporteur recommends that the Netherlands proposal should be adopted, with the text amended in accordance with the Swedish proposal.

ARTICLE 9

PARAGRAPH 1

Australia[2]

The Australian Government would omit the words "Government of the ".

Switzerland[3]

The Swiss Government states that it would be desirable to add, at the end of the paragraph, a provision indicating the person or authority who should notify the name of the chargé d'affaires ad interim to the Government of the receiving State. In Swiss practice the notification must be made by the accredited head of the mission before his departure or absence, otherwise it is made by the Ministry of Foreign Affairs of the sending State. This leaves no room for doubt.

PARAGRAPH 2

Australia[4]

The Australian Government would omit this paragraph.

United States of America[5]

The United States Government finds this article unacceptable. In each case the Government would require appropriate notification, and it could not rely on such a presumption as is proposed. Some governments customarily list, after the name of the head of mission, the name of the highest ranking, military, naval or air attaché.

1/ Ibid., Add.1, page 5.

2/ Ibid., page 7.

3/ Ibid., page 40.

4/ Ibid., page 7.

5/ Ibid., page 57.

United Kingdom[1]

The Government regards the head of a foreign diplomatic mission as remaining in charge of his mission while he is within the confines of the United Kingdom. It does not regard the appointment of a chargé d'affaires ad interim as appropriate in such circumstances. On the other hand, the Government would not see any particular objection to the system proposed by the Commission.

Normally the Government requires the appointment of a chargé d'affaires ad interim to be notified to it by the accredited head of mission prior to his own departure from the country. Should such notification be impracticable, the Government requires the appointment of the chargé d'affaires to be notified to it by the Minister for Foreign Affairs of the sending State. An exception to this general rule might arise in the case of an emergency caused by the death of the head of the mission in which event in the absence of any contrary notification from the Government of the sending State the United Kingdom Government would regard the charge of the mission as devolving upon the senior members of the diplomatic staff.

Chile[2]

The Chilean Government, like the United Kingdom Government, considers that it is not possible to appoint a chargé d'affaires ad interim if the head of mission is within the country. It proposes the deletion of the words "ad interim", and suggests that the chargé d'affaires might himself notify the fact that he has assumed charge of the mission.

Denmark[3]

In cases where no diplomatic member of the mission is present in the receiving State a non-diplomatic member of the staff might be officially in charge of the affairs of the mission in the capacity of chargé d'affaires. It might be considered whether the existence of such arrangements should be mentioned in the convention, for instance in a third paragraph added to this article.

The Rapporteur agrees with the proposal that at the end of paragraph 1 the following words be added: "by the head of the mission prior to his departure, or otherwise by the Government of the sending State".

1/ Ibid., Add.1, page 22.

2/ Ibid., Add.1, page 5.

3/ Ibid., page 18.

Paragraph 2 should be deleted, inasmuch as the situation is an emergency which should be dealt with according to circumstances (cf. the observation of the Danish Government).

ARTICLE 10

Sweden[1]

The Swedish Government proposes that paragraph (b) be deleted. There seem to be no valid reasons for maintaining to-day two separate categories of heads of missions, accredited to heads of State. Already when the question was raised in the League of Nations in 1927 the Swedish Government made the following statement: "It does not seem fair that two States, whether large or small, should be able, by means of a bilateral agreement reciprocally conferring upon the representatives the rank of ambassador, to place the representatives of other Governments in a position of inferiority which, however formal it may be, nevertheless constitutes a real disadvantage". The Swedish Government considers it most urgent that this development be taken into account when new rules concerning diplomatic intercourse between States are being created.

Switzerland[2]

The Swiss Government regards it as regrettable that no account was taken of the general tendency to abolish the distinction between the first two classes, for this tendency is in accordance with the general principle of the equality of States. A rule to that effect would have accelerated this trend and thus helped to eliminate some of the difficulties encountered in every period of transition.

The Rapporteur considers that these observations add nothing new to the discussion. One might add that it is very easy for States to remedy the situation if they feel they have been wronged. Accordingly he does not wish to resume last year's discussion of the subject.

United States of America[3]

The United States Government suggests that the article should begin with the words "For purposes of precedence and etiquette ..."

The Rapporteur observes that this idea is already expressed in substance in article 14. He would have no objection if it is desired to emphasize the point.

1/ Ibid., page 33.

2/ Ibid., page 41.

3/ Ibid., page 58.

Switzerland[1]

The use of the expression "other persons" may both cause confusion and delay the disppearance of this second class. No definitive rule for such a case should be laid down in this convention, which deals only with regular and permanent diplomatic missions.

So far as the Rapporteur has been able to discover, the term "other persons" in the text of the Vienna Regulation means ad hoc representatives. The Swiss Government's observation is therefore justified, and the words should be deleted.

Czechoslovakia[2]

The Czechoslovak Government considers that section I should stipulate in the respective articles, besides the clauses on heads of mission, also the rank and precedence of the other diplomatic staff of the mission.

The Rapporteur considers that even in the case of heads of mission it was doubtful whether the question of rank should be dealt with in the draft. Essentially, as has been emphasized by the United States Government, the problem is one of precedence and etiquette. As far as the heads of mission are concerned, the question goes, or rather, used to go beyond the limits of precedence and etiquette because of the ideas which formerly prevailed. In those circumstances, and for historical reasons (inter alia the Vienna Regulation), the Rapporteur thinks it justified to deal with the question here. As far as the rank of other members of the mission is concerned, the matter is exclusively one of etiquette and is in any case settled by protocol. In his opinion the question should not be considered.

1/ Ibid., page 41.
2/ Ibid., Add.1, page 10.

ARTICLE 11

United Kingdom[1]

The United Kingdom Government proposes that the article be redrafted in the following terms:

"States shall mutually agree the level of their diplomatic representation at each other's capitals".

United States of America[2]

The United States Government observes that the receiving and sending States need not be represented by heads of mission of the same rank.

The Rapporteur considers that this observation might be inserted in the commentary.

ARTICLE 12

In favour of the date of the official notification of arrival: United Kingdom (where this is existing practice).

In favour of the date of the presentation of letters of credence: Austria, Belgium, Sweden and Switzerland.

Luxembourg[3]

The Luxembourg Government has no preference, but believes that the solution should be made to coincide with that proposed in article 8 (commencement of the mission).

Switzerland[4]

The Swiss Government supports the principle of "functional necessity": precedence should be determined by the date of the commencement of functions, in other words, the date of the presentation of letters of credence, that being the traditional system.

United States of America[5]

The United States Government notes that the article deals with matters of practice and protocol in the receiving State, rather than with principles of international law suitable for codification.

Netherlands[6]

The Netherlands Government proposes that the words "the rules prevailing" should be substituted for the expression "the rules of the protocol" in

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1/ Ibid., add.1, page 23

2/ Ibid., page 58

3/ Ibid., page 25

4/ Ibid., page 41

5/ Ibid., page 58

6/ Ibid., add.1, page 15

paragraph 1, because these rules need not necessarily be confined to rules of protocol proper.

The Rapporteur interprets the Netherlands Government's comment to mean that the rules in question might be set forth in a form which differentiates them from rules of protocol. However that might be, he things that the adoption of the Netherlands proposal does not change the meaning. In the circumstances, he has no objection to its adoption.

ARTICLE 13

United States of America[1/]

The United States Government agrees with the provisions of this article, but suggests that the article should further provide that such uniform mode of reception be applied without discrimination.

The Rapporteur considers that this follows from the wording of article 13, which prescribes a uniform mode of reception. It is presumed that it will be applied without discrimination, but an express statement to this effect can be added in the commentary.

ARTICLE 14

Netherlands[2/]

There is a widely held view according to which an ambassador enjoys a special privilege of being allowed to apply directly to the head of the receiving State. The Netherlands Government would like to know whether this privilege is included in what is understood by "etiquette". It would appreciate it if an answer to this question could be given in the commentary to article 14.

The Rapporteur refers to the statement in Oppenheim's International Law (8th edition, Lauterpacht, vol. I, page 778, paragraph 366) that, unlike ambassadors, ministers have not the privilege of treating with the head of the State personally and cannot at all times ask for an audience with him.

This statement should be compared with that in Sir Ernest Satow's Guide to Diplomatic Practice (4th edition, Bland, 1956, page 167): the privileges of ambassadors were founded on the supposition that they alone, as representing the person of their sovereign, were competent to carry on negotiations with the

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1/ Ibid., page 58

2/ Ibid., add.1, page 15

sovereign himself. But this has no real significance in modern times, for they deal as a rule with the Minister of Foreign Affairs, even in countries which preserve a monarchical form of government. It is sometimes supposed that an ambassador can demand access to the person of the head of the State at any time, but this is not the case, as the occasions on which an ambassador can speak with the head of the State are limited by the etiquette of the court or Government to which he is accredited.

It may be added to this that modern developments in respect of the appointment of ambassadors must have reduced even further what little remained of this supposed right.

Additional articles proposed

Czechoslovakia[1/]

The Czechoslovak Government considers that section I should also stipulate the right of individual diplomatic members of a mission to exercise diplomatic activities in accordance with the instruction of their Governments. This part of the draft should equally provide for the right of a mission and of the head of such a mission to use the flag and emblem of his country on the official premises of the mission, on the residence of the head of a mission, and on the means of transport used by him.

The Rapporteur considers it unnecessary to deal with the first question, particularly if the definitions clause proposed by the Netherlands Government are adopted. On the other hand, the second proposal (concerning the flag and emblem) may be considered for adoption; it is in keeping with practice.

SECTION II

ARTICLE 15

Japan[2/]

This observation relates also to article 16.

The Japanese Government considers that the meaning and scope of the expression "mission premises" should be clarified. The term "premises" could be interpreted as (a) only the official residence of an ambassador or a minister, and the chancellery, or (b) all accommodations (including housing facilities for the members of the mission) owned or leased for diplomatic purposes by the sending

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1/ Ibid., add.1, page 10

2/ Ibid., page 20.

State, or (c) all accommodations used for diplomatic purposes (including dwellings of diplomatic agents).

United States of America[1]

The United States Government is in agreement with the apparent intent of the article: that it is the duty of the receiving State to ensure that the mission has adequate premises but that the receiving State is under no obligation to make exceptions from its laws relating to the acquisition of real property or title thereto. For added clarity, it proposes that the concluding words of the article, "or ensure adequate accommodation in some other way", be replaced by the words "or, in some other way, ensure accommodation, including housing and other facilities, for members of the mission".

Australia[2]

(ad article 16)

Some definition of the expression "premises" seems to be necessary.

The Rapporteur considers that, to make the draft clearer, a full explanation should be given of the meaning of the expressions "premises of the mission" and "private residence" of a diplomatic agent, and similar expressions as used in articles 15, 16, 17 and 23.

In article 15, the expressions "premises necessary" and "adequate accommodation" are, as is apparent from the content of the article, used in a generic sense. The expression "the premises of the mission" in articles 16 and 17 should, in conformity with the structure of the draft, be interpreted to mean the official premises used for the mission, including the private dwelling of the head of the mission, whether the premises are owned or leased by the sending State or by the head of the mission on behalf of the State.

Article 23 relates to the residence as such, even though it is not situated in the building or buildings containing the official premises.

The official premises of the mission, as well as the private residence, include the adjacent outbuildings, yards, parks and gardens, including parking grounds for motor vehicles.

A word of explanation should perhaps be added to article 23 concerning the position where the diplomatic agent has several residences.

1/ Ibid., page 59

2/ Ibid., page 7

Sweden[1]

The Swedish Government proposes that the wording of the commentary should be used: "or facilitate as far as possible adequate accommodation in some other way" (Commentary: "facilitate the accommodation of the mission as far as possible").

Switzerland[2]

The expression "ensure adequate accommodation in some other way" fails to take into account the practical difficulties in case of a housing shortage. The Swiss Government makes the same suggestion as the Swedish Government.

Chile[3]

Missions may obtain accommodation under lease, without having to wait for the receiving State to take action. The text might perhaps be improved by replacing the phrase "or ensure adequate accommodation in some other way" by the phrase "or permit adequate accommodation /to be obtained/ in some other way".

The Rapporteur considers that the reference is to the present almost general housing shortage. The Government of the receiving State is to do what it can to assist the mission in finding accommodation. The Rapporteur has no objection to the adoption of the Swedish-Swiss amendment.

Denmark[4]

The Danish Government suggests the insertion of the words "on a non-discriminatory basis".

The Rapporteur refers back to the Netherlands observation on article 7 (a general principle); he is of the opinion that in this context, too, the use of this phrase should be avoided.

ARTICLE 16

Definition of the expression "the premises of the mission"

Australia[5]

Japan[6]

A definition is requested.

Belgium[7]

Articles 16 and 23 have a common purpose but relate to different premises;

1/ Ibid., page 34.

2/ Ibid., page 42.

3/ Ibid., add.1, page 6.

4/ Ibid., page 18.

5/ Ibid., page 7.

6/ Ibid., page 20.

7/ Ibid., page 8.

they could be amalgamated or the same terminology could be used: "buildings or parts of buildings".

United States of America[1]

For article 17, the United States Government proposes a definition along the following lines: For the purposes of this article, property used for mission purposes shall be deemed to include the land and buildings used for the embassy or legation, the chancellery and all annexes thereto, and residences for officers and employees of the mission.

The Government goes on to say: The commentary might explain that property used for mission purposes should be deemed to include the land on which the buildings are situated, including gardens, parking lots, and vacant or unimproved land, provided that such lands are adjacent to the land on which the buildings are situated.

The Rapporteur refers to the remarks concerning article 15, where the word "premises" was used in a more generic sense. Here the question is somewhat different: What appurtenances, annexes etc. are covered by the protection granted? In the Rapporteur's opinion the answer is that the protection extends to the outbuildings, gardens and parking lots which are in the grounds of, or immediately adjacent to, the building itself. A statement to this effect in the commentary should suffice.

PARAGRAPH 1

Japan[2]

The provision is too absolute. It seems desirable to include, at least, a provision to the effect that the head of a mission is under an obligation to co-operate with the authorities in case of fire or an epidemic or in other extreme emergency cases.

Switzerland[3]

It is of course understood that inviolability of mission premises does not preclude the taking of appropriate steps to extinguish a fire which may endanger the neighbourhood, or to prevent the commission of a crime or an offence on the premises (cf. commentary on article 22.)

1/ Ibid., page 61.

2/ Ibid., page 20.

3/ Ibid., page 59.

United States of America[1]

Consent must be presumed when immediate entry is necessary to protect life and property as in the case of fire endangering adjacent buildings.

The Rapporteur refers to the considerations set forth in that part of the report which deals with general observations. In cases of extreme urgency, the immunities must give way to the paramount needs of life itself.

PARAGRAPH 3

United States of America[2]

The Government of the United States of America makes a number of observations on this paragraph.

Search. In the first place the Government states that search is covered by paragraph 1, and maintains that if there is agreement to that, the word should be deleted from paragraph 3. Otherwise, it would be necessary to explain what kind of search is intended.

The Rapporteur considers that in all probability a mission cannot be searched without an entry of the premises, and in that sense it can be said that search is covered by paragraph 1. Nevertheless, the reference to search in paragraph 3 is worth retaining. All the acts mentioned in this paragraph are performed by virtue of judicial decisions, and it must be made clear beyond all doubt that the inviolability of the premises is a bar to the performance of such acts.

United States of America[3]

Requisition. While fortunately Governments have rarely been forced to requisition property used for foreign diplomatic missions, the United States Government is of the view that international law does not absolutely preclude the requisition of such property or its taking by exercise of the right of eminent domain. This right, of course, could be exercised only in very special circumstances, such as those of a disaster of great magnitude, or the necessity of making important improvements to the city which require the taking of all the land on which the premises of the mission are situated. In that case, the receiving State would be under an obligation to make prompt and adequate compensation for the property taken, and, if necessary, to use its good offices to assist the sending State in obtaining suitable accommodation.

1/ Ibid., page 59.

2/ Ibid., page 59.

3/ Ibid., page 59.

So far as attachments and executions are concerned, the Government states that a distinction must be made between the case in which the property belongs to the foreign Government and is used for diplomatic purposes and the case in which the property is only rented or leased. In the former case, the claim of sovereign immunity would preclude attachment or execution. In the latter case, an order of the court may, under international law, be enforced, provided that the premises of the mission are not invaded.

The Rapporteur considers that the remarks concerning attachment and execution seem to be accurate. An explanation may be given in the commentary. So far as the comments relating to requisition are concerned, he again refers to the remarks concerning cases of extreme emergency under the heading "Other general observations". Whether or not a case is of extreme emergency depends on the magnitude of the disaster or of the interests at stake.

Paragraph (2) of the commentary

United States of America[1/]

The Government of the United States does not agree that judicial notices of any nature whatsoever need be delivered through the Ministry of Foreign Affairs of the receiving State. If the person concerned does not enjoy diplomatic immunity, the document should be served on him at his home or other appropriate place. If he does enjoy diplomatic immunity, he is not subject to jurisdiction unless there has been a waiver by his Government. The Foreign Office need become involved only where a document has been erroneously served and has to be returned.

The Rapporteur considers that paragraph (2) of the commentary relates to the case in which a summons to appear in court or some other writ is to be served on a diplomatic agent by a process server. Owing to the inviolability of the official premises and residence of the diplomatic agent, it may be extremely difficult for the process server to serve the document in a manner which is not offensive to the diplomatic agent. In Europe at any rate, it is customary for such documents to be served through the Ministry of Foreign Affairs of the receiving State. This procedure seems unobjectionable.

Paragraph (4) of the commentary

United States of America[2/]

The United States Government cannot approve the language used. It is

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1/ Ibid., page 60.

2/ Ibid., page 60.

suggested that the substance of this paragraph should be restated as a rule of international law worded somewhat as follows: "Notwithstanding the inviolability of the premises of the mission, real property is subject to the laws of the country in which it is situated. The sending State is obliged to permit the land on which the premises of the mission are situated to be used for carrying out public works, such as the widening of a road, for example. The receiving State, for its part, is obliged to provide prompt and adequate compensation and, if necessary, to place other appropriate premises at the disposal of the sending State."

Luxembourg[1/]

The problem discussed in paragraph (4) of the commentary (carrying out of public works) should be settled by a special clause in the actual text of article 16. Since the provisions of this article are very specific, the language of the commentary would hardly, in the event of a dispute, prevail against the express terms of the convention.

Sweden[2/]

The matter is of such great importance that the Swedish Government advocates the same solution (i.e. a provision in the article itself). If possible, the obligations of the two parties should, however, be laid down in a still more precise manner than in the statement in the commentary.

Switzerland[3/]

There might be some advantage in including a rule on the subject in the text of the convention. It is true that such a rule would merely constitute the application to a particular case of the general principle of functional necessity.

The Rapporteur considers that the remarks made in the commentary are fully consonant with the legal position as laid down in the rules relating to diplomatic immunity. On the one hand, the right in question may be noted but it is NOT enforceable. On the other hand, the laws of the country should be respected, in conformity with the rule laid down in article 33. Accordingly, the Rapporteur does not really see why the substance of the remarks in the commentary should NOT be embodied in the text of the convention itself. For this purpose, the wording used by the United States Government is more apt than the language used in the Commission's commentary.

1/ Ibid., pages 25 - 26.

2/ Ibid., page 34.

3/ Ibid., page 43.

SECTION II A

ADDITIONAL PARAGRAPH

Czechoslovakia[1]

The Czechoslovak Government considers that it would be useful if this section contained a provision to the effect that the inviolability of the premises of the mission does not cover the right to asylum, if there is no special agreement to that effect.

The Rapporteur points out that when the subject was first introduced it was decided not to deal with the question of asylum. That decision should be adhered to.

At most, a reference might be added in the commentary, to dispel the impression that the question of asylum is in any way prejudged by the draft.

ARTICLE 17

Belgium[2]

The Belgian Government proposes "national, regional or local", so as to make allowance for taxes levied by the provinces (cf. article 26).

The same Government adds that, in order that the French word locaux should not be used in two different senses, it would be preferable to use the expression "buildings or parts of buildings used by the mission" (immeubles ou parties d'immeubles utilisés par la mission).

If, under a lease, the sending State agrees to pay the land taxes, it cannot claim exemption under article 17. In this case, the taxes would actually constitute an increase in the rent.

Chile[3]

The Chilean Government makes an observation to the same effect as the last observation of the Belgian Government.

United States of America[4]

The United States Government raises the same question. Exemption from dues and taxes on the premises of a diplomatic mission should be granted only if they

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1/ Ibid., Add.1, page 11.

2/ Ibid., page 9.

3/ Ibid., Add.1, page 6.

4/ Ibid., page 61.

would be payable by the Government as owner or lessee of the premises, but there should be no exemption from taxes for which the landlord, rather than the State, is liable, or from taxes due with respect to real property owned by the head of the mission personally. The United States Government considers the article unclear and proposes the following text:

> "The sending State shall be exempt from all national (or local) dues or taxes in respect of the premises of the mission owned by or on behalf of the sending State and used for legation purposes, other than, on a basis of reciprocity, such charges as represent payment for services actually rendered." (The definition quoted in article 16 follows).

Luxembourg[1/]

The delimitation between "such (taxes) as represent payment for services actually rendered" and general taxes does not appear to be the same in all countries. Certain benefits (e.g. police protection, lighting or cleaning of public thoroughfares) are considered in some countries as services which give rise to (separate) remuneration, whereas in other countries these are public services covered by the general tax. It would seem that the criterion for making a distinction must be the specific nature of the services. This is the criterion which the Commission has selected in article 26 (e) (specific services rendered). The same formula should be adopted in article 17.

Japan[2/]

This article may be interpreted to mean that missions are exempt from indirect taxes. For example, there would hardly be any justification for granting exemption from taxes on electricity and gas used in the chancellery if electricity and gas were not exempt from taxation in the private dwellings of the mission staff. Under the Convention on Privileges and Immunities of the United Nations, the United Nations enjoys exemption only from direct taxes.

United Kingdom[3/]

United Kingdom practice does not recognize the exemption of the premises of a diplomatic mission from local dues or taxes. The Government has no power to

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1/ Ibid., page 26.

2/ Ibid., page 20.

3/ Ibid., Add.1, page 23.

require the local authorities to refrain from levying rates on the occupiers of diplomatic premises, although arrangements exist for partial relief from rates on a basis of reciprocity. The applicable principle is that the diplomatic mission pays that proportion of the rate which is attributable to municipal services from which the mission is deemed to derive direct benefit.

The Rapporteur considers that the article relates to direct dues and taxes only, viz. the general taxes which do not constitute payment for specific services. Customs duties, which are paid by the public, as part of the price of a commodity, are an example of the type of taxation with which the article is not concerned. The observations of the United States, Belgian and Chilean Governments regarding the premises in respect of which exemption should be granted seem to be well justified and accordingly some elaboration is required in the text or commentary. The Belgian amendment suggesting that regional dues and taxes should be mentioned seems justified.

In addition, the article should speak of "specific services rendered", as proposed by the Government of Luxembourg (cf. article 26). The practice in the United Kingdom, as described in the observation by the Government of that country, seems to be an admissible application of the principle.

ARTICLE 18

United States of America[1/]

The words "and documents" should be omitted, as being confusing and unnecess

Observations on the commentary: The United States Government cannot agree with the statement that the inviolability applies to archives and documents, regardless of the premises in which they may be. Inviolability presupposes that archival material will be on the premises of the mission, in ordinary transit by courier or sealed pouch, or in the personal custody of duly authorized officers of the mission for use in the performance of their functions.

The Rapporteur considers that the article as worded merely indicates that the inviolability enjoyed by the mission's premises and property also extends to archives and documents. They enjoy this inviolability by reason of the fact that the archives form part of the premises of the mission, just as the contents of

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1/ Ibid., page 61.

those premises and the mission's documents form part of the property of the mission. The reason why archives and documents are mentioned specifically is to emphasize the importance which attaches to them by virtue of their confidential nature. The provision is hardly capable of causing confusion; nor can it be denied that the protection is due to the mission's documents regardless of their whereabouts (e.g. a letter sealed with the mission's seal and sent by post).

SUBSECTION B

ARTICLE 19

United States of America[1]

The words toutes les facilités have been translated into English as "full facilities". Some indication should be given as to the scope and meaning of these words.

The Rapporteur considers that when a mission moves in for the first time or changes its premises, there are - in an age when State authorities, sometimes by acting as suppliers and sometimes by issuing permits, control a large part of a nation's economic activity and work - many cases in which the assistance of the authorities of the receiving State can facilitate the installation. Assistance may be provided in putting in telephones, for example, or, if building work has to be done, in obtaining the necessary licences and permits. Valuable assistance may be given, too, in the actual work of the mission, as for example activities of the kind mentioned in article 2(d), in organizing study trips, etc. (subject, of course, to the reasonableness of the request for services).

ARTICLE 20

Australia[2]

The article would appear to require a receiving State to treat the members of all diplomatic missions equally. It seems that equal treatment should be conditional upon reciprocity.

Switzerland[3]

The terms of the article are in agreement with Swiss practice. The principle of freedom of movement, subject to limitation only for reasons of national security,

1/ Ibid., page 62.

2/ Ibid., page 7.

3/ Ibid., page 44.

is the logical consequence of the general principle of functional necessity.

United States of America[1]

The article is so broadly phrased as to sanction the present practice of certain Governments of restricting so extensively the travel of members of a diplomatic mission as to render the right of freedom of movement and travel illusory. The latter part of the article would require that travel controls be applied without discrimination. The principle of reciprocity, however, is an integral factor in matters of this nature. It would be preferable to have no article on the subject, rather than one which may give rise to abuse.

Netherlands[2]

The principle of freedom of movement should be given a more prominent place in the wording of the article, whilst the power to curtail this freedom should be kept within very narrow limits. The final sentence of the commentary should be incorporated in the article itself. The Netherlands Government proposes the following text:

> "The receiving State shall ensure to all members of the mission freedom of movement and travel in its territory. Nevertheless, the receiving State may, for reasons of national security, issue laws and regulations prohibiting or regulating the entry into specifically indicated places, provided that the places thus indicated do not become so extensive as to render freedom of movement and travel illusory."

The Rapporteur has no objection in principle to the text proposed by the Netherlands Government but thinks it will be necessary to allow for bans on travel not only to particular places but also in whole zones. Even if the exception may give rise to abuses, it is inevitable and it is nevertheless to the good that the principle should be established.

The questions of reciprocity and reprisals will be considered together with reference to the whole draft when it is finally seen what form the codification will take.

1/ Ibid., page 62.

2/ Ibid., Add.1, page 15.

ARTICLE 21

PARAGRAPH 1

Switzerland[1]

It is a consequence of functional necessity that the obligation of the receiving State to accord to the diplomatic mission freedom to employ all appropriate means of communication is limited in principle to the mission's exchanges, on the one hand, with the Government of the sending State, and on the other, with the consulates under its authority within the receiving State. It is not really essential for the diplomatic mission to be able to use all means of direct communication with the other diplomatic missions or consulates of the sending State situated in third countries. To grant such facilities is not a general international custom, and therefore this is done only in specific cases, by virtue of a special agreement or by tacit agreement. In accordance with this view, Swiss practice allows diplomatic couriers only for communication between the diplomatic mission and the Government of the sending State and also, as an exception, for communication between the mission and another diplomatic delegation of the sending State, but not between the mission and consulates of the sending State situated in a third State.

Japan[2]

The right of consulates to communicate by means of diplomatic bag or diplomatic courier is not yet established in international law.

United States of America[3]

The United States Government is of the view that in a number of respects the commentary on this article does not reflect existing rules of international law.

The Rapporteur considers that the Swiss Government is right in saying that at the present time the use by a mission of all the means of communication listed in paragraph 1 is recognized by international law solely for the purposes of the mission's communications with its Government and the consulates of the sending State in the State or States to which the mission is accredited. An extension of

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1/ Ibid., page 44.

2/ Ibid., page 21.

3/ Ibid., page 62.

this right to include also the missions and consulates of the sending State in third countries does not seem indispensable because such communications can be made through the Ministry of Foreign Affairs of the sending State. The Rapporteur would therefore have no objection to the amendment of the article in the manner suggested.

Belgium[1]

Observations on paragraph (1) of the commentary. The Belgian Government can accept this provision as a general rule. In view, however, of the saturation of the wavelengths suitable for medium and long-distance communication, the Belgian authorities would not be in a position, under present conditions, to grant diplomatic missions permission to employ such means of communication.

Japan[2]

The Japanese Government also mentions the difficulties referred to by the Belgian Government.

United Kingdom[3]

The United Kingdom Government makes no objection to the use of wireless apparatus by foreign diplomatic missions for the purpose of communicating with their respective governments. The missions concerned are not required to seek any special permission or to obtain a licence to operate such installations.

Argentina[4]

The Argentine Government proposes that the last two sentences of the commentary on paragraph 1 should be inserted in the article as paragraph 5.

The Rapporteur recommends the acceptance of the Argentine proposal, which seems to meet a need.

1/ Ibid., page 9.

2/ Ibid., page 21.

3/ Ibid., Add.1, page 23.

4/ Ibid., page 4.

Netherlands[1/]

The word "messages" should be replaced by the more usual term "dispatches" (French: messages).

The Rapporteur has no objection.

PARAGRAPH 3

Several governments comment on the reference to "articles intended for official use".

Switzerland[2/]

The expression "articles intended for official use" may lead to misunderstanding. There would be no way of distinguishing between such articles and "articles for the use of a diplomatic mission" which, under article 27, enjoy exemption from Customs duties. The use of the expression "articles intended for official use" would make it impossible to distinguish between licit and illicit consignments.

For this reason, in Swiss practice, the diplomatic bag must contain only official correspondence and documents, and no other articles whatsoever. It would therefore be necessary, at the very least, to give a restrictive definition of the articles of a special nature which may be transported in the diplomatic bag, taking into account functional necessity, by using some such phrase as "articles of a confidential nature essential for the performance of the mission's functions".

Belgium[3/]

It does not seem desirable to extend the inviolability of the diplomatic bag to such articles. The phrase should be replaced by "official documents".

United States of America[4/]

The United States Government concurs generally but recommends the addition of a new sentence to paragraph 3: "Any article which is radio-active may not be considered as an article intended for official use of a diplomatic mission, and any diplomatic bag containing such an article may be rejected."

1/ Ibid., Add.1, page 15.

2/ Ibid., pages 44 and 45.

3/ Ibid., page 9

4/ Ibid., page 62.

Netherlands[1]

The Netherlands Government proposes the following text for paragraphs 2 and 3: "The diplomatic bag, which may contain only diplomatic documents or articles intended for official use, may not be opened or detained". The Netherlands Government is of the opinion that it is desirable to define what is meant by "diplomatic documents" in the commentary. It takes the view that "diplomatic documents" should include all documents sent under official seal or stamp. Even when the mission attaches official seals or stamps to private documents it does not exceed its authority, because in certain circumstances it may be the mission's duty to undertake the transmission of such documents in order to protect its nationals abroad.

The Rapporteur considers that the criticism of the expression "articles intended for official use" is justified and that it would be desirable to choose a more restrictive expression like that proposed by the Swiss Government, which would also cover the United States proposal. The Rapporteur has no objection, either, to the redrafting proposed by the Netherlands Government, or to that Government's suggested explanation of the expression "diplomatic documents".

Belgium[2]

The Belgian Government raises another linguistic point relating to the commentary: "The diplomatic bag may not always take the form of a bag, especially in the case of a large consignment of documents or archives which may be transported in boxes, or even by motor lorry".

The Rapporteur considers that this point should be dealt with in the commentary.

PARAGRAPH 4

Belgium[2]

The Belgian Government points out that the term "diplomatic courier" is not defined and suggests the following definition: "Any person who carries a diplomatic bag and is furnished for the purpose with a document (courier's passport) testifying to his status".

1/ Ibid., Add.1, page 15.

2/ Ibid., page 9.

Switzerland[1]

This provision does not appear satisfactory. The diplomatic courier does not remain permanently in the receiving State; his stay is limited to the period of travel during which he exercises his functions. It is therefore enough to grant him personal inviolability in the actual exercise of his functions.

Proposed text: "In the exercise of his functions, the diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial. He shall enjoy no other privilege or immunity."

Suggestion for a new paragraph: A special provision confirming the custom, which is becoming more and more general, of entrusting the diplomatic bag to the captains of the aircraft of regular airlines.

United States of America[2]

It is suggested that paragraph 4 be revised to read as follows:

"The diplomatic courier shall be protected while in transit in the receiving State or in the territory of a third State which he entered with proper documentation".

Netherlands[3]

The second sentence of paragraph 4 allows of too extensive an application, because it also accords inviolability to persons performing the function of a diplomatic courier as an additional function. This inviolability should only be accorded to persons travelling exclusively as couriers and for a particular journey only. Proposed text: "In case he travels exclusively as a diplomatic courier he shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial".

Japan[4]

Observation on paragraph (4) of the commentary. With reference to the captains of commercial aircraft, the Japanese Government states that such persons should not be treated as diplomatic couriers in every case.

1/ Ibid., page 45.

2/ Ibid., page 62.

3/ Ibid., Add.1, page 16.

4/ Ibid., page 21.

Chile[1]

It might be advisable to consider extending the personal inviolability of the diplomatic courier to the captain or a member of the crew of a commercial aircraft carrying the diplomatic bag; that immunity would exist only for the duration of the journey and until the bag is delivered.

The Rapporteur has no objection to the insertion of the definition proposed by the Belgian Government either in the text of the article itself or in the commentary.

As regards the protection of the diplomatic courier and his inviolability, the Rapporteur has the impression that perhaps the 1957 text goes a little further than was intended and that an attempt will have to be made to produce from the three proposals submitted by the Swiss, Netherlands and United States Governments a more restrictive text which excludes from the benefit of inviolability the captain and members of the crew of a commercial aircraft in cases where the diplomatic bag is entrusted to one of them.

It does not seem advisable to extend these privileges to such persons. The bag itself will always enjoy inviolability.

Proposed additional articles

Netherlands[2]

The Netherlands Government points out that subsections A and B do not contain exhaustive regulations concerning all the subjects which should be included in them.

1/ Ibid., Add.1, page 7

2/ Ibid., Add.1, page 16.

1. There is for instance, no express provision in the draft governing the exemption from taxation of the mission's activities.

The Rapporteur considers that cases of such taxation should be extremely rare. It is of course conceivable that the receiving State might wish to charge taxation on the revenue received by the mission from duties and charges on visas, for example. Such taxation would undoubtedly be in confliot to the the nature of the activity in question. A provision to prevent such a development might be added to article 17.

2. The Netherlands Government points out further that it cannot be inferred from the draft articles that, if the receiving State maintains different rates of exchange, the foreign mission should be accorded the most favourable rate of exchange. These observations, the Netherlands Government goes on to say, may induce the Commission to supplement its draft articles in this respect.

The Rapporteur considers that this observation is justified intrinsically and by practice, and that it would be desirable to insert a suitable provision in the draft. Since the measure in question tends to facilitate indirectly the functioning of the mission, the provision could be inserted in article 19.

ARTICLE 22

Switzerland[1]

The personal inviolability of the diplomatic agent derives from the general principle of functional necessity, and that principle also serves to delimit it.

United States of America[2]

The composition of the diplomatic staff requires precise definition (cf. article 4).

Chile[3]

Paragraph 2. The terminology used in paragraph 2 might constitute a somewhat undesirable departure from the Regulation of Vienna in extending the term "diplomatic agent" to include the entire diplomatic staff of the mission. It would be better to devise a more precise formula under which only heads of mission would be described as "diplomatic agents". Consideration might be given to the wording used in the Havana Convention, which, in article 14, extends inviolability "to all classes of diplomatic officers".

United Kingdom[4]

Paragraph 2 defines the term "diplomatic agent" and in the context of paragraph 1 appears to limit personal inviolability to this class of persons. It thus appears to be in conflict with article 28, paragraph 1. It is suggested that the drafting of article 22 be reviewed in the light of this apparent inconsistency.

Netherlands[5]

If the definitions proposed by the Netherlands Government are adopted paragraph 2 could be deleted.

1/ Ibid., pages 45 and 46.

2/ Ibid., page 62.

3/ Ibid., Add.1, page 7.

4/ Ibid., Add.1, page 23.

5/ Ibid., Add.1, page 16.

The Rapporteur considers that the difficulties connected with paragraph 2 would in fact disappear if the proposed definitions were adopted.

ARTICLE 23

Japan[1]

(a) In relation to article 15, it is necessary to clarify the meaning and scope of "private residence" as distinguished from mission premises. For example, it is not clear whether the term "private residence" includes housing facilities for the members of the mission furnished by a sending State.

(b) The provision of paragraph 1 is considered to be too absolute as in the case of article 16, paragraph 1, if not even more so. This is especially so in the case of private residences of the members of the administrative and technical staff of a mission.

(c) The provision of paragraph 2 should not be applied to immovable property held by a diplomatic agent in his private capacity.

United States of America[2]

Paragraph 2 requires further consideration. For instance, no inviolability would attach to a diplomatic agent's property, papers and correspondence pertaining to a commercial venture in the receiving State.

Netherlands[3]

Along the same lines, the Netherlands Government proposes the following text: "His papers and correspondence and, subject to the provisions of article 24, paragraph 3, his property likewise shall enjoy inviolability."

United Kingdom[4]

In the commentary, the inviolability is described as extending to the diplomatic agent's bank account. It is assumed that this has reference to the freedom of such accounts from exchange control measures. It is suggested that the point be made clear in the text of article 16.

1/ Ibid., page 21.
2/ Ibid., page 63.
3/ Ibid., Add.1, page 16.
4/ Ibid., Add.1, page 24.

Comment by the Rapporteur: Paragraph 1. For the terminology employed in articles 15, 16, 17 and 23 in relation to the premises used by the mission and its members, see the explanations given under article 15.

Some explanation is also necessary concerning the scope of the provision in cases in which the diplomatic agent has several residences (e.g. a country house to which he retires for recreation) in addition to his usual residence. Since the inviolability attaches to the person of the diplomatic agent, it is natural that his country residence should also enjoy inviolability.

The other observations of the Japanese Government have already been dealt with elsewhere.

Paragraph 2. As several Governments have pointed out, this paragraph requires some more specific provisions. The question is: to what extent should the article make reservations for exceptions to the exemption from the jurisdiction of the receiving State (article 24)? It seems natural that these exceptions should be valid likewise in the case of property. So far as documents and correspondence are concerned, the application of the same exceptions might jeopardize the confidential nature of the documents and correspondence. These exceptions should therefore not be applied. In these circumstances, the wording proposed by the Netherlands Government could serve as a basis for the amendment of the article.

In its observations the United Kingdom Government assumes that the remark in the commentary to the effect that the inviolability of property applies also to bank accounts refers to the freedom of such accounts from exchange control measures. This assumption is correct, but the commentary also contemplates all the other effects of the inviolability of property, in conformity with article 16. A note to this effect might be inserted in the commentary.

ARTICLE 24

PARAGRAPH 1

Luxembourg[1/]

The enumeration not only appears to be superfluous but also carried with it the danger of a restrictive interpretation. In some countries there are still other types of jurisdiction besides the three forms listed, including commercial courts, labour jurisdictions and social security jurisdictions, which are neither

1/ Ibid., page 26.

civil nor administrative. Consequently it would be preferable to lay down the general rule of immunity from jurisdiction at the outset, without further specification, and to let it be followed by the three exceptions listed under (a), (b) and (c).

The Rapporteur considers that it is of some value to mention the three kinds of jurisdiction to which the article refers, in order to emphasize the point, among others, that there is no exception so far as criminal jurisdiction is concerned. It may be noted in the commentary that the terms employed include also specialized jurisdictions.

The exceptions

PARAGRAPH 1 (a)

Japan[1]

It is desirable that this provision be interpreted so as not to include the residences of which the diplomatic agent might be the owner in his private capacity.

Netherlands[2]

The Netherlands Government considers that paragraph 1 is tautological, and that a "real action" in English law is not quite synonymous with an action réelle in continental law.

It suggests the following wording: "An action in rem relating to immovable property situated in the territory of the receiving State, unless held by the diplomatic agent on behalf of his Government for the purpose of the mission."

The Rapporteur considers that this seems to satisfy the Japanese Government's wishes. The Rapporteur has no objection to the Netherlands observation.

PARAGRAPHS 1 (b), 1 (c)

United States of America[3]

The United States Government considers that these exceptions are not at present recognized under international law and that the only exception should be the one mentioned under (a), which relates to actions in rem rather than to actions in personam.

1/ Ibid., page 21.
2/ Ibid., Add.1, page 16.
3/ Ibid., page 63.

The Rapporteur considers that while exceptions (b) and (c) cannot be said to be sanctioned by international law, they cannot, on the other hand, be said to be in conflict with international law. The Commission accepted exception (b) on the basis of the following considerations. In cases where the courts of the receiving State are normally competent to decide disputes concerning the succession to an estate, it will be necessary in many cases for all the interested persons to be parties to the judicial proceedings. If in such a case a diplomatic agent is an interested party, the consequence of his being able to claim immunity from jurisdict would be that the settlement of the estate would be held in abeyance - hardly a desirab state of affairs. In case (c), the considerations were as follows. A condition of the exercise of a liberal profession or commercial activity must be that the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities conducted in the country. It would be quite improper if a diplomatic agent, ignoring the restraints which his status ought to have imposed upon him, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.

The Rapporteur concludes that the position reflected in the text should be maintained.

PARAGRAPH 1 (b)

Luxembourg[1/]

It should be specified that the succession must be one for which the courts of the receiving State are competent.

The Rapporteur agrees.

PARAGRAPH 1 (c)

Australia[2/]

The expression "commercial activity" appears to require some definition.

The Rapporteur points out that the use of the words "commercial activity" as part of the phrase "a professional or commercial activity" indicates that it is not a single act of commerce which is meant, by a continuous activity.

A reference in the commentary would seem to be sufficient.

1/ Ibid., page 26.

2/ Ibid., page 7.

Chile[1]

The situation contemplated in this sub-paragraph appears very unusual and is in any case inadmissible by virtue of the very nature of diplomatic functions.

PARAGRAPH 2

Belgium[2]

The exception provided for in article 24, paragraph 3, might perhaps with advantage be included in paragraph 2. Paragraph 1 covers all types of proceedings. The immunity provided for by paragraph 2 is of so sweeping a nature, however, that it might be taken to apply even in the cases covered by the exceptions in paragraph 1.

Netherlands[3]

For greater clarity, paragraph 2 should read as follows: "A diplomatic agent is not obliged to give evidence except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1."

The Rapporteur agrees.

PARAGRAPH 3

Japan[4]

It is desirable that the term "execution" be interpreted to include both administrative (against a delinquent taxpayer, for example) as well as judicial executions.

The Rapporteur observes that it should be sufficiently clear that the reference here is to the execution of the decisions of all the jurisdictions mentioned in paragraph 1, to which the paragraph refers.

PARAGRAPH 4

Luxembourg[5]

The Luxembourg Government approved the idea on which this paragraph is based. In order to fill the gap, which is detrimental to the interests of third parties,

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1/ Ibid., Add.1, page 8.
2/ Ibid., pages 9 and 10.
3/ Ibid., Add.1, page 16.
4/ Ibid., page 21.
5/ Ibid., page 27.

it would seem desirable to include a provision vesting competence in such a case in the courts of the sending State, notwithstanding any provision to the contrary in the laws of that State. Secondly, it would seem advisable to point out in this article that the Government of the receiving State always has the right, in the interest of persons under its jurisdiction, to approach the mission or Government concerned when immunity from jurisdiction is applied. Such right of political action might appear to be automatic in this case; nevertheless, it would seem advisable to make express reservations covering this possibility, in order to prevent a mission from refusing even to engage in discussions. The Luxembourg Government proposes that the last part of this article should be re-worded as follows.

> "4. If, under the provisions of the internal law of the sending State, the diplomatic agent is subject to the jurisdictions of the receiving State and the sending State does not waive the immunity from jurisdiction of the agent, the latter shall be subject to the jurisdiction of the sending State, notwithstanding any provision to the contrary in the law of that State. In such case, the competent court shall be that of the seat of the Government of the sending State."

It is proposed that a paragraph 5 reading as follows should be added:

> "5. Immunity from jurisdiction shall be without prejudice to the right of the Government of the receiving State to approach the mission or Government having jurisdiction over the agent concerned for the purpose of protecting its interests or those of its nationals."

Switzerland[1/]

Second sentence: It would seem to be preferable to allow each State to settle this question as it sees fit. The sentence should therefore be deleted. According to the modern theory of functional necessity, which has replaced the exterritoriality theory, the diplomatic agent is domiciled in the receiving State.

United States of America[2/]

The United States Government suggests that the last sentence of paragraph 4 be deleted.

1/ Ibid., page 46.

2/ Ibid., page 63.

Netherlands[1]

The purpose of this paragraph, viz. to guarantee that there will always be a court of the sending State competent to exercise jurisdiction over the diplomatic agent, is not realized if the exercise of this jurisdiction is made dependent on the law of the sending State. The words "to which he shall remain subject in accordance with the law of that State" must therefore be deleted.

The Rapporteur observes that if it is decided that the draft should take the form of a convention, the idea that the sending State should co-operate by making the diplomatic agent subject to the jurisdiction of one of its courts should also be adopted.

The Rapporteur is therefore in favour of retaining the last sentence.

The Rapporteur has no objection to the Netherlands amendment.

Sweden[2]

The Swedish Government asks what is the position of a diplomatic agent who has left his diplomatic post with respect to disputes which date back to his sojourn in the receiving State.

In the Rapporteur's opinion the provisions of article 31 answer this question unambiguously.

ARTICLE 25

Switzerland[3]

The rules are in conformity with existing law, as are the remarks in the commentary.

United States of America[4]

Paragraphs 3 and 4 recognize implied waivers. This is inconsistent with the accepted theory that the immunity is for the benefit of the Government concerned, not of the individual. For various reasons, the sending State may object to one of the members of its mission becoming involved in judicial proceedings in the receiving State. Accordingly, the United States Government is of the opinion that, in each case, there should be an express waiver of immunity by the sending State.

1/ Ibid., Add.1, page 17.
2/ Ibid., page 35.
3/ Ibid., page 46.
4/ Ibid., page 63.

Luxembourg[1]

It is not very clear in each case who has the right to waive immunity and who may validly notify the waiver. The difficulty originates in the fact that the diplomatic agent is the sole qualified representative of the sending State in the receiving State and it is difficult to see who, except the diplomatic agent himself, could notify a waiver on behalf of the sending State. The text proposed by the Commission carries with it the danger that immunity may be invoked in proceedings initiated or consented to by a diplomatic agent on the pretext that the waiver was his personal action and not the action of the sending State. Such an attitude would be contrary to good faith.

The provisions of the article should be arranged in the following sequence: first, the article should lay down the general principle that immunity may be waived by the sending State; secondly, it should add that the diplomatic agent is presumed to be qualified to notify such waiver; thirdly, it should require the waiver to be express in the case of penal proceedings, whereas in all other proceedings it may be implied.

If it was felt that this presumption might lead to further difficulties, it would be well to consider a variant under which certain limitations would be placed on the retracting by the Government concerned of a waiver made by its agent.

The Luxembourg Government repeats the observation that the penal and civil jurisdictions are not the only ones (see article 24). The Government proposes the following text.

> "1. The immunity of diplomatic agents from jurisdiction may be waived by the sending State. Diplomatic agents shall be presumed to be competent, in proceedings in which they are concerned, to notify the waiver on behalf of the sending State.
> (Variant: The immunity of diplomatic agents from jurisdiction may be waived by the sending State. Diplomatic agents shall be competent, in proceedings in which they are concerned, to notify the waiver on behalf of the sending State. The Government of the sending State shall not revoke the waiver unless it can show that the diplomatic agent was not free when he made the waiver or that the waiver is prejudicial to the interests of the sending State).
>
> "2. In penal proceedings, waiver must always be effected expressly. In all other cases, the waiver may be express or implied. An implied waiver is presumed to have occurred," etc. (the rest of the text unchanged, except that paragraph 4 becomes paragraph 3).

1/ Ibid., pages 28 and 29.

Sweden[1]

The stipulation that a waiver of immunity must always be effected expressly by the Government of the sending State seems to go beyond what is generally regarded as sufficient under present international practice, namely that the head of mission waives the immunity of the other persons belonging to the mission. It would seem that it is a matter between the head of mission and his Government whether the latter's express consent is necessary in such cases or not.

United Kingdom[2]

In criminal proceedings the United Kingdom Government would not insist on waiver being effected by the Government of the sending State; waiver by the head of mission would be regarded as adequate, assuming him to have the necessary authority to make it.

The Rapporteur points out that most of the Governments which have commented on the matter maintain that an express waiver by the Government is in no case necessary. Only the United States Government maintains that an express waiver by the Government is necessary in each case. The majority opinion seems to reflect correctly what is at present the general practice, but a Government is of course always free to instruct its heads of mission that it reserves the right to make a waiver by express act. For the purposes of a convention, the Commission's draft seems to be an acceptable compromise.

Union of Soviet Socialist Republics[3]

It would be advisable also to provide for arrangements for the waiver of immunity from administrative jurisdiction and to stipulate that such waiver must be stated expressly.

The Rapporteur considers that paragraphs 3 and 4 should be slightly amended so as to bring administrative proceedings within the scope of the article.
Paragraph 3: "In civil or administrative proceedings, ..."
Paragraph 4: "... in respect of civil or administrative proceedings...".

1/ Ibid., page 35.
2/ Ibid., Add.1, page 24.
3/ Ibid., Add.1, page 20.

With reference to articles 26 and 27, and particularly the latter, it should be pointed out that on the subject of privileges granted in what may be called fiscal matters. Governments hold different opinions. It is debatable whether, or at any rate to what extent, the subject is governed by any rules of international law and whether the concessions are not rather granted as a matter of courtesy. Adhering strictly to the principle of functional necessity, one might say that the advantages granted are not necessary for the purpose of the diplomatic agent's performance of his function and that the effect of their abolition would merely be to transfer, in one form or another, to the sending State or to the diplomatic agent himself the economic burden which those advantages represent for the receiving State. On the other hand, however great the variations in practice may have been, these advantages have entered into current practice; and it must be admitted that they have made a not unimportant contribution to the efficient functioning of the diplomatic machinery.

In the codification of the law on this subject, the choice lies between two courses: either the codification attempts to create a uniform system by establishing the advantages at a reasonable level, which should not be too low, or else it establishes minimum advantages, leaving it to individual States to agree on higher advantages subject to reciprocity.

Even if the first alternative is chosen, reciprocity clause may be necessary.

In his first report, the Rapporteur chose the first course, assuming that the economic burden - even after allowance for the increase in diplomatic staffs - would not be excessive and that the receiving State would receive the same advantages for its representatives in foreign countries.

The question of reciprocity can usefully be dealt with after the individual articles have been considered.

ARTICLE 26

General observations

Switzerland[1/]

In general agreement with Swiss practice.

1/ Ibid., page 46.

United States of America[1]

Some of the provisions of this article conform with requirements of international law, others do not.

Belgium[2]

It is proposed, as in the case also of article 17, that the word "regional" be inserted.

It should also be made clear that the text refers only to taxes levied in the receiving State.

The Belgium Government suggests that the article should begin with the following words: "Provided that he is not a national of the receiving State, a diplomatic agent shall be exempt, in the said State, from all dues and taxes, personal or real, national, regional or local, save ..."

The Rapporteur has no objection.

Comments on the various exceptions

The Government of Luxembourg proposes[3] a new text for the whole article:

"1. A diplomatic agent shall be exempt from all dues and taxes, personal or real, national or local, save:

(a) Dues and taxes on private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity;

(b) Dues and taxes on income which has its source in the receiving State and on property other than the furniture and personal effects of the diplomatic agent and his family which is situated in the said State;

(c) Charges levied for specific services rendered.

"2. The exemption provided in the first paragraph does not include reimbursement of indirect taxes incorporated in the price of goods which are circulating freely at the time of purchase.

"3. Exemption shall be granted in respect of estate, succession or inheritance duties, except in the case of immovable property situated in

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1/ Ibid., page 64.

2/ Ibid., pages 9 and 15.

3/ Ibid., page 30.

the territory of the receiving State and movable property, other than the furniture and personal effects of the diplomatic agent and his family, which are situated in that State. This regulation shall be applicable to estates, successions or inheritances left or inherited by the diplomatic agent or by the members of his family who live with him."

Sub-paragraph (a)

Japan[1]

Clarification of the meaning of the term "indirect taxes" is desirable.

Belgium[2]

As the concept of direct or indirect taxation is difficult to define with absolute precision, the article cannot apply to such taxes as registration, court or record fees and mortgage dues and stamp duty. Nor can it apply to taxes assimilated to stamp duty (taxes on transactions).

Luxembourg[3]

As a rule exemption from indirect taxes should also be granted, but subject to a limitation: "it does not appear feasible to grant reimbursement in respect of duties incorporated in the price of goods if such goods are circulating freely at the time of purchase".

The Rapporteur proposes the addition of the words: "included in the price".

Sub-paragraph (b)

Luxembourg[3]

The words "and not on behalf of his Government" seem to be superfluous. In the Rapporteur's opinion these words reinforce the sense and therefore serve some purpose.

Netherlands[4]

With regard to the exceptions in sub-paragraphs (b) and (d) the question arises whether dues and taxes on income derived from private immovable property are covered by the one or by the other of these sub-paragraphs. In the latter case all such income would be taxable whereas in the former case dues and taxes can only be

1/ Ibid., page 22.
2/ Ibid., page 13.
3/ Ibid., page 29.
4/ Ibid., Add.1, page 17.

levied on income derived from property held by the diplomatic agent in his private capacity. On this point the text of the draft should be clarified.

United Kingdom[1]

See observations concerning article 17.

As was indicated in the comments on article 17, the United Kingdom Government does not recognize the title of a diplomatic agent to enjoy as of right exemption from local (i.e. municipal) taxation (known in the United Kingdom as "local rates") though a partial relief from these charges may be given on a basis of reciprocity. No distinction is made in this connexion between property occupied for diplomatic purposes (i.e. the residence normally occupied by the diplomatic agent in his diplomatic capacity) and property occupied by the diplomatic agent for purposes of private relaxation. In the matter of Income Tax Schedule A (which is concerned with the taxation of profits deemed to accrue to the taxpayer from the ownership of property) the practice of the Government is to regard the residence in or near London of a member of the diplomatic staff as occupied for diplomatic purposes and as qualifying for exemption from tax. A second residence, and the residence of members of the non-diplomatic staff, are not regarded as occupied for diplomatic purposes and do not qualify for exemption, but the individual is entitled to claim, as an offset to the assessment, any personal reliefs from tax to which he may be entitled under the provisions of the relevant United Kingdom legislation.

So far as the comments of the Netherlands Government are concerned, the Rapporteur points out that sub-paragraph (b) refers to taxes and dues levied directly on immovable property, independently of income, whereas sub-paragraph (d) covers also income from immovable property. In sub-paragraph (d) the same exception should be made as in sub-paragraph (b).

As regards the comment of the United Kingdom Government, cf. the remarks under article 17.

Sub-paragraph (c)

Luxembourg[2]

The effect of this provision would be to make the tax system of the receiving State applicable to estates, successions or inheritances left by the diplomatic agent or by the members of his family who live with him. This seems absolutely inadmissible. The Luxembourg Government believes that, as a matter of principle, tax immunity should be recognized in respect of estates, successions and inheritances, but that the immunity should be limited by an exception applying to immovable property situated in

1/ Ibid., Add.1, page 24.

2/ Ibid., page 29.

the receiving country and to movable assets, except the furniture and personal effects of the diplomatic agent and his family, situated in the same country.

Netherlands[1]

According to the laws of many countries, including the Netherlands, a diplomati agent is deemed to remain domiciled in the sending State for the purpose of levying estate, succession, or inheritance duties. Therefore, it should be provided that the death of a diplomatic agent does not give rise to the levying of estate, succession or inheritance duties by the receiving State, except with regard to property situated in that State.

The Rapporteur considers that, in the matter of estate, succession or inherita duties a distinction must be drawn between the estate of a person enjoying diplomati immunity (e.g. the wife or children of the diplomatic agent) and the estate of some other person not enjoying this immunity. In the former case, the receiving State would not be entitled to charge succession duties (howesoever designated) except on assets situated in the country; in the latter case no exemption would appear to be justified. The text should be amended to cover the first case. Article 31 or the commentary thereto should mention the case of the estate left by a deceased diplomat agent. The rule in such a case should be the same as in the case referred to abov

Sub-paragraph (d)

Luxembourg[2]

This sub-paragraph should mention, in addition to income which has its source in the receiving State, property which is situated in that State, in order to cover the case of a tax on capital on funds invested by the diplomatic agent in the receiving country.

The Rapporteur gathers that what the Luxembourg Government has in mind is the taxation of funds invested in the receiving country. The comment would appear to be justified.

1/ Ibid., Add.1, page 17.

2/ Ibid., page 29.

Sub-paragraph (e)

Chile 1/

Under Chilean administrative law, dues or charges (tasas) are a type of tax prescribed as remuneration for special services rendered for purposes of public utility. Consequently, the "personal dues" referred to at the beginning do not exist under the Chilean system of taxation, so that it would be impossible to indicate which are the personal dues from which diplomatic agents are exempt, and in what ways they differ from the charges referred in sub-paragraph (e), from which those officials are not exempt. Sub-paragraph (e) should be deleted. The exceptions should include taxes designed to remunerate specific services and also benefits under social welfare legislation in respect of domestic staff recruited locally.

In the Rapporteur's opinion Sub-paragraph (e) is entirely in keeping with the provision which the Chilean Government seems to wish inserted. In view of the systems in force in most countries, there can be no question of deleting the other exceptions.

The question of social legislation will be dealt with after a new article proposed by the Luxembourg Government has been quoted.

The advisability of adopting the text proposed by that Government, with certain amendments, might be discussed.

Proposed new article

Union of Soviet Socialist Republics 2/

It should be provided that diplomatic agents are exempt from all personal obligations in the form of services or payments. This type of exemption is generally recognized in international law and international practice.

The Rapporteur considers this comment justified; an article on the subject might be inserted either before or after article 26.

1/ Ibid., Add.1, page 8

2/ Ibid., Add.1, page 20

ARTICLE 27

Belgium [1]

The Belgian Government proposes that article 27 should read as follows:

"1. The receiving State shall, in accordance with such regulations as it shall prescribe, grant exemption from Customs duties and from all prohibitions and restrictions in respect of the import or subsequent re-export of:

(a) articles for the official use of a diplomatic mission;

(b) articles for the personal use of diplomatic agents, the administrative and technical staff of a mission and members of their families belonging to their respective households, including articles necessary to their establishment.

"2. The personal baggage of diplomatic agents shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in this article. Such inspection shall be conducted only in the presence of those concerned or in the presence of their authorized representatives.

"3. For the purposes of paragraph 1, the expression 'Customs duties' shall mean all dues and taxes payable on imports or re-exports.

"4. The provisions of this article shall not apply:

(a) to articles traffic in which is specifically prohibited by the law of the receiving State for reasons of public morality, safety, health or order;

(b) to persons who are nationals of the receiving State or who engage in any professional or gainful occupation in the said State."

This proposal is made for the following reasons:

(a) The existing text is insufficiently explicit regarding the exemption which the draft is apparently intended to embody. It will be seen that, unless the expression "Customs duties" is defined, such taxes or dues as may be assessed on a basis wholely unconnected with the Customs

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1/ Ibid., page 10

principle. (e.g. excise duties, consumption taxes, transfer taxes and the like) will remain applicable. Furthermore, restrictions of certain kinds (e.g. economic quotas) will not be removed.

(b) It is general practice for the receiving State to lay down regulations for the grant of Customs exemption. Such regulations cover, for instance, the form of applications for exemption, the services assigned to deal with them, the import routes etc., and, where applicable, the health formalities to be complied with, the conduct of plant pathology inspections and the like.

(c) Paragraph 1(a) should specify "for the official use of a diplomatic mission" so as to conform with the many similar texts on the subject.

(d) Exemption is out of the question for members of the diplomatic corps who are nationals of the receiving State or who engage in a profession or gainful occupation therein.

(e) Since there can be no question of granting privileges in respect of articles traffic in which is specifically prohibited by the laws of the receiving State for reasons of public morality, safety, health or order, a proviso to that effect should be included in article 27.

PARAGRAPH 1

Japan [1]

Clarification of the meaning of "Customs duties" is desirable.

It is also desirable to modify this article so that it may be possible to restrict or prohibit the use of the articles imported without Customs duties for purposes other than those for which they were imported, such as re-sale of these articles to persons not entitled to diplomatic immunity.

Switzerland [2]

It would be advisable to include in the actual text of the Convention a general reservation under which the receiving State would be able to impose certain restrictions, in order to avoid possible abuses.

1/ Ibid., page 22

2/ Ibid., page 47

Some of the restrictions imposed by the Swiss Government are cited; for example, diplomatic agents who are not heads of mission may import the furniture required for their initial installation duty-free, provided that it is imported within one year of their transfer and is not sold for a period of five years thereafter.

One duty-free car may be imported every three years.

It would be advisable to mention in the text of the Convention itself that the prohibitions and restrictions on import and export should not interfere with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use, as stated in paragraph (5) of the commentary. It is, however, understood that such a provision would refer only to economic and financial measures, and that prohibitions and restrictions in the interests of public welfare, such as health protection, would still apply.

United States of America [1]

If the term "diplomatic agent" refers only to an individual recognized in an officer status, this paragraph conforms with United States practice in the matter.

Netherlands [2]

Paragraph 1: the Netherlands Government wonders whether the Commission only examined the traditional practice of States or also discussed prevailing economic conditions when it drafted the provision exempting from Customs duties all imported articles, even those destined for purely private use. It might be useful if the Commission reconsidered its draft from this point of view and inserted a relevant observation in the commentary to this article.

Chile [3]

Chilean legislation lays down certain restrictions. Consideration might be given to a formula whereby any State may establish a quota system for the exemptions enjoyed by diplomatic officials, in which case other countries might act on a basis of reciprocity.

1/ Ibid., page 64

2/ Ibid., Add.1, page 17

3/ Ibid., Add.1, page 9

The Rapporteur notes that several of the questions raised in the observations are answered in the commentary; he agrees, however, that it may be of advantage to incorporate some of these observations in the text of the draft convention. The provisions proposed by Belgium - and in particular paragraphs 1, 3 and 4 - do not diverge in substance from the Commission's intentions and, furthermore, they satisfy all the other observations made. Accordingly, the Commission might consider whether the Belgium text would not be a good basis for the drafting of the article. Its paragraph 4(b) introduces a new rule. Possibly this provision is not necessary; in the case contemplated, the proper solution might well be merely to secure the recall of the person concerned or to declare him persona non grata.

PARAGRAPH 2

Belgium [1]

Apart from some slight drafting changes, the text of the Belgian proposal is the same as that of the draft.

Japan [2]

It is desirable to modify this article so that an inspection might also be conducted even though without "very serious" grounds.

Switzerland [3]

On the basis of reciprocity, heads of missions and their families are entirely exempted from Customs control whereas other diplomatic agents are normally subject to the control; in practice, however, the Customs authorities are lenient.

United States of America [4]

Paragraph 2: It is the view of the United States Government that exemption from inspection is accorded as a matter of courtesy, and not because it is a requirement of international law.

1/ Ibid., page 10
2/ Ibid., page 22
3/ Ibid., page 47
4/ Ibid., page 64

Netherlands [1]

Paragraph 2: The Netherlands Government objects to this provision. The exemption from inspection is practically made illusory by what is further laid down in this paragraph. In its opinion this provision should be analogous to the one contained in article 21, paragraph 2, dealing with the diplomatic bag, and should be worded as follows: "The personal baggage of a diplomatic agent, which may contain only articles covered by the exemptions mentioned in paragraph 1, shall be exempt from inspection".

In the Rapporteur's view, the exemption from Customs duties granted to the diplomatic agent is never total; it would accordingly be excessive to request total exemption from inspection, for it is part of the normal functions of the customs authorities to exercise the right to inspect for the purpose of satisfying themselves that import and export regulations are observed. The only possible argument in favour of total exemption would be that it is essential to the dignity of the diplomatic agent. But that dignity cannot suffer from so attenuated a right of inspection as that contemplated in this paragraph. On the other hand, there is no ground for the type of amendment proposed by the Japanese Government.

Personal baggage is that which accompanies the person and which should, as a rule, contain only his personal effects.

ARTICLE 28

This article has been much criticized, mainly because of the number of persons to whom the privileges are granted. The question of the status of persons who are nationals of the receiving State has also elicited some comments.

General observations

Sweden [2]

In some respects paragraph 1 goes further than certain provisions of Swedish law; but the Swedish Government does not wish to suggest any changes in the text at this stage.

1/ Ibid., page 17

2/ Ibid., page 35

Switzerland [1]

This provision introduces several innovations which require careful study.

United States of America [2]

In the United States only officers and members of their families whose names are included in the diplomatic list enjoy certain privileges, in the absence of reciprocal arrangements.

Other Governments may be of the opinion that the granting of diplomatic immunities to subordinate employees of a mission for other than official acts is not required under international law.

A careful and precise statement by the International Law Commission as to the privileges, immunities and exemptions to which the various categories of officers and employees of a mission should be considered entitled would materially contribute to the betterment of relations between governments.

The United States Government hopes that the Commission will be in a position to make such a statement.

PARAGRAPH 1

(a) Members of family

Switzerland [3]

In Switzerland, the family circle enjoying privileges and immunities is limited to the spouse and minor children and, in the case of heads of mission, to parents and parents-in-law. The advantage of this system is that it avoids abuse and controversy, while not precluding the receiving State from making exceptions in special cases.

Belgium [4]

In Belgium these privileges and immunities are granted only to the wives and children of diplomatic agents and of administrative and technical staff, and to no other members of their families.

1/ Ibid., page 47
2/ Ibid., page 65
3/ Ibid., page 47
4/ Ibid., page 11

The Rapporteur notes that, according to practice, the privileges granted to a diplomatic agent are extended to certain persons who are members of his family and belong to his household. The group comprising "members of the family" is not very clearly defined; but it is not denied that it comprises at least his wife and his minor children. Although it cannot be affirmed with the same certainty that this is a rule of international law, there are strong arguments for including in the family other persons belonging to the household, as is stated in paragraph (8) of the commentary on the draft article. If the codification takes the form of a convention, the Commission should recommend this extension as a step in the direction of the progressive development of international law.

(b) Administrative and technical staff

Belgium 1/

According to the Belgian memorandum, the privileges are granted to administrative and technical staff and to their wives and children.

Switzerland 2/

Administrative and technical staff would be placed in every way on the same footing as diplomatic staff. In Switzerland, staff in this category enjoy immunity only for acts performed as part of their official functions and are accorded only limited Customs privileges. It would therefore be preferable to maintain the present juridical situation, in which the receiving State may accord certain facilities at its discretion. The proposed innovation might contribute to the inordinate growth of diplomatic missions and lead to abuse. Moreover, such a system would make it more difficult to appoint nationals of the receiving State as members of the administrative and technical staff.

United States of America 3/

Immunity from jurisdiction is granted to all officers and employees of a diplomatic mission in Washington who have been duly notified to and accepted by the United States in such capacity, as well as to their families.

1/ Ibid., page 11

2/ Ibid., page 48

3/ Ibid., page 65

The United States, just as other Governments, does not extend immunity to those whose names are not included the diplomatic list, except for certain exemptions from Custom duties granted on a basis of reciprocity (on first arrival).

Argentina [1]

As the Commission itself has observed, there is no uniformity in the granting of diplomatic privileges and immunities to technical and administrative staff. In order to try to prevent possible objections with regard to privileges, it is proposed that such equal consideration should be granted in accordance with the regulations established under local legislation, subject to reciprocity.

Union of Soviet Socialist Republics [2]

It would be advisable to provide in article 28 that, by agreement between the States concerned, privileges and immunities may be extended on a basis of reciprocity to members of administrative, technical and service staff, including the private servants of the head or members of the mission.

Czechoslovakia [3]

The range of persons enjoying diplomatic privileges is broader than that generally recognized. The Czechoslovak Government therefore believes that the question of the grant of immunities to non-diplomatic personnel of a mission and to the service staff and private servants should be left to the agreement of the States concerned.

The Rapporteur, while still considering the arguments given in support of the attitude taken up by the majority of the Commission at its ninth session to be very sound, realizes that the opposition to the solution adopted is very strong and that the possibility of some change in that attitude should therefore be considered.

1/ Ibid., page 4

2/ Ibid., page 21

3/ Ibid., Add.1, page 10

Position of nationals of the receiving State

Belgium [1]

Privileges and immunities are withheld from members of the family who are nationals of the receiving State. There would appear to be some danger in this restriction, e.g. the possibility that the wife of the head of a mission or of a diplomatic agent might be liable to criminal proceedings. It seems advisable to stipulate that, at any rate, the wife of the head of a mission shall enjoy diplomatic immunity even if she is a national of the receiving State.

The Rapporteur thinks that this question is not without importance. Pressure may be brought to bear on a diplomatic agent if his wife is subject to the jurisdiction of the receiving State. On the other hand, such cases are surely rather rare and, at all events, the situation can be very easily prevented from arising.

Chile [2]

There is a possibility that the words "administrative and technical staff of a mission" are somewhat ambiguous and that diplomatic immunities are extended too far. The Commission might study a formula that would render those terms more precise.

Belgium [3]

In view of the proposed new wording of article 27, the cross-reference should be confined to articles 22 - 26.

It is suggested that a paragraph reading as follows be added:

> "In the case of the persons referred to in article 26 and in the present article (paragraphs 1 - 4), however, who are not nationals of the sending State, the exemptions provided by the said articles shall be granted only in respect of income actually taxed in the sending State."

The Rapporteur thinks it is difficult to find some other term to describe the staff here designated as "administrative and technical staff".

1/ Ibid., page 12

2/ Ibid., Add.1, page 9

3/ Ibid., pages 11 and 16

With regard to the amendment to the article proposed by the Belgian Government the Rapporteur considers it desirable to retain the structure of the draft.

The new paragraph proposed by the Belgian Government would apply only to persons who are nationals neither of the sending nor of the receiving State. It is questionable whether this category justifies a special provision.

PARAGRAPH 2

Australia [1]

The expression "service staff" should be defined.

The Rapporteur observes that this question has already been dealt with.

Japan [2]

As regards the "members of the service staff", it is desirable to make necessary modifications so as to grant them, regardless of their nationality, only the same privileges and immunities accorded to "private servants". Especially in the case of nationals of a receiving State, the latter might find it most difficult to grant, as provided in the draft, immunities in respect of acts performed in the course of their duties.

Luxembourg [3]

Paragraph 2 will give rise to much difficulty in practice. The question is the extent to which violations of traffic regulations by chauffeurs of diplomatic missions can be considered as acts performed in the course of duty. The Luxembourg Government considers that such acts are not performed in the course of duty and whatever the opinion of the Commission may be on

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1/ Ibid., page 7

2/ Ibid., page 22

3/ Ibid., page 30

this matter it would like a clear decision in the commentary.

The Rapporteur agrees that the question should be dealt with in the commentary. But it is not so simple. Unless the functions referred to are qualified, it would appear to be the function of a chauffeur to drive.

Netherlands [1]

(With reference to paragraphs 2, 3 and 4)

Paragraph 1 only regulates the position of persons who are not nationals of the receiving State, whereas paragraph 2 regulates the position of all members of the service staff irrespective of their nationality. As a result, there is a discrepancy in treatment between, on the one hand, the members of the administrative and technical staff, and, on the other hand, the members of the service staff of the nationality of the receiving State, which discrepancy cannot be justified and which, as appears from paragraph (5) of the commentary to article 30, it was not the intention to make.

The Netherlands Government is of the opinion that article 28 should only lay down rules governing the position of persons who are not nationals of the receiving State. (Text proposed for paragraph 2 - 4).

The Netherlands Government proposes the following amendments:

(1) Paragraph 2: Transfer the phrase "if they are not nationals of the receiving State" to the first sentence, and combine the two sentences of the paragraph into one;

(2) Combine paragraphs 3 and 4 into a single paragraph 3, beginning with the text of paragraph 4 and continuing "Apart from that they shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction etc.".

1/ Ibid., Add.1, page 18

The Rapporteur endorses the view of the Netherlands Government, and considers the text it proposes acceptable.

ARTICLE 29

United States of America [1]

The provisions of this article represent existing United States law on the subject and are in conformity with international law as the United States Government interprets it.

Netherlands [2]

The purpose of the provision, viz. to prevent persons from being subject to the nationality laws of the receiving State against their will, is brought out more clearly in the commentary than in the text of the article itself. It is suggested that the commentary be substituted for the text of the article.

Belgium [3]

This article relates only to the acquisition of the nationality of the receiving State by a person against his will (see commentary).

This qualification should be inserted in the text. It is suggested that the following words be added: "unless he requests that they should be applied to him".

Difficulties may arise in determining the nationality of a child whose father is a diplomat accredited abroad and whose mother is a national of the receiving State. It would be preferable to delete the exception. Proposed new wording:

> "Persons enjoying diplomatic privileges and immunities in the receiving State shall not be subject to the laws in force therein concerning the acquisition of nationality unless they request that the said laws should be applied to them."

1/ Ibid., page 65

2/ Ibid., Add.1. page 18

3/ Ibid., page 12

The Rapporteur has no objection to the Netherlands proposal. He also shares the Belgian Government's fear that the exception may give rise to difficulties.

ARTICLE 30

Cambodia[1]

Cambodian nationals may not be appointed members of the diplomatic staff of a foreign diplomatic mission. See also comments on article 28.

Switzerland[2]

This provision appears satisfactory. The commentary thereon is a useful addition to present doctrine.

Luxembourg[3]

The effect of the second sentence might be to give rise to unjustified claims against Governments which do not desire to grant their own nationals any privileges other than immunity from jurisdiction for acts performed in the exercise of their functions. This sentence should be deleted.

Netherlands[4]

This article should regulate the position of persons possessing the nationality of the receiving State. If the wife or members of the family of a diplomatic agent possess the nationality of the receiving State, they may be granted diplomatic privileges and immunities only if they possess the nationality of the sending State as well, so that the latter can exercise jurisdiction over them.

The Netherlands Government proposes the addition to article 30 of two paragraphs worded as follows:

> "2. A member of the administrative and technical staff, a member of the service staff or a private servant of the head or members of the mission who is a national of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, any jurisdiction assumed by the receiving State shall be exercised in such a manner as will avoid undue interference with the conduct of the business of the mission.

1/ Ibid., page 17

2/ Ibid., page 48

3/ Ibid., page 30

4/ Ibid., Add.1, page 18

"3. A member of the family of one of the persons mentioned in article 28, paragraph 1, forming part of his household, shall enjoy the privileges and immunities mentioned in articles 22 to 27, even if he is a national of the receiving State, provided he is a national of the sending State as well."

United States of America[1]

(observation on the last paragraph of the commentary)

After referring to the content of this provision and of the last paragraph of the commentary thereon, the United States Government expresses the opinion that all officers and employees of a diplomatic mission, regardless of nationality, should enjoy immunity of jurisdiction in respect of official acts.

The Rapporteur considers that, even if the last sentence is deleted, as is proposed by the Luxembourg Government, the content of the article is clear. So far as the Netherlands proposals are concerned, he thinks that the proposed paragraph 2 merely restates the content of paragraph (5) of the commentary to article 30, the only change being the addition of the last sentence, which repeats the idea expressed in the last sentence of paragraph (9) of the commentary to article 28. The proposed paragraph 3 is in effect, the last sentence of paragraph (5) of the commentary to article 30, the only difference being the phrase at the end (after "even if etc.").

The Rapporteur has no objection to paragraph 2. He is more doubtful concerning the proposed paragraph 3, the proper context is (in his opinion) article 28. If the receiving State does not recognize dual nationality, there will be difficulties.

ARTICLE 31

PARAGRAPH 1

United States of America[2]

The United States Government submits that privileges and immunities begin only when a person's appointment is notified to and accepted by the Ministry of Foreign Affairs.

The Rapporteur has no objection.

1/ Ibid., page 65

2/ Ibid., page 66

PARAGRAPH 2

United Kingdom[1]

It is the practice of the United Kingdom Government to regard the privileges and immunities of entitled persons as commencing from the date on which the notification of assumption of duties is made to the Foreign Office by the head of mission concerned and as persisting after the notification of the termination of his diplomatic employment for such reasonable period as is necessary to enable him to wind up his affairs and leave the country.

Belgium[2]

The exemptions provided for in article 27 cease to be applicable so soon as the functions of the persons entitled to them come to an end.

The provision should consequently either embody a reservation to that effect or be amended.

The Rapporteur considers that the United Kingdom Government's observation should not call for any amendment of the text. On the other hand, the Belgian Government's observation seems acceptable.

ARTICLE 32

Switzerland[3]

The proposed solution is interesting but incomplete. For example there is no attempt to deal with the situation which would arise if there were a breach of diplomatic relations between the receiving or the sending State and the countries through which the diplomatic agent must pass; specific provisions on the subject would be desirable.

The Rapporteur considers that a severance of diplomatic relations does not alter the position. The situation would, however, be changed in the event of war.

Something might be said on the subject in the commentary.

1/ Ibid., Add.1, page 24

2/ Ibid., page 13

3/ Ibid., page 48

United States of America[1]

The United States Government agrees with paragraph 1, if it is intended to apply only to the case of a diplomatic agent passing through the territory of a third State in immediate and continuous transit while proceeding on official business to or from a post to which the agent is regularly assigned. However, a third State is not obliged to accord inviolability to a diplomatic agent while he is in transit for other purposes or during a sojourn in such third State. The article should be revised to cover also other members of the staff of the mission. It is a condition precedent to the claiming of any rights by persons in transit through a third State, whether as a diplomatic courier, a diplomatic agent, or any other person connected with a diplomatic mission, that the individual concerned be properly documented, and that the third State has authorized his transit, or that his presence in the third State is inadvertent and unplanned, being due to an unforeseen circumstance, as in the case of shipwreck or forced landing of an airplane.

The Rapporteur considers that it is clear from the wording of the article that it deals only with transit in the sense understood by the United States Government. The condition that the diplomatic agent should be properly documented is justified, and could be dealt with in the commentary.

The article should, as proposed by the United States Government, be amended to cover other members of the staff of the mission.

Belgium[2]

With regard to paragraph 1, there can be no question of establishing any privileges or immunities in Customs matters for a diplomatic agent in a third State.

However, in view of the observations made in paragraph (3) of the commentary, the draft should provide for such agents to be treated with courtesy.

1/ Ibid., page 66

2/ Ibid., page 13

For this purpose the paragraph might read:

> "If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him every facility consistent with its national laws."

The Rapporteur considers that it is clear from the wording of the article that the question of Customs duties is not in issue here. On the other hand, the nature of the facilities may be discussed, and therefore also the amendment proposed by the Belgian Government.

Netherlands[1]

The Netherlands Government proposes that the article be supplemented by a provision reading as follows [to be added to paragraph 2]:

> "They shall accord despatches and other communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State."

The Rapporteur has no objection.

ARTICLE 33

PARAGRAPH 3

Switzerland[2]

As regards abuse of the premises of a diplomatic mission, the Swiss Government remarks that it appears difficult to include absolute rules in the text of the convention. Switzerland does not recognize the right to grant asylum in mission premises.

Belgium[3]

In order to ensure that there is no abuse of the privilege of inviolability, the Belgian Government proposes the addition of the following paragraph 4:

> "If documents or objects relating to a commercial or industrial activity are lodged in premises housing a diplomatic mission or in the private residence of a diplomatic agent, the head of the mission shall take all appropriate steps to ensure that the inviolability as provided in article 16, 18 and 23 does not, in any way, impede the application of the laws in force in the receiving State in respect of the said commercial or industrial activity."

The Rapporteur hesitates to introduce rules which, by regulating commercial activities, appear to countenance them.

1/ Ibid., Add.1, page 19

2/ Ibid., page 49

3/ Ibid., page 14

Luxembourg[1]

Paragraph (4) of the commentary might give rise to erroneous interpretations. The examples cited in these explanations might give the impression that the granting of the right of asylum would be a legitimate use of the mission premises only if there was a specific convention regulating such grant. A clarification is imperative.

The Rapporteur draws attention to the concluding paragraph of article 16.

ARTICLE 34

United States of America [2]

A notification that an individual has become persona non grata, or a request that he be recalled, is customarily given by the receiving State to the head of the mission concerned, rather than to the individual. Such notifications normally also provide that such person's appointment will be considered terminated as of a certain date.

The Rapporteur has no objection to the text being amended in accordance with this observation.

ARTICLE 35

Denmark[3]

The Danish Government suggests the addition of the following paragraph to the article:

> "The receiving State shall permit the withdrawal of the movable property of such persons with the exception of any such property /which has been/ acquired in the country and the export of which is prohibited at the time of departure".

The Rapporteur has no objection to the principle of the additional paragraph.

1/ Ibid., page 31

2/ Ibid., page 67

3/ Ibid., page 18

Chile[1]

The Chilean Government considers that the words "must place at their disposal the necessary means of transport" might suggest that the receiving State is under an obligation in all cases to arrange for the departure of diplomatic agents; in current practice this is only done exceptionally.

The Rapporteur thinks that the words "in case of necessity" might be added to the text.

ARTICLE 36

Netherlands[2]

The principle that the provisions of the draft articles shall apply only in time of peace and regulate at most the transition from time of peace to time of war is not adhered to in this article. The article might be interpreted as being applicable throughout the duration of an armed conflict. If the above-mentioned principle is to be enforced consistently the reference to armed conflict in article 36 will have to be deleted and a new article 36A will have to be inserted, laying down transitional measures applicable in case diplomatic relations should be broken off. On the analogy of article 31, paragraph 2, protection would have to continue for a reasonable period. In the commentary to the article it should be clearly stated that the receiving State will continue to be obliged to grant protection, though no longer under the peacetime law codified by the Commission, but under the law of war.

In view of these considerations, the Netherlands Government suggests that the following article and commentary be inserted in the draft articles:

"Article 36A

"In case of the outbreak of an armed conflict the receiving State shall respect and protect the premises of the mission, together with its property and archives during a reasonable period as mentioned in article 31 paragraph 2.

1/ Ibid., Add.1, page 9

2/ Ibid., Add.1, page 19

"Commentary:

"1. As the rules proposed by the Commission are only intended to apply in time of peace, the provisions of article 36 are not applicable if diplomatic relations are broken off as the result of the outbreak of an armed conflict. In such a case, as in the cases provided for in article 31 paragraph 2 and in article 35, it appears necessary to establish transitional rules in order to regulate the transition from the law of peace to the law of war. Article 36A constitutes such a rule.

"2. After the expiry of the period mentioned in article 31 paragraph 2, the receiving State shall accord the premises, property and archives of the mission such respect and protection as is required by the relevant rules of the law of war."

The Rapporteur agrees unless a simpler formula can be found to limit the application of article 36. If one is found, the commentary might be expanded.

ARTICLE 37

United States of America[1/]

This article should be deleted if the draft articles are not prepared in the form of a convention.

Switzerland[2/]

It would be advisable to give the Court compulsory jurisdiction so that each State should have the right to bring the dispute before the Court unilaterally by a simple application.

Union of Soviet Socialist Republics[3/]

The Soviet Government proposes that the article be redrafted to read as follows after the words "through diplomatic channels": ... "shall be referred to conciliation, submitted to the International Court of Justice in accordance with the Statute of the Court, or referred to arbitration in accordance with existing agreements".

The Rapporteur considers that, if the intention is to make sure that the dispute will be settled, either the text proposed by the Commission should be retained or the Swiss Government's proposal should be adopted. The Swiss proposal has much merit. For one thing, it would avoid delays caused by efforts to reach a settlement by conciliation.

1/ Ibid., page 67

2/ Ibid., page 49

3/ Ibid., Add.1, page 21

Additional articles proposed

Application of social legislation

Luxembourg[1]

The Government of Luxembourg believes that the convention should provide an answer to a question which is giving rise to an increasing number of difficulties as various countries progressively develop their social legislation and, especially, their social security legislation. In order to situate the question properly, a distinction should be made between the effect of such legislation on the diplomatic staff of missions and its effect on diplomatic missions or the agents of such missions in their relations with subordinate staff in respect of the obligations which may devolve upon them in their capacity as employers.

1. In the case of the diplomatic agents themselves and of administrative and technical staff, there would appear to be no doubt as to exemption from social legislation, without prejudice to such agents being covered by the security systems of their countries of origin.

2. On the other hand, it seems advisable that social legislation should continue to apply to service staff members and private servants who are nationals of the receiving country or who had their residence there before taking up employment; for practical purposes, this means locally recruited staff. If this solution were accepted, the employer would have to assume the obligations incumbent upon employers (declaration and payment of contributions). It would matter little whether the capacity of an employer was assumed by the mission as such or by a diplomatic agent personally. In other words this arrangement would consist of requiring diplomatic missions to observe the social welfare conditions in force at the place of their mission whenever they were recruiting staff at that place.

The provision in question could be worded as follows:

"Additional article

1. The persons mentioned in article 28 paragraph 1, shall be exempt from the social security legislation in force in the receiving State.

1/ Ibid., page 31

2. Members of the service staff of the mission and private servants of the head or of members of the mission are subject to the social security legislation in force in the receiving State if they are nationals of that State or if they had their residence in the territory of the receiving State before taking up employment. In this case, the employer is bound to comply with the obligations inherent in his capacity as such."

The Rapporteur considers the observation justified. The text proposed by the Luxembourg Government might serve as the basis for a new article, to be inserted, possibly, after article 33.

Chile[1/]

The exceptions in article 26 should include benefits under social welfare legislation in respect of domestic staff recruited locally.

The Rapporteur notes that in many countries legislation contains provisions on this subject which follow more or less the lines of those proposed by the Luxembourg Government. He recommends the acceptance of these proposals in principle. The article could, perhaps be inserted after article 33.

Issue of diplomatic passports and visas

Japan[2/]

The Japanese Government hopes that the Commission will propose provisions concerning the issue of diplomatic passports and visas. Such passports and visas provide practically the sole basis for granting privileges and immunities at the Customs upon entering or leaving a country. This point concerns not only the normal diplomatic personnel dealt with in the draft articles but also the officials of the Foreign Office and official delegates to international conferences.

The Rapporteur realizes that it may well be that many abuses exist which jeopardize the privileges of diplomatic agents, especially in the matter of exemption from Customs inspection and Customs duties. In his opinion regulations should not be drafted until the practice of the Governments is better known and in any case not at this stage of the work.

1/ Ibid., Add.1, page 9

2/ Ibid., page 22

See also under the following heading.

Structure of the draft

The Swiss Government comments on this subject at some length.[1/]

Section I. It would seem preferable to place articles 10-14, which deal with the classes of heads of mission and contain rules of outstanding importance, immediately after article 2, which defines the functions of a diplomatic mission, and before articles 3-8.

Section II. See also comments on Section III below.

The draft is based on the sound principle that the privileges and immunities of diplomatic missions and agents should be interpreted in the light of "functional necessity" or, to use a more precise phrase, "the purpose of the mission". There would be some advantage in stating this principle in a general article to be placed at the head of section II. Such a provision would furnish a juridical basis for the limitations that have become necessary (article 7) and would generally facilitate the interpretation of the convention.

This general article might also include article 33 paragraphs 1 and 3; or, if so desired, these two provisions might be inserted respectively in article 22 and in article 16.

Furthermore, the general article on privileges and immunities should contain a clause prescribing that the mission must be established in the capital or its environs as agreed for this purpose by the receiving State.

Section III. It would seem that article 33, paragraphs 1 and 3, which deal with abuses of privileges and immunities, ought to be placed at the head of section II in a new article containing a complete definition of privileges and immunities based on the general principle of "functional necessity". Article 33, paragraph 2, might well become the second paragraph of article 2, which defines the function of the mission.

Section IV. It would appear more logical to eliminate section IV. Article 34, dealing with the end of the function of a diplomatic agent, should be placed in section I, after articles 3-8 and before article 9, (which provides for the temporary replacement of a head of mission). Article 35 should either follow

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1/ Ibid., page 37

or be embodied in article 31, which defines the duration of privileges and immunities. The same applies to article 36, since it contains provisions on the partial continuation of privileges and immunities in case of an interruption of diplomatic relations.

The Rapporteur considers that there is hardly any justification for placing articles 10-14 before articles 3-8 in section I. The latter articles, which deal with the appointment of members of the mission and matters incidental thereto, should logically precede provisions which, like articles 10-14, deal mainly with questions that, though important, are essentially questions of etiquette.

With regard to the observations on sections II and III the Rapporteur considers that the value of a comprehensive definition of the advantages which are conferred by diplomatic privileges and immunities is debatable. The definition would necessarily be vague, and its value would consist mainly in stressing functional necessity. The importance of the principle of functional necessity in the establishment of the rules should not, after all, be exaggerated. Even if the evolution of these rules, has been influenced, unconsciously, by functional necessity, other theories and considerations served as guide in that evolution. Hence, one should not look primarily to this principle for evidence of the existence or scope of a privilege, but to existing practice; and only if existing practice does not offer any guidance can the principle of functional necessity be of some help. Reference has already been made to this subject in the Rapporteur's remarks concerning section II B.

That being so, the question is whether an interpretation clause should be inserted in the draft, or whether an expanded commentary would suffice.

A further reason why the Swiss Government favours an article containing such a provision appears to be the desire to merge in that article the provisions of article 33, paragraphs 1 and 3.

These provisions are out of context in article 22 and equally out of context in article 16 (as proposed in the alternative). The Rapporteur's view is that they should be inserted where their importance can be emphasized as an essential factor in privileges and immunities; but that purpose can be accomplished just as well and perhaps better if they are placed in a separate section after the privileges have been set out. This is the solution which he personally supports.

With regard to the place of article 33, paragraph 2, he shares the Swiss Government's view that the idea behind article 33, i.e. that privileges do not relieve the persons enjoying them of the duty to respect the laws of the receiving State is not given due prominence. Paragraph 2 refers to the subject of relations with the receiving State, and should be inserted either as a separate paragraph of article 2, or as a separate article immediately thereafter.

With regard to the observations on section IV, the Rapporteur shares the Swiss Government's opinion, at least concerning the proper context of articles 34 and 35. With regard to article 36, he thinks its proper context is perhaps at the end of Section II A, i.e. after article 18; article 31 deals with the duration of individual privileges and immunities, whereas article 36 deals only with premises, including archives.

Future studies

Netherlands[1/]

The Netherlands Government subscribes to the view that all the aspects of this comprehensive subject should not be regulated in one single convention but that, in particular, the rules governing "ad hoc diplomacy" and consular relations should be laid down in separate conventions. The same applies to the relations between States and international organizations and to those between the organizations themselves. Unlike the Commission, the Netherlands Government is, however, of the opinion that already now the need is felt for a regulation of the latter type of relations, partly also as a result of the development of the ius legationis of international organizations such as the European Coal and Steel Community, and it would appreciate it if the Commission would request its Rapporteur to include this subject in his studies.

1/ Ibid., Add.1, page 11