UNITED NATIONS

REPORT
OF THE
INTERNATIONAL LAW COMMISSION

Covering the work of its tenth session
28 April—4 July 1958

GENERAL ASSEMBLY

OFFICIAL RECORDS : THIRTEENTH SESSION

SUPPLEMENT No. 9 (A/3859)

NEW YORK, 1958

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the statute of the Commission annexed thereto, as subsequently amended, held its tenth session at the European Office of the United Nations, Geneva, from 28 April to 4 July 1958. The work of the Commission during the session is described in the present report. Chapter II of the report contains the model rules on arbitral procedure, which are submitted to the General Assembly for its consideration. Chapter III contains the final draft on diplomatic intercourse and immunities which is also submitted to the General Assembly. Chapter IV gives an account of the progress so far made in the Commission's work on the subjects of State responsibility, the law of treaties and consular intercourse and immunities. Chapter V deals with certain administrative and other matters.

I. Membership and attendance

2. The Commission consists of the following members:

Name	*Nationality*
Mr. Roberto Ago	Italy
Mr. Ricardo J. Alfaro	Panama
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Sir Gerald Fitzmaurice	United Kingdom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China
Mr. Thanat Khoman	Thailand
Faris Bey El-Khouri	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

3. On 30 April 1958 the Commission elected Mr. Ricardo J. Alfaro of Panama to fill the casual vacancy caused by the resignation of Mr. Jean Spiropoulos consequent upon the latter's election to the International Court of Justice. Mr. Alfaro assisted in the work of the Commission from 28 May onwards.

4. At the 454th meeting on 2 June 1958, the Commission received a letter from Mr. Abdullah El-Erian, United Arab Republic, in which he stated that, having regard to the provision in article 2, paragraph 2, of the Commission's statute that no two members of the Commission shall be nationals of the same State, he wished to tender his resignation. The Commission accepted the resignation and, as from 2 June 1958, Mr. El-Erian took no further part in the work of the Commission. At a private meeting on 6 June 1958 the Commission decided to postpone until the beginning of the next session the election to fill the casual vacancy caused by the resignation of Mr. El-Erian.

5. Mr. Thanat Khoman was not able to be present during the session.

II. Officers

6. At its 431st meeting on 28 April 1958, the Commission elected the following officers:

Chairman: Mr. Radhabinod Pal;

First Vice-Chairman: Mr. Gilberto Amado;

Second Vice-Chairman: Mr. Grigory I. Tunkin;

Rapporteur: Sir Gerald Fitzmaurice.

7. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

III. Agenda

8. The Commission adopted an agenda for the tenth session consisting of the following items:

1. Filling of casual vacancy in the Commission (article 11 of the statute).
2. Arbitral procedure: General Assembly resolution 989 (X).
3. Diplomatic intercourse and immunities.
4. Law of treaties.
5. State responsibility.
6. Consular intercourse and immunities.
7. Date and place of the eleventh session.
8. Planning of future work of the Commission.
9. Limitation of documentation: General Assembly resolution 1203 (XII).
10. Other business.

9. In the course of the session the Commission held forty-eight meetings. It considered all the items on the agenda with the exception of the law of treaties (item 4) and State responsibility (item 5). As regards the latter two items, and consular intercourse and immunities (item 6) which was considered only briefly, see chapter IV.

Chapter II

ARBITRAL PROCEDURE

I. General observations

A. Historical

10. In presenting its final report on arbitral procedure, the International Law Commission recalls the following passages from the opening paragraphs of the report on this subject which it drew up at its fifth session in 1953:[1]

"9. At its first session in 1949, the International Law Commission selected arbitral procedure as one of the topics of codification of international law and appointed Mr. Georges Scelle as special rapporteur. The successive stages of the preparation and discussion of that topic are set forth in paragraphs 11-14 of the report of the Commission on its fourth session.[2]

"10. At its fourth session in 1952, the Commission adopted a 'draft on arbitral procedure' with accompanying comments.[3] In accordance with article 21, paragraph 2, of its statute, the Commission decided to transmit the draft, through the Secretary-General, to Governments with the request that they should submit their comments. The Commission also decided to draw up, during its fifth session in 1953, a final draft for submission to the General Assembly in accordance with article 22 of its statute.

"11. . . .

"12. During its fifth session in 1953, the Commission, at its 185th to 194th meetings, considered the draft in the light of the comments of Governments and of the study of the provisional draft by its members in the intervening period between the fourth and fifth sessions. As the result, the Commission adopted a number of substantial changes which are commented upon in the present report. No reference is made to verbal changes and alterations in drafting."

11. In submitting its 1953 draft on arbitral procedure, which was at that time intended as a final draft, the Commission, in paragraph 55 of its report for that year,[4] expressed the view that this final draft, as adopted, called for action on the part of the General Assembly of the kind contemplated in article 23, paragraph 1 (*c*), of the statute of the Commission, namely, that the draft should be recommended to Member States with a view to the conclusion of a convention; the Commission recommended accordingly. The reasons why the Commission considered the conclusion of a general convention on the subject to be important and highly desirable were set out in full in paragraph 56 of that report.

12. The draft was not, however, finally considered by the Assembly until the tenth session in 1955, when it was subjected to considerable criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the subject. These criticisms were summarized as follows by the special rapporteur, Mr. Georges Scelle, in the report he prepared for the Commission at its ninth session in 1957:

"The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, [*i.e.*] the codification of custom."[5]

Accordingly, the Assembly eventually adopted resolution 989 (X) of 14 December 1955 which reads as follows:

"The General Assembly,

"*Having considered* the draft[6] on arbitral procedure prepared by the International Law Commission at its fifth session and the comments[7] thereon submitted by Governments,

"*Recalling* General Assembly resolution 797 (VIII) of 7 December 1953, in which it was stated that this draft includes certain important elements with respect to the progressive development of international law on arbitral procedure,

"*Noting that* a number of suggestions for improvements on the draft have been put forward in the comments submitted by Governments and in the observations made in the Sixth Committee at the eighth and current sessions of the General Assembly,

"*Believing* that a set of rules on arbitral procedure will inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements,

"1. *Expresses* its appreciation to the International Law Commission and the Secretary-General for their work in the field of arbitral procedure;

"2. *Invites* the International Law Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they may contribute further to the value of the draft on arbitral

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[1] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, (A/2456), chapter II.

[2] *Ibid., Seventh Session, Supplement No. 9*, (A/2163), paras. 11-14.

[3] *Ibid.*, para. 24.

[4] *Ibid., Eighth Session, Supplement No. 9*, (A/2456).

[5] See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109, para. 7.

[6] *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, (A/2456), para. 57.

[7] *Ibid., Tenth Session, Annexes*, agenda item 52, documents A/2899 and Add.1 and 2.

procedure, and to report to the General Assembly at its thirteenth session;

"3. *Decides* to place the question of arbitral procedure on the provisional agenda of the thirteenth session, including the problem of the desirability of convening an international conference of plenipotentiaries to conclude a convention on arbitral procedure."

13. The International Law Commission was not able to take the matter up at its eighth session in 1956, because of the necessity of completing at that session its final draft on the law of the sea; but it devoted some time to the subject at its ninth session in 1957, with a view to completing the work during its present (tenth) session, for presentation to the General Assembly at its forthcoming thirteenth session, as requested in resolution 989 (X) quoted above. As stated in paragraph 19 (chapter III) of its 1957 report,[8] the Commission, at the ninth session, considered the matter principally from the point of view of what, in the light of the Assembly's resolution, ought to be "the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether this object should be a convention or simply a set of rules which might inspire States in the drawing up of provisions for inclusion in international treaties and special arbitration agreements". As stated in the same paragraph, the Commission, at its 419th meeting decided in favour of the second alternative. It may be noted, without unduly stressing the point, that the Assembly resolution, while leaving fully open the possibility of convening an eventual international conference to conclude a convention on the subject, appeared rather to incline to the alternative solution.

14. In coming to this conclusion, a majority of the members of the Commission[9] were motivated by the feeling that the draft as it stood constituted a homogeneous and self-consistent whole, based on the view that the process of arbitration flowed logically from the agreement of the parties to submit to arbitration and that, the agreement to arbitrate having once been entered into, certain necessary consequences followed which affected the whole of the ensuing arbitral procedure, and which the parties must, in order to honour their agreement, be prepared to accept. It was however clear from the reactions of Governments that this concept of arbitration, while not necessarily going beyond what two States might be prepared to accept for the purposes of submitting a particular dispute to arbitration *ad hoc,* or even beyond what two individual States might be willing to embody in a bilateral treaty of arbitration intended to govern generally the settlement of disputes arising between them *inter se,* did definitely go beyond what the majority of Governments would be prepared to accept in advance as a general multilateral treaty of arbitration to be signed and ratified by them, in such a way as to apply automatically to the settlement of all future disputes between them. To re-cast the draft in such a way that it might attract the signature and ratification of a majority of Governments it would be necessary to embark on a complete revision, involving in all probability an alteration in the whole concept on which it was based. In these circumstances the Commission took the view that it would be preferable to leave the existing general form and structure of the draft as it stood, but to present it to the General Assembly not as the basis of a general multilateral convention on arbitral procedure, but as a set of model draft articles which States could draw upon, to such extent as they might see fit in concluding bilateral or plurilateral arbitral agreements *inter se,* or in submitting particular disputes to arbitration *ad hoc.*

15. The special rapporteur, Mr. Georges Scelle, accordingly drew up a further report[10] in the light of this conclusion, for consideration by the Commission at its present session. On the basis of this report the Commission discussed the matter at its 433rd to 448th, 450th and 471st to 473rd meetings and adopted the articles set out in part II below These articles are followed by a general commentary, but no article-by-article commentary is furnished, for the following reasons. For the purposes of its original draft of thirty-two articles prepared at its fourth session in 1952[11] for comment by Governments, the Commission had furnished an article-by-article commentary prepared by the special rapporteur, Mr. Georges Scelle. Although, as stated in paragraph 12 of its report for 1953,[12] a number of substantial changes were, in the light of the comments of Governments, introduced into the final draft submitted to the Assembly in that report, these changes were not considered to be of such a character as to require a further or new article-by-article commentary, and the matter was dealt with by means of a general commentary contained in paragraphs 15-52 of the report prepared by the general rapporteur for that year, Mr. H. Lauterpacht (now Sir Hersch Lauterpacht, Judge of the International Court of Justice). The present text, now presented, while also containing a number of changes of substance and, as explained in paragraph 13 above, entailing a change of objective so to speak, equally involves no fundamental alterations of structure or concept, for the reasons set out in paragraph 14. The increase in the original number of articles from thirty to thirty-eight is due almost wholly to the fact that the Commission decided, on the recommendation of the special rapporteur, and in the light of certain comments made in the General Assembly in 1955, to include a number of provisions relating to the routine conduct of arbitral proceedings, such as are normally inserted in the *compromis d'arbitrage.*[13] These provisions are for the most part of a type which do not involve important points of principle and call for no special comment. Having regard to these considerations, to the detailed commentary contained in the 1952 report, to the further detailed commentary on the 1952 articles contained in the documents referred to in footnote 13 below, to the very full general commentary contained in the 1953 report, and also to the existence of further commentaries contained in the special rapporteur's reports for 1957[14] and 1958,[15] the Commission feels that any further general or detailed restatement of the principles governing the text would be otiose, and that the comparatively brief commentary on certain of the articles which is contained in part III below will suffice to explain any points of special importance or any changes to which particular attention should be drawn.

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[8] *Ibid., Twelfth Session, Supplement No. 9* (A/3623).

[9] See, *passim,* the summary record of the 419th meeting of the Commission in vol. I of the *Yearbook of the International Law Commission, 1957* (A/CN.4/SER.A/1957), pp. 181-185.

[10] A/CN.4/113 of 6 March 1958.

[11] *Official Records of the General Assembly, Seventh Session, Supplement No. 9* (A/2163), chapter II.

[12] *Ibid., Eighth Session, Supplement No. 9* (A/2456).

[13] This decision was taken despite the fact that the valuable printed *Commentary on the Draft Convention on Arbitral Procedure* (A/CN.4/92) to the original mimeographed version of which the Commission referred in paragraph 13 of its 1953 report, contained an annex of about 130 pages devoted to this type of provision.

[14] A/CN.4/109, para. 7. See *Yearbook of the International Law Commission, 1957,* vol. II (A/CN.4/SER.A/1957/Add.1).

[15] A/CN.4/113 of 6 March 1958.

B. Scope and purpose of the draft[16]

16. The commentary to the 1953 text states fully the fundamental principles governing the law of arbitration on which the text is based.[17] There is no need to re-state all these principles. Special reference will however be made presently to two of them (namely the character and consequences of the obligation to arbitrate, and the autonomy of the parties), on account of their great overriding importance.

17. The structural and other affinities between the present text and that of 1953 are clearly apparent from the comparative table of articles which, for convenience of reference, is given in a footnote below.[18] But these affinities must not be allowed to obscure the fact that the text is not now presented as a prospective convention the adoption of which by the General Assembly would involve for Member States the question of deciding whether to sign and ratify it or not. This question, considered as such, no longer arises. If, as the Commission, in accordance with article 23, paragraph 1 (*b*), of its statute, now recommends, the Assembly adopts the present report by resolution, the draft articles would become binding on any Member State only in the following circumstances, which indicate the three or four purposes they are now specifically intended to serve:

(i) If they were embodied in a convention between two or more States for signature and ratification *inter se,* intended to govern the settlement of all, or of any specified category of future disputes arising between them;

(ii) If they were similarly embodied in a particular arbitral agreement for the settlement *ad hoc* of an already existing dispute;

(iii) If—which is a variant of (ii)—parties to a dispute which they propose to refer to arbitration, wished to embody the articles, in whole or in part, in their arbitral agreement or in the *compromis d'arbitrage,* or to include clauses based upon them, or for which the articles would serve as a model;

(iv) If, in the same circumstances as (iii), the parties did not wish, or found it difficult, to draw up a detailed arbitral agreement or *compromis,* and preferred simply to declare that the settlement of the dispute and the process of arbitration would be governed by the present articles with or without such exceptions, variations or additions as the parties might indicate.

18. It is thus clear that the draft articles are not intended as, and do not constitute a general treaty of arbitration. They are intended as a guide, not as a straitjacket; in this way the fundamental principle of the autonomy of the parties to a dispute, to which further reference will be made presently, is fully preserved. Nevertheless, this principle itself is not unfettered. It is absolute only in the sense that nothing can compel two States to engage in arbitration except their own agreement to do so, given either generally and in advance, or *ad hoc* in relation to the particular dispute. But this consent, once given, binds the parties and obliges them to carry out the undertaking to arbitrate. From this, certain consequences follow, which are legal consequences. These cannot be escaped by the parties, whether they make use of the present articles to govern their arbitration or not—for these consequences are inherent in, and spring from, the simple undertaking to arbitrate, once this has been given in binding form.

19. The present text therefore, like that of 1953, is based on the fundamental concept that an agreement to arbitrate involves in substance an international obligation equivalent to a treaty obligation.[19] Having once entered into it (which they were free not to do) the parties are legally bound to carry it out and, in consequence, to take all the steps necessary to enable the arbitration to take place and the dispute to be finally liquidated; and, similarly, to refrain from any action, positive or negative, which would impede or frustrate that consummation. This may be styled the principle of non-frustration. Experience having shown that there are a number of ways in which a party to a dispute, despite its undertaking to arbitrate, can in fact frustrate the process of arbitration—e.g., by failing to appoint its arbitrator, or otherwise to co-operate in setting up the arbitral tribunal; by withdrawing its arbitrator during the course of the proceedings and failing to appoint another; by failing to appear and present or defend its case before the tribunal, etc.—the present text, like that of 1953, provides automatic procedures for filling in any gaps thus created by the action or inaction of the parties, and thereby for preventing the frustration of the agreement and enabling the arbitration to take place and result in a final settlement binding on the parties.[20]

20. Within these limits which, it should be emphasized, do not spring from these articles as such, but from the inherent legal position on which they are based, and by which they themselves are governed, the parties, by virtue of the principle of their autonomy,[21] remain free to conduct their arbitration as they please. Subject to the overriding principle of non-frustration, they can adopt what procedural or other rules they like. In so far as they adopt or proceed on the basis of the present articles, they can (subject always to the same limitation) introduce

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[16] The present draft is of course intended to apply to arbitrations between States. The Commission discussed the question how far it might also be applicable to other types of arbitration, such as arbitrations between international organizations, or between States and international organizations, or between States and foreign private corporations or other juridical entities. The Commission decided not to proceed with these aspects of the matter. Nevertheless, now that the draft is no longer presented in the form of a potential general treaty of arbitration, it may be useful to draw attention to the fact that, if the parties so desired, its provisions would, with the necessary adaptations, also be capable of utilization for the purposes of arbitrations between States and international organizations or between international organizations.

In the case of arbitrations between States and foreign private corporations or other juridical entities, different legal considerations arise. However, some of the articles of the draft, if adapted, might be capable of use for this purpose also.

[17] *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), chapter II, paras. 18-29 and 48-52.

[18] The present numbers of the articles are followed by numbers in brackets which indicate the article in the 1953 draft (A/2456, para. 57) on which the present article is broadly based. Where the present article had no equivalent in 1953, this fact is indicated by the word "new" in brackets after the number of the article.

Preamble (1 and 14), article 1 (2), article 2 (9), article 3 (3 and 4), article 4 (5), article 5 (6), article 6 (8), article 7 (new), article 8 (10), article 9 (11), article 10 (12, para.1), article 11 (12, para.2), article 12 (13), article 13 (new), article 14 (new), article 15 (new), article 16 (new), article 17 (new), article 18 (15), article 19 (16), article 20 (17), article 21 (18), article 22 (21), article 23 (22), article 24 (23), article 25 (20), article 26 (19), article 27 (19, 7 and part new), article 28 (24, 25), article 29 (24, para.2), article 30 (26), article 31 (27), article 32 (new), article 33 (28), article 34 (new), article 35 (30), article 36 (31), article 37 (32), article 38 (29 and part new).

[19] The forms taken by arbitral agreements may of course be of very diverse characters.

[20] See *Official Records of the General Assembly, Eighth Session, Supplement No. 9* (A/2456), paras. 18-25.

[21] *Ibid.*, paras. 48-52.

what exceptions, variations or additions seem good to them. In this respect, it is desirable to make it quite clear that, within the limits stated, the application of the present articles, in so far as adopted by the parties to a dispute, will always be subject to any special provisions in the arbitral agreement or *compromis d'arbitrage*. Consequently, although for reasons of convenience or emphasis certain of the articles contain phrases such as "Unless otherwise provided in the *compromis* . . .", this should not be taken to mean that the application of other articles is not equally subordinated to the will of the parties and to variation or even exclusion under the terms of the *compromis*.

21. Naturally, where in the preceding paragraph reference is made to the limitations implied by the principle of non-frustration, it is not intended to suggest that States can in practice be prevented from drawing up their arbitral agreement or *compromis* in such a way that it will be possible for one or other of them to frustrate the purpose of the arbitration. But (at any rate with the exception of those cases where the agreement or *compromis* expressly permits it) the party taking the frustrating action will be acting in a manner which, even if not actually contrary to the arbitral agreement as such, will be contrary to the basic principles of general international law governing the process of arbitration. The present articles are designed (and this is now one of their chief objects) to ensure that, if the parties draw up their arbitral agreement or *compromis* in such a way that its object can be frustrated, they will at least do so with open eyes. If two States, aware of what they are doing, choose to draft their agreement or *compromis* in this way, they are entitled—or at any rate they have the faculty—to do so. But if they wish to close the door to the possibility of frustration, the present articles indicate by what means this can be done.

II. Text of the draft

22. The final text on arbitral procedure in the form of a set of model draft articles, as adopted by the Commission at its 473rd meeting, reads as follows:

MODEL RULES ON ARBITRAL PROCEDURE

Preamble

The undertaking to arbitrate is based on the following fundamental rules:

1. Any undertaking to have recourse to arbitration in order to settle a dispute beween States constitutes a legal obligation which must be carried out in good faith.

2. Such an undertaking results from agreement between the parties and may relate to existing disputes or to disputes arising subsequently.

3. The undertakng must be embodied in a written instrument, whatever the form of the instrument may be.

4. The procedures suggested to States parties to a dispute by these model rules shall not be compulsory unless the States concerned have agreed, either in the *compromis* or in some other undertaking, to have recourse thereto.

5. The parties shall be equal in all proceedings before the arbitral tribunal.

THE EXISTENCE OF A DISPUTE AND THE SCOPE OF THE UNDERTAKING TO ARBITRATE

Article 1

1. If, before the constitution of the arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether the existing dispute is wholly or partly within the scope of the obligation to go to arbitration, such preliminary question shall, at the request of any of the parties and failing agreement between them upon the adoption of another procedure, be brought before the International Court of Justice for decision by means of its summary procedure.

2. The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

3. If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.

THE compromis

Article 2

1. Unless there are earlier agreements which suffice for the purpose, for example in the undertaking to arbitrate itself, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, as a minimum:

(*a*) The undertaking to arbitrate according to which the dispute is to be submitted to the arbitrators;

(*b*) The subject-matter of the dispute and, if possible, the points on which the parties are or are not agreed;

(*c*) The method of constituting the tribunal and the number of arbitrators.

2. In addition, the *compromis* shall include any other provisions deemed desirable by the parties, in particular:

(i) The rules of law and the principles to be applied by the tribunal, and the right, if any, conferred on it to decide *ex aequo et bono* as though it had legislative functions in the matter;

(ii) The power, if any, of the tribunal to make recommendations to the parties;

(iii) Such power as may be conferred on the tribunal to make its own rules of procedure;

(iv) The procedure to be followed by the tribunal; provided that, once constituted, the tribunal shall be free to override any provisions of the *compromis* which may prevent it from rendering its award;

(v) The number of members required for the constitution of a *quorum* for the conduct of the hearings;

(vi) The majority required for the award;

(vii) The time limit within which the award shall be rendered;

(viii) The right of the members of the tribunal to attach dissenting or individual opinions to the award, or any prohibition of such opinions;

(ix) The languages to be employed in the course of the proceedings;

(x) The manner in which the costs and disbursements shall be apportioned;

(xi) The services which the International Court of Justice may be asked to render.

This enumeration is not intended to be exhaustive.

CONSTITUTION OF THE TRIBUNAL

Article 3

1. Immediately after the request made by one of the States parties to the dispute for the submission of the dispute to arbitration, or after the decision on the arbitrability of the dispute, the parties to an undertaking to arbitrate shall take the necessary steps, either by means of the *compromis* or by special agreement, in order to arrive at the constitution of the arbitral tribunal.

2. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, or from the date of the decision on arbitrability, the President of the International Court of Justice shall, at the request of either party, appoint the arbitrators not yet designated. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties,

the appointments shall be made by the oldest member of the Court who is not a national of either party.

3. The appointments referred to in paragraph 2 shall, after consultation with the parties, be made in accordance with the provisions of the *compromis* or of any other instrument consequent upon the undertaking to arbitrate. In the absence of such provisions, the composition of the tribunal shall, after consultation with the parties, be determined by the President of the International Court of Justice or by the judge acting in his place. It shall be understood that in this event the number of the arbitrators must be uneven and should preferably be five.

4. Where provision is made for the choice of a president of the tribunal by the other arbitrators, the tribunal shall be deemed to be constituted when the president is selected. If the president has not been chosen within two months of the appointment of the arbitrators, he shall be designated in accordance with the procedure prescribed in paragraph 2.

5. Subject to the special circumstances of the case, the arbitrators shall be chosen from among persons of recognized competence in international law.

Article 4

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. Once the proceedings have begun, an arbitrator appointed by a party may not be replaced except by mutual agreement between the parties.

3. Arbitrators appointed by mutual agreement between the parties, or by agreement between arbitrators already appointed, may not be changed after the proceedings have begun, save in exceptional circumstances. Arbitrators appointed in the manner provided for in article 3, paragraph 2, may not be changed even by agreement between the parties.

4. The proceedings are deemed to have begun when the president of the tribunal or the sole arbitrator has made the first procedural order.

Article 5

If, whether before or after the proceedings have begun, a vacancy should occur on account of the death, incapacity or resignation of an arbitrator, it shall be filled in accordance with the procedure prescribed for the original appointment.

Article 6

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal. It may only propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal if it can show that the appointment was made without knowledge of that fact or as a result of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator or of the president of the tribunal, the question of disqualificaton shall, in the absence of agreement between the parties, be decided by the International Court of Justice on the application of one of them.

3. Any resulting vacancy or vacancies shall be filled in accordance with the procedure prescribed for the original appointments.

Article 7

Where a vacancy has been filled after the proceedings have begun, the proceedings shall continue from the point they had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning, if these have already been started.

POWERS OF THE TRIBUNAL AND THE PROCESS OF ARBITRATION

Article 8

1. When the undertaking to arbitrate or any supplementary agreement contains provisions which seem sufficient for the purpose of a *compromis*, and the tribunal has been constituted, either party may submit the dispute to the tribunal by application. If the other party refuses to answer the application on the ground that the provisions above referred to are insufficient, the tribunal shall decide whether there is already sufficient agreement between the parties on the essential elements of a *compromis* as set forth in article 2. In the case of an affirmative decision, the tribunal shall prescribe the necessary measures for the institution or continuation of the proceedings. In the contrary case, the tribunal shall order the parties to complete or conclude the *compromis* within such time limits as it deems reasonable.

2. If the parties fail to agree or to complete the *compromis* within the time limit fixed in accordance with the preceeding paragraph, the tribunal, within three months after the parties report failure to agree—or after the decision, if any, on the arbitrability of the dispute—shall proceed to hear and decide the case on the application of either party.

Article 9

The arbitral tribunal, which is the judge of its own competence, has the power to interpret the *compromis* and the other instruments on which that competence is based.

Article 10

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall apply:

(*a*) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(*b*) International custom, as evidence of a general practice accepted as law;

(*c*) The general principles of law recognized by civilized nations;

(*d*) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. If the agreement between the parties so provides, the tribunal may also decide *ex aequo et bono*.

Article 11

The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of the law to be applied.

Article 12

1. In the absence of any agreement between the parties concerning the procedure of the tribunal, or if the rules laid down by them are insufficient, the tribunal shall be competent to formulate or complete the rules of procedure.

2. All decisions shall be taken by a majority vote of the members of the tribunal.

Article 13

If the languages to be employed are not specified in the *compromis*, this question shall be decided by the tribunal.

Article 14

1. The parties shall appoint agents before the tribunal to act as intermediaries between them and the tribunal.

2. They may retain counsel and advocates for the prosecution of their rights and interests before the tribunal.

3. The parties shall be entitled through their agents, counsel or advocates to submit in writing and orally to the tribunal any arguments they may deem expedient for the prosecution of their case. They shall have the right to raise objections and incidental points. The decisions of the tribunal on such matters shall be final.

4. The members of the tribunal shall have the right to put questions to agents, counsel or advocates, and to ask them for explanations. Neither the questions put nor the remarks made during the hearing are to be regarded as an expression of opinion by the tribunal or by its members.

Article 15

1. The arbitral procedure shall in general comprise two distinct phases: pleadings and hearing.

2. The pleadings shall consist in the communication by the respective agents to the members of the tribunal and to the opposite party of memorials, counter-memorials and, if necessary, of replies and rejoinders. Each party must attach all papers and documents cited by it in the case.

3. The time limits fixed by the *compromis* may be extended by mutual agreement between the parties, or by the tribunal when it deems such extension necessary to enable it to reach a just decision.

4. The hearing shall consist in the oral development of the parties' arguments before the tribunal.

5. A certified true copy of every document produced by either party shall be communicated to the other party.

Article 16

1. The hearing shall be conducted by the president. It shall be public only if the tribunal so decides with the consent of the parties.

2. Records of the hearing shall be kept and signed by the president, registrar or secretary; only those so signed shall be authentic.

Article 17

1. After the tribunal has closed the written pleadings, it shall have the right to reject any papers and documents not yet produced which either party may wish to submit to it without the consent of the other party. The tribunal shall, however, remain free to take into consideration any such papers and documents which the agents, advocates or counsel of one or other of the parties may bring to its notice, provided that they have been made known to the other party. The latter shall have the right to require a further extension of the written pleadings so as to be able to give a reply in writing.

2. The tribunal may also require the parties to produce all necessary documents and to provide all necessary explanations. It shall take note of any refusal to do so.

Article 18

1. The tribunal shall decide as to the admissibility of the evidence that may be adduced, and shall be the judge of its probative value. It shall have the power, at any stage of the proceedings, to call upon experts and to require the appearance of witnesses. It may also, if necessary, decide to visit the scene connected with the case before it.

2. The parties shall co-operate with the tribunal in dealing with the evidence and in the other measures contemplated by paragraph 1. The tribunal shall take note of the failure of any party to comply with the obligations of this paragraph.

Article 19

In the absence of any agreement to the contrary implied by the undertaking to arbitrate or contained in the *compromis*, the tribunal shall decide on any ancillary claims which it considers to be inseparable from the subject-matter of the dispute and necessary for its final settlement.

Article 20

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.

Article 21

1. When, subject to the control of the tribunal, the agents, advocates and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

2. The tribunal shall, however, have the power, so long as the award has not been rendered, to re-open the proceedings after their closure, on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or if it considers, after careful consideration, that there is a need for clarification on certain points.

Article 22

1. Except where the claimant admits the soundness of the defendant's case, discontinuance of the proceedings by the claimant party shall not be accepted by the tribunal without the consent of the defendant.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

Article 23

If the parties reach a settlement, it shall be taken note of by the tribunal. At the request of either party, the tribunal may, if it thinks fit, embody the settlement in an award.

Article 24

The award shall normally be rendered within the period fixed by the *compromis*, but the tribunal may decide to extend this period if it would otherwise be unable to render the award.

Article 25

1. Whenever one of the parties has not appeared before the tribunal, or has failed to present its case, the other party may call upon the tribunal to decide in favour of its case.

2. The arbitral tribunal may grant the defaulting party a period of grace before rendering the award.

3. On the expiry of this period of grace, the tribunal shall render an award after it has satisfied itself that it has jurisdiction. It may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law.

DELIBERATIONS OF THE TRIBUNAL

Article 26

The deliberations of the tribunal shall remain secret.

Article 27

1. All the arbitrators shall participate in the decisions.

2. Except in cases where the *compromis* provides for a quorum, or in cases where the absence of an arbitrator occurs without the permission of the president of the tribunal, the arbitrator who is absent shall be replaced by an arbitrator nominated by the President of the International Court of Justice. In the case of such replacement the provisions of article 7 shall apply.

THE AWARD

Article 28

1. The award shall be rendered by a majority vote of the members of the tribunal. It shall be drawn up in writing and shall bear the date on which it was rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the tribunal who have voted for it. The arbitrators may not abstain from voting.

2. Unless otherwise provided in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

3. The award shall be deemed to have been rendered when it has been read in open court, the agents of the parties being present or having been duly summoned to appear.

4. The award shall immediately be communicated to the parties.

Article 29

The award shall, in respect of every point on which it rules, state the reasons on which it is based.

Article 30

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the tribunal has allowed a time limit for the carrying out of the award or of any part of it.

Article 31

During a period of one month after the award has been rendered and communicated to the parties, the tribunal may,

either of its own accord or at the request of either party, rectify any clerical, typographical or arithmetical error in the award, or any obvious error of a similar nature.

Article 32

The arbitral award shall constitute a definitive settlement of the dispute.

INTERPRETATION OF THE AWARD

Article 33

1. Any dispute between the parties as to the meaning and scope of the award shall, at the request of either party and within three months of the rendering of the award, be referred to the tribunal which rendered the award.

2. If, for any reason, it is found impossible to submit the dispute to the tribunal which rendered the award, and if within the above-mentioned time limit the parties have not agreed upon another solution, the dispute may be referred to the International Court of Justice at the request of either party.

3. In the event of a request for interpretation, it shall be for the tribunal or for the International Court of Justice, as the case may be, to decide whether and to what extent execution of the award shall be stayed pending a decision on the request.

Article 34

Failing a request for interpretation, or after a decision on such a request has been made, all pleadings and documents in the case shall be deposited by the president of the tribunal with the International Bureau of the Permanent Court of Arbitration or with another depositary selected by agreement between the parties.

VALIDITY AND ANNULMENT OF THE AWARD

Article 35

The validity of an award may be challenged by either party on one or more of the following grounds:

(*a*) That the tribunal has exceeded its powers;

(*b*) That there was corruption on the part of a member of the tribunal;

(*c*) That there has been a failure to state the reasons for the award or a serious departure from a fundamental rule of procedure;

(*d*) That the undertaking to arbitrate or the *compromis* is a nullity.

Article 36

1. If, within three months of the date on which the validity of the award is contested, the parties have not agreed on another tribunal, the International Court of Justice shall be competent to declare the total or partial nullity of the award on the application of either party.

2. In the cases covered by article 35, sub-paragraphs (*a*) and (*c*), validity must be contested within six months of the rendering of the award, and in the cases covered by sub-paragraphs (*b*) and (*d*) within six months of the discovery of the corruption or of the facts giving rise to the claim of nullity, and in any case within ten years of the rendering of the award.

3. The Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for annulment.

Article 37

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal constituted by agreement between the parties, or, failing such agreement, in the manner provided by article 3.

REVISION OF THE AWARD

Article 38

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision, and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact, and in any case within ten years of the rendering of the award.

3. In the proceedings for revision, the tribunal shall, in the first instance, make a finding as to the existence of the alleged new fact and rule on the admissibility of the application.

4. If the tribunal finds the application admissible, it shall then decide on the merits of the dispute.

5. The application for revision shall, whenever possible, be made to the tribunal which rendered the award.

6. If, for any reason, it is not possible to make the application to the tribunal which rendered the award, it may, unless the parties otherwise agree, be made by either of them to the International Court of Justice.

7. The tribunal or the Court may, at the request of the interested party, and if circumstances so require, grant a stay of execution pending the final decision on the application for revision.

III. Comments on particular articles

Notes:

(i) The following comments are not intended as an article-by-article commentary. Only those articles are commented upon which are either new or involve substantial changes not otherwise self-explanatory. Many of the changes made, as compared with the 1953 text, are only changes of a technical or drafting character or in the nature of re-arrangement.

(ii) No attempt is made to indicate the reason why in a number of cases no changes have been made in order to meet criticisms made in the General Assembly or elsewhere by Governments. In the first place, the reasons for and against the proposed changes are fully set out in the 1957[22] and 1958[23] reports of the special rapporteur, Mr. Georges Scelle. In the second place, the fact that the articles are now presented as a model draft rather than as a potential general convention of arbitration which would be binding upon States has the effect of placing these criticisms against a different background thus causing them to lose a good deal of their point.

23. *Preamble.* Subject to language changes, the first three paragraphs of this preamble correspond to article 1 of the 1953 text. Paragraph 4 is new, but merely states the position already set out earlier in the present commentary, according to which the articles have no binding effect unless specifically embodied by the parties in a *compromis* or other agreement. Paragraph 5 corresponds to article 14 of the 1953 text.

24. In view of the fact that all the provisions of the preamble relate to the substantive law of arbitration rather than to arbitral procedure as such, the Commission felt that in the present context of the draft it would be preferable to state them in preambular form and not keep them as substantive articles. In effect they govern any arbitration, but they govern it as principles of general international law rather than as deriving from the agreement of the parties.

25. *Article 1.* This article, like a number of others in the text, e.g. articles 3, 6, 27, 33, 36, 37 etc., involves the exercise of functions by the President of the Inter-

[22] See *Yearbook of the International Law Commission, 1957*, vol. II (A/CN.4/SER.A/1957/Add.1), document A/CN.4/109

[23] A/CN.4/113 of 6 March 1958.

national Court of Justice, or by the Court itself. Criticisms of similar provisions in the 1953 text were made on the ground that this set up the International Court of Justice as a sort of super-tribunal not subordinate to the agreement of the parties. Despite doubts expressed by certain of its members, the Commission did not consider these criticisms to be well-founded, particularly in the present context of the draft, according to which the articles in question will be binding upon the parties only in so far as they accept those articles and make them part of the arbitral agreement. On the other hand, the articles are necessary if the process of arbitration is not to be liable to possible frustration as described in paragraphs 18, 19, 20 and 21 above. The practice of conferring functions upon the President of the International Court, or even upon the Court itself, is a fairly common one and has never given rise to any difficulty. Further comments on this matter are contained in paragraphs 45 and 46 of the commentary to the 1953 text.

26. *Article 2.* There is now included, amongst the matters which a *compromis* must deal with, the specification of the undertaking to arbitrate in virtue of which the dispute is to be submitted to arbitration. The list of matters which ought if possible to be regulated by the *compromis* remains substantially unchanged.

27. *Article 4.* This article, as compared with the 1953 text, has been amplified so as to include possible cases not previously covered.

28. *Article 5.* This article covers the previous articles 6 and 7 of the 1953 text. The changes effected are based in particular on the feeling that it is not in practice possible to prevent an arbitrator from withdrawing or resigning if he wishes to do so, and that in such event it is not necessary to do more than provide for the filling of the vacancy by the same means as were employed for the original appointment.

29. *Article 7.* This article is new. It is obviously undesirable that the proceedings should have to start again from the beginning merely because a vacancy has occurred and has been filled. There is, moreover, no difficulty over the written proceedings, which the new arbitrator is able to read. On the other hand, if the oral proceedings have begun, the new arbitrator ought to have the right to require that these be started again.

30. *Article 8.* The first paragraph of this article does not differ substantially from the corresponding article 10 of the 1953 text, but embodies technical improvements and simplifications in what was a somewhat complicated provision. As regards paragraphs 2 and 3 of the previous article 10, various objections were felt to the idea of the tribunal itself drawing up the *compromis;* nor was this felt to be necessary. Whether or not there is a *compromis* in the technical sense of that term, there is always an undertaking to arbitrate, whether this has been completed by the drawing up of a *compromis* or not. Even if the parties are unable to draw up or complete the *compromis,* it is always possible for the tribunal to proceed with the case, so long as one of the parties requests it to do so. Either the nature of the dispute will have been defined in the original agreement to arbitrate or, alternatively, it will be defined in the application made to the tribunal to proceed with the case and in the subsequent written pleadings the deposit of which the tribunal will order.

31. *Article 9.* Despite the considerations set out in paragraph 42 of the commentary to the 1953 text, in favour of retaining the term "widest", which appeared in the corresponding article 11 of that text, the Commission decided that the use of this term was unnecessary and might give rise to difficulties.

32. *Article 10.* The substance of this article, as compared with the corresponding article 12 of the 1953 text, remains the same; but as the phrase "shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice" was considered to be unsatisfactory, and no other general phrase referring to that provision seemed free from drafting difficulties, it was decided to set out the actual terms of Article 38, paragraph 1. Paragraph 2 of old article 12 (the question of *non liquet*) now appears, somewhat amended, as article 11.

33. *Articles 13 to 17.* These articles, as explained in paragraph 15 above, have been newly introduced, in order to meet certain wishes expressed in the course of the General Assembly's discussions. They are articles relating to the routine procedure of arbitration and call for no special comment, except with reference to article 17, which is based on the consideration that it is undesirable, once the written proceedings have been closed, for further documentary material to be presented or adduced in evidence by the parties. Nevertheless, it is equally not desirable to exclude all possibilty of presenting such new material. The essential consideration is that, if new material presented by one of the parties is admitted, the other should have an opportunity of dealing with it in writing and should be able to require a prolongation of the written proceedings for that purpose. In this way the possibility of new written material being presented on the eve of the oral hearing, so that the other party has inadequate time to consider or reply to it in writing before the oral hearing takes place, can be eliminated.

34. *Article 19.* This article has been a good deal simplified in comparison with the corresponding article 16 of the 1953 text. In particular, the general reference to ancillary claims, in place of the phraseology used in the previous article 16, should get over a number of difficulties of definition which that phraseology might have entailed. The basic object is that the grounds of dispute between the parties arising out of the same subject-matter should be completely disposed of.

35. *Article 21.* Paragraph 2 of this article, which otherwise corresponds to article 18 of the 1953 text, is new. It seemed to the Commission desirable to give the tribunal this faculty in order to insure that no element material to its decision should be excluded.

36. *Article 22.* The corresponding article 21 of the 1953 text provided that in no case could discontinuance of the proceedings by the claimant party be accepted by the tribunal without the consent of the defendant party. It seemed to the Commission that this principle ought only to apply in those cases where the claimant party proposed to discontinue the proceedings without any recognition of the validity of the defendant's case, since in that event the defendant State may still have an interest in endeavouring to secure from the tribunal a positive pronouncement in its favour. Where, however, such recognition is given, it would obviously be unnecessary to require the consent of the defendant party before the proceedings could be discontinued.

37. *Article 25.* The drafting of the corresponding article 20 of the 1953 text was defective inasmuch as it seemed to imply that it would always be the defendant party which would fail to appear and defend the claim, and the claimant party whose case would accordingly be adjudged valid. It is, however, equally possible that the claimant party may fail to pursue its case, but that the

defendant party will not be content with anything short of an actual decision in favour of its own arguments in case the claimant should attempt to re-open the matter at a later date. The article has, therefore, been amended to take account of both possibilities. The second paragraph is new, but self-explanatory.

38. *Articles 26 and 27.* These articles include the matters previously dealt with by the single article 19 of the 1953 text. The second paragraph of article 27 is new. The Commission felt it undesirable to adhere to the somewhat rigid system of the previous article 19, which could be interpreted as involving the unremitting attendance on all occasions of all the members of the tribunal. It is, on the other hand, necessary to ensure that an arbitrator shall not, through his deliberate absence, be able to frustrate the rendering of the award.

39. *Article 28.* Paragraphs 1, 3 and 4 of this article correspond to the same paragraphs of article 24 of the 1953 text, and paragraph 2 corresponds to article 25 of that text. The first sentence of paragraph 1 is, however, new. Despite the general provision on the subject of majority decisions contained in article 12, it was felt desirable to repeat this requirement specifically in respect of the rendering of the award. Paragraph 2 of the previous article 24 concerning the statement of the reasons for the award now appears as article 29 of the present text.

40. *Article 32.* This article is new. It no doubt goes without saying that the award constitutes a final settlement of the dispute, but it seemed desirable to the Commission to emphasize this fact in view of the provisions concerning the possible interpretation, revision or annulment of the award. These possibilities do not alter the fact that, subject to any necessity for interpreting, or to any eventual revision or annulment of the award, it constitutes, in principle, a definitive and final settlement.

41. The provisions concerning interpretation in article 33, which previously figured in article 28 of the 1953 text, remain substantially unchanged apart from re-wording and re-arrangement.

42. *Article 34.* This article is new. Its object is to ensure that the documents and written records of arbitral proceedings, which may be of great value for the study of international law and in other ways, should not become lost or forgotten. It goes without saying that the Secretary-General of the Permanent Court of Arbitration, or other depositary, would not permit any inspection of the records by a third party without obtaining the consent of the parties to the dispute.

43. *Article 35.* Sub-paragraph (*d*) is new as compared with the corresponding article 30 of the 1953 text. Despite the cogent considerations contained in paragraph 39 of the commentary to that text, the Commission decided to add the nullity of the undertaking to arbitrate or of the *compromis* as a ground of the nullity of the eventual award. It is difficult, in principle, to deny that the nullity of the original undertaking or *compromis,* if established, must automatically entail the nullity of the award. Such cases should, however, prove exceedingly rare. The principle at issue is the same as that which governs the essential validity of treaties, and it is noticeable that there are very few precedents involving the nullity of a treaty or other international agreement, when drawn up in proper form, and apparently regularly concluded between duly authorized plenipotentiaries or governmental organs empowered to act on behalf of the State.

Chapter III

DIPLOMATIC INTERCOURSE[24] AND IMMUNITIES

I. Introduction

44. In the course of its first session, in 1949, the International Law Commission selected "diplomatic intercourse and immunities" as one of the topics the codification of which it considered desirable and feasible. It did not, however, include this subject among those to which priority was accorded.[25]

45. At its fifth session in 1953, the Commission was apprised of General Assembly resolution 685 (VII) of 5 December 1952, by which the Assembly requested the Commission to undertake, as soon as it considered it possible, the codification of "diplomatic intercourse and immunities" and to treat it as a priority topic.[26]

46. At its sixth session in 1954, the Commission decided to initiate work on the subject, and appointed Mr. A. E. F. Sandström special rapporteur.[27]

47. Owing to lack of time, the Commission was unable to take up the subject until its ninth session in 1957. At that session, the Commission considered the topic on the basis of the report prepared by the special rapporteur (A/CN.4/91). It adopted a provisional set of draft articles with a commentary.[28]

48. In accordance with articles 16 and 21 of its statute, the Commission decided to transmit this draft, through the Secretary-General, to Governments for their observations. By 16 May 1958, the Governments of the following countries had communicated their observations: Argentina, Australia, Belgium, Cambodia, Chile, China, Czechoslovakia, Denmark, Finland, Italy, Japan, Jordan, Luxembourg, Netherlands, Pakistan, Sweden, Switzerland, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia (A/CN.4/114 and Add.1-6). The text of these observations is reproduced in an annex to the present report. The Commission also had before it a summary (A/CN.4/L.72), prepared by the Secretariat, of opinions expressed in the Sixth Committee of the General Assembly relative to the 1957 draft.

49. During the present session, at its 448th, 449th, 451st to 468th and 474th to 478th meetings, the Commission examined the text of the provisional draft in the light of the observations of Governments and of the conclusions drawn from them by the special rapporteur (A/CN.4/116 and Add.1 and 2). In consequence of that examination, the Commission made a number of changes in the provisional draft.

50. At its 468th meeting, the Commission decided (under article 23, paragraph 1 (*c*) of its statute) to recommend to the General Assembly that the draft articles on diplomatic intercourse and immunities should be recommended to Member States with a view to the conclusion of a convention.

51. The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of *"ad hoc* diplomacy", covering itinerant 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 at a future session.

52. 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. However, these matters are, as regards most of the organizations, governed by special conventions.

II. Text of the draft articles and commentary

53. The text of the draft articles together with a commentary, as adopted by the Commission at its present session, is reproduced below.

DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

Definitions

Article 1

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

(*a*) The "head of the mission" is the person charged by the sending State with the duty of acting in that capacity;

(*b*) The "members of the mission" are the head of the mission and the members of the staff of the mission;

(*c*) The "members of the staff of the mission" are 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 having diplomatic rank;

(*e*) A "diplomatic agent" is the head of the mission or a member of the diplomatic staff of the mission;

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[24] The term "intercourse" (in the English text) has traditionally been employed by the Commission in relation to this subject. The term used in the French text is "Relations (diplomatiques etc.)". There is no reason why in English the title "Diplomatic relations and immunities" should not also be employed.

[25] See *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), paras. 16 and 20.

[26] *Ibid., Eighth Session, Supplement No. 9* (A/2456), para. 170.

[27] *Ibid., Ninth Session, Supplement No. 9* (A/2693), para. 73.

[28] *Ibid., Twelfth Session, Supplement No. 9* (A/3623), para. 16.

(*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.

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

Establishment of diplomatic relations and missions

Article 2

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

Commentary

(1) There is frequent reference in doctrine to a "right of legation" said to be enjoyed by every sovereign State. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, since no right of legation can be exercised without agreement between the parties, the Commission did not consider that it should mention it in the text of the draft.

(2) Article 2, which corresponds to article 1 of the 1957 draft, remains unchanged. It merely states that the establishment of diplomatic relations between two States, and in particular of permanent diplomatic missions, takes place by mutual agreement.

(3) The most efficient way of maintaining diplomatic relations between two States is for each to establish a permanent diplomatic mission (i.e., an embassy or a legation) in the territory of the other; but there is nothing to prevent two States from agreeing on other methods of conducting their diplomatic relations, for example, through their missions in a third State.

(4) All independent States may establish diplomatic relations. In the case of a State which is a member of a federation, the question whether it is qualified to do so depends on the federal constitution.

Functions of a diplomatic mission

Article 3

The functions of a diplomatic mission consist *inter alia* in:

(*a*) Representing the sending State in the receiving State;

(*b*) Protecting in the receiving State the interests of the sending State and of its nationals;

(*c*) Negotiating with the Government of the receiving State;

(*d*) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;

(*e*) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Commentary

(1) A detailed enumeration of all the functions of a diplomatic mission would be very lengthy. The Commission has merely mentioned the main categories under very broad headings.

(2) First of all, under sub-paragraph (*a*), comes the task which characterizes the whole activity of the mission. The mission represents the sending State in the receiving State. The mission, and in particular the head of the mission, is the spokesman for its Government in communications with the receiving Government, or in any discussions with that Government to which relations between the two States may give rise.

(3) Sub-paragraphs (*b*), (*c*) and (*d*) state the classic functions of the mission, viz. protecting in the receiving State the interests of the sending State and of its nationals; negotiating with the Government of the receiving State and ascertaining conditions and developments in the receiving State and reporting thereon to the Government of the sending State.

(4) The functions mentioned in sub-paragraph (*b*) must be carried on in conformity with the rules of international law. The validity of the rule laid down in article 40, paragraph 1, which prohibits interference in the internal affairs of the receiving State, and of the rule concerning the exhaustion of remedies in the local courts (in cases in which this rule is applicable) is not affected in any way.

(5) The phrase "conditions and developments" in sub-paragraph (*d*) covers the political, cultural, social and economic activities of the country, and in general all aspects of life which may be of interest to the sending State. Only lawful means may be used by the mission in ascertaining these conditions and developments.

(6) The enumeration of functions as given in the draft prepared at the ninth session (1957) has been supplemented by a reference to certain functions which, in consequence of the establishment of the United Nations and of modern developments, have acquired steadily increasing importance, viz. (*e*) promoting friendly relations between the sending State and the receiving State and developing economic, cultural and scientific relations between the two States.

(7) With regard to trade missions, it should be noted that the question of commercial representation as such—i.e., apart from the commercial attachés of a diplomatic mission—is not dealt with in the draft because it is usually governed by bilateral agreement.

Appointment of the head of the mission: agrément

Article 4

The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

Appointment to more than one State

Article 5

Unless objection is offered by any of the receiving States concerned, a head of mission to one State may be accredited as head of mission to one or more other States.

Appointment of the staff of the mission

Article 6

Subject to the provisions of articles 7, 8 and 10, the sending State may freely appoint the members

of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand, for its approval.

Appointment of nationals of the receiving State

Article 7

Members of the diplomatic staff of the mission may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

Persons declared persona non grata

Article 8

1. The receiving State may at any time notify the sending State that the head of the mission, or any member of the staff of the mission is *persona non grata* or not acceptable. In such case, the sending State shall, as the case may be, recall the person concerned or terminate his functions with the mission.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1, the receiving State may refuse to recognize the person concerned as a member of the mission.

Commentary

(1) Article 5 is new, but the text of articles 4, 6, 7 and 8 as adopted at the ninth session was left unchanged, with the exception of some purely drafting alterations.

(2) Articles 4 to 8 deal with the appointment of the persons who compose the mission. The mission comprises a head, and assistants subordinate to him, who are normally divided into several categories: diplomatic staff, who are engaged in diplomatic activities, administrative and technical staff, and service staff. While it is the sending State which appoints the persons who compose the mission, the choice of these persons and, in particular, of the head of the mission, may considerably affect relations between the States, and it is clearly in the interests of both States that the mission should not contain members whom the receiving State finds unacceptable.

(3) The procedure for achieving this result differs according as the person concerned is the head of mission or another member of the mission. As regards the former, the sending State ascertains in advance whether a person whom it proposes to accredit as head of its mission to another State is *persona grata* with that State. If the *agrément* is not given, then the person in question cannot be accredited. The fact that a head of mission has been approved does not, however, prevent a receiving State which has meanwhile found reasons for objecting to him from subsequently notifying the sending State that he is no longer *persona grata*, in which case he must be recalled and, if the sending State fails to recall him, the receiving State may declare his functions terminated.

(4) As regards other members of the mission, they are in principle freely chosen by the sending State, that is to say, their names are not submitted in advance; but if at any time—if need be, before the person concerned arrives in the country to take up his duties—the receiving State finds that it has objections to him, that State may, as in the case of a head of mission who has been approved, inform the sending State that he is *persona non grata*, with the same effect as in the case of the head of the mission.

(5) This procedure is sanctioned by articles 4, 6 and 8. So far as details are concerned, it should be noted first that the use of the term "not acceptable" as an alternative for the term *persona non grata* in article 8, paragraph 1, is intended to cover non-diplomatic staff, with respect to whom the term *persona non grata* is not usually employed. At the end of the same paragraph, the words "or terminate his functions with the mission" are intended principally to cover cases where the person concerned is a national of the receiving State.

(6) The fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed, should be interpreted as meaning that this question is left to the discretion of the receiving State.

(7) When a person who has already taken up his duties is declared *persona non grata*, the normal consequence is (as indicated above) that the sending State recalls him or declares his functions terminated (see article 41, sub-paragraph (*b*)). But, if the sending State fails to do this within a reasonable time, the receiving State is authorized to take action of its own accord. It may declare that the functions of the person concerned are terminated, that he is no longer recognized as a member of the mission, and that he has ceased to enjoy diplomatic privileges.

(8) As is clear from the reservation stated in article 6, the free choice of the staff of the mission is a principle to which there are exceptions. One of these exceptions is mentioned in paragraph (4) of this commentary. Another, for which article 6 expressly provides, is that in the case of military, naval and air attachés, the receiving State may, in accordance with what is already a fairly common practice, require their names to be submitted beforehand for its approval.

(9) A further exception is that arising out of article 7 of the draft, concerning cases where the sending State wishes to choose as diplomatic agent a national of the receiving State or a person who is a national of both the sending and receiving States. The Commission takes the view that such an appointment is subject to the express consent of the receiving State, even though some States do not insist on this condition. The Commission did not, on the other hand, think it necessary to provide that the consent of the receiving State is a condition necessary for the appointment as a diplomatic agent of a national of a *third* State, or for the appointment of a national of the receiving State to the administrative, technical or service staff of a foreign mission. In these cases, the considerations underlying article 7 do not apply; and in the case of administrative and technical staff and service staff, the Commission was influenced by the further factor that it is undeniably necessary to recruit for these categories of the staff persons with a good knowledge of the local language and of local conditions. Serious difficulties might be created for the sending State if the receiving State refused to authorize local recruitment of staff in these categories, whereas the difficulties created would probably be inconsiderable so far as diplomatic staff was concerned. The only objection which might be raised to these considerations is that, in some States, nationals have to seek the consent of their own Government before entering the service of a foreign Government. Such a requirement, however, is merely an obligation governing the relationship between a national and his own Government, and does not affect relations between States, and is not therefore a rule of international law. While the practice of appointing nationals of the receiving State as

members of the diplomatic staff has now become fairly rare, and there are grounds for believing that it will disappear altogether with the development of States which have recently obtained their independence, the majority of the members of the Commission thought that the case should be mentioned. Certain members of the Commission, however, stated that they were in principle opposed entirely to the appointment of nationals of the receiving State as members of the diplomatic staff, and to the grant of diplomatic privileges and immunities to such persons.

(10) The free choice of staff mentioned in article 6 does not imply exemption from visa formalities, where these are required by the receiving State.

(11) Article 5, which is new, is concerned with the fairly frequent case in which a sending State wishes to accredit a head of mission to one or more other States. This is permissible, provided that none of the receiving States concerned objects.

Notification of arrival and departure

Article 9

The arrival and departure of the members of the staff of the mission, and also of members of their families, and of their private servants, shall be notified to the Ministry for Foreign Affairs of the receiving State. A similar notification shall be given whenever members of the mission and private servants are locally engaged or discharged.

Commentary

It is desirable for the receiving State to know the names of the persons who may claim privileges and immunities. Accordingly, it is *inter alia* provided in article 9, which is new, that the names of persons recently appointed to a mission and of those who are finally leaving their posts must be notified.

Size of staff

Article 10

1. In the absence of specific agreement as to the size of the mission, the receiving State may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the receiving State, and to the needs of the particular mission.

2. The receiving State may equally, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category.

Commentary

(1) The English text of paragraph 1, as drafted at the ninth session (article 10 corresponds to article 7 of the 1957 draft), has been amended by the substitution of the word "normal" for the word "customary", for the sake of concordance with the French text. The last sentence of paragraph 2 of the 1957 text has been moved to article 6, with certain drafting changes based on paragraph (3) *in fine* of the 1957 commentary, which it was felt more accurately expressed the Commission's intentions.

(2) There are questions connected with the mission's composition which may cause difficulty besides that of the choice of the persons comprising the mission. In the Commission's view, these matters require regulation, and article 10 is intended to deal with them.

(3) Paragraph 1 of the article refers to cases where the staff of the mission is inordinately increased; experience in recent years having shown that such cases may present a problem. Such an increase may cause the receiving State real difficulties. Should the receiving State consider the staff of a mission unduly large, it should first endeavour to reach an agreement with the sending State. Failing such agreement, the receiving State should, in the view of the majority of the Commission, be given the right within certain limits to refuse to accept a size exceeding what is reasonable and normal. In such cases there are two sets of conflicting interests, and the solution must be a compromise between them. Account must be taken both of the mission's needs, and of prevailing conditions in the receiving State. Any claim for the limitation of the staff must remain within the bounds stated by the article.

(4) Paragraph 2 gives the receiving State the right to refuse to accept officials of a particular category. But its right to do so is circumscribed in the same manner as its right to claim a limitation of the size of the staff, and must, furthermore, be exercised without discrimination between one State and another.

(5) The provisions of this article have been criticized on the grounds that the criteria by reference to which a dispute is to be settled are too vague and would not solve the problems arising. Furthermore, it has been argued that the provisions of paragraph 2 go beyond the principles of international law as now recognized, and that, once the establishment of a mission has been agreed, the sending State has the right to equip the mission with all the categories of staff needed for the discharge of the mission's functions, because only the two States concerned are in a position to decide what circumstances and conditions had a bearing on the size and composition of their respective missions. The Commission does not deny that the parties concerned are best qualified to settle disputes of the kind to which this article relates. That is why the Commission has referred to the desirability of such disputes being settled, if possible, by agreement between the parties. At the same time, criteria must be laid down which are to guide the parties, or which, in the absence of agreement between the parties, are to be observed in the arbitral or judicial decision to which it would be necessary to have recourse. As so often happens when conflicting interests are the subject of a compromise, these criteria are necessarily vague. The reason why these provisions do not form part of existing international law is that the problem is new. It can hardly be said that the mission's needs are in any way jeopardized, seeing that it is precisely one of the safeguards offered by these provisions that the mission's needs constitute one of the decisive considerations, and since, in addition, special account is to be taken of "what is reasonable and normal."

Offices away from the seat of the mission

Article 11

The sending State may not, without the consent of the receiving State, establish offices in towns other than those in which the mission itself is established.

Commentary

The provisions of this article have been included to forestall the awkward situation which would result for the receiving Government if mission premises were established in towns other than that which is the seat of the Government.

Commencement of the functions of the head of the mission

Article 12

The head of the mission is considered as having taken up his functions in the receiving State either when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or when he has presented his letters of credence, according to the practice prevailing in the receiving State, which shall be applied in a uniform manner.

Commentary

(1) The text of the corresponding provision (article 8) prepared at the Commission's ninth session gave as the principal alternative the first part of the present article (i.e., the passage preceding the phrase: "or when he has presented his letters of credence"). The latter phrase was at that time given as a "variant". The article was accompanied by the following commentary: "So far as concerns the time at which the head of the mission may take up his functions, the only time of interest from the standpoint of international law is the moment at which he can do so in relation to the receiving State—which must be the time when his status is established. On practical grounds, the Commission proposes that it be deemed sufficient that he has arrived and that a true copy of his credentials has been remitted to the Ministry for Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the head of State. The Commission, however, decided also to mention the alternative stated in the text of the article."

(2) Of the Governments which submitted observations on the draft, six were in favour of the principal alternative and nine in favour of the variant. Hence the Commission, although considering the establishment of a uniform regulation desirable, decided to leave the choice of the system to be applied to the discretion of the receiving State subject, however, to the condition that a separate decision is not taken *ad hoc* as each case occurs, but that a uniform system is applied to all missions. This stipulation now forms part of the article. In addition, some slight drafting changes have been made to the text. The significance of the matter lies in the fact that the precedence and seniority of heads of mission depends upon the date on which their functions are deemed to have been taken up (see article 15 below).

Classes of heads of mission

Article 13

1. Heads of mission are divided into three classes, namely:

(*a*) That of ambassadors or nuncios accredited to Heads of State;

(*b*) That of envoys, ministers and internuncios accredited to Heads of State;

(*c*) That of *chargés d'affaires* accredited to Ministers for Foreign Affairs.

2. Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class.

Article 14

The class to which the heads of their missions are to be assigned shall be agreed between States.

Precedence

Article 15

1. Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice prevailing in the receiving State, which must be applied without discrimination.

2. Alterations in the credentials of a head of mission not involving any change of class shall not affect his precedence.

3. The present article is without prejudice to any existing practice in the receiving State regarding the precedence of the representative of the Pope.

Mode of reception

Article 16

The procedure to be observed in each State for the reception of heads of mission shall be uniform in respect of each class.

Commentary

(1) These articles correspond to articles 10 to 14 of the previous session's draft, which have been amended in the following respects:

(*a*) In article 10 (*a*) of the old text, the word "legates" has been deleted, as legates are never heads of mission;

(*b*) In article 10 (*b*) the words "other persons" have been replaced by "internuncios", since these representatives of the Pope can be the only persons referred to;

(*c*) Article 10 of the old text, amended as described above, has become paragraph 1, and the former article 14 is now paragraph 2 of the new article 13;

(*d*) In article 15, paragraphs 1 and 3, there are certain changes of terminology. Paragraph 2 has been amended to clarify the rule stated therein.

(2) In the report covering the work of the ninth session, articles 10 to 13 (new articles 13 to 16) were accompanied by the following passages (*inter alia*) by way of commentary:

"(1) Articles 10—13 are intended to incorporate in the draft the gist of the Vienna Regulation concerning the rank of diplomats.[29] Article 10 lists the dif-

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[29] The text of the Regulation of Vienna on the classification of diplomatic agents is as follows:

"In order to avoid the difficulties which have often arisen and which might occur again by reason of claims to precedence between various diplomatic agents, the Plenipotentiaries of the Powers which have signed the Treaty of Paris have agreed to the following articles and feel it their duty to invite the representatives of other crowned heads to adopt the same regulations.

"*Article 1.* Diplomatic officials shall be divided into three classes: that of ambassadors, legates or nuncios; that of envoys, whether styled ministers or otherwise, accredited to sovereigns; that of *chargés d'affaires* accredited to Ministers of Foreign Affairs.

"*Article 2.* Only ambassadors, legates or nuncios shall possess the representative character.

"*Article 3.* Diplomatic officials on extraordinary missions shall not by this fact be entitled to any superiority of rank.

"*Article 4.* Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified.

"The present regulation shall not in any way modify the position of the Papal representatives.

ferent classes of heads of mission, the classes conferring rank according to the order in which they are mentioned.

"(2) In view of the recent growing tendency—intensified since the Second World War—on the part of States to appoint ambassadors rather than ministers to represent them, the Commission considered the possibility of abolishing the title of minister or of abolishing the difference in rank between these two classes.

". . .

"(10) Some of the provisions of the Vienna Regulation have not been included in the draft: articles 2 and 6 because the questions dealt with therein are no longer of current interest, article 3 because the draft has exclusive reference to permanent missions, and article 7 because it deals with a matter which falls rather within the province of the law of treaties."

This commentary should now be supplemented by the following:

(3) The rule in article 14 that "The class to which the heads of their missions are to be assigned shall be agreed between States" does not imply that the heads of mission by which States are represented in each other's territory must necessarily belong to the same class. There are instances in which that has not been the case.

(4) As a consequence of article 12, the precedence of heads of missions is determined under article 15, paragraph 1, as being in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the practice of the receiving State.

(5) The Commission's object in incorporating the text of article 14 of the 1957 draft as paragraph 2 of the new article 13 was to stress the equality in law of heads of mission. Differences in class between heads of mission are not material except for purposes of precedence and etiquette. "Etiquette" refers only to ceremonial (article 16) and matters of conduct (protocol).

(6) The new text of article 15, paragraph 2, emphasizes in unambiguous terms that the rule set forth in that provision does not apply to a change of class. If the head of mission is promoted to a higher class, he ranks in the new class according to the decisive date applicable for that class.

(7) The Commission did not feel called upon to deal in the draft with the rank of the members of the mission's diplomatic staff. This staff comprises the following classes:

Ministers or Ministers-Counsellors;

Counsellors;

First Secretaries;

Second Secretaries;

Third Secretaries;

Attachés.

(8) There are also specialized officials such as military, naval, air, commercial, cultural or other attachés, who may be placed in one of the above-mentioned.

Chargé d'affaires ad interim

Article 17

If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of the mission shall be conducted by a *chargé d'affaires ad interim*, whose name shall be notified to the Ministry for Foreign Affairs of the receiving State.

Commentary

(1) This article, which apart from certain drafting changes reproduces the text of article 9, paragraph 1, of the draft prepared at the Commission's ninth session (1957), provides for situations where the post of head of the mission falls vacant, or the head of the mission is unable to perform his functions. The *chargé d'affaires ad interim* here referred to is not to be confused with the *chargé d'affaires* mentioned in article 13, sub-paragraph (*c*), who is called *chargé d'affaires en pied* and is appointed on a more or less permanent footing.

(2) The question when a head of a mission is to be regarded as unable to perform his functions must be answered according to the practice of the receiving State. Usage differs from country to country; in some, the head of the mission is not regarded as requiring to be replaced so long as he is in the country; in others his actual ability to perform his functions is taken into consideration. It is not possible to lay down a hard-and-fast rule.

(3) The text of this article as drafted at the ninth session contained a paragraph 2 which stipulated that, in the absence of notification, the member of the mission placed immediately after the head of the mission on the mission's diplomatic list would be presumed to be in charge. This provision was criticized, and the Commission considered that the (undoubtedly rather rare) case of "absence of notification" did not justify a special provision. It can be left to the States concerned to find methods of communication if needed.

Use of flag and emblem

Article 18

The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, and on the residence and the means of transport of the head of the mission.

Commentary

This article is new. The rule laid down in the article was considered desirable in view of the existence in certain countries of restrictions concerning the use of flags and emblems of foreign States.

Section II. Diplomatic privileges and immunities

General comments

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and

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"*Article 5.* A uniform method shall be established in each State for the reception of diplomatic officials of each class.

"*Article 6.* Ties of relationship or family alliances between Courts shall not confer any rank on their diplomatic officials. The same shall be the case with political alliances.

"*Article 7.* In acts or treaties between several Powers which admit the *alternat*, the order in which the ministers shall sign shall be decided by lot.

"The present Regulation was inserted in the Protocol concluded by the Plenipotentiaries of the eight Powers which have signed the Treaty of Paris at their meeting on 19 March 1815."

(The Regulation was signed by the following countries: Austria, Spain, France, Great Britain, Portugal, Prussia, Russia and Sweden. Translation taken from the report of a sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, C.203. M.77. 1927.V, p.2.)

immunities, the Commission will mention the "exterritoriality" theory, according to which the premises of the mission represent a sort of extension of the territory of the sending State; and the "representative character" theory, which bases such privileges and immunities on the idea that the diplomatic mission personifies the sending State.

(2) There is now a third theory which appears to be gaining ground in modern times, namely, the "functional necessity" theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions.

(3) The Commission was guided by this third theory in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself.

(4) Privileges and immunities may be divided into the following three groups, although the division is not completely exclusive:

(*a*) Those relating to the premises of the mission and to its archives;

(*b*) Those relating to the work of the mission;

(*c*) Personal privileges and immunities.

SUB-SECTION A. MISSION PREMISES AND ARCHIVES

Accommodation

Article 19

The receiving State must either permit the sending State to acquire on its territory the premises necessary for its mission, or ensure adequate accommodation in some other way.

Commentary

(1) The laws and regulations of a given country may make it impossible for a mission to acquire the premises necessary to it. For that reason the Commission has inserted in the draft an article which makes it obligatory for the receiving State to ensure the provision of accommodation for the mission if the latter is not permitted to acquire it.

(2) This obligation, because it would impose too heavy a burden on the receiving State, does not apply to the residences of the members of the staff of the mission.

Inviolability of the mission premises

Article 20

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of the mission.

2. The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.

3. The premises of the mission and their furnishings shall be immune from any search, requisition, attachment or execution.

Commentary

(1) This article (which reproduces unchanged the text of article 16 of the 1957 draft), deals firstly with the inviolability of the premises of the mission.

(2) The expression "premises of the mission" includes the buildings or parts of buildings used for the purposes of the mission, whether they are owned by the sending State or by a third party acting for its account, or are leased or rented. The premises comprise, if they consist of a building, the surrounding land and other appurtenances, including the garden and car park.

(3) From the point of view of the receiving State, this inviolability has two aspects. In the first place, the receiving State is obliged to prevent its agents from entering the premises for any official purpose whatsoever (paragraph 1). Secondly, it is under a special duty to take all appropriate steps to protect the premises from any invasion or damage, and to prevent any disturbance of the peace of the mission or impairment of its dignity (paragraph 2). The receiving State must, in order to fulfil this obligation, take special measures—over and above those it takes to discharge its general duty of ensuring order.

(4) The inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending State by reason of the fact that the premises are used as the headquarters of the mission.

(5) A special application of this principle is the rule that no writ may be served within the premises of the mission, and that no summons to appear before a court may be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission. The service of such documents should be effected in some other way. In some countries, the persons concerned may apply to the Ministry for Foreign Affairs of the receiving State. There is nothing to prevent service through the post if it can be effected in that way.

(6) The inviolability concerned confers on the premises, their furnishings and fixtures, immunity from any search, requisition, attachment or execution. The opinion had been expressed that the rule laid down in paragraph 3 of this article was unnecessary, because the acts referred to could not be performed without a contravention of the provisions of paragraph 1. Nevertheless, the rule has a value of its own in that it provides that the premises must not be entered even in pursuance of a judicial order. If the premises are leased or rented, measures of execution may of course be taken against the private owner, provided that it is not necessary to enter the premises of the mission.

(7) While the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated, in order to carry out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State should co-operate in every way in the implementation of the plan which the receiving State is contemplating; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State. The Commission did not consider it advisable to insert in the article itself a provision on these lines, which had formed paragraph (4) of the commentary on article 16 of the draft adopted by the Commission at its ninth session. To do so would convey the erroneous impression that the commentary was concerned with an exception to the principle of inviol-

ability. The text of the commentary refers solely to the moral duty of the sending State to co-operate.

Exemption of mission premises from tax

Article 21

The sending State and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

Commentary

(1) The text of this article reproduces that of article 17 of the 1957 draft, with slight changes which do not alter the substance. The article now mentions "national, regional or municipal dues or taxes", which is a more comprehensive description and, according to the Commission's interpretation, covers all dues and taxes levied by any local authority. The phrase at the end of the article "for services actually rendered" has been replaced by the corresponding phrase used in article 32 "for specific services rendered". the Commission thought that a reference to *specific* services rendered was preferable to the phrase "for services *actually* rendered".

(2) The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission. This liability becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.

Inviolability of the archives

Article 22

The archives and documents of the mission shall be inviolable.

Commentary

(1) This article reproduces unchanged the text of the corresponding provision in article 18 of the 1957 draft. As the Commission pointed out in the commentary to its 1957 draft: "The inviolability applies to archives and documents, regardless of the premises in which they may be. As in the case of the premises of the mission, the receiving State is obliged to respect the inviolability itself and to prevent its infringement by other parties."

(2) It was suggested that the words "and documents" in the text of the article should be deleted, and that the statement in the commentary that the inviolability applies to archives and documents, regardless of the premises in which they may be, was too sweeping. The commission cannot share this view. The mission's documents, even though separated from the archives, and whether belonging to the archives or not, must, like the archives themselves, be inviolable, irrespective of their physical whereabouts (e.g., while carried on the person of a member of a mission). It was for that reason that this extension was provided for in the General Convention on the Privileges and Immunities of the United Nations (article II, section 4).

(3) Although the inviolability of the mission's archives and documents is at least partly covered by the inviolability of the mission's premises and property, a special provision is desirable because of the importance of this inviolability to the functions of the mission. This inviolability is connected with the protection accorded by article 25 to the correspondence and communications of the mission.

SUB-SECTION B. FACILITATION OF THE WORK OF THE MISSION, FREEDOM OF MOVEMENT AND COMMUNICATION

Facilities

Article 23

The receiving State shall accord full facilities for the performance of the mission's functions.

Commentary

(1) This article, which corresponds to article 19 of the 1957 draft, remains unchanged.

(2) A diplomatic mission may often need the assistance of the Government and authorities of the receiving State, in the first place during the installation of the mission, and to an even greater extent in the performance of its functions, for instance in obtaining information, an activity referred to in article 3 (*d*). The receiving State (which has an interest in the mission being able to perform its functions satisfactorily) is obliged to furnish all the assistance required, and is under a general duty to make every effort to provide the mission with all facilities for the purpose. It is assumed that requests for assistance will be kept within reasonable limits.

Free movement

Article 24

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Commentary

One of the necessary facilities for the performance of the mission's functions is that its members should enjoy freedom of movement and travel. Without such freedom, the mission would not be able to perform adequately its function of obtaining information under article 3 (*d*). This freedom of movement is subject to the laws and regulations of the receiving State concerning zones entry into which is prohibited or regulated for reasons of national security. The establishment of prohibited zones must not, on the other hand, be so extensive as to render freedom of movement and travel illusory

Freedom of communication

Article 25

1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The official correspondence of the mission shall be inviolable.

3. The diplomatic bag shall not be opened or detained.

4. The diplomatic bag, which must bear visible external marks of its character, may only contain diplomatic documents or articles intended for official use.

5. The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

Commentary

(1) Apart from paragraph 2, which is new, the article substantially reproduces the text of article 21 of the 1957 draft. Paragraph 2 being new, the succeeding paragraphs have been re-numbered accordingly. In the former paragraph 3 (now paragraph 4) the phrase "which must bear visible external marks of its character" has been added after the words "The diplomatic bag".

(2) This article deals with another generally recognized freedom, which is essential for the performance of the mission's functions, namely freedom of communication. Under paragraph 1, this freedom is to be accorded for all official purposes, whether for communications with the Government of the sending State, with the officials and authorities of that Government or the nationals of the sending State, with missions and consulates of other Governments or with international organizations. Paragraph 1 of this article sets out the general principle, and states specifically that, in communicating with its Government and the other missions and consulates of that Government, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. If a mission wishes to make use of its own wireless transmitter it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. Provided that the regulations applicable to all users of such communications are observed, such permission must not be refused.

(3) Formerly, the freedom to employ all appropriate means of communications was limited in principle to the diplomatic 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. Nowadays, with the extension of air communications, the practice has changed. Communications with embassies and consulates in other countries no longer always pass through the Ministry for Foreign Affairs in the sending State; often use is made of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed. The Commission has therefore not changed the rule laid down in paragraph 1.

(4) Paragraph 3 (former paragraph 2) states that the diplomatic bag is inviolable. Paragraph 4 (former paragraph 3) indicates what the diplomatic bag may contain. The Commission considered it desirable that the statement of the inviolability of the diplomatic bag should be preceded by the more general statement that the official correspondence of the mission, whether carried in the bag or not, is inviolable. In accordance with paragraph 4, the diplomatic bag may be defined as a bag (sack, pouch, envelope or any type of package whatsoever) containing documents and (or) articles intended for official use. According to the amended text of this paragraph, the bag must bear visible external marks of its character.

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

(6) Paragraph 5 deals with the inviolability and the protection enjoyed by the diplomatic courier in the receiving State. The diplomatic courier is furnished with a document testifying to his status: normally, a courier's passport. When the diplomatic bag is entrusted to the captain of a commercial aircraft, he is not regarded as a diplomatic courier. This case must be distinguished from the not uncommon case in which a diplomatic courier pilots an aircraft specially intended to be used for the carriage of diplomatic bags. There is no reason for treating such a courier differently from one who carries the bag in a car driven by himself.

(7) The protection of the diplomatic bag and courier in a third State is dealt with in article 39.

Article 26

The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Commentary

This article states a rule which is universally accepted.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

This sub-section deals with members of the mission who are foreign nationals (articles 27 to 36), with nationals of the receiving State (article 37), and with certain general matters (articles 38 and 39).

Personal inviolability

Article 27

The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all reasonable steps to prevent any attack on his person, freedom or dignity.

Commentary

(1) This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences.

(2) The paragraph 2 which formed part of the corresponding article 22 in the 1957 draft has been deleted in consequence of the introduction of article 1 (definitions).

Inviolability of residence and property

Article 28

1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of article 29, his property, shall likewise enjoy inviolability.

Commentary

(1) This article concerns the inviolability accorded to the diplomatic agent's residence and property. Because this inviolability arises from that attaching to the person of the diplomatic agent, the expression "the private residence of a diplomatic agent" necessarily includes even a temporary residence of the diplomatic agent.

(2) Paragraph 2 of the corresponding article 23 of the 1957 draft has been amended so as to make the exception to immunity from jurisdiction provided for in article 29, paragraph 3, applicable to the inviolability of property.

(3) So far as movable property is concerned (as was explained in the commentary on article 23 in the 1957 draft), the inviolability primarily refers to goods in the diplomatic agent's private residence; but it also covers other property such as his motor car, his bank account, and goods which are intended for his personal use or essential to his livelihood. In mentioning his bank account, the Commission had in mind immunity from the measures referred to in article 20, paragraph 3.

Immunity from jurisdiction

Article 29

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, save in the case of:

(*a*) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission;

(*b*) An action relating to a succession in which the diplomatic agent is involved as executor, administrator, heir or legatee;

(*c*) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State, and outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 1, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

Commentary

(1) Certain drafting changes have been made in paragraphs 1 (*a*) and 3 of this article as it stood in the 1957 draft (article 24). In paragraph 4, the end of the first sentence ("to which he shall remain subject etc.") and the second sentence have been deleted.

(2) The jurisdictions mentioned comprise any special courts in the categories concerned, e.g. commercial courts, courts set up to apply social legislation, and all administrative authorities exercising judicial functions.

(3) A diplomatic agent enjoys immunity from the receiving State's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also immunity from its civil and administrative jurisdiction. At the same time, he has the duty to respect the laws and regulations of the receiving State as laid down in article 40 of the present draft.

(4) The immunity from criminal jurisdiction is complete, whereas the immunity from civil and administrative jurisdiction is subject to the exceptions stated in the text.

(5) The first exception concerns immovable property belonging to the diplomatic agent personally. All States claim exclusive jurisdiction over immovable property on their territory. This exception is subject to the conditions that the diplomatic agent holds the property in his private capacity and not on his Government's behalf for the purposes of the mission.

(6) The second exception is based on the consideration that, because it is of general importance that succession proceedings should not be hampered, the diplomatic agent cannot plead diplomatic immunity for the purpose of refusing to appear in a suit or action relating to a succession.

(7) The third exception arises in the case of proceedings relating to a professional or commercial activity exercised by the diplomatic agent outside his official functions. It was urged that activities of these kinds are normally wholly inconsistent with the position of a diplomatic agent, and that one possible consequence of his engaging in them might be that he would be declared *persona non grata*. Nevertheless, such cases may occur and should be provided for, and if they do occur the persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.

(8) There may be said to be a fourth exception, in the case referred to in article 30, paragraph 3 (counterclaim directly connected with the diplomatic agent's principal claim).

(9) Paragraph 2 of the article derives from the diplomatic agent's inviolability. There is no obligation on a diplomatic agent to testify, i.e., to give evidence as a witness. This does not mean that a diplomatic agent ought necessarily to refuse to co-operate with the authorities of the receiving State, for example in the investigation of a crime of which he has been an eye-witness. On the contrary, it may be proper for him to give the authorities the information he possesses. Where his immunity is waived, he may give either written or oral testimony. In certain countries there are special rules concerning the manner in which a diplomatic agent's testimony is to be taken in those cases in which he consents to give evidence.

(10) In consequence of certain observations, the Commission considered whether paragraph 2 of the article should not contain an exception to cover the cases referred to in paragraph 1. The Commission concluded that these cases should not be mentioned. It is debatable whether the question of the obligation to give evidence is relevant in cases where the diplomatic agent is himself a party to the suit. At all events—and this was the decisive point in the Commission's opinion—in such cases the diplomatic agent is called upon to testify in his own interest and, if he fails to do so, he must accept the consequences.

(11) The effect of immunity from jurisdiction, and of the privileges mentioned in articles 27 and 28, is that the diplomatic agent is also immune from measures of

execution, subject to the exceptions mentioned in paragraph 3 of the present article.

(12) Paragraph 4 states the obvious truth that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country. But it may happen that this jurisdiction does not apply, either because the case does not come within the general competence of the country's courts, or because its laws do not designate a local forum in which the action can be brought. In the provisional draft the Commission had meant to fill this gap by stipulating that in such a case the competent court would be that of the seat of the Government of the sending State. This proposal was, however, opposed on the ground that the *locus* of the jurisdiction is governed by municipal law. Although of the opinion that Governments should see to it that there is in their States a competent forum for hearing cases against members of their diplomatic missions abroad, the Commission did not wish to press the matter, and the provision in question was deleted. In some countries the problem is solved, at least in part, by a rule to the effect that diplomatic agents while on mission abroad have a specified domicile in their own country.

Waiver of immunity

Article 30

1. The immunity of its diplomatic agents from jurisdiction may be waived by the sending State.

2. In criminal proceedings, waiver must always be express.

3. In civil or administrative proceedings, waiver may be express or implied. A waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

4. Waiver of immunity of jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment for which a separate waiver must be made.

Commentary

(1) This article corresponds to article 25 of the 1957 draft. Paragraph 1 which, except for a minor drafting amendment, remains unchanged, implies that the immunity of its diplomatic agents from jurisdiction may be waived by the sending State alone. The waiver of immunity must be on the part of the sending State because the object of the immunity is that the diplomatic agent should be able to discharge his duties in full freedom and with the dignity befitting them. This is the principle underlying the provision contained in paragraph 1.

(2) In the text adopted at the ninth session in 1957, paragraph 2 read as follows: "In criminal proceedings, waiver must always be effected expressly by the Government of the sending State". The Commission decided to delete the phrase "by the Government of the sending State", because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the representative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission.

(3) In view of the amended text of paragraph 2, there is no longer any doubt but that paragraphs 2 and 3 deal only with the question of the form which the waiver should take in order to be effective (see commentary of the report of the ninth session, paragraph (2)). A distinction is drawn between criminal and civil proceedings. In the former case, the waiver must be express. In civil, as in administrative proceedings, it may be express or implied, and paragraph 3 explains the circumstances in which it is presumed to be implied. Thus, if in such proceedings a valid waiver may be inferred from the diplomatic agent's behaviour, his expressly declared waiver must naturally also be regarded as valid. He is presumed to have the necessary authorization.

(4) Paragraphs 3 and 4 have been amended to include also administrative procedure.

(5) It goes without saying that proceedings, in whatever court or courts, are regarded as an indivisible whole, and that immunity cannot be invoked on appeal if an express or implied waiver was given in the court of first instance.

(6) Under paragraph 3, the initiation of proceedings by a diplomatic agent precludes him from invoking immunity in respect of counter-claims directly connected with the principal claim. In such a case the diplomatic agent is deemed to have accepted the jurisdiction of the receiving State as fully as may be required in order to settle the dispute in regard to all aspects closely linked to the basic claim.

Exemption from social security legislation

Article 31

The members of the mission and the members of their families who form part of their households, shall, if they are not nationals of the receiving State, be exempt from the social security legislation in force in that State except in respect of servants and employees if themselves subject to the social security legislation of the receiving State. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving State.

Commentary

National social security legislation grants substantial benefits, often in the form of insurance, to persons living in the country, in consideration, however, of the payment of annual premiums by the beneficiary or his employer (old age pensions, industrial accident and sickness insurance, unemployment insurance, etc.). Whereas members of a mission and members of their families who are nationals of the receiving State would naturally be subject to such legislation, this is not necessarily the case when they have foreign nationality. Under the present article, which is new, such persons are exempt from the receiving State's social security legislation so far as they themselves are concerned, but not as regards the payment of any contributions due in respect of servants or employees.

Exemption from taxation

Article 32

A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save:

(*a*) Indirect taxes incorporated in the price of goods or services;

(*b*) Dues and taxes on private immovable property, situated in the territory of the receiving State, unless he holds it on behalf of his Government for the purposes of the mission;

(*c*) Estate, succession or inheritance duties levied by the receiving State, subject, however, to the provisions of article 38 concerning estates left by members of the family of the diplomatic agent;

(*d*) Dues and taxes on income having its source in the receiving State;

(*e*) Charges levied for specific services rendered;

(*f*) Subject to the provisions of article 21, registration, court or record fees, mortgage dues and stamp duty.

Commentary

(1) In all countries diplomatic agents enjoy exemption from certain dues and taxes; and although the degree of exemption varies from country to country, it may be regarded as a rule of international law that such exemptions exists, subject to certain exceptions.

(2) The introduction to the article has been slightly changed, in keeping with the terminology used in article 21. The dues and taxes covered in that article are only those levied on the premises as such.

(3) As an explanation of the term "indirect taxes" used in sub-paragraph (*a*), the words "incorporated in the price of goods or service" have been added.

(4) Sub-paragraph (*b*) has been modified to bring it into line with the redraft of article 29, paragraph 1 (*a*).

(5) Article 31, paragraph 3, of the 1957 draft (article 38, paragraph 3, of the present draft) has been amended in the sense that, in the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, estate, succession or inheritance duties may be levied only on the immovable property situated in the receiving State. The proviso in sub-paragraph (*c*) of this article is intended to take that amended provision into account.

(6) Sub-paragraph (*d*) applies to the income of the diplomatic agent which has its source in the receiving State. Income from immovable property held by the diplomatic agent on behalf of his Government does not belong to him, and consequently he is not liable to dues and taxes on such income.

(7) In the French text of sub-paragraph (*e*) the word *impôt* has been added before the word "taxes." The exception provided for in this sub-paragraph calls for no explanation.

(8) Sub-paragraph (*f*) is new. The rule stated therein seems to be in conformity with practice.

Exemption from personal services and contributions

Article 33

The diplomatic agent shall be exempt from all personal services or contributions.

Commentary

This article is new. It deals with the case where certain categories of persons are obliged, as part of their general civic duties or in cases of emergency, to render personal services or to make personal contributions.

Exemption from customs duties and inspection

Article 34

1. The receiving State shall, in accordance with the regulations established by its legislation, grant exemption from customs duties on:

(*a*) Articles for the use of a diplomatic mission;

(*b*) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative.

Commentary

(1) Articles for the use of the mission are in practice exempted from customs duties, and this is generally regarded as a rule of international law.

(2) In general, customs duties are likewise not levied on articles intended for the personal use of the diplomatic agent or of members of his family belonging to his household (including articles intended for his establishment). This exemption has been regarded as based on international comity. Since, however, the practice is so generally current, the Commission considers that it should be accepted as a rule of international law.

(3) Because these exemptions are open to abuses, States have very frequently made regulations, *inter alia*, restricting the quantity of goods imported or the period during which the imported articles for the establishment of the agent must take place, or specifying a period within which goods imported duty-free must not be resold. Such regulations cannot be regarded as inconsistent with the rule that the receiving State must grant the exemption in question. To take account of this practice, the Commission amended the wording of the first sentence in paragraph 1, by referring to the regulations "established" by the legislation of the receiving State. *Ad hoc* action in each case is therefore not permissible.

(4) Goods imported by a diplomatic agent for the purpose of any business carried on by him cannot, of course, qualify for exemption.

(5) The expression "customs duties," as used in this article, means all duties and taxes chargeable by reason of import or export.

(6) While the Commission did not wish to prescribe exemption from inspection as an absolute right, it endeavoured to invest the exceptions proposed to the rule with all necessary safeguards.

(7) In framing the exception, the Commission referred not only to articles in the case of which exemption from customs duties exceptionally does not apply, but also to articles the import or export of which is pro-

hibited by the laws of the receiving State, although without wishing to suggest any interference with the customary treatment accorded with respect to articles intended for a diplomatic agent's personal use.

(8) The diplomatic agent's personal baggage is that containing his personal effects. Very commonly, although not invariably, his personal baggage travels with him; but when he travels by air, part of his personal baggage may be sent separately by boat or rail.

Acquisition of nationality

Article 35

Members of the mission, not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Commentary

This article is based on the generally received view that a person enjoying diplomatic privileges and immunities should not acquire the nationality of the receiving State solely by the operation of the law of that State, and without his consent. In the first place the article is intended to cover the case of a child born on the territory of the receiving State of parents who are members of a foreign diplomatic mission and who also are not nationals of the receiving State. The child should not automatically acquire the nationality of the receiving State solely by virtue of the fact that the law of that State would normally confer local nationality in the circumstances. Such a child may, however, opt for that nationality later if the legislation of the receiving State provides for such an option. The article covers, secondly, the acquisition of the receiving State's nationality by a woman member of the mission in consequence of her marriage to a local national. Similar considerations apply in this case also and the article accordingly operates to prevent the automatic acquisition of local nationality in such a case. On the other hand, when the daughter of a member of the mission who is not a national of the receiving State marries a national of that State, the rule contained in this article would not prevent her from acquiring the nationality of that State, because, by marrying, she would cease to be part of the household of the member of the mission.

Persons entitled to privileges and immunities

Article 36

1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 27 to 34.

2. Members of the service staff of the mission who are not nationals of the receiving State shall enjoy immunity in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment.

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

Commentary

(1) This article corresponds to article 28 of the 1957 draft. Paragraph 1 is unchanged. There is no change of substance in the former paragraphs 2 to 4, but the text has been rearranged in consequence of the Commission's decision to deal with all questions relating to the privileges and immunities due to nationals of the receiving State in article 37. In this rearrangement the former paragraphs 3 and 4 have been amalgamated.

(2) It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of States in deciding which members of the staff of a mission shall enjoy privileges and immunities. Some States include members of the administrative and technical staff among the beneficiaries, and some even include members of the service staff. There are also differences in the privileges and immunities granted to the different groups. In these circumstances it cannot be claimed that there is a rule of international law on the subject, apart from that already mentioned.

(3) The solutions adopted for this problem will differ according to whether the privileges and immunities required for the exercise of the functions are considered in relation to the work of the individual official or, alternatively, in relation to the work of the mission as an organic whole.

(4) In view of the differences in State practice, the Commission had to choose between two courses: either to work on the principle of a bare minimum, and stipulate that any additional rights to be accorded should be decided by bilateral agreement; or to try to establish a general and uniform rule based on what would appear to be necessary and reasonable.

(5) A majority of the Commission favoured the latter course, believing that the rule proposed would represent a progressive step.

(6) The Commission differentiated between members of the administrative and technical staff on the one hand, and members of the service staff on the other.

(7) As regards persons belonging to the administrative and technical staff, it took the view that there were good grounds for granting them the same privileges and immunities as members of the diplomatic staff. The Commission considered several other proposals; for example, it was proposed that these categories should qualify for immunity from jurisdiction solely in respect of acts performed in the course of their duties, and that in all other respects the privileges and immunities to be accorded to them should be determined by the receiving State. By a majority, however, the Commission in 1957 decided that they should be put on the same footing as the diplomatic staff. In the light of observations received from several Governments, the Commission reviewed the question at the present session and, by almost the same majority, confirmed its earlier decision.

(8) The reasons relied on may be summarized as follows. It is the function of the mission as an organic whole which should be taken into consideration, not the

actual work done by each person. Many of the persons belonging to the services in question perform confidential tasks which, for the purposes of the mission's function, may be even more important than the tasks entrusted to some members of the diplomatic staff. An ambassador's secretary or an archivist may be as much the repository of secret or confidential knowledge as members of the diplomatic staff. Such persons equally need protection of the same order against possible pressure by the receiving State.

(9) For these reasons, and because it would be difficult to distinguish as between the various members or categories of the administrative and technical staff, the Commission recommends that the administrative and technical staff should be accorded not only immunity from jurisdiction in respect of official acts performed in the course of their duties but, in principle, all the privileges and immunities granted to the diplomatic staff.

(10) With regard to service staff, the Commission took the view that it would be sufficient for them to enjoy immunity only in respect of acts performed in the course of their duties, and exemption from dues and taxes on the emoluments they receive by reason of their employment (paragraph 2). States will, of course, remain free to accord additional privileges and immunities to persons in this category.

(11) In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals of the receiving State. The Commission did not feel it desirable to go farther and lay down a criterion for determining who should be regarded as a member of the family, nor did it desire to fix an age limit for children. The spouse and children under age, at least, are universally recognized as members of the family, but in some cases other relatives may also be regarded as qualifying as "members of the family" if they are part of the household. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties or special circumstances are necessary qualifications. Such special circumstances might exist where a relative kept house for an ambassador, although she was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect, to become a part of it.

(12) With regard to private servants of the head or members of the mission, a majority of the Commission took the view that they should not enjoy privileges and immunities as of right, except for exemption from dues and taxes on the emoluments they receive by reason of their employment. In the majority view, the mission's interest would be adequately safeguarded if the receiving State were under a duty to exercise its jurisdiction over their persons in such manner as to avoid undue interference with the conduct of the mission's business.

(13) In connexion with this article, the Commission considered what value as evidence could be attached to the lists of persons enjoying privileges and immunities which are normally submitted to the Ministry for Foreign Affairs. It took the view that such a list might constitute presumptive evidence that a person mentioned therein was entitled to privileges and immunities, but did not constitute final proof, just as absence from the list did not constitute conclusive proof that the person concerned was not so entitled.

Diplomatic agents who are nationals of the receiving State

Article 37

1. A diplomatic agent who is a national of the receiving State shall enjoy inviolability and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions. He shall enjoy such other privileges and immunities as may be granted to him by the receiving State.

2. Other members of the staff of the mission and private servants who are nationals of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

Commentary

(1) Paragraph 1 of the article corresponds to article 30 of the 1957 draft. It deals with the position of a *diplomatic agent* who is a national of the receiving State, but in a different form. Paragraph 2, which is new, deals with the position of the other members of the mission and with that of private servants, and reproduces the rules concerning such persons which were formerly embodied in article 28, paragraphs 3 and 4, of the 1957 draft or referred to in the commentary to former article 30 as an implied consequence of the rule there stated.

(2) With regard to the privileges and immunities of a diplomatic agent who is a national of the receiving State, practice is not uniform, and the opinion of writers is also divided. Some writers hold the view that a diplomatic agent who is a national of the receiving State should enjoy full privileges and immunities subject to any reservations which the receiving State may have made at the time of the *agrément*. Others are of the opinion that the diplomatic agent should enjoy only such privileges and immunities as have been expressly granted him by the receiving State.

(3) This latter opinion was supported by a minority of the Commission. The majority favoured an intermediate solution. It considered it essential for a diplomatic agent who is a national of the receiving State to enjoy at least a minimum of immunity to enable him to perform his duties satisfactorily. That minimum, it was felt, was inviolability, and also immunity from jurisdiction in respect of official acts performed in the exercise of his functions, although certain members of the Commission urged that he ought to be granted more extensive privileges considered necessary for the satisfactory performance of his duties.

(4) The privileges and immunities to be enjoyed beyond the stated minimum by a diplomatic agent who is a national of the receiving State will depend on the decision of the receiving State.

(5) Attention is drawn to the fact that the phrase "diplomatic agent" includes, not only the head of the mission, but also members of the diplomatic staff.

(6) Under paragraph 2, "other" members of the mission (i.e., other than diplomatic agents) and private servants who are nationals of the receiving State only enjoy such privileges and immunities as are granted to

them by that State. However, as stated in the same paragraph, the jurisdiction which the receiving State may exercise over their persons must be exercised in such a manner as not to interfere unduly with the conduct of the business of the mission.

(7) The fact that the draft makes no mention of the position of the members of the families of any of the persons specified in the article implies that they enjoy only such privileges and immunities as are granted to them by the receiving State.

Duration of privileges and immunities

Article 38

1. Every person entitled to diplomatic privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3. In the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country, and the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall be levied only on immovable property situated in the receiving State.

Commentary

(1) The first two paragraphs of this article deal with the times of commencement and termination of entitlement, in the case of persons entitled to privileges and immunities in their own right. In the case of persons who derive their entitlement from such persons, other dates may apply, viz. the dates of commencement and termination of the relationship which constitutes the grounds of the entitlement.

(2) As regards paragraph 2, the question had been raised whether exemption from import duties should not cease immediately on the termination of functions. The Commission did not take that view. It was in any event clear that, as regards *export* duties, these should continue until the person concerned had had time to make arrangements for his departure. Similarly, in the case of import duties also, there are cases calling for exemption, e.g. where goods have been ordered prior to any knowledge of appointment to another post.

(3) A provision was added to paragraph 3 to the effect that, in the event of the death of a member of the mission not a national of the receiving State, or of a member of his family, the receiving State may not levy estate, succession and inheritance duties, except on immovable property situated in that country.

Duties of third States

Article 39

1. 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 inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in case of any members of his family enjoying diplomatic privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1, third States shall not hinder the passage of members of the administrative, technical or service staff of a mission, and of members of their families, through their territories.

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers in transit the same inviolability and protection as the receiving State is bound to accord.

Commentary

(1) In the course of diplomatic relations it may be necessary for a diplomatic agent or a diplomatic courier to pass through the territory of a third State. Several questions were raised on this subject during discussion in the Commission.

(2) The first question is whether the third State is under a duty to grant free passage. The view was expressed that it was in the interest of all States belonging to the community of nations that diplomatic relations between the various States should proceed in a normal manner, and that in general, therefore, the third State should grant free passage to the member of a mission and to the diplomatic courier. It was pointed out, on the other hand, that a State was entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to go further into this matter.

(3) Another question concerns the position of the member of the mission who is in the territory of a third State either in transit or for other reasons, and who wishes to take up or return to his post or to go back to his country. Has he the right to avail himself of the privileges and immunities to which he is entitled in the receiving State, and to what extent may he avail himself of them? Opinions differ and practice provides no clear guide. The Commission felt it should adopt an intermediate position.

(4) The Commission proposes (paragraph 1) that the diplomatic agent should be accorded inviolability and such other privileges and immunities as may be required to ensure his transit or return. The same privileges and immunities should be extended to the members of the diplomatic agent's family, and the Commission accordingly amended the text proposed at the ninth session, which did not contain any provision to that effect.

(5) With regard to the members of the administrative, technical and service staff and their families, the Commission recommends that, in circumstances similar to those specified in paragraph 1 of the article, there should be an obligation on third States not to hinder the

passage of such persons. Paragraph 2, which is new, lays down this rule.

(6) The second sentence of paragraph 3 reproduces the language of the corresponding provision (article 32, paragraph 2) in the 1957 draft, viz. a third State through whose territory a diplomatic courier passes in transit shall accord him the same inviolability and protection as the receiving State. The Commission considers, however, that the third State should accord to official diplomatic correspondence and to other communications in transit the same freedom and protection as is accorded by the receiving State. Accordingly, a provision to that effect (which precedes the provision relating to the protection of the courier) has been inserted in paragraph 3 of the article.

SECTION III. CONDUCT OF THE MISSION AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

Article 40

1. Without prejudice to their diplomatic privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. Unless otherwise agreed, all official business with the receiving State entrusted to a diplomatic mission by its Government, shall be conducted with or through the Ministry for Foreign Affairs of the receiving State.

3. The premises of a diplomatic mission must not be used in any manner incompatible with the functions of the mission as laid down in the present draft articles, or by other rules of general international law, or by any special agreements in force between the sending and the receiving State.

Commentary

(1) Paragraph 1, which remains unchanged, states in its first sentence the rule already mentioned, that in general it is the duty of the diplomatic agent, and of all persons enjoying diplomatic privileges and immunities, to respect the laws and regulations of the receiving State. Immunity from jurisdiction implies merely that the agent may not be brought before the courts if he fails to fulfil his obligations. The duty naturally does not apply where the agent's privileges and immunities exempt him from it. Failure by a diplomatic agent to fulfil his obligations does not absolve the receiving State from its duty to respect the agent's immunity.

(2) The second sentence of paragraph 1 states the rule that persons enjoying diplomatic privileges and immunities must not interfere in the internal affairs of the receiving State; for example, they must not take part in political campaigns. The making of representations for the purpose of protecting the interests of the diplomatic agent's country or of its nationals in accordance with international law does not constitute interference in the internal affairs of the receiving State within the meaning of this provision.

(3) Paragraph 2 states that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission should conduct all official business entrusted to it by its Government: nevertheless, by agreement (whether express or implied) between the two States, the mission may deal directly with other authorities of the receiving State, as specialist attachés, in particular, frequently do.

(4) Paragraph 3 stipulates that the premises of the mission shall be used only for the legitimate purposes for which they are intended. Failure to fulfil the duty laid down in this article does not render article 20 (inviolability of the mission premises) inoperative but, on the other hand, that inviolability does not authorize a use of the premises which is incompatible with the functions of the mission. The question of asylum is not dealt with in the draft but, in order to avoid misunderstanding, it should be pointed out that among the agreements referred to in paragraph 3 there are certain treaties governing the right to grant asylum in mission premises which are valid as between the parties to them.

SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

Modes of termination

Article 41

The function of a diplomatic agent comes to an end, *inter alia:*

(*a*) If it was for a limited period, then on the expiry of that period, provided there has been no extension of it;

(*b*) On notification by the Government of the sending State to the Government of the receiving State that the diplomatic agent's function has come to an end (recall);

(*c*) On notification by the receiving State, given in accordance with article 8, that it considers the diplomatic agent's function to be terminated.

Commentary

This article lists various examples of the ways in which a diplomatic agent's function may come to an end. The causes which may lead to termination under points (*b*) and (*c*) are extremely varied.

Facilitation of departure

Article 42

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment, and must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

The Commission thought necessary to make it clear that, naturally, only in case of need is the receiving State under a duty to place means of transport at the disposal of persons leaving the country.

Protection of premises, archives and interests

Article 43

If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(*a*) The receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;

(*b*) The sending State may entrust the custody of the premises of the mission, together with its property and archives, to the mission of a third State acceptable to the receiving State;

(*c*) The sending State may entrust the protection of its interests to the mission of a third State acceptable to the receiving State.

Commentary

With the exception of certain drafting changes (e.g. in sub-paragraph (*c*)), the article reproduces unchanged the terms of the corresponding article in the 1957 draft.

SECTION V. NON-DISCRIMINATION

Article 44

1. In the application of the present rules, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(*a*) Where the receiving State applies one of the present rules restrictively because of a restrictive application of that rule to its mission in the sending State;

(*b*) Where the action of the receiving State consists in the grant, on the basis of reciprocity, of greater privileges and immunities than are required by the present rules.

Commentary

(1) It is stipulated in the draft that certain of its rules are to be applied without discrimination as between States (article 10, paragraph 2; article 15, paragraph 1), or uniformly (article 16). It should not be inferred that these are the only cases in which the rule of non-discrimination is applicable. On the contrary, this is a general rule which follows from the equality of States. Article 44, which is new, lays down the rule expressly.

(2) In the article laying down the rule, the Commission was, however, at pains to refer to two cases in which, although an inequality of treatment is implied, no discrimination occurs, inasmuch as the treatment in question is justified by the rule of reciprocity which is very generally applicable in the matter of diplomatic relations.

(3) The first of these cases is that in which the receiving State applies restrictively one of the rules of the draft because the rule is so applied to its own mission in the sending State. It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule; otherwise, there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.

(4) The second case is that in which the receiving State grants, subject to reciprocity, privileges and immunities more extensive than those prescribed by the rules of the draft. It is only natural that the receiving State should be free, as regards the grant of benefits greater than those which it is obliged to grant, to make such grant conditional on receiving reciprocal treatment.

SECTION VI. SETTLEMENT OF DISPUTES

Article 45

Any dispute between States concerning the interpretation and application of this Convention that cannot be settled through diplomatic channels shall be referred to conciliation or arbitration or, failing that, shall, at the request of either of the parties, be submitted to the International Court of Justice.

Commentary

The Commission discussed whether a clause should be inserted in the draft concerning the settlement of disputes arising out of its interpretation or application, and also where the clause should be placed and what form it should take. Opinion was divided. Some members considered that where, as in the present case, the Commission's task had consisted of codifying substantive rules of international law, it was unnecessary to deal with the question of their implementation. Others suggested that the clause should be included in a special protocol. A majority, however, thought that, if the present draft were submitted in the form of a convention, a provision governing the settlement of disputes would be necessary and that, for this purpose, it should stipulate that, in cases where other peaceful means of settlement proved ineffective, the dispute would be referred to the International Court of Justice. The article as drafted at the ninth session (article 37) has been clarified by the addition of words stating that this can be done at the request of either of the parties.

Chapter IV

PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

I. State responsibility

54. The special rapporteur, Mr. F. V. García Amador, in accordance with the request of the Commission made during its ninth session that he should continue with his work on the subject, submitted his third report at the present session (A/CN.4/111). It was not possible, for want of time, to discuss the report. However, in chapter V below an account is given of the planning of the future work of the Commission which includes, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

II. Law of treaties

55. Sir Gerald Fitzmaurice, the special rapporteur, having continued his work on this subject at the request of the Commission, presented at the present session his third report, dealing with the essential validity of treaties (A/CN.4/115). As in the case of State responsibility, lack of time did not permit the Commission to take up the subject, but the Commission's plans for future work are explained in chapter V, and include, *inter alia*, plans for taking up this subject at the eleventh session. The special rapporteur will continue his work.

III. Consular intercourse and immunities

56. Towards the end of the session, the Commission began discussion of the report on this subject (A/CN.4/108), submitted by the special rapporteur, Mr. Jaroslav Zourek, at the previous session. After an exposé by the special rapporteur, and a general exchange of views on the subject as a whole, and also on the first article, the Commission deferred further consideration of the report until the next session. The special rapporteur will continue his work.

Chapter V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

I. Planning of future work of the Commission

57. On account of certain hopes expressed in the General Assembly during its twelfth session in 1957, to the effect that on the completion of the draft on diplomatic intercourse and immunities it might be possible for the work on the related subject of consular intercourse and immunities to be accelerated, the Commission decided to take this subject up next, on the basis of the report of the special rapporteur, Mr. Zourek, contained in document A/CN.4/108. Accordingly, the Commission, in addition to devoting two meetings to a general discussion of the subject (see chapter IV, part III, above) decided to place it first on the agenda for its eleventh session in 1959 with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft for the comments of Governments (see also paragraphs 61, 64 and 65 below). Other subjects which the Commission decided to place on its agenda for next year were the law of treaties and State responsibility, but no final decision was taken as to the order in which these subjects would be discussed, or as to the amount of time to be devoted to them respectively.

58. In paragraphs 26-29 of its report covering its ninth session in 1957[30] an account was given of a discussion regarding the methods of work of the Commission which it had held at that session, arising out of certain views expressed in the Sixth Committee of the Assembly at the latter's eleventh session in 1956. Although the conclusion then reached was that there were no immediate steps which the Commission could usefully take to accelerate its work, it was stated that the Commission proposed to keep the matter under review and to give it renewed consideration at its next session, in the light of experience of the working of the Commission with a membership of twenty-one.[31]

59. Accordingly, and also because the matter had been the subject of further observations in the Sixth Committee of the Assembly at its twelfth session in 1957, the Commission discussed it again during its present session on the basis of a paper[32] prepared by Mr. Zourek who, as last year's Chairman of the Commission, had attended the relevant meetings of the Sixth Committee. After examining the various methods by which the Commission's work might be accelerated, Mr. Zourek thought it possible to rely on only one of them as constituting a method that could be followed without prejudicing the quality of the Commission's work. This consisted in a re-organization of methods of work in such a way that less would be done in the plenary meetings and more in committees or sub-commissions, of which greater use would be made; and the paper concluded by setting out a number of concrete proposals to that end.[33]

60. In addition to these proposals Mr. Zourek in an oral statement, suggested that Governments should be given more time to comment on first drafts produced by the Commission, also for the members to digest these comments and for the special rapporteur to make his recommendations concerning them. At present, the effective period which Governments had in order to make comments, from the time when the Commission's report reached them to the date by which replies were supposed to be sent in, was only some four or five months; this period was precisely that during which the annual session of the General Assembly took place, when a number of the officials concerned would be absent in New York. The result was that often only a small number of Governments offered any comments, and many of the comments arrived late—some too late to be pre-digested in writing either by the special rapporteur concerned or by the Secretariat before the Commission's session began. Mr. Zourek accordingly proposed that the Commission's present practice of completing a draft at one session for submission to Governments, with a view to preparing a final draft at the immediately following session in the light of the comments of Governments, and for submission to the General Assembly in the same year, should

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[30] *Official Records of the General Assembly, Twelfth Session, Supplement No. 9* (A/3623).

[31] At the eleventh session of the General Assembly in 1956, the membership of the Commission was increased from fifteen to twenty-one. The ninth session of the Commission in 1957 was the first to be held with this increased membership; the present session the second.

[32] A/CN.4/L.76 of 21 May 1958. As implied in paragraph 17 of this paper, however, the great majority of delegations in the Assembly did not seek to criticize the Commission's methods.

[33] "With a view to speeding up the work of the International Law Commission, while keeping it on a high scientific level, the following changes in the Commission's organization and methods of work might be considered in the light of past experience:

"(*a*) In the absence of a contrary decision by the Commission, any draft prepared by the special rapporteurs would be the subject of a general discussion in plenary meeting.

"(*b*) When the general discussion was concluded, the Commission would review the articles of the draft and the amendments submitted by members, so that they could have an opportunity of presenting their views. Votes would not be taken at that stage of the work unless the circumstances made it necessary to take a vote on a question of principle in order to simplify and facilitate the work.

"(*c*) After this preliminary discussion, the draft would be referred to a sub-commission so constituted as to include representatives of all the world's principal legal systems. The sub-commission, of which the special rapporteur would automatically be a member, should not consist of more than ten members.

"(*d*) The sub-commission would fully discuss the special rapporteur's proposals and the amendments thereto, and would prepare draft articles for the full Commission. In view of the importance of this work for the Commission itself, for the Governments of States Members of the United Nations and for academic circles, the meetings of the sub-commissions would be conducted in the same way as plenary meetings, i.e., with simultaneous interpretation and summary records.

"(*e*) The drafts prepared by the sub-commissions would be submitted to the full Commission for possible discussion and adoption.

"(*f*) The Commission would always be entitled to reserve a particularly important or urgent draft for discussion in plenary meeting only."

be modified, and that the Commission should only prepare its final draft at the second session following that in which the first draft had been prepared.

61. With regard to this last proposal, the Commission, while conscious that it would prolong the period before the end of which a final draft on any given subject could be presented to the Assembly,[34] felt little doubt that its work tended to suffer because of defects in the process of obtaining and dealing with the comments of Governments, and accordingly decided in principle to adopt this proposal. On this basis it decided that if, at its next session in 1959, it could complete a first draft on consular intercourse and immunities to be sent to Governments for comment, it would not take that subject up again in order to prepare a final draft in the light of those comments until its thirteenth session in 1961, and would proceed with other subjects at its twelfth session in 1960.

62. As regards the other concrete proposals (see footnote 33) contained in Mr. Zourek's paper, the Commission, while considering that they ought certainly to be kept in mind and acted upon as occasion might require or render desirable, felt that this should be done on an *ad hoc* basis and that no definite decision was called for in advance to the effect that the Commission would always (or even usually) adopt this method of work. Such a method might on occasion be useful in the initial stages of drawing up a draft on a difficult or complex subject. On the other hand, the experience of the present session, during which the Commission had finalized no less than two complete drafts for presentation to the General Assembly, had shown that, during the later stages at any rate, the work could proceed quite sufficiently quickly in the full Commission, and that no real advantage would be gained by setting up sub-commissions. There was moreover always the danger that, except in cases obviously suitable for reference to a sub-commission, the discussions in the smaller body would merely be re-opened in plenary meeting and the ground be gone over again with no real saving of time.

63. It was also pointed out that in any case the suggestion made in the second sentence of sub-paragraph (*d*) of Mr. Zourek's proposals—apart from budgetary and other implications of a practical character—was open to objection because it would tend to deprive any committee or sub-commission of precisely that informality and conversational atmosphere which enabled difficult or controversial points to be disposed of quickly. It would tend to re-introduce much of the deliberate character of the plenary meetings of the Commission, and this would not be off-set by the smaller number of members involved.

64. However, subject to this, the Commission felt that the topic of consular intercourse and immunities (because of its similarity to that of diplomatic intercourse and immunities which had now been debated at two sessions, and with which all members were thoroughly familiar) might well lend itself to the method of work proposed by Mr. Zourek. Accordingly, in view of its desire to complete a first draft if possible by the fifth week of its next session, the Commission decided that it would organize its work on that subject at its next session on the basis of Mr. Zourek's proposals, with the exception of that contained in the second sentence of sub-paragraph (*d*). It was also decided to ask all the members who might wish to propose amendments to the existing draft presented by the special rapporteur[35] to come to the next session prepared to put in their principal amendments in writing within a week, or at most ten days, of the opening of the session (this would not of course preclude the submission of further or consequential amendments at later stages).

65. It was also decided that, in future, the Commission's Drafting Committee should be formally constituted as what it had long been in fact, namely, a committee to which could be referred not merely pure drafting points, but also points of substance which the full Commission had been unable to resolve, or which seemed likely to give rise to unduly protracted discussion. It was to such a committee that the method of work to be adopted next year in respect of consular intercourse and immunities would relate. This decision would not entail any alteration in the present arrangements for the Drafting Committee. If, however, the Commission at any time decided to make greater use of sub-commissions on points of substance, this might necessitate recourse to simultaneous interpretation and possibly summary records, thereby involving an administrative and budgetary problem calling for study by the Secretariat and an eventual decision by the Assembly.

66. For other ideas which were considered, but which were regarded as unsatisfactory, it will be sufficient to refer to paragraphs 22 and 23 of Mr. Zourek's paper above-mentioned and the remarks there made.[36] As a variant of the one contained in paragraph 22 (*b*), it was suggested in the course of the discussion that the length of the sessions should be increased from ten to twelve weeks, although what had been envisaged as necessary to compensate for the increase in membership had been a prolongation of the session proportionate to that increase—i.e., of four weeks.[37] But it was felt that even an increase of two weeks would give rise to some or all of the difficulties mentioned by Mr. Zourek. However, a related suggestion which was discussed and will be kept in mind was the possibility that the special rapporteurs for the various subjects to be taken at a given session should hold a meeting with some members of the Commission a week or ten days before the opening of the session, in order to have a preliminary discussion and thereby to shorten the discussion in the Commission itself.

67. The Commission also draws attention to the fact that, while during the main part of the session it holds one plenary meeting a day, experience has shown that towards the end of the session, when the draft report to the General Assembly is being finalized, two meetings are often needed. Provision should therefore be made in the budget for the servicing of approximately ten extra meetings during, but principally towards the end of, the session.

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[34] However, while retarding the presentation of any individual draft, it need not, after a certain initial delay, hold up the orderly *flow* of drafts to the Assembly year by year, in so far as it is otherwise possible to achieve that.

[35] A/CN.4/108.

[36] See footnote 32 above. As regards the idea of the Commission's working in two main sections, paragraph 23 of this paper stated "The suggestion that the International Law Commission should be split up into two or more sub-commissions working on different subjects along parallel lines does not provide an adequate solution. If that suggestion were accepted, the Commission would cease to exist as a single organ and would be replaced by two or more sub-commissions working independently. Unity of views would not be assured and the sub-commissions might reach conflicting results. Moreover, such a reform would be contrary to the Commission's present Statute."

[37] The Commission did not however accept the view that the 40 per cent increase in the membership of the Commission effected by the Assembly's decision in 1956, had resulted in a 40 per cent increase in the time taken up by its proceedings.

I. Review of the Commission's work during its first ten sessions

68. At the conclusion of this, its tenth session, the Commission thought it might be useful to review briefly the work accomplished during that period, since this might have a bearing on the matters discussed in paragraphs 57 to 67 above. The chief points that seemed to emerge were as follows:

(*a*) In view of the great difficulty and complexity of any work of codification or progressive development,[38] the fact that good work could only be done by proceeding with deliberation, and also the necessity of producing in most cases a detailed commentary as well as a set of well-thought-out and well-drafted articles and a general report on the subject concerned, the Commission considered that the finalization *on the average* of one completed piece of work for presentation to the Assembly in each year constituted about as much as it would be possible or desirable to aim at consistently with maintaining the requisite standard of work. In fact the Commission had done better than this, having in its ten sessions produced no less than fifteen[39] or sixteen[40] final and completed pieces of work. The fact that some of these (e.g. the reports on defining aggression, on reservations to multilateral conventions, and on ways and means of making international law more generally known) did not consist of or include a set of articles, was due to the fact that they concerned matters specially referred to the Commission by the Assembly for opinion, report or proposals, rather than for codification as such.

(*b*) A considerable amount of the time of the Commission had in fact been taken up with these and other special tasks referred to it by the Assembly, with the result that its own programme of codification, as drawn up at its first session in 1949,[41] had been delayed. During its last five sessions, however, i.e., since and including 1954, the Commission had finally completed nine[42] pieces of codification or progressive development, of which eight[43] were covered by its own original selection of topics to be dealt with, and four[44] figured amongst the five topics[45] originally selected for priority treatment. Of these nine completed pieces of work, four had already been taken up at an international conference[46] and two more would be similarly taken up in 1959.[47] Of the remaining three, one had in effect not so far been proceeded with by the Assembly,[48] while two were going to the Assembly in final form at its forthcoming session. The Commission's task was over when it presented final drafts. Any further action was for the Assembly. Such further action had sometimes been taken and sometimes not.

(*c*) The question arose whether, even if the Commission were to produce drafts more quickly, Governments, and the Assembly itself, would be able to keep pace with them. As it was (see paragraphs 60 and 61 above), Governments had difficulty in furnishing comments, and often it was only a small minority that did so. As regards the Assembly, it would no doubt always be possible to hold a general discussion each year in the Sixth Committee on any texts prepared by the Commission. But in many cases this did not suffice, and further action was required, such as holding an international conference which could be attended by the necessary experts on the subjects involved, who would not normally be present in the Sixth Committee. The already crowded condition of the international programme, however, would make it difficult to hold many conferences of a codificatory character. It was doubtful whether, on the average, such conferences could be held oftener than once a year, or more probably once

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[38] It was pointed out that many national codifications had taken up periods of ten years or even much longer. Yet in the domestic field a homogeneous corpus of law was being dealt with by persons who were all of the same nationality and all had the same legal background. Bodies so constituted could conveniently split up into sections, each dealing more or less independently with different parts of the subject. This was not possible for the Commission, which was quite differently constituted and had a very different kind of subject-matter to deal with.

[39] These were:

1. Draft Declaration on Rights and Duties of States.
2. Ways and means for making the evidence of customary international law more readily available.
3. Formulation of the Nürnberg Principles.
4. Question of international criminal jurisdiction.
5. Draft Code of Offences against the Peace and Security of Mankind.
6. Question of defining aggression.
7. Reservations to multilateral conventions.
8. Draft on arbitral procedure.
9. Draft Convention on the Elimination of Future Statelessness.
10. Draft Convention on the Reduction of Future Statelessness.

11–14. Articles concerning the law of the sea comprising:
Régime of territorial waters;
Régime of the high seas;
Fisheries: Conservation of the living resources of the high seas;
The continental shelf.

15. Draft on diplomatic intercourse and immunities.

The above list takes into account the fact that the Conference on the Law of the Sea adopted four distinct Conventions as comprising the law of the sea. Each is an independent subject.

[40] Sixteen, if account is taken of the fact that the draft on arbitral procedure presented to the Assembly in 1953 was, so far as the Commission was concerned, a final and completed text. In effect the Commission has presented two final texts on this subject.

[41] The report of the Commission on its first session contains, in chapter II, paragraph 16, the following list of topics selected by the Commission for codification:

1. Recognition of States and Governments;
2. Succession of States and Governments;
3. Jurisdictional immunities of States and their property;
4. Jurisdiction with regard to crimes committed outside national territory;
5. Régime of the high seas;
6. Régime of territorial waters;
7. Nationality, including statelessness;
8. Treatment of aliens;
9. Right of asylum;
10. Law of treaties;
11. Diplomatic intercourse and immunities;
12. Consular intercourse and immunities;
13. State responsibility;
14. Arbitral procedure.

See *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925) chapter II, para. 16.

[42] Draft Code of Offences against the Peace and Security of Mankind (one);
Law of the sea: Régime of territorial waters, Régime of the high seas, Fisheries: Conservation of the living resources of the high seas, The continental shelf (four);
Elimination of future statelessness; Reduction of future statelessness (two); Arbitral procedure (one);
Diplomatic intercourse and immunities (one).

[43] I.e., all but the Draft Code of Offences against the Peace and Security of Mankind.

[44] The régime of the high seas; fisheries; the continental shelf; and arbitral procedure.

[45] As in footnote 44, plus the law of treaties.

[46] I.e., those covering the law of the sea.

[47] Draft Convention on the Elimination of Future Statelessness and Draft Convention on the Reduction of Future Statelessness.

[48] I.e., the Draft Code of Offences against the Peace and Security of Mankind.

in two years. For administrative and technical reasons, they could not usually be held concurrently with either the meetings of the Assembly or of the Commission itself. This meant that, in practice, the only time of the year at which such conferences could be held, unless they were very short, was between January and April. In these circumstances, the Commission came to the conclusion that it should adhere to its policy of taking enough time to ensure that any final draft it produced would be good, and such as could in substance be adopted by an international conference—a policy that had been fully vindicated by the results of the recent Conference on the Law of the Sea. Added to this, there was the important consideration that the whole of international law and international relations was now going through a period of adjustment. In such a situation speed was not necessarily the most important consideration. Time spent in endeavouring to reconcile different points of view and different types of outlooks and ideas was not time wasted. In the course of the years what would matter was the quality of the work, not whether a greater or lesser period had been spent in producing it.

69. The foregoing observations in no way imply that the Commission is not fully aware of the necessity of proceeding as fast as is reasonably possible with its work —and it intends to do so. But it has thought it useful to try and place the matter in its wider perspective.

III. Co-operation with other bodies

70. In 1956 the Commission adopted a resolution requesting the Secretary-General to authorize the Secretary of the Commission to attend the fourth meeting of the Inter-American Council of Jurists, scheduled to be held at Santiago, Chile, in 1958. At the next session in 1957, the Secretary informed the Commission of the postponement until 1959 of the meeting of the Inter-American Council.

71. During the present session the Commission had before it a joint proposal (A/CN.4/L.77) by Mr. R. J. Alfaro, Mr. G. Amado, and Mr. F. V. García Amador, which would renew the request to the Secretary-General in view of the convening of the fourth meeting of the Inter-American Council of Jurists early in 1959.

"*The International Law Commission,*

"*Recalling* article 26 of its statute and the resolutions adopted at its sixth, seventh and eighth sessions regarding co-operation with inter-American bodies and, in particular, that at its eighth session it requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, in the capacity of an observer, the fourth meeting of the Inter-American Council of Jurists to be held in Santiago, Chile, in 1958,

"*Noting* that this meeting has been postponed until early in 1959,

"*Considering* that, since the subject of State responsibility will be discussed at the eleventh session of the Commission and is also the principal item on the agenda for the fourth meeting of the Inter-American Council of Jurists, there exists again a real opportunity for co-operation between the International Law Commission and the Inter-American Council of Jurists,

"*Decides*:

"1. To request the Secretary-General to authorize the Secretary of the International Law Commission to attend, in the capacity of an observer for the Commission, the fourth meeting of the Inter-American Council of Jurists to be held early in 1959 at Santiago, Chile, and submit a report to the Commission at its next session regarding such matters discussed by the Council as are also on the agenda of the Commission;

"2. To communicate this decision to the Inter-American Council of Jurists and to express the hope that the Council may be able, for a similar purpose, to request its Secretary to attend the next session of the Commission."

73. The Commission also had before it a communication received from the Asian-African Legal Consultative Committee informing it of the holding of a second session at Colombo, Ceylon, from 14 to 26 July 1958, during which session the Committee proposed to consider certain items also of interest to the Commission. In view of the closeness of the date of this second session, the Commission was unable to consider the question of sending an observer. It authorized the Secretary to inform the Asian-African Legal Consultative Committee of this fact and, at the same time, to express its interest in the work of the Committee and its hope that the Committee would transmit to it such records and other documents as related to matters falling within the scope of the work of the Commission.

IV. Control and limitation of documentation

74. Resolution 1203 (XII) of the General Assembly concerning this question had been placed on the agenda of the Commission for the present session and was duly brought to the attention of the Commission. The Commission took note of the resolution.

V. Date and place of the next session

75. The Commission decided to hold its eleventh session in Geneva from 20 April to 26 June 1959.

VI. Representation at the thirteenth session of the General Assembly

76. The Commission decided that it should be represented at the next (thirteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabinod Pal.

ANNEX

Comments by Governments on the draft articles concerning diplomatic intercourse and immunities adopted by the International Law Commission at its ninth session in 1957 (A/3623, para. 16)*

CONTENTS

1. ARGENTINA

Transmitted by a note verbale *of 30 January 1958 from the Permanent Mission of Argentina to the United Nations*

[*Original: Spanish*]

The competent organs of the Argentine Government consider that the draft clauses are on the whole acceptable. They have certain comments to make, however, concerning articles 6, paragraph 1, 8, 21 and 28, paragraph 1.

The wording of article 6, paragraph 1, becomes ambiguous if it is considered that the phrase "according to circumstances" should be deleted, since once the representative of a State has been declared *persona non grata* there are no circumstances that can alter the situation and the representative must leave the country in which he has been exercising his functions.

As regards article 8, the competent organs of the Argentine Government are of opinion that 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.

As regards article 21, the relevant part of the commentary should be added as paragraph 5: "If a mission wishes to make use of a wireless transmitter belonging to it, it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. If the regulations applicable to all users of such communications are observed, such permission should not be refused".

Finally, as regards article 28, paragraph 1, which provides that "apart from diplomatic agents" and the members of their families accompanying them, "the administrative and technical staff of a mission" and the members of their families accompanying them shall enjoy the privileges and immunities mentioned in articles 22 to 27, it is understood that, as the Commission observes, there is no uniformity in the granting of diplomatic privileges and immunities to the technical and administrative staff of diplomatic missions. In order to take into account the existing disparity in the treatment accorded to this class of officials and 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.

* Originally distributed in documents A/CN.4/114 and Add. 1-6.

2. AUSTRALIA

Transmitted by a note verbale *of 11 February 1958 from the Permanent Representative of Australia to the United Nations*

[*Original: English*]

The Government of Australia has perused with interest the draft articles prepared by the International Law Commission at its ninth session on the subject of diplomatic intercourse and immunities, and takes the opportunity to express its appreciation of the work of the Commission and its special rapporteur, Mr. A. E. F. Sandström, upon the work which has been done on the subject and the provisional draft, which appears to cover in a comprehensive manner all aspects of the subject.

While it must naturally reserve any final position with regard to the draft, and would desire to make it clear that the presence or absence of any comment must not be taken as necessarily involving acceptance of any part of the draft, either in principle or in detail, the Government of Australia submits the following observations for consideration by the special rapporteur when preparing his further proposals to the Commission.

Article 2

The words "the Government" should be omitted in sub-articles (1), (3) and (4), since diplomatic missions generally represent Heads of States, and it is considered inaccurate to describe such functions by reference to Governments.

Article 5

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.

Article 7

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

Article 8

The Australian Government would prefer the alternative version, namely, that a head of mission takes up his functions when he has presented his letters of credence.

Article 9

1. The Australian Government would omit the words "Government of the" for reasons already stated in connexion with article 2.

2. The Australian Government would omit this sub-article.

Article 12

1. The Australian Government would omit the words "either of the official notification of their arrival or" in this sub-article, being of the view that precedence dates from presentation of letters of credence and not from date of official notification of arrival.

2. The Australian Government does not quite understand what this sub-article is intended to cover.

Article 16

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

Article 20

2. As stated, this sub-article would appear to require a receiving State to treat all members of all diplomatic missions equally. Some provision for reciprocity appears to be necessary, e.g., if the receiving State places a general restriction upon members of all missions in its territory, the sub-article as drafted would preclude the respective sending States from imposing similar restrictions on the missions of the receiving State in its territory. Such restrictions would not operate in respect of members of other missions whose States had not placed restrictions upon missions in their territory.

Article 24

1. (*c*) The expression "commercial activity" appears to require some definition.

Article 25

2. The Australian Government would prefer substitution of "Head" for "Government".

4. As a point of drafting detail, the words "the judgement" in this sub-article should read "any judgements".

Article 28

2. The expression "service staff" should be defined.

4. In the view of the Australian Government, the exemption provided for should apply only where the emoluments are paid by the Government of the sending State.

3. Belgium

Transmitted by letters dated 29 January and 4 and 12 February 1958 from the Permanent Representative of Belgium to the United Nations

[*Original: French*]

A

29 January 1958

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

The wording of several articles is nevertheless subject to certain objections.

1. *Article 8* provides that "The head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented a true copy of his credentials to the Ministry for Foreign Affairs of the receiving State."

In Belgium, the head of the mission does not take up his functions until he has presented his credentials to the Head of the State. The latter, however, instructs the Minister for Foreign Affairs to receive credentials in the event of his own prolonged absence or illness.

The Belgian Government adopts the alternative proposed by the International Law Commission: "The head of the mission is entitled to take up his functions in relation to the receiving State when he has presented his letters of credence."

2. *Article 12, paragraph 1,* provides that "Heads of mission shall take precedence in their respective classes in the order of date either of the official notification of their arrival or of the presentation of their letters of credence, according to the rules of the protocol in the receiving State, which must be applied without discrimination."

In Belgium the order of precedence of heads of mission is determined solely by the date of the presentation of the letters of credence; the date of the official notification of arrival has no relevance.

3. *Articles 16 and 23* have a common purpose but relate to different premises; they could be amalgamated or the same terminology could be used: e.g. "buildings or parts of buildings".

4. *Articles 17 and 26* grant exemption from all "national or local" dues or taxes. It would be desirable as regards Belgium to make allowance for taxes levied by the provinces and to amend this phrase to read "national, regional or local".

In order to avoid using the French word *locaux* in two different senses in article 17 it would perhaps be preferable to use here also the expression "buildings or parts of buildings used by the mission" (*immeubles ou parties d'immeubles utilisés par la mission*).

5. The commentary on *article 21, paragraph 1,* implies that the receiving State is under an obligation to permit diplomatic missions to make use of radiocommunication installations belonging to them provided that the regulations applicable to all users of such communications are observed.

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 to grant diplomatic missions such permission under present conditions.

6. *Article 21, paragraph 3:* The customs treatment applicable to articles intended for official use is prescribed by draft article 27, paragraph 1 (*a*). It does not seem desirable to extend the inviolability of the diplomatic bag to such articles. The phrase "articles intended for official use" should be replaced by "official documents".

With reference to paragraph (2) of the commentary it should be noted that the diplomatic bag may not always take the form of a bag (sack or envelope), especially in a large consignment of documents or archives which may be transported in cases, or even by motor-lorry.

7. *Article 21, paragraph 4:* Diplomatic courier is not defined in the draft. According to generally established practice and, as indicated in paragraph (4) of the commentary, the expression "courier" should be understood to mean any person who carries a diplomatic bag and is furnished for the purpose with a document (courier's passport) testifying to his status.

8. The exception prescribed in *article 24, paragraph 3,* might perhaps with advantage be included in paragraph 2.

The reference in paragraph 1 to civil and administrative jurisdiction is doubtless intended to cover all types of proceedings before civil and administrative courts. The immunity provided by paragraph 2 is of so sweeping a nature, however, that it might be taken to apply even in the cases for which exception is made in paragraph 1.

9. 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 laws 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 wholly unconnected with the customs 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.

10. In view of the proposed new wording of article 27, the cross-reference in *article 28, paragraph 1,* should be confined to articles 22 to 26. The reservation proposed for article 27 could be repeated here by inserting after the words "nationals of the receiving State" the words: "and do not engage in any professional or gainful occupation therein".

Article 28, which enumerates the persons entitled to diplomatic privileges and immunities, also contains the following provisions concerning the families of diplomatic agents: "Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27".

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.

Lastly, article 28, paragraph 1, withholds privileges and immunities from members of the family who are nationals of the receiving State. There would appear to be some danger in this restriction. It would have, for example, the effect of making the wife of the head of a mission or of a diplomatic agent liable to criminal prosecution if she happened to be a national of the receiving State. This being so, 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.

11. *Article 29* provides as follows concerning the acquisition of nationality:

"As regards the acquisition of the nationality of the receiving State, no person enjoying diplomatic privileges and immunities in that State, other than the child of one of its nationals, shall be subject to the laws of the receiving State."

This provision prompts several comments:

(1) The International Law Commission's commentary appears to restrict the scope of the article, for it states that: "This article is based on the idea that a person enjoying diplomatic privileges and immunities shall not, by virtue of the laws of the receiving State, acquire the nationality of that State *against his will*"—unless he be the child of a national of the receiving State.

The Belgian Government considers it desirable that this should be specified in the actual text of article 29.

Read out of context, article 29 might be construed as prohibiting voluntary acquisition of the nationality of the receiving State by the persons in question, which is not the intention of the authors of the draft. The difficulty could be overcome by adding the words: "unless he requests that they should be applied to him".

(2) The application of this article may give rise to difficulties 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 seem preferable to delete this exception.

The article might read as follows: "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."

12. *Article 31, paragraph 2:* The exemptions prescribed by article 27 cease to be applicable to imports so soon as the functions of the persons entitled to the exemptions as mentioned in paragraph 1 (*b*) of that article and, if the reference to article 27 is retained in article 28, paragraph 1, the functions also of the persons entitled to the privileges and immunities as mentioned in article 28, paragraph 1, come to an end.

Consequently, the provision should either embody a reservation to that effect or be amended.

13. *Article 32, 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.

This could be done by wording the paragraph as follows:

"1. 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."

14. According to paragraph 15 of the report, the draft was prepared on the provisional assumption that it would form the basis of a convention.

There is no objection to the use of the draft for this purpose.

Since, however, some of its clauses are worded in general terms, it would seem necessary, whatever the nature of the final document, expressly to limit its application to the States signatories of that document.

B

4 February 1958

1. The wording of the first paragraph of article 26 should be amended to make it clear that the text refers only to taxes levied in the receiving State.

Furthermore, the term "indirect taxes" used in article 26 is understood in Belgium to mean taxes other than those imposed periodically on specific taxpayers in respect of a continuing situation. The concepts of direct or indirect taxation are, however, difficult to define with absolute precision and it should therefore be made clear that the exemption provided in article 26 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) although, in Belgium, these are not generally collected from diplomatic agents.

2. In order to ensure that there is no abuse of the privilege of inviolability of the mission premises (article 16), the mission

documents (article 18), the private residence of the diplomatic agent (article 23, paragraph 1) or the diplomatic agent's papers (article 23, paragraph 2), the following paragraph 4 should be added to article 33:

"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 articles 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."

C

12 February 1958

Article 17: Exemption of mission premises from tax

(*a*) It must be pointed out first of all that, under article 11, paragraph 1, of the co-ordinated Income Tax Acts, the tax on immovable property (as likewise the related national emergency tax) is payable by the owner, occupier, lease-holder, superficiary or usufructuary of the taxable property. This provision in no way limits the freedom of agreement between lessor and lessee; however, should the sending State assume responsibility for property taxes under a lease it would not be entitled to invoke the provision of article 17 in support of an application for exemption from such taxes, which in the circumstances would amount in practice to an increase in rent.

(*b*) In accordance with the consistent practice of the courts, it is made a condition of exemption from the immovable property tax and the related national emergency tax in Belgium that the immovable property in question should belong to the foreign State. In extreme cases this condition may be deemed to be met where a building is purchased by the head of a diplomatic mission recognized as acting on behalf of the sending State, which thus becomes the owner of the building. The principle is that exemption may be granted only to a foreign State. It is not possible, therefore, to agree to an exemption which would extend to immovable property purchased by the head of a foreign diplomatic mission in his private capacity. In this respect article 26, sub-paragraph (*b*), appears to make satisfactory provision for cases in which immovable property intended for a mission's use is purchased in the name of the head of the mission but on behalf of the sending State.

Article 26: Exemption from taxation

(*a*) The Belgian Department of Direct Taxation considers that diplomatic immunities should not, as a general rule, apply to diplomatic agents who are nationals of the receiving State. This rule is accepted by most States and is due to a desire to avoid granting undue fiscal privileges.

Although such instances must be very rare, article 30 provides for the case where the diplomatic agent is a national of the receiving State. It is therefore recommended that the nationality restriction laid down in article 28 should be applied to the diplomatic agents themselves.

(*b*) The text could be made more clear if it were specified in the opening words that the exemptions in question shall be accorded in the receiving State, as pointed out in the first note setting out the additional observations by the Belgian Government.

In view of the foregoing it is suggested that the opening words of article 26 might be amended to read as follows:

"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 or local, save..."

Article 28: Persons entitled to privileges and immunities

The persons referred to in article 28 are exempt subject only to the condition that they are not nationals of the receiving State. Persons exempt in the receiving State, however, are not necessarily liable to taxation in the sending State. This will be the case if the sending State's fiscal laws are inapplicable to such persons either in virtue of their nationality (some States tax only the emoluments paid to their nationals who are members of their diplomatic missions abroad) or in virtue of the nature of their functions (some States do not tax persons in the private employ of their diplomatic agents abroad other than heads of missions).

It will also be the case if the right to levy tax may not be exercised in the sending State owing to the existence of agreements for the avoidance of double taxation, many of which confer on the State in which the activity is carried on (in this case, the receiving State) the sole right to tax the emoluments of paid employees (including public officials who are not nationals of the State which pays such emoluments).

This situation may arise with reference to diplomatic agents as well as to the persons referred to in article 28, and may arise with reference to other sources of income, e.g. copyright or patent royalties, taxation of which is normally made the sole right of the State in which the recipient has his fiscal domicile—in this instance, the receiving State.

It is therefore suggested that a paragraph reading as follows should be added to article 28:

"5. In the case of the persons referred to in article 26 and in the present article (paragraphs 1 to 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."

4. CAMBODIA

Transmitted by a letter dated 21 February 1958 from the Minister for Foreign Affairs of Cambodia

[*Original: French*]

. . . The Royal Cambodian Government wishes to make the following reservations to the draft articles concerning diplomatic intercourse and immunities:

1. *Article 30*

Cambodian nationals may not be appointed members of the diplomatic staff of a foreign diplomatic mission.

2. *Article 28*

Cambodian nationals employed by an accredited diplomatic mission, as members of the administrative, technical or service staff of such a mission shall not enjoy diplomatic privileges and immunities in any part of Cambodian territory.

The jurisdiction exercised by Cambodia over such Cambodian nationals shall not unduly interfere with the conduct of the business of the accredited diplomatic missions.

5. CHILE

Transmitted by a letter dated 10 March 1958 from the Permanent Representative of Chile to the United Nations

[*Original: Spanish*]

. . .

On the whole, this 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 on Diplomatic Officers signed by the American countries at the Sixth International Conference of American States held in Havana in 1928. The purpose of the main differences between the present draft and the Convention is to adapt those principles to the new conditions brought about by changes in certain aspects of diplomatic relations.

The reforms, alterations or amplifications contemplated in the draft have taken due account of the practice adopted by States in situations for which allowance had not been made in the traditional rules. Many of these rules, which had lent themselves to differing interpretations, have been clarified and defined; new regulations have also been established to supplement existing ones or repair omissions when necessary.

Nevertheless, in view of the fundamental importance of this draft, which is designed to replace the Vienna Regulation of 1815, for the governing of international diplomatic intercourse and immunities, the Chilean Government considers that certain points should be studied in greater detail.

In the view of my Government, the following articles should receive further study for the reasons given below:

Article 2

"The functions of a diplomatic mission consist, *inter alia*, in:

". . .

"(*b*) Protecting the interests of the sending State and of its nationals in the receiving State;

". . ."

Although the article does not attempt to be exhaustive, as explained in the International Law Commission's commentary, it reproduces the practice followed by States for a very long time.

Paragraph (*b*) of this article states that one of the functions of a diplomatic mission is to protect the interests of the nationals of the sending State. In this respect, 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. There can be no doubt that diplomatic missions should protect the interests of the sending State but, in so far as its 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 aforesaid paragraph somewhat inadequate.

Article 3

"The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State."

The present drafting of article 3 might lead to the mistaken assumption that the *agrément* of the receiving State is necessary for all heads of mission, when it 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 minister". The following sentence might also be added: "This provision shall not apply to *chargés d'affaires*."

Article 5

"Members of the diplomatic staff of the mission may be appointed from among the nationals of the receiving State only with the express consent of that State."

As it stands, this article appears to admit of the possibility that a national of a third State might be appointed without the consent of the receiving State, which would be contrary to the principle that a document of this kind is intended to establish. 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 only in exceptional cases.

Article 8

"The head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented a true copy of his credentials to the Ministry of Foreign Affairs of the receiving State.

"(*Alternative:* When he has presented his letters of credence)."

The Government of Chile is in agreement with the practical considerations given in the Commission's commentary on article 8. It deems it sufficient that the head of the mission has arrived and that a true copy of his credentials has been remitted to the Ministry of Foreign Affairs of the receiving State, there being no need to await the presentation of the letters of credence to the Head of State.

Experience has shown that a recently appointed head of mission may find himself obliged to act immediately without awaiting the presentation of his letters of credence to the Head of State. Since the times of notification of arrival and presentation of the true copy of the credentials do not always coincide, account need only be taken of such presentation.

For these reasons, the Government of Chile considers that article 8 is a great improvement, but that the points mentioned above need clarification and the proposed alternative should consequently be rejected.

Article 9

"1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, the affairs of the mission shall be handled by a *chargé d'affaires ad interim*, whose name shall be notified to the Government of the receiving State.

"2. In the absence of notification, the member of the mission placed immediately under the head of the mission on the mission's diplomatic list shall be presumed to be in charge."

The Government of Chile has certain observations to make concerning the drafting of paragraph 1 of this article. It considers that the scope of this provision is somewhat restricted and that it would be advisable to specify in greater detail the type of situation that might arise from the head of the mission being unable to perform his functions, although still in the country, as in the case of leave away from the capital or sickness. Clearly it is not possible to appoint a *chargé d'affaires ad interim* if the head of mission merely leaves the capital, but such an appointment would be in order if he left the country.

On the other hand, it is not specified who should notify the name of the *chargé d'affaires ad interim* nor what procedure should be followed in case of the death of the head of the mission. In that case the *chargé d'affaires ad interim* might himself notify the fact that he has assumed the charge of the mission.

For the reasons given above, it would be preferable to delete the qualifying phrase *ad interim*.

Article 10

"Heads of missions are divided into three classes, namely:

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

"(*b*) That of envoys, ministers and other persons accredited to heads of State;

"(*c*) That of *chargés d'affaires* accredited to Ministers of Foreign Affairs."

In sub-paragraph (*c*), article 10 refers to *chargés d'affaires* or officers in that category accredited to Ministers of Foreign Affairs. In practice this category, however, seems to have disappeared since at present there are only embassies and legations, and existence of a *chargé d'affaires* presupposes the subsequent appointment of an ambassador. This does not imply that he is not the head of a mission and therefore the classification in the draft is acceptable.

Article 15

"The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission or ensure adequate accommodation in some other way."

The text of this article is designed to cover countries whose internal legislation does not allow foreign diplomatic missions to acquire premises for the conduct of their business. The text provides that in such cases the State shall be obliged to "ensure" adequate accommodation for the mission.

In the opinion of the Government of Chile, there seems no justification for obliging a receiving State, merely because foreign missions may not acquire property in the country, to "ensure adequate accommodation in some other way". In fact, missions may obtain accommodation under lease, without having to wait for the State to take the action provided for in the article.

The text might, perhaps, be improved if the alternative suggestions were drafted in the same terms as the first; that is if, instead of reading "or ensure adequate accommodation in some other way", it were to read "or permit adequate accommodation in some other way".

Article 17

"The sending State and the head of the mission shall be exempt from all national or local dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for services actually rendered."

The exemption of diplomatic missions from taxes, where the premises occupied by them are leased only, does not apply in Chile since under our system of taxation the tax on leased property is paid not by the tenant but by the owner.

From a logical standpoint the inclusion of this exemption would be feasible and useful provided that its application was limited to countries in which a tenant is subject to a direct tax.

Article 21

". . .

"4. 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."

The Government of Chile has no observations to make concerning the drafting of this paragraph, but is of the opinion that 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.

A provision of this kind would extend protection to the person responsible for carrying the official documents of States which do not employ diplomatic couriers.

Article 22

"1. The person of a diplomatic agent shall be inviolable. He shall not be liable to arrest or detention, whether administrative or judicial. The receiving State shall treat him with due respect and take all reasonable steps to prevent any attack on his person, freedom or dignity.

"2. For the purposes of the present draft articles, the term 'diplomatic agent' shall denote the head of the mission and the members of the diplomatic staff of the mission."

The Government of Chile has no observations to make in respect of paragraph 1 of this article. However, it considers that 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 that would retain the term "diplomatic agent" for heads of mission and use another term to describe the rest of the staff.

Here, consideration might be given to the wording used in the Havana Convention, mentioned earlier, which, under article 14 (*a*), extends inviolability "to all classes of diplomatic officers".

Article 24

"A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction save in the case of:

". . .

"(*c*) An action relating to a professional or commercial activity exercised by the diplomatic agent in the receiving State and outside his official functions."

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

Article 25

"1. The immunity of diplomatic agents from jurisdiction may be waived by the sending State.

"2. In criminal proceedings, waiver must always be effected expressly by the Government of the sending State.

"3. In civil proceedings, waiver may be express or implied. An implied waiver is presumed to have occurred if a diplomatic agent appears as defendant without claiming any immunity. The initiation of proceedings by a diplomatic agent shall preclude him from invoking immunity of jurisdiction in respect of counter-claims directly connected with the principal claim.

"4. Waiver of immunity of jurisdiction in respect of civil proceedings shall not be held to imply waiver of immunity regarding measures of execution of the judgement, which must be separately made."

The Government of Chile considers it unnecessary to make a separate waiver of immunity regarding measures of execution of the judgement, as provided in paragraph 4. Where immunity has been waived for reasons that must have been carefully weighed by those entitled to it, the waiver should be complete, in order to ensure respect for the enforcement of judgements. Refusal to waive immunity in the final instance, when judgement is about to be enforced, would render the earlier waiver meaningless.

Article 26:

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

". . .

"(*d*) Dues and taxes on income which has its source in the receiving State;

"(*e*) Charges levied for specific services rendered."

The first paragraph of the proposed article 26 states that a diplomatic agent shall be exempt from "taxes, personal or real, national or local". Sub-paragraph (*e*) of the same article states that diplomatic agents must pay "charges levied for specific services rendered".

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 term "personal dues" used in the first paragraph of article 26 of the draft, has no meaning under our system of taxation; it would thus be impossible to indicate which are the personal dues from which diplomatic agents are exempt, and in what way they differ from the charges referred to in sub-paragraph (*c*), from which those officials are not exempt.

Furthermore, the Government of Chile considers that sub-paragraph (*e*) of article 26 should be deleted for the reasons given in connexion with article 24.

The exceptions should include taxes designed to remunerate specific services and also contributions under social welfare legislation in respect of domestic staff recruited locally.

Article 27

"1. Customs duties shall not be levied on:

"(*a*) Articles for the use of a diplomatic mission;

"(*b*) Articles for the personal use of a diplomatic agent or members of his family belonging to his household, including articles intended for his establishment.

"2. The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are very serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1, or articles the import or export of which is prohibited by the law of the receiving State. Such inspection shall be conducted only in the presence of the diplomatic agent or in the presence of his authorized representative."

With regard to the provisions of article 27, Chilean legislation lays down certain restrictions in matters relating to customs. 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.

Article 28

"1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective household, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27."

In this article as drafted 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.

Article 35

"The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities to leave at the earliest possible moment and, particularly, must place at their disposal the necessary means of transport for themselves and their property."

Lastly, the Government of Chile considers that the present drafting of this article might give reason to believe that the receiving State is under an obligation in all cases to arrange for the departure of diplomatic agents; in practice at present this is done only exceptionally.

In bringing the foregoing observations to your attention, I should be glad if you would kindly forward them to the International Law Commission and, at the same time, convey the congratulations of the Chilean Government for its commendable achievement in drafting the articles under consideration.

. . .

6. China

Transmitted by a letter date 29 April 1958 from the Ministry for Foreign Affairs of China

[*Original: English*]

Article 5

It is stated in commentary (6) under article 6 that the appointment as a member of the diplomatic staff of a person who is the national of both the sending and the receiving States also requires the express consent of the receiving State. The Government of China does not share this view. It seems to be legally unsound and arbitrary that the appointment of a person having the nationality of both States be put on the same footing as that of a person who is a national of the receiving State only, and politically unwise because such a practice would lead to controversy on the conflict of their respective laws of nationality and thus disturb the harmony between the two States. The Chinese Government is of the opinion that in case of a person having dual nationality no consent of the receiving State should be required for his appointment, although his acceptance of the diplomatic post of the sending State could jeopardize his status of nationality with respect to the receiving State. It is therefore suggested that a second paragraph be added to article 5, which reads:

"The preceding paragraph may not apply in cases where the person concerned is a national of both the sending State and the receiving State. The receiving State shall not declare him as *persona non grata* by reason of his dual nationality."

Article 8

Concerning the time of commencement of the functions of the head of the mission, the alternative presented in the Commission's draft is preferred. However, in case of a delayed official reception by the Head of the State, the head of the mission should be permitted to request the Minister for Foreign Affairs of the receiving State to arrange for an earlier commencement of his diplomatic activities if he so wishes.

Article 9

The second paragraph of the article seems to serve no useful purpose. If the post of the head of the mission is vacant or if he is unable to perform his functions, there is no question that the sending State would designate a *chargé d'affaires ad interim* inasmuch as it intends to maintain an effective and orderly representation. Failure on the part of the sending State to do so may just be presumed that no one is in charge of the mission. The question of who is to notify the receiving State of the name of the *chargé d'affaires ad interim* may be left entirely to the sending State.

Article 22

As mentioned in the commentary under the article, the principle of personal inviolability does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences. It may be desirable to have these exceptions to the principle of personal inviolability incorporated into the body of the article.

Article 24

The Government of China would suggest the deletion of paragraph 4 of the article. The jurisdiction of the sending State over its diplomatic agents shall be such as is prescribed by the law of that State, and may not necessarily be a subject to be covered in the articles concerning diplomatic immunity, which, in the opinion of the Chinese Government, is to deal solely with the immunities enjoyed by the diplomatic agents in the receiving State and, in certain circumstances, in a third State. Any rigid rule concerning this subject is not only considered undesirable but might also prove to be incompatible with the very purpose of the long-established practice of diplomatic immunity.

Article 28

The Government of China doubts the advisability and the necessity of adopting rules that would grant the administrative and technical staff of a mission, and members of their families, the same privileges and immunities as the members of the diplomatic staff of a mission. As a general rule, it should be sufficient that they shall enjoy immunity in respect of the acts performed in their official capacity and be exempted from dues and taxes on the emoluments they receive by reason of their employment, if they are not nationals of the receiving State. States who find it fit to grant them full diplomatic privileges and immunities may of course do so at their own will or by bilateral agreements.

It is also suggested that a definition of the term "members of family" may be useful to avoid abuse and controversy.

7. Czechoslovakia

Transmitted by a letter dated 10 March 1958 from the Permanent Representative of Czechoslovakia to the United Nations

[*Original: English*]

. . .

(1) The Czechoslovak Government considers it desirable that section I of the draft should express the principle that all States enjoy law of legation.

(2) With a view to completeness, the Czechoslovak Government would recommend that the provisions on functions of a diplomatic mission (article 2 of the draft) be supplemented by a provision on activities serving the promotion of friendly relations among States and the development of their economic, cultural and scientific relations, and by a provision on consular activities in those cases where official consular relations are non-existent between States.

(3) The Czechoslovak Government holds that section I of the draft should also stipulate in the respective articles, besides the classes of heads of mission, also the rank and precedence of the other diplomatic staff of the mission and the right of individual diplomatic members of a mission to exercise diplomatic activities in accordance with the instructions of their Governments.

(4) 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 transportation used by him.

(5) With respect to section II of the draft, the Czechoslovak Government would note that the range of persons enjoying diplomatic privileges, as provided under draft article 28, is broader than that generally recognized by the regulations of international law, and the Czechoslovak Government therefore believes that the question of the accordance 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.

(6) The Czechoslovak Government considers that it would be useful if section II of the draft contained a provision to the effect that the inviolability of the premises of the mission, of the residence of the head of mission and of the other premises occupied by the personnel of the mission does not cover the right to asylum, if there is no special agreement to that effect.

8. Denmark

Transmitted by a letter received on 5 March 1958 from the Deputy Permanent Representative of Denmark to the United Nations

[*Original: English*]

[*Note:* The letter states that the Ministry for Foreign Affairs is in agreement with the articles other than those commented on below.]

Article 8

The Danish Government consider that 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. The remittance to the Ministry for Foreign Affairs of a true copy of his credentials should therefore be sufficient.

Article 9

The attention is drawn to the fact that in cases where no diplomatic member of a 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.

Article 15

The Danish Government suggest to insert the words "on a non-discriminatory basis" after the words "the receiving State shall".

Article 35

It is suggested to add 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 acquired in the country and the export of which is prohibited at the time of departure".

9. Finland

Transmitted by a note verbale *dated 18 April 1958 from the Permanent Representative of Finland to the United Nations*

[*Original: English*]

The draft articles prepared by the International Law Commission seem on the whole to be acceptable and to correspond to international practice.

In *article 2* concerning the functions of a diplomatic mission the word "all" could be deleted from paragraph (*d*), since the diplomatic mission will of course make its own choice of the lawful means by which it will ascertain conditions and developments in the receiving State.

Article 3 of the draft provides that an *agrément* be obtained for all heads of mission from the receiving State prior to their nomination. This has, however, been applied in practice only in regard to ambassadors and ministers. It would appear that as far as *chargé d'affaires* are concerned a freer procedure should be maintained.

In *article 8* both alternatives mentioned have their advantages. In Finland the commencement of official functions of the head of a mission is considered to occur when he has presented his letters of credence, which is a clearly defined and indisputable moment.

It ought to be considered—as has already been done by the Commission—whether the classes of heads of mission mentioned in *article 10, paragraphs* (a) *and* (b), as accredited to heads of States should be combined, as to constitute in future a uniform class of representatives of the same rank, i.e., ambassadors (and nuncios). After the Second World War there has been an increasing tendency towards the accrediting of ambassadors in place of envoys and ministers.

In *article 16, paragraphs 1 and 3,* of the draft similar questions are dealt with to some extent. Paragraph 3 appears somewhat superfluous, since it has been stipulated in paragraph 1 that the premises occupied by the mission shall be inviolable and that agents of the receiving State shall not enter these premises without the consent of the head of the mission. It is difficult to understand how any search as prohibited in paragraph 3, or any measures of attachment or enforcement could be performed. The latter paragraph should in fact be interpreted as a modification of the preceding paragraph in certain individual cases, but the intention may have been to refer here to certain known events. In any event, it would be desirable to re-formulate article 16 in such a way that its paragraphs 1 and 3 were more closely connected.

In *article 21, paragraphs 2 and 3* should perhaps be amalgamated, preferably in such a manner as to determine the permissible contents of the diplomatic bag and to add the remark that it (as such) is protected. Paragraph 4 of article 21 stipulates that the diplomatic courier shall enjoy personal inviolability, and that he may not be subjected to arrest or detention. It should of course be considered of the utmost importance that diplomatic mail and other official parcels may, by using a diplomatic courier, be forwarded to destination with promptness and reliability. But if such a courier makes himself guilty of a felony during his journey or becomes dangerous to those in his vicinity, it seems natural that in the former instance he might be detained for a short period for interrogation and, in the second, that persons necessary to guard him should be appointed for as long as he is within the boundaries of the State in question, without in any way interfering with the diplomatic bag in such instances. This could be mentioned at least as a suggestion in the commentary to the article under discussion, even if it bears on exceptional cases which are not as a rule discussed in drafts of codification.

Article 24, paragraph 4: Whether the diplomatic agent is, and to what extent, under the jurisdiction of the sending State, whose national he is as a rule, is above all an internal problem of this State, which is decided in accordance with the rules of international law pertaining to the individual as applied by the State in question. The criminal law of numerous States does not provide for crimes committed abroad—or does so only to a limited extent in exceptional cases, nor are the courts always competent to hear even civil disputes which are the consequence of juridical acts performed abroad. It seems difficult to force States to modify their laws, even where diplomatic agents are concerned, and it emerges from the commentary to the draft under discussion, as well as from the International Law Commission's records of discussion, that this is by no means the intention. The significance of the paragraph will therefore remain limited in any event. It would not seem desirable that the last clause goes so far as to mention what courts shall be competent to deal with the matters in question, if they are not designated under the laws of that State.

Article 28, paragraph 1, shows that members of the family of a diplomatic agent cannot demand for themselves any diplomatic privileges and immunities if they are nationals of the receiving State. To deprive them of all privileges on this basis does, however, seem unreasonable, especially when the wife of the diplomatic agent is in question. It would not seem recommendable that the administrative and technical staff of a mission lose all privileges and immunities on the same basis, while the domestic staff of the mission, in accordance with paragraph 2 of the article, are allowed certain minimum rights irrespective of their nationality. Paragraphs 3 and 4 of the same article, concerning the legal status of personal servants of diplomatic agents, and particularly their exemption from taxes, should be amalgamated, in the same way as in paragraph 2 of the article, where problems associated with the legal position of the whole domestic staff of the mission are treated.

According to *article 29* of the draft, nationality laws of the receiving State should not be applied to persons enjoying diplomatic privileges and immunities, except for the children of nationals of the receiving State. This exception, at least in such categorical form, seems doubtful. The general rule is that children of diplomatic agents who are born in countries adhering to the *jus soli* principle, do not acquire the nationality of the State in question. If the spouse of a diplomatic agent—usually a woman—is a national of the receiving country, and the diplomatic agent himself belongs to a country in which

jus sanguinis rules are applied, an application of the *jus soli* rule would result in obvious unfairness.

In *paragraph 5* of the commentary on *article 30* it is stated that the article concerning immunity from jurisdiction of a diplomatic agent who is a national of the receiving State indirectly implies that members of the domestic staff of a mission, who are nationals of the receiving State, should also be allowed no privileges or immunities other than those granted to them by the receiving State. This stipulation is, however, at variance with article 28, paragraph 2, of the draft, which states that such persons should in any event be granted such immunity as is necessary in respect of acts performed in the course of their duties. Nationals of the receiving State lose exemption from taxes only in respect of emoluments received from the mission.

It emerges from the commentary to *article 31* that the time confirmed by paragraph 1 of this article from which diplomatic privileges and immunities are considered to have commenced is not always applicable to persons who derive their entitlement from persons entitled to privileges and immunities in their own right. Because of this the said paragraph is in need of more precise formulation. Paragraph 3 of article 31 prohibits the withdrawal from the receiving State of movable property in the event of the death of a diplomatic agent or of a member of his family, if such property has been acquired in the receiving State and if its export was prohibited at the time of death. Such a strict provision appears unreasonable, particularly if no export prohibition had existed at the time when the property was acquired.

Article 36, paragraph (c). Since it is the general international custom to apply for the agreement of the receiving State before a third State can undertake these functions and proceed to fulfil them, it would be preferable to use in the text the clear and accurate formula *accepté par* (and not *acceptable pour),* as has been suggested by the International Law Commission. A corresponding modification should perhaps be made also in paragraph (*b*) of article 36.

10. Italy

Transmitted by a letter dated 18 April 1958 from the Permanent Delegation of Italy to the United Nations

[*Original: French*]

The Italian Government states that it is, in general, in agreement with the draft articles concerning diplomatic intercourse and immunities, prepared by the International Law Commission during its ninth session from 23 April to 28 June 1957, and has the honour to submit the following observations and proposals:

Article 4

This article should, it is proposed, be amended to read:

"Subject to the provisions of articles 5, 6 and 7, the sending State may freely appoint the other members of the staff of the mission; before sending them to the territory of the receiving State, however, it shall notify the latter of the appointment. The receiving State may take cognizance of the appointment either expressly or tacitly."

Article 6

It is proposed that the last part of paragraph 2 be amended to read:

". . . the receiving State may refuse to recognize the person concerned as a member of the mission and may make an expulsion order against him."

Article 8

The alternative given in the draft is considered preferable: "when he has presented his letters of credence".

Article 10

The term "internuncios" should be added under (*b*).

Article 12

It is proposed that in paragraph 1 the following phrase should be omitted: "either of the official notification of their arrival or".

It is considered desirable that an *article 12A* should be inserted in these terms:

"The heads of mission accredited to the same State form the diplomatic corps.

"The diplomatic corps performs the functions which it is recognized to possess by international usage, and it is represented for all purposes by its doyen.

"The doyen is the senior head of mission or, in countries in which precedence is granted to the Holy See, the Apostolic Nuncio."

Article 15

It is proposed that this article should be amended to read:

"The receiving State shall permit the sending State to acquire on its territory the premises necessary for its mission. In any case, if the sending State should not wish or should be unable to exercise this right, the receiving State shall ensure adequate accommodation for the mission in some other way."

Article 17

This article should, it is proposed, be amended to read:

"No national or local dues or taxes shall be levied in respect of the premises of the mission other than such as represent payment for services actually rendered."

Article 18

It is proposed that this article should be amended to read:

"The archives and documents of the mission shall be inviolable, wheresoever they may be."

Article 21

Paragraph 2 should contain a definition of the diplomatic bag, especially since the definition contained in the commentary is not satisfactory, for it does not make any reference to seals or to the external identification marks which the bag should always bear.

It should also be provided that the sending State is under a duty to communicate to the receiving State an advance description of its diplomatic bags, and to address the bags invariably to the head of mission in person.

Article 24

It is proposed that paragraph 2 be amended to read:

"A diplomatic agent is not obliged to give evidence concerning questions which are in any manner whatsoever connected with his duties. In other cases, he may not be summoned to appear before the judicial authority. If it should be necessary for the local judicial authority to take a deposition from the diplomatic agent, the said authority shall proceed to his residence in order to receive his statement orally, or the said authority shall delegate a competent official for this purpose, or else shall request the agent to make the statement in writing."

Article 25

It is proposed that paragraph 1 be amplified by the addition of the following:

"The head of mission may waive the immunity of members of his staff from jurisdiction on his own authority."

Article 26

Sub-paragraph (*a*) should, it is proposed, be amended to read:

"Dues and taxes levied in payment of services actually rendered."

Article 27

The following should be added at the end of paragraph 1:

"The receiving State may nevertheless place reasonable restrictions on the number of articles imported for the uses specified in (*a*) and (*b*)."

Article 28

The extension of diplomatic privileges and immunities to cover members of the administrative and technical staff of the mission or to members of a diplomatic agent's family conflicts with international usage and is entirely unacceptable to the Italian Government. The privileges and immunities in question

should be restricted to the officials whose names appear in the diplomatic lists.

Article 30

This article should, it is proposed, be amended to read:

"A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction and any other privilege or immunity which is strictly related to the exercise of his functions. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State."

Article 31

Paragraph 1 should, it is proposed, be amended to read:

"A diplomatic agent shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State on proceeding to take up his post, provided that the formality of *agrément* referred to in article 3 or that of notification referred to in article 4 [Italian Government's text] has been satisfied. If he is already in the territory of the receiving State, he shall enjoy the said privileges and immunities on the satisfaction of the aforesaid formalities."

Article 33

It is proposed that paragraph 1 be amended to read:

"Without prejudice to their diplomatic privileges or immunities it is the duty of all diplomatic agents to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

"The members of the administrative or technical staff of the mission shall be bound by the same duties."

Article 36

It is proposed that sub-paragraph (*c*) should be amended to read:

"The sending State may entrust the protection of the interests of its country to the mission of a third State acceptable to the receiving State."

11. Japan

Transmitted by a note verbale *dated 6 February 1958 from the Permanent Representative of Japan to the United Nations*

[*Original: English*]

I. *General*

The Government of Japan are deeply appreciative of the contribution made by the International Law Commission in drawing up the draft articles concerning diplomatic intercourse and immunities. The Japanese Government, considering that the present subject constitutes an important field of the international law to be codified, are ready to co-operate in every possible way to promote its codification now being carried on by the United Nations. It is sincerely hoped that the International Law Commission will at its tenth session examine especially the points mentioned below, and will continue to exert still further efforts with the view to concluding a multilateral treaty on the subject.

II. *Article by article comments*

Section I. Diplomatic intercourse in general

1. *Articles 1-6*

The classification of the members of a diplomatic mission into several distinct categories is an extremely important point of the whole system proposed by the present draft articles, in so far as different privileges and immunities are accorded according to this classification (see article 28).

Hence 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 the articles themselves.

(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. For example, under the present draft articles, it is natural to assume that, as distinguished from diplomatic agents, those who perform low-grade duties, such as janitors and chauffeurs, belong the "service staff". However, under the Japanese laws all such persons are given the uniform status of regular public service or full-time government official. Therefore the status under national laws alone cannot always provide adequately the basis for classification of the members of the diplomatic, administrative and technical staffs and the members of the service staff.)

2. *Article 7*

It is hoped that a statement will be inserted in the commentary to this article that it would be desirable to make the size of the missions exchanged correspond in principle to each other.

3. *Article 8*

The alternative that "when he has presented his letters of credence" is more desirable.

Section II. Diplomatic privileges and immunities

4. *Articles 15 and 16*

It is desirable that the meaning and scope of "mission premises" be clarified.

(The term "premises" could be interpreted as either (*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 a mission) owned or leased for diplomatic purposes by a sending State; or (*c*) all accommodations used for diplomatic purposes (including private dwellings of diplomatic agents).)

5. *Article 16*

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

6. *Article 17*

Whatever the meaning of "mission premises" may be (see comment 4 above), article 17 might be interpreted to mean that the mission premises are exempt from indirect taxes from which the diplomatic agents are not exempt by virtue of article 26. (For example, it would hardly be proper to interpret this article so as to exempt diplomatic agents from taxes on electricity and gas used in their chancellery while they are not exempt from such taxes on gas and electricity used in their private dwellings.)

Under the Convention on Privileges and Immunities of the United Nations, the United Nations, its assets, income and other property enjoy exemption only from all direct taxes.

7. *Article 21*

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

(*b*) In view of the present situation of the frequency assignment, it is difficult to approve the use of wireless transmitter by a diplomatic mission every case.

(*c*) In paragraph 4 of the commentary, there is a statement concerning the captain of a commercial aircraft to whom the diplomatic bag is entrusted. Such persons should not be treated as diplomatic couriers in every case.

8. *Article 23*

(*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 the first paragraph of this article 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.

9. *Article 24*

(*a*) It is desirable that this article be interpreted to provide that immovable property held by a diplomatic agent in his private capacity under article 24, paragraph 1, sub-paragraph (*a*), does not include his own dwelling held in his private capacity. (This subject is connected with article 23.)

(*b*) It is desirable that the term "execution" used in this article be interpreted to include both administrative (against a delinquent taxpayer, for example), as well as judicial executions. These measures, of course, can only be taken without infringing the principle of inviolability of diplomatic agent's person and his residence.

10. *Article 26*

(*a*) Clarification of the meaning of "indirect taxes" is desirable.

(*b*) Clarification of the meaning of "source" is desirable.

11. *Article 27*

(*a*) Clarification of the meaning of "customs duties" is desirable.

(*b*) Clarification of the meaning of "personal baggage" is desirable.

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

(*d*) It is 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 resale of these articles to persons not entitled to diplomatic immunities.

12. *Article 28*

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

13. *Supplementary remark*

It is hoped that provisions will also be made in the course of the Commission's next session concerning the delivery of diplomatic passports and the granting of diplomatic visas. Such passports and visas provide practically the sole basis for granting privileges and immunities at the custom upon entering or leaving a country. This point concerns not only the normal diplomatic personnel treated in the present draft articles, but also the officials of a Foreign Office on an official mission and the official delegates to international conferences.

12. Jordan

Transmitted by a letter dated 24 September 1957 from the Permanent Representative of Jordan to the United Nations

[*Original: English*]

. . .

I am directed by my Government to inform you that my Government considers the provisions of the draft articles as covering the requirements.

. . .

13. Luxembourg

Transmitted by a note verbale *of 7 February 1958 from the President of the Government and Minister for Foreign Affairs of Luxembourg*

[*Original: French*]

On the whole, the Luxembourg Government can fully approve the draft articles prepared by the International Law Commission. It considers that the Commission's work is a distinguished contribution to the unification and development of international law in a sphere which is of great practical importance to Governments.

The following remarks apply only to a few points of details and to certain choices which had been left open in the Commission's text. The Luxembourg Government would also like to raise a preliminary question of more general scope as well as a further question dealing with social legislation.

Preliminary question

In drawing up the articles of the draft, the International Law Commission dispensed with any kind of general principle in order that it might devote itself to reaching a positive solution to the main questions of a concrete nature which arise in connexion with diplomatic relations. This method is entirely commendable since to lay down principles which are unduly general could lead to considerable difficulties. Nevertheless, it would seem essential to indicate clearly (e.g. in the preamble to the convention which would 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 legal and administrative practices of States in cases where the rules finally adopted in the convention did not offer a positive solution.

For instance, the draft articles include no general rule concerning the domicile of the diplomatic agent. Is this domicile fixed at his place of actual residence or does it continue to be legally fixed in his country of origin? The question is important because domicile constitutes the criterion of permanent abode for the application of a large number of rules of law, with respect not only to jurisdictions (article 26 of the draft) or to the acquisition of nationality (article 29), but also to the application of civil law and, especially, to judgement of the validity of civil documents which the diplomatic agent may have to draw up at his place of residence. This example shows that, although the draft settles a large number of practical matters, it is still not completely exhaustive and room must be left for supplementary solutions.

Article 2

Sub-paragraph (*a*) of this article states that the functions of a diplomatic mission consist in "representing the Government of the sending State in the receiving State". This formula raises an important question of principle. The function of a diplomatic mission consists not only in representing the Government of the sending State, i.e., the executive branch, but also the State as a whole. It is precisely this notion which is expressed in the traditional formula that diplomatic agents represent the Heads of States, it being understood that the person of the Head of State, which is generally above the divisions between the organs of power, represents the unity of the State as a whole.

It would therefore be more correct to say that the functions of a diplomatic mission consist in "representing the sending State in the receiving State".

Article 8

As regards the commencement of the functions of the head of the mission, the International Law Commission mentions an alternative course. The Government of Luxembourg prefers the solution proposed by the Commission itself, considering it to be the most practical one. It considers that the head of the mission should be able to take up his functions when he has presented a copy of his credentials to the Ministry for Foreign Affairs.

Article 12

The Government of Luxembourg has no preference as between the two methods mentioned in paragraph 1 of this article for determining precedence of heads of missions. Either alternative would appear to be acceptable, yet it believes that the solution proposed in article 8 (commencement of the mission) should be made to coincide with the criterion selected in article 12 (precedence of heads of mission).

Article 16

The Luxembourg Government considers that the matter discussed in paragraph 4 of the commentary (carrying out 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, it would not seem possible, in the event of litigation, to win acceptance for the considerations set forth in the commentary over the explicit text of the convention.

Article 17

The application of this article might give rise to disagreements, since 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 apparently considered in some countries as services which give rise to remuneration, whereas in other countries these measures are public services covered by the general tax. In such cases, therefore, it would seem that the criterion for making a distinction must be the specific nature of the services and not that of services "actually rendered", since any public service is actually rendered. This is in fact the criterion which the Commission has selected elsewhere, i.e., in article 26 (*e*), which is concerned with "charges levied for specific services rendered". The same formula should be adopted in article 17.

Article 24

Paragraph 1 of this article makes a distinction between immunity from criminal, civil and administrative jurisdiction. This enumeration not only appears to be superfluous, but also carries with it the danger of a restrictive interpretation. In some countries there are still other types of jurisdiction besides the three forms listed above, including commercial courts, labour jurisdictions and social security jurisdictions, which are neither civil nor administrative. It would therefore be more advantageous 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*). It should be specified in (*b*), which deals with actions relating to successions, that the succession must be one which is opened in the receiving country, in order to prevent the possibility of the diplomatic agent being sued in that country, by reason of his residence, in connexion with a succession opened in his country of origin or in another country.

Paragraph 4 states that the immunity from jurisdiction enjoyed by the diplomatic agent in the receiving State does not exempt him from the jurisdiction of his own country. In order that this provision may be applied, it is necessary, however, that a court of the country of origin should be competent under its laws. Therefore, if under the legislation of that country the court of the country of residence was competent, the parties concerned would not be able to bring any jurisdiction into operation, since in the receiving country they would be faced by the diplomatic immunity of the defendant and in the sending country there would be no jurisdiction competent to settle the dispute. In order to fill this gap, which is detrimental to the interests of third parties, it would seem desirable to include a provision assigning competence in such a case to the courts of the sending State, notwithstanding any provision to the contrary in the laws of that State.

On the other hand, 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 or a Government from being able to invoke immunity from jurisdiction as grounds for refusing even to engage in discussions with the receiving Government concerning the possibilities of an amicable arrangement.

In view of these considerations, the Luxembourg Government proposes that the last part of this article should be reworded as follows:

"4. If, under the provisions of the internal law of the sending State, the diplomatic agent is subject to the jurisdiction 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.

"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."

Article 25

Application of this article could give rise to practical difficulties, since it is not very clear in each case who has the right to waive immunity and who may validly notify the waiver to the jurisdictions. 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 therefore 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.

Accordingly, the Luxembourg Government proposes that article 25 should be drafted as follows:

First, the general principle should be laid down that immunity may be waived by the sending State. This principle should be accompanied by a statement that the diplomatic agent is presumed to be qualified to notify such waiver. Secondly, it should be required that the waiver be expressed in the case of penal proceedings, whereas it may be implicit in all other proceedings.

If the Commission 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.

It should also be pointed out that the distinction drawn between criminal jurisdiction (paragraph 2) and civil jurisdiction (paragraph 3) is not exhaustive, since there are still other types of jurisdiction, as mentioned above in connexion with article 24. A general residual category must therefore be opposed to the category covered by paragraph 2 (penal jurisdiction).

In accordance with these comments, the Luxembourg Government is pleased to submit the following to the Commission:

"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, the 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).

Article 26

This article, which deals with exemption from taxation, calls for a number of comments.

(*a*) *Indirect taxes.* The Government of Luxembourg considers that the exemption from indirect taxes, including excise duties, should be granted as a matter of principle, but subject to a limitation: it does not appear feasible to grant a reimbursement in respect of duties incorporated in the price of

goods if such goods are circulating freely at the time of purchase.

(*b*) *Taxes on immovable property.* The Luxembourg Government approves the solution proposed by the Commission, except that the words "and not on behalf of his Government for the purposes of the mission" seem to be superfluous.

(*c*) *Estate, succession or inheritance duties.* 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 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.

(*d*) This 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 of funds invested by the diplomatic agent in the receiving country.

(*e*) This provision can be approved.

In consequence of these comments, the Government of Luxembourg proposes that the text of article 26 should be amended as follows:

"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 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 by the members of his family who live with him."

Article 28

The provisions of this article appear to be fully acceptable. Paragraph 2, however, 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 this matter, it would like a clear decision in the commentary.

Article 30

The Government of Luxembourg believes that the effect of the second sentence might be to give rise to unjustified claims against Governments which did not desire to grant to their own nationals who have been appointed diplomatic agents by third States any privileges other than immunity from jurisdiction for acts performed in the exercise of their functions. The Luxembourg Government therefore believes that this sentence should simply be deleted. Deletion would in no way affect the possibility of granting further privileges by unilateral decision of a State which desired to grant them.

Article 33

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

Further question: application of social legislation

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 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.

"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."

14. Netherlands

Transmitted by a letter dated 26 March 1958 from the Permanent Representative of the Netherlands to the United Nations

[*Original: English*]

Introduction

The Netherlands Government has studied with interest the draft articles formulated by the International Law Commission under the title of "Draft articles concerning diplomatic intercourse and immunities". It agrees with the Commission that the subject of diplomatic intercourse and immunities constitutes a suitable topic for codification. It is of the opinion that the Commission's draft articles form an excellent basis for such codification.

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 *jus 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.

I. *General observations*

1. *Application of the articles in time of war*

The Netherlands 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 paragraph 2 of article 31 and of article 35, govern the transition from peacetime to wartime conditions. The Netherlands Government will enter more deeply into this matter in its comments on article 36. It is of the opinion that the relations between belligerents are governed by the law of war but that the draft articles continue to apply to the relations between belligerent and neutral States and between neutral States themselves. The Netherlands Government thinks that it is advisable that a paragraph dealing with this problem should be inserted in the commentaries to the articles.

2. *Reciprocity*

The Netherlands Government is of the opinion that, although it will not be possible to adhere to the principle of reciprocity in its strictest sense when rules are laid down governing diplomatic relations, 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.

3. *Reprisals*

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

4. *Emergency law*

The Netherlands Government is of the opinion that the privileges and immunities that have been granted to the diplomatic missions and their staffs do not preclude the taking of special measures by the receiving State in emergencies. In such cases the receiving State will be able successfully to invoke *force majeure* against the sending State. Such cases may occur in particular in connexion with the application of articles 16 and 22, so that it is advisable to insert an observation to this effect in the commentaries to these articles.

5. *Relationship between the convention and the commentaries thereto*

In spite of the great authority that may be attached to the commentaries which the Commission has submitted with its draft articles, these commentaries have no force of law. The Netherlands Government is therefore of the opinion that the principles mentioned in the commentaries which should be accorded force of law should be embodied in the articles themselves, and would therefore suggest that the Commission review its text in this respect.

6. *Definitions*

The Netherlands Government is of the opinion that it is to be recommended to have the draft articles preceded by an article containing definitions, running as follows:

"Articles containing 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."

If this article should be adopted, the word "other" before "members" in article 4 could be deleted, in article 5 the term "diplomatic agent" could be used and paragraph 2 of article 22 could be cancelled.

7. *Terminology*

The Commission has not always been consistent in the terminology used. For instance, the terms "member of the mission" and "member of the staff of the mission" are sometimes interchanged. In the title and in article 32 the term "immunities" is used whereas elsewhere the expression "privileges and immunities" is used. In the articles the expressions "immunity from jurisdiction" and "exemption from taxation" are used, whereas in the commentary to article 24 reference is made to "exemption from jurisdiction". In the opinion of the Netherlands Government it would add considerably to the clarity of the draft if a uniform terminology were used both in the articles and in the commentaries.

II. *Comments on individual articles*

Article 2

In the commentary to this article attention should be paid to the position of a foreign trade representation. In the Netherlands 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.

Article 4

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 and of personnel, even in the case of local personnel. Such an obligation would be consistent with the practice existing in various countries. Therefore the Netherlands Government is of the opinion 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 for 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."

Article 7

The words "reasonable and customary" in paragraph 1 refer to two criteria that may come into conflict with each other. The criterion is not what is customary but what is reasonable, on the one hand in the light of the needs of the sending State, and on the other in the light of the conditions prevailing in the receiving State. Therefore the words "and customary" should be deleted.

In paragraph 2 the words "and on a non-discriminatory basis" should be deleted. In the Netherlands Government's view the principle of non-discrimination is a general principle on which the application of all the draft articles should be based. By

making it obligatory to observe the principle of non-discrimination in respect of certain individual cases, the impression might be created that this principle should apply only or in particular to these cases, which would be contrary to the general nature of this principle.

The Netherlands Government is further of the opinion that article 7 should be supplemented by adding the provision 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 followed in various countries.

Article 8

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 embodied in article 8 should be adopted.

Article 12

It is to be recommended to substitute the words "the rules prevailing" for the expression "the rules of the protocol" in paragraph 1, because these rules need not necessarily be confined to rules of protocol proper.

Article 14

There is a widely held view according to which an ambassador enjoys the 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.

Article 20

In the Netherlands Government's view the principle of freedom of movement should be given a more prominent place in the wording of this article, whilst the power to curtail this freedom should be kept within very narrow limits. Furthermore, the final sentence of the commentary to article 20 should be incorporated in the article itself. Therefore the Netherlands Government proposes that article 20 be worded as follows:

"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 this indication be not so extensive as to render freedom of movement and travel illusory."

Article 21

The Netherlands Government suggests that the word "messages" in paragraph 1 be replaced by the more usual term "despatches" and that the principle that the diplomatic bag may not be opened be emphasized by combining paragraphs 2 and 3 into one paragraph reading as follows:

"The diplomatic bag, which may contain only diplomatic documents or articles intended for official use, may not be opened or detained."

In this connexion the Netherlands Government is of the opinion that it is desirable to define what is meant by "diplomatic documents" in the commentary to article 21. 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 under certain circumstances it may be the mission's duty to undertake the transmission of such documents in order to protect its nationals abroad.

The Netherlands Government is of the opinion that the second sentence of paragraph 4 allows of too extensive an application, because in its present wording it also accords inviolability during the entire journey and, under the provisions of article 32 also in third countries, to persons performing the function of a diplomatic courier in an additional function. In the Netherlands Government's view this inviolability should only be accorded to persons travelling exclusively as couriers and for a particular journey only. Therefore the second sentence should read as follows:

"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."

Comments on sub-sections A and B

The Netherlands Government draws attention to the fact that these sub-sections do not contain exhaustive regulations concerning all the subjects that should be included in them. There is, for instance, no express provision governing the exemption from taxation of the mission's activities. Neither can it be inferred from the draft articles that in case the receiving State should maintain different rates of exchange the foreign mission should be accorded the most favourable rate of exchange. These observations may induce the Commission to supplement its draft articles in this respect.

Article 23

In connexion with the relationship between paragraph 2 and paragraph 3 of article 24, paragraph 2 should read as follows:

"His papers and correspondence and, subject to the provisions of paragraph 3 of article 24, his property likewise, shall enjoy inviolability."

Article 24

In the opinion of the Netherlands Government sub-paragraph (*a*) of paragraph 1 is tautological, whilst it is believed that a "real action" in English law is not quite synonymous with an *action réelle* in continental law. This sub-paragraph should read as follows:

"(*a*) 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."

To make it quite clear that paragraph 2 does not exclude the diplomatic agent's obligation to give evidence in a law suit to which he himself is a party and in which he cannot claim immunity, 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 purpose of paragraph 4, *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. To realize this purpose the words "to which he shall remain subject in accordance with the law of that State", at the end of the first sentence, should be deleted.

Article 26

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

With regard to sub-paragraph (*c*), the Netherlands Government wishes to point out that, according to the laws of many countries, including the Netherlands, a diplomatic agent shall be deemed to remain domiciled in the sending State for the purpose of levying estate, succession, or inheritance duties. Therefore, provision should be made that the death of a diplomatic agent shall 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.

Article 27

The Netherlands Government wonders whether the Commission, in drafting sub-paragraph (*b*) of paragraph 1, only examined the traditional practice of States or also discussed the advisability, under present economic conditions, of 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.

The Netherlands Government objects to the provision contained in paragraph 2. The exemption from inspection of a diplomatic agent's personal baggage 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 paragraph 2 of article 21, 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."

Article 28

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. It is therefore suggested that this article be worded as follows:

"1. Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27.

"2. Members of the service staff of the mission shall, if they are not nationals of the receiving State, enjoy immunity in respect of acts performed in the course of their duties, and be exempt from dues and taxes on the emoluments they receive by reason of their employment.

"3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. Apart from that they 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."

Article 29

The purpose of the provision, *viz.* to prevent persons from being made 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. Therefore, the Netherlands Government suggests that this commentary be substituted for the text of the article.

Article 30

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—in the opinion of the Netherlands Government—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. Without this restriction these persons might not be subject to any jurisdiction at all.

In connexion with what has been set forth above, the Netherlands Government suggests that article 30 be worded as follows:

"1. A diplomatic agent who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of official acts performed in the exercise of his function. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State.

"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.

"3. A member of the family of one of the persons mentioned in paragraph 1 of article 28, 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."

Article 32

This article should be supplemented by a provision concerning the protection of the mission's communications across the territory of third States, which might read as follows:

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

Article 36

The principle that 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 paragraph 2 of article 31, 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, which will then apply.

In view of the above, 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 paragraph 2 of article 31.

"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 paragraph 2 of article 31 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 paragraph 2 of article 31, 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."

15. Pakistan

Transmitted by a letter dated 16 May 1958 from the Alternate Representative of Pakistan to the United Nations

[*Original: English*]

Article 8

Pakistan follows two different practices: (i) in respect of ambassadors, ministers, etc. and (ii) in respect of high commissioners. The former category of representatives is entitled to take up his functions when he has presented his letters of credence. The latter, who normally carried a letter of introduction to the Prime Minister, is entitled to take up his functions from the date of his arrival in Pakistan.. Any departure from the practice would be a matter of common concern to all the Commonwealth countries and the Government of Pakistan must

therefore for the present reserve its position in regard to this article.

Article 9

The Government of Pakistan considers that notification of the name of the *chargé d'affaires ad interim* who is to handle the affairs of the mission in the absence or incapacity of the head of the mission is necessary, and that paragraph 2 of this article should, therefore, be omitted.

Article 10

The Government of Pakistan recognizes a fourth class of heads of missions, namely, that of high commissioners, who normally carry letters of introduction to the Prime Minister. The Government of Pakistan considers that the article should be amended to include high commissioners.

Article 12

High commissioners take precedence in the class of ambassadors in the order of date of their arrival in Pakistan, whereas ambassadors take precedence in the order of date of the presentation of their letters of credence. Any change in this practice, as in the case of article 8, would be a matter of common concern to all Commonwealth countries and accordingly the Government of Pakistan must reserve its position on this article for the present.

Article 21

It is the understanding of the Government of Pakistan that the "appropriate means", mentioned in paragraph 1 of this article do not include messages by wireless transmitter.

Article 28

The non-diplomatic administrative and technical staff of a mission, mentioned in paragraph 1 of this article are, in Pakistan, exempt from levy of customs duties (article 27) only on their first arrival to take up appointment in Pakistan in respect of their pesonal effects on signing a declaration. The Government of Pakistan considers that the privileges and immunities extended to such staff by paragraph 1 of article 28 should be restricted to this extent.

16. Sweden

Transmitted by a letter dated 11 January 1958 from the Minister for Foreign Affairs of Sweden

[*Original: English*]

On most points, the Swedish Government can accept the draft articles proposed by the International Law Commission. They seem on the whole to correspond to internationally accepted practice.

On one principal point, however, the Swedish Government has observed with regret that the majority of the members of the International Law Commission have not followed the initial draft in the matter, prepared by the special rapporteur, Mr. A. E. F. Sandström. This point concerns the classification of heads of mission *(articles 10-13)*. The special rapporteur had suggested that classes of heads of mission be limited to two, that of ambassadors, accredited to Heads of States and that of *chargés d'affaires,* accredited to Ministers for Foreign Affairs (article 7 of the original draft). The majority of the Commission, however, decided to retain the classification laid down in the Vienna Regulation of 1815 concerning the rank of diplomats, with the change that the now obsolete rank of resident minister should be abolished. The main classes, those of ambassadors and envoys (ministers) have been retained. The Swedish Government wishes to stress that it prefers the original draft. There seem to be no valid reasons for maintaining today two separate categories of heads of mission, accredited to heads of State. Already when this question was raised within 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 their 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." In its commentary to articles 10-13 the Commission suggests (paragraph 4) that since the rate at which the tendency to give heads of mission the title of ambassador is now growing, this suggests that in time the problem will solve itself. The Swedish Government can agree with this statement, but considers it consequently most urgent that this development be taken into account when new rules concerning diplomatic intercourse between States are being created. The Swedish Government therefore suggests that paragraph (*b*) of article 10 be deleted.

The Swedish Government wishes to make the following additional observations.

Article 8

The practice in Sweden has been to consider that the functions of a head of mission commences when he has presented his letters of credence to the Head of State. The Swedish Government is willing to accept, however, the suggestion of the Commission that his functions may begin when he has presented a true copy of his credentials to the Ministry for Foreign Affairs. It would be preferable, however, that the wording of article 8 "and presented a true copy of his credentials to the Ministry for Foreign Affairs" be changed to "and a true copy of his credentials has been accepted by the Ministry for Foreign Affairs".

Article 12, paragraph 1

In Sweden, heads of mission take precedence in their respective classes in the order of the presentation of their letters of credence.

Article 15

The expression "or ensure adequate accommodation in some other way" should, in the view of the Swedish Government, preferably be replaced by "or facilitate as far as possible adequate accommodation in some other way".

Article 16

This article deals with the inviolability of the mission premises. In its commentary, the Commission has stated (paragraph 4) that "while the inviolability of the premises may enable the sending State to prevent the receiving State from using the land on which the premises of the mission are situated for carrying out public works (widening of a road, for example), it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated. In these circumstances, therefore, the sending State should co-operate in every way in the implementation of the plan which the receiving State has in mind; and the receiving State, for its part, is obliged to provide adequate compensation or, if necessary, to place other appropriate premises at the disposal of the sending State." The matter thus dealt with in the commentary is of such great importance that the Swedish Government would prefer that it be inserted in the text proper. If possible, the obligations of the two parties, the receiving State and the sending State, should, however, be laid down in a still more precise manner than in the statement of the commentary quoted above.

Article 24

This article, dealing with the immunity of diplomatic agents from the jurisdiction of the receiving State, might be amended on one point. Present international practice is not quite clear on the possibility of bringing an action to court in the receiving State against a diplomatic agent who has left his diplomatic post concerning matters or acts which go back to that person's sojourn in the receiving State. A stipulation on this point would, in the view of the Swedish Government, be of practical value.

Article 25, paragraph 2

The Commission states that a waiver of immunity in criminal proceedings must always be effected expressly by the Government of the sending State. This stipulation seems to go beyond present international practice according to which it is generally deemed enough 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 shall be necessary in such cases or not.

Article 28, paragraph 1

The stipulation that "the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective household, shall, if they are not nationals of the receiving State, enjoy the privileges and immunities mentioned in articles 22 to 27" goes further in some respects than certain Swedish legal provisions in the matter presently in force. The Swedish Government does not wish to suggest at this stage, however, any changes in this text.

17. Switzerland

Transmitted by a letter dated 7 February 1958 from the Permanent Observer of Switzerland to the United Nations

[*Original: French*]

I

General remarks

Switzerland has been greatly interested in the work of the United Nations International Law Commission on the codification of the rules of international law governing diplomatic intercourse and immunities. Inasmuch as it exchanges diplomatic missions with the majority of States, and in view of the many temporary delegations it sends and receives, the international conferences held in its territory and the international organizations which maintain their headquarters there, Switzerland attaches special importance to this work.

Switzerland welcomes the progress that has been made in this branch of the law but believes that the most urgent task is to arrive at a satisfactory wording of the rules existing already, thus laying the groundwork for future development.

Consequently, in the comments which follow we shall concentrate on describing the legal situation as it now exists in Switzerland, while also venturing to suggest, on the basis of practical experience, certain additions to the draft articles.

The draft articles concerning diplomatic intercourse and immunities deal 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 these organizations, as also the status of their officials. There is wisdom in proceeding step by step; 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. This is of some importance to Switzerland, since the rules governing privileges and immunities are applied to the international organizations situated in its territory, *mutatis mutandis*.

II

Structure of the draft

The draft is divided into five sections, as follows:

I. Diplomatic intercourse in general;

II. Diplomatic privileges and immunities;

III. Conduct of the mission and of its members towards the receiving State;

IV. End of the function of a diplomatic agent;

V. Settlement of disputes.

As regards the structure of section I, it would seem preferable to place articles 10 to 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 to 8, which are concerned with the appointment and commencement of functions of diplomatic agents.

With reference to section III, which consists of a single article—article 33—on the conduct of the diplomatic mission and of its members, it would seem that 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, which defines the role of the Ministry for Foreign Affairs in relation to diplomatic missions, might well become the second paragraph of article 2, which defines the function of the missions.

Also, it would appear more logical to eliminate section IV, and redistribute articles 34 to 36 as follows:

Article 34, dealing with the end of the function of a diplomatic agent, should be placed in section I, following articles 3 to 8 and preceding article 9, which provides for the temporary replacement of a head of mission by a *chargé d'affaires ad interim*.

Article 35, on the facilitation of departure of persons enjoying privileges and immunities, should either follow or be embodied in article 31 defining 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.

III

Section I: Diplomatic intercourse in general

It would seem advisable to insert an introductory provision at the beginning of the convention stating 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.

Article 1

This article corresponds to the present practice of States and calls for no special comment.

Article 2

The list of functions of a diplomatic mission appears to be in conformity with practice; fortunately, it is not exhaustive, and will therefore not stand in the way of future development.

A second paragraph might be added to this article. It would repeat the wording of article 33, paragraph 2, which establishes the predominant role played by the Ministry for Foreign Affairs in the relations of a diplomatic mission with the Government of the receiving State.

Articles 3 to 6

The rules governing the appointment of the members of a mission are in conformity with customary law and, in particular, the practice of Switzerland.

Articles 3 and 4 do not call for special comment.

As regards article 5, 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 of the draft.

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 functioning of the mission.

Article 6 is based on the general principle that the appointment of all the members of a diplomatic mission, including the head of the mission, the diplomatic and the non-diplomatic staff, is subject to the consent of the receiving State, in the form of express previous *agrément* for the head of the mission and of tacit agreement where other staff members are concerned.

According to paragraph (4) of the commentary, the fact that the draft does not say whether or not the receiving State is obliged to give reasons for its decision to declare *persona non grata* a person proposed or appointed should be interpreted as meaning that this question is left to the discretion of the

receiving State. To oblige the receiving State to give reasons for declaring an agent *persona non grata* would be an infringement of its sovereignty, for a State should be free at all times to accept a diplomatic representative or not. 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. If a receiving State were obliged to state its reasons, this might cause greater friction between it and the sending State than a decision for which no reasons were given.

Article 7

Paragraph 1 of this article, on the limitation of the mission's staff, is both felicitous and well-advised and confirms the practice of recent years. The arguments cited in that connexion in paragraph (2) of the commentary are pertinent.

We also endorse the principle laid down in paragraph 2 of the article, which completes the preceding provision. Nevertheless, the second sentence, concerning military, naval and air attachés, should be replaced by the following text, taken from the last sentence of paragraph (3) of the commentary:

> "In the case of military, naval and air attachés, the receiving State may require their names to be submitted beforehand for its approval."

It would appear preferable to consult the receiving State beforehand on the appointment of these attachés. 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.

Article 8

The draft provides for two possible ways of establishing the time at which the functions of a new head of mission commence. It would seem proper to retain only the alternative solution given in article 8, according to which the functions of the head of the mission begin only when he has presented his letters of credence. That system is more in conformity with the juridical intent of the formality. It is proper for the head of the mission to take up his functions by establishing contact with the highest authority of the receiving State. There is therefore no ground for changing the present rule of international law.

Article 9

It would be desirable to add, at the end of paragraph 1 of this article, 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 for Foreign Affairs of the sending State. This leaves no room for doubt that the appointment of the *chargé d'affaires ad interim* is in conformity with the intentions of the sending Government.

Articles 10 to 14

The logical place for articles 10 to 14 on the classes of heads of mission is after article 2, which deals with the functions of missions, and before articles 3 to 7 on the appointment of the various diplomatic agents.

Article 10

This article of the draft maintains the distinction between ambassadors and ministers and eliminates only the class of ministers resident.

It appears regrettable that in the course of this codification no account was taken of the general tendency to abolish the distinction between the first two classes of diplomatic agents accredited to Heads of State, for this tendency in eliminating a difference in rank which is no longer justified by identical functions 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 from one system to another; these difficulties are mentioned in paragraph (3) of the commentary.

Furthermore, the use of the expression "other persons" in the definition of the second class may both cause confusion and delay the disappearance of this class. If it should become necessary to establish other categories of agents of the second class for special or temporary missions, no definitive rule for such a case should be laid down in this convention, which deals only with regular and permanent diplomatic missions.

Article 11

No comment.

Article 12

According to the principle of "functional necessity", which underlies the provisions on privileges and immunities, 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—which, incidentally, is applied in Switzerland.

Paragraphs 2 and 3 do not call for comment.

Article 13

This article is in accordance with the practice and principle of non-discrimination.

Article 14

Same comment.

IV

Section II: Diplomatic privileges and immunities

As noted in paragraph (2) of the introductory comment, 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 made necessary by the inordinate size to which diplomatic missions have grown today—in particular, the limitation of mission staff provided for in article 7—and would generally facilitate the interpretation of the convention and amicable or arbitral procedures for the settlement of possible disputes.

This general article might also include paragraphs 1 and 3 of article 33 on the conduct of the mission and its members, since these two provisions deal with abuses of the privileges and immunities of persons on the one hand and abuses of the inviolability of premises on the other; or, if so desired, the first provision might be included in article 22 on personal inviolability and the second in article 16 on the inviolability of the mission premises.

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

Article 15

The present wording of this article, which obliges the receiving State to "ensure adequate accommodation" for the mission, fails to take into account the practical difficulties which that State might encounter in case of a housing shortage. The text should therefore be amended in accordance with the interpretation in the commentary:

> "The receiving State shall either permit the sending State to acquire on its territory the premises necessary for its mission, or facilitate the accommodation of the Mission as far as possible in some other way."

Article 16

The provisions on the inviolability of the mission premises, as interpreted in the commentary, are in accordance with international customary law and with Swiss practice. Paragraph (4) of the commentary contains remarks on the inability of the receiving State to dispose of the mission premises without the consent of the sending State and on the circumstances in which the latter should give its consent. There might be some advantage in including a rule to that effect 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", a principle which, as has been men-

tioned already, should be laid down at the beginning of section II.

Similarly, paragraph (3) of article 33, which prohibits improper use of the premises of a diplomatic mission, might be included in article 16.

It is of course understood that inviolability of mission premises does not preclude the taking of appropriate steps to extinguish a fire likely to endanger the neighbourhood or to prevent the commission of a crime or an offence on the premises. This accords with the principle that personal inviolability does not exclude either self-defence or measures to prevent the diplomatic agent from committing crimes or offences, as is stated in the commentary to article 22.

Article 17

Exemption granted by the receiving State to the diplomatic agent from all dues or taxes in respect of the premises of the mission, other than such as represent payment for services actually rendered, is in accordance with Swiss practice, which is based on reciprocity.

Article 18

Neither the provision on the inviolability of the archives nor the commentary call for remark.

Article 19

Neither the article nor the commentary call for remark.

Article 20

This provision on freedom of movement and the interpretation contained in the commentary are in agreement with Swiss practice. Indeed, the principle of freedom of movement, subject to limitation only for reasons of national security, is the logical consequence of the general principle of "functional necessity".

Article 21

The draft accords to a diplomatic mission freedom of communication "for all official purposes". This definition must be interpreted in the light of "functional necessity". It follows 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 the consulates of the sending State situated in a third State.

We have the following comment to make on the special provisions concerning diplomatic bags and couriers:

The inviolability of the diplomatic bag, as laid down in paragraph 2 of the article, is in conformity with both international custom and Swiss practice. The diplomatic bag is indeed essential for the performance of the mission's functions. The arguments to that effect in paragraph (3) of the commentary accord with the views on which Swiss usage is based. According to paragraph 3 of the article itself, the diplomatic bag may contain only "diplomatic documents or articles intended for official use". This last term may lead to misunderstanding. There would be no way of making a distinction between articles of a special nature which might be sent by diplomatic bag and "articles for the use of a diplomatic mission" which, under article 27 of the draft, enjoy full exemption from customs duties. The notion "articles intended for official use" would make it impossible to distinguish between licit and illicit consignments; it would thus encourage abuses which would bring discredit on the very institution of the diplomatic bag, and that would be contrary to the purpose of the preceding provision, which is to facilitate and accelerate communications and the exchange of important diplomatic documents between the mission and the sending State.

For this reason, in Swiss practice, the diplomatic bag may 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 some such phrase as: "articles of a confidential nature essential for the performance of the mission's functions".

Under article 21, paragraph 4, the diplomatic courier would enjoy unrestricted personal inviolability. This provision does not appear satisfactory. Unlike the members of the diplomatic mission, the diplomatic courier does not remain permanently in the receiving State; his stay is limited to the periods of travel during which he exercises his functions. It is therefore enough to grant him personal inviolability in the actual exercise of his functions. For this reason, the text of article 21, paragraph 4, should be drafted as follows:

> "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."

There should also be 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.

Article 22

Since the personal inviolability of the diplomatic agent derives from the general principle of "functional necessity", that principle also serves to delimit it. As noted in the commentary, the principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.

Article 23

The principle of the inviolability of residence and property of diplomatic agents is in agreement with international custom and Swiss practice.

Article 24

The provisions of this article on immunity from jurisdiction and the commentary call for no remark, except the provision regarding the competent court in the sending State.

According to the modern theory of "functional necessity", which has replaced the "exterritoriality" theory, the diplomatic agent is domiciled in the receiving State. Consequently if, under the law of the sending State, the competent tribunal is that of the domicile of the debtor, the agent cannot be brought before the courts of that State. It would be preferable to allow each State to settle this question as it sees fit. The second sentence of paragraph 4 should therefore be deleted.

Article 25

The rules on the waiver of immunity are in conformity with existing law, as are the remarks in the commentary.

Article 26

This provision on the exemption of a diplomatic agent from taxation is in general agreement with Swiss practice.

Article 27

This text enunciates the principle that articles for the use of a diplomatic mission and for the personal use of diplomatic agents shall be exempted from customs duties. Nevertheless, as is recognized in paragraph (3) of the commentary itself, the receiving State should be able to impose certain restrictions, in order to avoid possible abuses. It would therefore be advisable to include a general reservation in the actual text of the convention.

In Swiss practice, diplomatic agents enjoy exemption from customs duties with the following limitations:

Diplomatic agents who are not heads of mission are entitled to import their furniture duty-free only if it is to be used for their initial installation and on condition that it is imported in the course of the year following the transfer of the person concerned to Switzerland and that it is not sold for a period of

five years from the date of admission. The importation of automobiles is subject to the following regulations:

Heads of mission and other diplomatic agents have the right to import a car duty-free every three years and may not sell it before the end of that period. The spouse and minor children of a diplomatic agent are the only members of his family who enjoy exemption from customs duties. On the basis of reciprocity, heads of mission and their families are entirely exempted from customs control, whereas as a matter of principle other diplomatic agents are subject to the control; in practice, however, the customs authorities are lenient.

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 interest of public welfare, such as health protection, would still apply.

Article 28

This provision, which defines the privileges and immunities of persons other than diplomatic agents, introduces several innovations which require careful study.

(*a*) The members of the family of a diplomatic agent forming part of his household would be accorded the same treatment as the agent himself. 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.

(*b*) 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. Furthermore, the proposed innovation might contribute to the inordinate growth of diplomatic missions—which the draft seeks to arrest—and lead to abuse. Lastly, such a system would make it more difficult to appoint nationals of the receiving State as members of the administrative and technical staff, and yet there is a real need for this, in particular for linguistic reasons.

(*c*) Paragraphs 3 and 4 concerning the private servants of members of diplomatic staff appear satisfactory.

Article 29

No comment.

Article 30

This provision on the privileges and immunities accorded to diplomatic agents who are nationals of the receiving State is satisfactory. The commentary thereon is a useful addition to present doctrine.

Article 31

No comment.

Article 32

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.

V

Section III: Conduct of the mission and of its members towards the receiving State

Article 33

As mentioned under chapter II, relating to the structure of the draft, the various paragraphs of this article should be inserted in sections I and II and section III would thus be eliminated.

Paragraph 1 of this article lays down a needed rule—that it is the duty of diplomatic agents to respect the laws and regulations of the receiving State and not to interfere in its internal affairs.

Paragraph 2 contains a useful definition of the role of the Ministry for Foreign Affairs in the relations of the diplomatic mission with the receiving State. It would be more logical to embody this rule in article 2 which defines the functions of diplomatic missions.

As regards abuse of the premises of a diplomatic mission, dealt with in paragraph 3, it appears difficult to include absolute rules in the text of the convention. Switzerland, for its part, does not recognize the right to grant asylum in mission premises.

VI

Section IV: End of the function of the diplomatic agent

Articles 34 to 36

These articles call for no special remark beyond the comments made under the chapter "Structure of the draft", where it was proposed to eliminate section IV and to transfer the articles from that section to sections I and II.

VII

Section V: Settlement of disputes

Article 37

If it is intended that any dispute concerning the interpretation or application of the convention should be submitted to the International Court of Justice, 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.

18. Union of Soviet Socialist Republics

Transmitted by a note verbale *dated 11 March 1958 from the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations*

[*Original: Russian*]

. . .

1. *Article 5* of the draft provides that members of the diplomatic staff of embassies and missions may be appointed from among the nationals of the receiving State only with the express consent of that State.

An additional clause should be added to provide that the receiving State may stipulate that members of the administrative, technical and service staff of diplomatic missions also may be selected from among the nationals of the receiving State only with the consent of that State.

2. *Article 25* sets out the arrangements for the waiver of the immunity of diplomatic agents from the criminal and civil jurisdiction of the receiving State. 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 expressly stated.

3. *Article 26* refers to the taxation privileges of diplomatic agents.

Provision should also be made for diplomatic agents to be 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.

4. *Article 28* extends privileges and immunities to the administrative and technical staff of diplomatic missions, together with the members of their families forming part of their respective households, if all these persons are not nationals of the receiving State.

Bearing in mind current practice, 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 the administrative, technical and service staff of a diplomatic mission, including the private servants of the head or members of the mission.

5. *Article 37* should be redrafted as follows:

"Any dispute between States concerning the interpretation or application of this convention that cannot be settled through diplomatic channels, shall be referred to conciliation, submitted to the International Court of Justice in accordance with the Statute of the Court, or referred to arbitration in accordance with existing agreements."

19. United Kingdom of Great Britain and Northern Ireland

Transmitted by a letter dated 10 March 1958 from the Secretary of State for Foreign Affairs in the United Kingdom

[*Original: English*]

. . .

Her Majesty's Government wish to take this opportunity of placing on record their high appreciation of the painstaking study which the Commission has devoted to its subject, and of expressing their broad agreement with the rules and principles embodied in the draft articles, subject, however, to the detailed comments contained in the accompanying memorandum, and to the reservation that certain of the draft articles are still under consideration: comments on these will follow as soon as possible.

Subject to any such supplementary comments, it may be assumed, with regard to those articles on which no comment is made or where no contrary opinion is expressed, that the practice of Her Majesty's Government in the United Kingdom is in line with the proposals of the Commission or that no serious objection is seen to these proposals, to which Her Majesty's Government would be prepared to conform.

. . .

Memorandum

Article 2: The functions of a diplomatic mission

It is for consideration whether the functions specifically enumerated in this article should include a reference to cultural activities, that is to say, the function of projecting the culture and way of life of the sending State in the receiving State, which seems in modern times to be one of the acknowledged functions of a diplomatic mission. It is noted, however, that the article as drafted purports to enumerate certain functions *inter alia* and it may therefore be that a specific reference to cultural functions is unnecessary.

Article 5: Appointment of nationals of a receiving State

It is not the normal practice of Her Majesty's Government to grant such express consent as is contemplated in this article.

Article 7: Limitation of staff

Her Majesty's Government do not require their previous *agrément* to be sought to the appointment of military, naval or air attachés to foreign diplomatic missions in London.

Article 8: Commencement of the functions of the head of the mission

It is the practice of Her Majesty's Government to regard a head of mission as having taken up his functions from the date on which he notifies his arrival and presents to the Foreign Office a copy of his letters of credence, and they would prefer the final version of this article to be drafted in accordance with the first of the two alternatives contained in the draft.

Article 9: Chargé d'affaires ad interim

Her Majesty's Government in the United Kingdom regard the head of a foreign diplomatic mission as remaining in charge of his mission while he is within the confines of the United Kingdom, even though incapacitated by sickness: they do not regard the appointment of a *chargé d'affaires ad interim* as appropriate in such circumstances. On the other hand, Her Majesty's Government would not see any particular objection to the system proposed by the Commission.

Normally Her Majesty's Government require the appointment of a *chargé d'affaires ad interim* to be notified to them by the accredited head of mission prior to his own departure from the country. Should such notification be impracticable, Her Majesty's Government require the appointment of the *chargé d'affaires* to be notified to them 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 when, in the absence of any contrary notification from the Government of the sending State, Her Majesty's Government would regard the charge of the mission as devolving upon the senior member of the diplomatic staff.

Article 11: Classes of heads of mission

A redraft of this article is suggested in the following terms:

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

Article 12: Precedence

In the practice of Her Majesty's Government the determining date of the order of precedence of the diplomatic representative is the date of the delivery of the copy of his credentials to the Foreign Office. Her Majesty's Government accept the terms of this article in this sense.

Article 17: Exemption of mission premises from taxes

The practice of Her Majesty's Government does not recognize the exemption of the premises of a foreign diplomatic mission from local dues or taxes. Her Majesty's Government have no power to require the municipal authorities in the United Kingdom to refrain from levying on the occupiers of diplomatic premises the local rates which they are empowered by statute to levy, although arrangements exist for partial relief from rates on a basis of reciprocity, the principle applicable being that of payment by the diplomatic mission concerned of that proportion of the rates leviable which is attributable to municipal services from which the mission is deemed to derive direct benefit.

Article 21: Freedom of communication

Her Majesty's Government make no objection to the use of wireless receiving and transmitting 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.

Article 22: Personal inviolability

Article 22, paragraph (2), defines the term "diplomatic agent" as denoting the head of mission and the members of the diplomatic staff of the mission and in the context of article 22, paragraph (1), appears to limit personal inviolability to this class of persons only. It thus appears to be in conflict with article 28, paragraph (1), which extends to persons who do not come within the definition of "diplomatic agent" the privileges and immunities of articles 22-27. It is suggested that the drafting of article 22 be reviewed in the light of this apparent inconsistency.

Article 23: Inviolability of residence and property

In the commentary to this article 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 the article.

Article 25: Waiver of immunity

In criminal proceedings Her Majesty's 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.

Article 26: Exemption from taxation

As indicated in the comment on article 17, Her Majesty's Government do 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 Her Majesty's 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.

Article 31: Duration of privileges and immunities

It is the practice of Her Majesty's 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.

20. United States of America

Transmitted by a note verbale *of 24 February 1958 from the Acting Representative of the United States of America to the United Nations*

[*Original: English*]

General observations

The Government of the United States of America directs its first observations to the question of the form in which the draft articles concerning diplomatic intercourse and immunities will be submitted to the General Assembly. Paragraph 15 of the introduction to the draft articles states that the draft was prepared on the provisional assumption that it would form the basis of a convention, and that the final decision as to the form in which the draft will be submitted to the General Assembly will be taken in the light of comments received from Governments.

The United States Government fully subscribes to the sentiments expressed by the General Assembly in its resolution 685 (VII), adopted on 5 December 1952, in which the International Law Commission was requested to undertake "the codification of the topic 'Diplomatic intercourse and immunities', and to treat it as a priority topic". As stated in that resolution, the common observance by all Governments of existing intercourse and immunities, particularly in regard to the treatment of diplomatic representatives of foreign States, is to be desired. However, 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. Governments which sincerely endeavour to honour their international obligations will welcome a concise statement of what those obligations are today.

Some of the articles concerning diplomatic intercourse and immunities submitted for comment by Governments, however, cannot be considered as a codification of existing principles of international law on the subject. 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 to a convention 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 which prescribe rules for the treatment of diplomatic representatives of one Government in the territory of the other.

2. Adoption of such a multilateral convention by some Governments and not by others would result in disagreement and confusion with respect to the treatment of diplomatic personnel of adhering countries in the territory of non-adhering countries, and *vice versa*.

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 effect or 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 the articles apparently represent an effort to compromise 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 susceptibly 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.

The United States Government further observes that the draft articles would have greater application than appears to have been contemplated. The report of the International Law Commission states that the draft articles are 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 representatives to certain international organizations and members of their staffs. For instance, section 15 of the Agreement between the United States and the United Nations regarding the Headquarters of the United Nations, signed on 26 June 1947 (11 UNTS 11), provides that the privileges and immunities to which various classes of individuals shall be entitled are those which, subject to corresponding conditions and obligations, members of diplomatic missions accredited to the United States receive.

The United States Government further observes that the draft articles appear to reflect inadequate consideration of the principle of reciprocity, which presently underlies much of the practice of Governments in respect to diplomatic privileges and immunities. While certain rules of conduct should be observed by all Governments without discrimination, other rules need apply only on a basis of reciprocity.

The United States Government therefore recommends that the International Law Commission not undertake to revise the draft articles in the form of a convention but, rather, undertake to prepare a codification of existing principles of international law on the subject of diplomatic intercourse and immunities. 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.

In addition to the observations of Governments regarding the draft articles, the replies to the Secretary-General's request dated 12 October 1955 for information regarding the laws, regulations and practice of States concerning diplomatic intercourse and immunities should be useful in determining those areas in which the particular principle of international law involved is so well settled that it may be codified. The fact that the practice of some Governments may be at variance with a particular rule may indicate only that such Governments are not presently honouring the international obligations which devolve on them as members of the family of States.

Observations on individual articles

Article 1

This article, which states that the establishment of diplomatic relations and of permanent diplomatic missions takes place by mutual consent between States, confirms the general practice. 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 to such dual or multiple accreditation.

Article 2

There would appear to be general agreement that a diplomatic mission may perform the functions enumerated in paragraphs (*a*) to (*d*) of article 2. However, the functions listed are obvious, and admittedly not exhaustive. The United States Government therefore considers that it is probably not practical to define the precise functions which a diplomatic mission may perform.

Article 3

It is the general practice of States, including the United States, to obtain the *agrément* of the receiving State for the appointment of a new chief of mission.

Article 4

Article 4 provides that, subject to the provisions of articles 5, 6, and 7, the sending State may freely appoint other members of the staff of the mission.

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 persons 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. This is true, even though the right is exercised only infrequently and under special circumstances. Under United States immigration laws, some form of acceptance by the United States Government is a condition precedent to the visa applicant's classification as a foreign government official or employee (see sections 101 (*a*) (15) (A) (i) and (ii) of the Immigration and Nationality Act, 66 Stat. 167, 8 U.S.C. 1101). A courteous refusal by the receiving State to issue appropriate entry documents to a particular individual would seem preferable to the receipt, by the mission immediately upon arrival of a new member thereof, of an unanticipated notification that such individual is *persona non grata* or not acceptable to the receiving State. See paragraph 3 of observations on article 6.

Article 5

Article 5 provides that members of the diplomatic staff of a mission may be appointed from nationals of the receiving State only with express consent of that State. It would appear that this article might provide instead that they could be appointed except in cases where the receiving State expressly objected.

The United States of America 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.

Article 6

Paragraph 1 of article 6 provides that the receiving State may at any time declare a member of the staff *persona non grata* or not acceptable, and that the sending State shall recall such person or terminate his functions. The second paragraph provides that if the sending State refuses or fails within a reasonable time to recall or terminate the functions of such person, the receiving State may refuse to recognize the person concerned as a member of the mission.

This Government agrees that a person declared *persona non grata* or whose recall is demanded is entitled to a reasonable time to depart, during which time he continues to enjoy the immunities attaching to his previous position at the mission. 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.

To assist Governments in determining the import and probable effect of article 4 and certain subsequent articles, a new article might be added which would set forth precisely what personnel compose the diplomatic, administrative, technical and service staff of a mission. Clear distinctions should be made between officer and subordinate staff personnel, and between nationals of the sending State vis-à-vis nationals of the receiving State and of third countries employed by the sending State. Such an article should also make reference to military, naval and air attachés and their staffs. For instance, paragraph (6) of the commentary following article 6 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. The staffs of diplomatic missions of the United States Government, just as those of many other Governments, include many nationals of the receiving State, employed to perform various subordinate functions.

Paragraph (6) of the commentary following article 6 states that one of the exceptions arising out of article 5 of the draft is where the sending State wishes to choose as a member of its diplomatic staff a person who is a national of both the receiving State and the sending State. The Commission takes the view that this should only be done with the express consent of the receiving State. In this connexion it should be noted that Governments sometimes differ on the question of who has and who does not have dual nationality. The United States 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.

Article 7

The first paragraph of article 7 provides that the receiving State may limit the size of a mission to what is reasonable and customary, having regard to circumstances and conditions in the receiving State, and to the needs of the particular mission.

As a restatement of a general principle the language used 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 performance of the announced functions of the mission, or the problem of arbitrary demands by the receiving State that the diplomatic and administrative personnel of a mission be reduced to a size which the sending State believes will make performance of necessary and proper functions almost impossible.

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.

The second paragraph of article 7 provides that a State may also, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category and may decline to accept any persons as military, naval or air attachés without previous *agrément*.

The United States Government therefore 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. 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.

As noted in the observations regarding article 4, although the authority is exercised with restraint, any State may deny entry to any foreign national, including service attachés. The United States Government does not require *agréments* for military, naval, or air attachés except on the basis of reciprocity. Since the Governments of Hungary, Italy, the Philippines, Romania and Spain require *agréments* for the top service officers only, this Government reciprocates and requires a similar *agrément*. Even those Governments do not require *agréments* for assistant military, air or naval attachés. In the event these Governments would eliminate the requirement for any such *agréments* the United States Government would reciprocate.

Article 8

Article 8 lays down a rule as to the time when the head of a mission is entitled to take up his functions in relation to the receiving State. This is largely a matter of protocol or local custom. In the United States of America, ambassadors and ministers are received by the President, but a new head of mission first presents to the Secretary of State copies of his letters of credence, the letters of recall of his predecessor, and a copy of the remarks he proposes to make when received by the President. After this presentation to the Secretary of State he may perform all the functions of his office.

Article 9

This provides that if the post of head of mission is vacant, or if the head of mission is unable to perform his functions, the affairs of the mission shall be handled by a *chargé d'affaires ad interim,* whose name shall be notified to the Government of the receiving State. The article further provides that in the absence of such notification, the member whose name appears next on the mission's diplomatic list is presumed to be in charge.

The United States Government finds this article unacceptable. In each instance the United States Government would require appropriate notification before recognizing any member of the mission as *chargé d'affaires ad interim.* This is true whether the post is vacant, or whether the head of mission is temporarily away from the capital or is ill. The United States Government would not "presume" that a certain official was empowered to speak for his Government in the capacity of *chargé d'affaires ad interim.* Moreover, it would be particularly objectionable to require States to make such a presumption on the basis of the order in which names might appear on a diplomatic list. Some Governments do not publish such a list and, if they do, the published list may be out of date. Also, it should be noted that the diplomatic list is not intended to be used for the purpose of determining which officer shall be *chargé d'affaires ad interim.* Some Governments, for instance, customarily list, after the name of the head of mission, the name of the highest ranking military, naval or air attaché.

Article 10

This article divides heads of mission into three classes. It is suggested that this article might begin with the words "For purposes of precedence and etiquette . . .".

Article 11

This article restates the general practice of States, which is to agree on the class to which the heads of their missions are to be assigned. The United States Government observes, however, that the receiving and sending States concerned need not be represented by heads of mission of the same rank. One State may be represented by an ambassador, for instance, while the other prefers to be represented by a minister or a *chargé d'affaires.*

Article 12

The rules of precedence of heads of missions prescribed in article 12 deal with matters of practice and protocol in the receiving State, rather than with principles of international law suitable for codification. See, also, observations on article 8 above.

Article 13

The United States Government agrees with the provisions of article 13, which would require each State to establish a uniform mode for the reception of heads of mission of each class.

It is suggested that the article further provide that such uniform mode of reception should be applied without discrimination. See, also, comment on article 8, above.

Article 14

The United States Government agrees that, except as concerns precedence and etiquette, there should be no differentiation between heads of mission by reason of their class.

Article 15

The United States Government agrees with the apparent intent of article 15, that it is the duty of the receiving State to ensure that the sending State has adequate accommodations, but that the receiving State is under no duty to make exceptions from its laws relating to title to or ownership of real property. The United States believes, however, that for added clarity the article should be revised to read somewhat as follows:

> "The receiving State shall either permit the sending State to acquire in its territory the premises necessary for its mission, or, in some other way, ensure accommodations, including housing and other facilities, for members of the mission."

Article 16

The United States Government agrees that the premises of a diplomatic mission shall be regarded as inviolable and may not be entered by local authorities except with the consent of the head of the mission. However, such consent will be presumed when immediate entry is necessary to protect life and property, as in the case of fire endangering adjacent buildings.

Paragraph 3 of the article, considered in the light of the commentary thereon, presents special problems. This paragraph provides that the premises and furnishings of the mission shall be immune from search, requisition, attachment or execution. It would appear that paragraph 1 of the article covers "search" of a mission, as used in paragraph 3. If there is agreement to this, then the word "search" should be deleted from paragraph 3. If not, the United States Government would appreciate an explanation of what sort of search is intended. Second, 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 right of eminent domain. This right, of course, could only be exercised under very limited circumstances, such as the happening of a disaster of great magnitude, or the necessity of making important improvements to the city which require the taking of all or some of the land on which the premises of the mission are located. In such case, the receiving State is obligated 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 other suitable accommodations. Last, as to attachments and executions, in the case of rented or leased property international law requires only that the premises of the mission not be invaded to enforce an order of the court. The situation is different, of course, where the property is owned by the foreign Government and used for diplomatic purposes. In such case, the claim of sovereign immunity would preclude attachment or execution.

The United States Government does not agree with the last sentence of paragraph (2) of the commentary. It is not

clear what sort of judicial notices are referred to. The United States Government agrees that a process server may not serve a summons or process on the premises of the mission. However, this Government does not agree that judicial notices of any nature whatsoever need be delivered through the Minister for Foreign Affairs of the receiving State. If the person to whom the *subpoena* or process is addressed does not enjoy diplomatic immunity, the document should be served on him at his home or other appropriate place away from the premises of the mission. If the person concerned enjoys diplomatic immunity, he is not subject to the jurisdiction of the local courts in the absence of a waiver by his Government. The Foreign Office need become involved only where such a document has been erroneously served, and the head of mission requests the Foreign Office to return the process to the court with an appropriate suggestion of immunity.

The United States Government could not approve the language used in paragraph (4) of the commentary. It is suggested that the substance of this paragraph 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 obligated 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."

Article 17

The United States Government agrees with this article, if it is intended to grant an exemption from taxes in respect of the premises of a diplomatic mission for which the foreign Government concerned would be liable either as owner or lessee. This Government does not agree, however, if the article is intended to grant an exemption from taxes levied against rented or leased property for which the landlord, rather than the sending State, is liable, or for taxes due with respect to real property owned by the head of the mission personally. Moreover, the article fails to clarify the particular categories of property which shall be considered as constituting the premises of the mission. The article might be revised to read as follows:

"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. For the purposes of this article, property used for legation purposes shall be deemed to include the land and buildings used for the embassy or legation, the chancery and all annexes thereto, and residence for officers and employees of the mission."

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

Article 18

The United States Government agrees that the archives of the mission are inviolable, but suggests that the words "and documents" should be omitted, as the phrase is confusing and unnecessary.

The United States Government cannot agree with the statement in the commentary that the inviolability applies to "archives and documents, regardless of the premises in which they may be". The inviolability which properly attaches to the archives of the mission 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.

Article 19

The United States Government agrees that the receiving State should accord appropriate facilities for the performance of the mission's functions. However, there should be some indication as to the meaning and scope of the words "full facilities".

Article 20

Article 20 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 and movement illusory. The latter part of the article would require that travel controls be applied without discrimination to diplomatic representatives of all States, including those which do not restrict the movements of representatives of the receiving State. The principle of reciprocity, however, is an integral factor in matters of this nature. It is believed that it would be preferable to have no article on the subject, rather than one so subject to arbitrary abuse.

Article 21

The United States Government concurs generally with paragraphs 1 and 3 of article 21. This Government recommends, however, that a new sentence be added to paragraph 2 of article 21, which would read as follows:

"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."

The United States Government further suggests 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."

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

Article 22

This provides that the persons of diplomatic agents, defined as the head of the mission, and members of the diplomatic staff of the mission, shall be inviolable, and that they shall not be subject to arrest or detention, be it administrative or judicial. As stated in the observations regarding article 4, above, the composition of the diplomatic staff requires more precise definition.

Article 23

The United States Government agrees with paragraph 1 of article 23, to the effect that the private residence of a diplomatic agent is inviolable. However, this Government is of the opinion that paragraph 2 requires further consideration. For instance, no inviolability would attach to the property, papers, and correspondence of a diplomatic agent pertaining to a commercial venture in the receiving State.

Article 24

This article undertakes to lay down a new rule of international law. While providing complete immunity from criminal jurisdiction, the article would make the exemption from civil jurisdiction subject to certain exceptions not presently recognized under international law. Moreover, paragraph 4 of the article undertakes to prescribe which court in the sending State is competent to exercise jurisdiction over its own diplomatic agents.

The United States Government is of the opinion that the article should be revised to restate existing principles of international law on the subject. This, it is submitted, requires complete exemption of persons entitled to diplomatic immunity from criminal and civil process, in the absence of a waiver by the sending State, except with respect to real property owned by such person in his private capacity. In the latter case, court proceedings are usually *in rem* rather than *in personam*. The United States Government also suggests that the last sentence of paragraph 4 of the article be deleted.

Article 25

The United States Government agrees with the principles expressed in paragraphs 1 and 2 of article 25, which provide that the immunity of diplomatic agents may be waived by the sending State, and that in criminal proceedings, the waiver must always be expressly made by the Government.

Paragraphs 3 and 4, however, recognize implied waivers of immunity in certain civil proceedings. This is inconsistent with the accepted theory that the immunity is for the benefit of the Government concerned, not 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.

Article 26

Article 26 cannot be considered as a statement of the tax exemptions to which diplomatic agents are presently entitled under existing principles of international law. While some of the provisions thereof may conform with requirements of international law, others do not.

Article 27

Paragraph 1 of the article provides that customs duties shall not be levied on articles for the use of the mission or for the personal use of a diplomatic agent or members of his family belonging to his household. Assuming that the term "diplomatic agent" refers only to an individual recognized in an officer status, this paragraph conforms with United States practice in the matter.

Paragraph 2 of the article further provides that the personal baggage of a diplomatic agent may not be inspected except under limited circumstances and in the presence of such agent or his authorized representative. It is the view of the United States Government that the customary exemption from inspection by customs authorities of the personal baggage of a diplomatic officer is accorded as a matter of courtesy, and not because it is a requirement of international law.

Article 28

This article provides that, in addition to diplomatic agents, the privileges and immunities mentioned in articles 22 to 27 shall also be enjoyed by members of the family of the diplomatic agent, and likewise the "administrative and technical staff" of the mission, and their families, provided such persons are not nationals of the receiving State. Members of the "service staff", however, are to enjoy immunity only in respect of acts performed in the course of their duties and, if not nationals of the receiving State, are to be exempt only from dues and taxes on their salaries. The last two paragraphs of the article apply to private servants.

The United States Government considers that 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.

It is well known that few Governments are as generous as the United States Government in extending privileges and immunities to all members of the staff of a diplomatic mission. The United States, just as most Governments, does not extend immunity to families of employees of diplomatic missions in Washington whose names are not included in the Diplomatic List. Also, except on first arrival and for a reasonable period thereafter, such employees and their families do not, in the absence of reciprocal arrangements, enjoy free importation privileges and certain other tax exemptions enjoyed by officer personnel. Also, the United States Government, on request, suggests to American courts the immunity from jurisdiction of all officers and employees of a diplomatic mission in Washington, regardless of nationality, who have been duly notified to and accepted by the United States in such capacity, as well as the immunity of families of officers included on the Diplomatic List.

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. The United States Government is hopeful that the International Law Commission will be able to restate the international law rule on the subject with sufficient clarity that it will serve as a firm guide to what immunities Governments must accord to members of foreign diplomatic missions.

Article 29

This article provides that, as regards the acquisition of nationality of the receiving State, no person enjoying diplomatic privileges and immunities in that State, other than the child of one of its nationals, shall be subject to the laws of the receiving State. This represents existing United States law on the subject and is in conformity with international law as the United States Government interprets it.

Article 30

This article provides that a diplomatic agent who is a national of the receiving State shall enjoy immunity from the jurisdiction only in respect of official acts performed by him in the exercise of his functions. The last paragraph of the commentary states that the proposed rule implies that members of the administrative and service staff of a mission who are nationals of the receiving State shall enjoy only such privileges and immunities as may be granted them by the receiving State.

The United States Government is of the opinion that all officers and employees of a diplomatic mission, regardless of nationality, should enjoy immunity from jurisdiction in respect of official acts. Such immunity is for the benefit of the Government, and not the individual (see observations regarding articles 6 and 28, above).

Article 31

The United States Government agrees with the provisions of article 31 specifying that entitlement of an individual to diplomatic privileges and immunities commences on the moment of his entry into the territory to take up his post, and continues until his departure on expiry of his appointment or a reasonable time thereafter in which to depart and have his effects removed. The United States Government submits, however, that where the person is already in the territory of the receiving State, his privileges and immunities begin only when his appointment is notified to *and accepted* by the Ministry for Foreign Affairs.

Article 32

The United States Government agrees with article 32, if it is intended to apply only to the duties of a third State with respect to a diplomatic agent passing through or in its territory in immediate and continuous transit proceeding on official business to or from a post to which he is regularly assigned. However, a third State is not obligated to accord inviolability to a diplomatic agent while in transit for other purposes or during a sojourn in such third State. The United States Government further observes that this article should be revised to cover other members of the staff of the mission.

It is of course 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 a unforeseen circumstance, as in the case of shipwreck or forced landing of an airplane.

Article 33

The United States Government agrees with the statement that persons entitled to diplomatic immunity should nonetheless respect the laws and regulations of the receiving State, and should refrain from interfering in the internal affairs of that State. Also, the United States Government further agrees that, in the absence of special agreement, the mission should conduct its business through the Foreign Office, and that the premises of the mission should not be used for purposes incompatible with the functions of the mission. However, see United States observations on article 2, regarding the functions of a mission.

Article 34

This article appears correctly to describe, *inter alia*, the various modes of termination of appointment, except that paragraph (*c*) should be reworded. 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.

Article 35

This appears to reflect existing practice regarding the duty of the receiving State to grant facilities for departure, even in case of armed conflict.

Article 36

This appears to reflect existing practice regarding the duty of the receiving State to respect and protect the premises, property and archives if diplomatic relations are broken off or if a mission is withdrawn or discontinued, and to permit the sending State's interests to be represented by a third State acceptable to the receiving State.

Article 37

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

21. YUGOSLAVIA

Transmitted by a letter dated 19 May 1958 from the Permanent Representative of Yugoslavia to the United Nations

[*Original: English*]

I

General comments

1. The present text of the draft rules concerning diplomatic intercourse and immunities of permanent diplomatic missions, elaborated by the International Law Commission at its ninth session, may be considered in principle as acceptable and could, subject to some smaller alterations, serve as a final proposal for the codification of the matter.

2. The United Nations Charter, which represents the basic source of contemporary international law, should provide the basis for this codification. However, in implementing this stand, concrete necessities should be borne in mind and compromise solutions should be adopted with regard to questions where differences between the new requirements of the Charter and earlier practices may occur, or where the provisions of the Charter do not affect directly the corresponding rules of the draft. Generally speaking, as far as diplomatic privileges and immunities and the protection of diplomatic persons are concerned, special guarantees are needed. Such guarantees were not provided by the Universal Declaration of Human Rights, which should be considered as the guiding principle of international law and which guarantees only a minimum of rights to each individual.

3. The Commission has acted properly when it extended its work to the field of the codification of rules concerning *ad hoc* diplomacy and the representation of States in international organizations. The Secretariat of State for Foreign Affairs considers that much more extensive and comprehensive studies will have to be carried out before taking up the codification of rules concerning *ad hoc* diplomacy and the representation of States in international organizations. The Commission has embarked on the best possible road when it has taken up the codification of rules regulating the status of diplomatic missions first. The Secretariat of State for Foreign Affairs considers that section I of the rules on permanent diplomatic missions could be implemented independently of other sections, and that the conclusion of an international convention would provide the most appropriate form for the implementation of such rules.

II

Specific comments

Article 2

The question of defining the functions of a diplomatic mission constitutes one of the most complex problems pertaining to this field. Contemporary practice is pointing to an ever increasing extension of these functions, so that classical rules do not appear to be satisfactory any more.

It is believed that the Commission should once more consider the formulation adopted at the ninth session, which is based on classical principles but fails to exhaust all the functions of a diplomatic mission. It would be useful to consider the possibility of drafting a more detailed formulation, which would cover the functions more extensively, including the elements already embodied in the present formulation. The possibility of inserting these functions in a different part of the draft should be also taken into consideration, bearing in mind the elaboration either of a negative or of a positive formulation of these functions.

Article 4

The Secretariat of State for Foreign Affairs considers that it should be ascertained whether this provision applies only to the appointment of diplomatic personnel alone or to the whole staff of a diplomatic mission, both diplomatic and non-diplomatic. It should be also made clear what is meant by the expression "other members of the staff of the mission".

Article 5

As regards article 5, the Secretariat of State for Foreign Affairs wishes to underline that it is, in principle, opposed to the institution of members of the diplomatic staff of a mission appointed from among the nationals of the receiving State, as it considers that this institution constitutes an historic anachronism with regard to diplomatic agents and the diplomatic staff of missions. Nevertheless, if the Commission finally adopts this institution, care should be taken that the privileges and immunities necessary for the independent carrying out of functions should be guaranteed to such persons also.

It would be useful if the Commission also considered in the course of its further work the question of diplomatic agents and diplomatic staff who are nationals of third States.

Article 8

Bearing in mind the reasons by which the Commission was prompted when formulating the first alternative, namely, that "the head of the mission is entitled to take up his functions in relation to the receiving State when he has notified his arrival and presented the true copy of his credentials to the Ministry for Foreign Affairs of the receiving State", the Secretariat of State for Foreign Affairs admits the possibility of a discussion concerning its adoption. However, it wishes to emphasize that the second alternative, namely "when he has presented his letters of credence", is more in line with actual practice and offers a greater legal security, as the very act of presentation of letters of credence to the head of State is, in addition to its more solemn character, of a greater legal significance.

Article 10

As modern practice is developing intensively in the direction of the abolition of the class of ministers plenipotentiary, it would be useful if the Commission reconsidered this article with a view to the possible abolition of the class of ministers plenipotentiary. If the Vienna classification into three classes were maintained, it could be pointed out, at least in the commentary, that this classification is not in contradiction with the recognition of the sovereignty and equality of States in accordance with the United States Charter, as it does not deprive the States of the right to exchange those classes of diplomatic agents to which they have agreed. This is all the more desirable as the differentiation of diplomatic agents results in a definite inequality as regards protocol, and sometimes also in an inequality of substance if too much importance is attached to the provisions of protocol.

Article 17

As far as this article is concerned, it is necessary to give a precise definition of the expression "for services actually rendered", as a number of disputes have arisen in actual practice with regard to this matter.

Article 28

The basic remark with regard to this article is concerned with the granting of diplomatic privileges and immunities to the administrative and technical staff of a mission. On the basis of the general rules of international law, which exist today and are applied in the majority of States, the administrative and technical staff of a mission enjoy only the privileges and immunities they need for the unhindered carrying out of their functions, and which cannot be identified with the functions of

the diplomatic staff. It would be desirable to explain precisely what is meant by the expression "members of the family of a diplomatic agent forming part of his household", in order to define precisely the circle of persons enjoying diplomatic privileges and immunities.

The same applies to paragraph 2 of this article. It would be useful to clarify the meaning of the sentence "members of the service staff of the mission shall enjoy immunity in respect of acts performed in the course of their duties", in order to ascertain the basis upon which they are granted diplomatic privileges and immunities.

The Secretariat of State for Foreign Affairs, on its part, wishes to emphasize that, in its opinion, articles 33, 34, 35 and 36 of the present draft should be reconsidered and elaborated in more detail, in view of the fact that they have been formulated in a rather incomplete manner and that they require an as comprehensive analysis as possible.