

# **United Nations Conference on Diplomatic Intercourse and Immunities**

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## **20th meeting of the Committee of the Whole**

Extract from Volume I of the *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities (Summary records of the plenary meetings and of the meetings of the Committee of the Whole)*

64. Mr. GLASER (Romania) also thought it wise to leave the text unchanged. He agreed with the arguments advanced against any alteration, especially those of the representatives of Iran, the USSR, and the United Kingdom. The object of the codification on which the Conference was engaged was to try to make existing rules a little more flexible, in order that the presence of diplomatic representatives would help to improve relations between States. The use of the flags contributed to that end, for it distinguished the premises and vehicles of the mission, and so gave the inhabitants of the receiving country an opportunity to show respect for foreign diplomatic representatives. With regard to the concern that some representatives felt over possible abuse of privilege by excessive use of a flag, he suggested that it was unwise to spoil a good rule for fear of a remote risk. The Philippine amendment, even as revised, still suffered from the ambiguity referred to by the representative of India, and in any case was a move towards rigidity rather than towards the desired flexibility. He agreed with the representatives who considered that article 40 contained sufficient safeguards. He was in favour of article 18 and would vote against the amendments.

The meeting rose at 1.10 p.m.

## TWENTIETH MEETING

Friday, 17 March 1961, at 3.25 p.m.

Chairman: Mr. LALL (India)

### Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4) (continued)

#### Article 18 (Use of flag and emblem) (continued)

1. The CHAIRMAN invited the Committee to continue its debate on article 18 and the amendments thereto.<sup>1</sup>

2. Mr. SUBARDJO (Indonesia) supported the comments made by the Iranian and Soviet Union representatives at the previous meeting. The mission of the sending State should have the right to use its national flag and emblem at will. However, that right should not be abused, and he hoped that the Philippine amendment would be adopted. His delegation would therefore vote for the text of article 18 as amended by the Philippines.

3. Mr. ZLITNI (Libya) considered that the use of the flag, a sacred symbol to every country, was very important. Nevertheless, it must be subject to the laws and regulations of the receiving State. His delegation would therefore support the Philippine amendment and the Italian amendment, but suggested that in the latter the words "according to" should be replaced by "subject to".

<sup>1</sup> See 19th meeting, para. 41, and also, for revised Philippine amendment, para. 58.

4. Mr. SHARDYKO (Byelorussian Soviet Socialist Republic) said that article 18 as drafted was perfectly acceptable. The amendments tended to restrict the mission's unquestionable right to use the flag and emblem of the sending State. His delegation could not approve that point of view. Moreover, draft article 40 laid down that all persons enjoying diplomatic privileges and immunities owed the duty to respect the laws and regulations of the receiving State. The Italian and Philippine amendments were therefore superfluous. There had been talk of possible abuses by the sending State, but they were really inconceivable. The International Law Commission, which had studied the matter thoroughly, had therefore not thought fit to restrict the mission's right to display the flag and emblem of the sending State. That right would be seriously impaired if restricted by the laws of the receiving State. His delegation believed that it should remain an absolute right, and therefore could not support the amendments to article 18.

5. Mr. MELO LECAROS (Chile) said that article 18 stated a right, not a duty. The right should be qualified, and that was the object of the amendments of Italy and the Philippines, which his delegation supported. However, the limitations should be defined not only by the laws and regulations, but also by the practice and customs of the receiving State. He hoped that the sponsors of the amendments would agree to insert that rule.

6. Mr. de ERICE y O'SHEA (Spain) said that there was really very little difference of opinion. The Committee might note the view expressed by the United Kingdom representative (19th meeting, para. 63) that article 40 applied to all the privileges declared in the convention, including that in article 18. The amendments to article 18 would then be unnecessary, and the Committee could adopt the article as it stood.

7. Mr. REGALA (Philippines) said that, having regard to the Spanish representative's suggestion and in order to facilitate the Committee's work, he would withdraw his delegation's amendment.

8. Mr. BOUZIRI (Tunisia) agreed with the Byelorussian representative that the abuses in question were inconceivable, but they nevertheless occurred in real life. It was precisely to prevent such abuses that article 18 should be amended in the manner proposed by Italy and the Philippines.

9. Mr. MARISCAL (Mexico) withdrew his delegation's amendment.

10. Mr. MAMELI (Italy) said his delegation attached importance to its amendment to article 18. However, having regard to the debate he would be willing to accept a more flexible wording, such as that suggested by the representative of Chile. If that were impossible, he would support the Spanish representative's suggestion.

11. The CHAIRMAN thought that the Committee should adopt the Spanish suggestion and that, in view of the terms of article 40, article 18 might stand as drafted by the International Law Commission.

*It was so agreed.*

*New article proposed by Mexico concerning the basis of diplomatic privileges and immunities*

12. The CHAIRMAN drew attention to the new article proposed by Mexico (L.127).

13. Mr. de ROSENZWEIG DIAZ (Mexico), explaining the object of his delegation's proposal, said that according to the International Law Commission's introductory commentary to section II of its draft, the modern theory justifying diplomatic privileges and immunities was that of "functional necessity". His delegation considered that that theory should be embodied in an article of the convention, and so had put forward its proposal, which was based on section 20 of the Convention on the Privileges and Immunities of the United Nations, approved by the General Assembly on 13 February 1946.

14. Mr. BALLINI SHAW (Argentina) unreservedly supported the Mexican proposal. Diplomatic privileges and immunities were not conferred on persons, but on the States they represented; and it was important that the principle should be embodied in the convention. Moreover, the new article would facilitate the interpretation of the convention's provisions, especially those of article 30.

15. Mr. CARMONA (Venezuela) said the Committee had reached one of the most difficult and controversial questions of diplomatic law: the privileges and immunities enjoyed by diplomats. The opinions of learned writers were not uniform but, as the Commission had said, the modern trend was towards the new theory that diplomatic privileges and immunities were accorded to diplomatic agents by reason of their functions, the true beneficiary being therefore the State they represented. The Convention on Privileges and Immunities of the United Nations, adopted by the General Assembly in 1946, and the Convention on the Privileges and Immunities of the Specialized Agencies adopted in 1949, confirmed that principle. It could not be ignored in the convention which the Conference was drafting. His delegation would therefore wholeheartedly support the Mexican proposal.

16. Mr. CAMERON (United States of America) said he appreciated the Mexican delegation's reasons for submitting its proposal, and entirely agreed with the representatives of Argentina and Venezuela concerning the nature of diplomatic privileges and immunities. Nevertheless, as the object of the Conference was to codify diplomatic usage, his delegation would prefer that the preamble should state the principle underlying the Mexican proposal, so that it might govern the whole convention.

17. Mr. BARTOŠ (Yugoslavia) approved the idea which underlay the Mexican proposal and which had in fact guided the Commission in preparing section II of its draft. His delegation was prepared to support the Mexican proposal, but felt bound to point out that the insertion of the proposed clause implied recognition, not only of the principle accepted by the Commission, but also of an obligation to waive diplomatic privileges and immunities in cases where laws or regulations had

been infringed. The Yugoslav delegation considered, therefore, that a passage corresponding to the article proposed by Mexico, which was based on the "functional necessity" theory, should be included in the preamble, not in the operative part, of the convention.

18. Mr. TUNKIN (Union of Soviet Socialist Republics) pointed out that the Mexican proposal referred to the "functional theory". But the International Law Commission stated in paragraph 3 of its introductory comments to section II that it had been guided by that theory "while also bearing in mind the representative character of the head of mission and of the mission itself". It was, moreover, advisable not to embark on problems of theory. The Conference was to lay down the standards to which States should conform. Admittedly, the "functional necessity" theory had been accepted in the Conventions on the Privileges and Immunities of the United Nations and of the specialized agencies; but the Committee should not be guided by instruments applicable to international organizations, which differed essentially from the States to which the draft articles applied.

19. In any case, the adoption of the proposal would inevitably harm the whole text, for it would be dangerous to lay down that the instrument was to be interpreted according to a principle that had not been the only one taken into account in the drafting of the various articles. Besides, it was not customary to introduce theoretical declarations into legal documents. Hence, the Soviet delegation considered that the principle should be incorporated neither in the operative part nor in the preamble.

20. Mr. de ROSENZWEIG DIAZ (Mexico) said that, contrary to what the Soviet Union representative had implied, it was not unusual for legal documents to contain statements of principle intended to facilitate their application. The Commission's commentaries were not going to be submitted to the States for ratification, and the principles which had governed the preparation of the articles should therefore be mentioned in the text itself.

21. In reply to the Yugoslav representative, he said that the rule derived from the principle embodied in the proposal would be applied by the appropriate administrative authorities, or by the conciliation or arbitration body which would adjudicate disputes arising out of the application of the convention. It was to be hoped that the International Court of Justice would never have occasion to rule on such disputes, but if the contingency should arise it should be able in its ruling to rely on principles clearly stated in the convention. Furthermore, the adoption of provisions laying down principles would certainly help to prevent disputes, and hence to improve relations between States.

22. Mr. de ERICE y O'SHEA (Spain) supported the proposal, for it reflected the evolution of the theories justifying the grant of diplomatic privileges and immunities. The modern theory was no longer that of extritoriality, but that of functional necessity.

23. Mr. LEFEVRE (Panama) also supported the proposal and thought the provision should be included in the operative part rather than in the preamble.

24. Mr. GASIOROWSKI (Poland) said it was not desirable to introduce the principle stated in the proposal into the draft. Firstly, the argument that it appeared in the Convention on the Privileges and Immunities of the United Nations was not very convincing, for the legal status of representatives of States was not at all the same as that of staff members of international organizations. Secondly, the principle was implicit in the draft, for instance in article 30, paragraph 1; hence there was no need to mention it explicitly, in a form which reflected only one aspect of the views expressed by the International Law Commission. Poland would therefore vote against the Mexican proposal.

25. Mr. EL-ERIAN (United Arab Republic) said he fully appreciated the reasons for the Mexican proposal. He had himself, when a member of the International Law Commission in 1957, defended the view that its draft should contain a statement of the theoretical basis of diplomatic privileges and immunities (ILC, 383rd meeting, para. 31). Nevertheless, he thought that the Mexican proposal might give rise to difficulties of interpretation. Besides, as the Polish representative had said, the principle stated in the proposal was already implicit in the draft; and if it was to be mentioned explicitly it should probably appear in the preamble. The best course would perhaps be to ask the drafting committee to prepare a suitable passage, based on the Commission's commentary, for insertion in the preamble.

26. Mr. BINDSCHEDLER (Switzerland) said his delegation supported the Mexican proposal for three reasons. First, owing to the steady increase in the number and size of diplomatic missions, it was essential to state specifically that privileges and immunities were accorded in the interest of the mission's functions and that the privileges and immunities should not be more extensive than those functions necessitated. Secondly, since the theory of extritoriality perhaps still had its adherents, an explicit reference to the "functional necessity" theory would not be superfluous. Lastly, the statement of the principle contained in the proposal would facilitate the settlement of any disputes submitted to conciliation or arbitration bodies.

27. Unlike the United States representative, he took the view that the proposed provision should be incorporated in an article and not in the preamble, for it stated a legal rule which should be mandatory. Since, however, the members of a diplomat's family, who performed no diplomatic functions, also enjoyed privileges and immunities, the provisions should perhaps be revised to read "Diplomatic privileges... in order that the mission and its members may..."

28. Mr. HUCKE (Federal Republic of Germany) said that, although the principle stated in the proposal appeared in modern multilateral conventions, it might not be wise to mention it explicitly in an article or in the preamble, since articles 29 and 30, and also article 40,

paragraph 1, applied to the provisions of the convention as a whole and concerned more particularly privileges and immunities. Furthermore, the proposed provision tended to weaken the position of diplomats and to diminish the esteem for their functions. For those reasons his delegation was unable to support the proposal.

29. Mr. TUNKIN (Union of Soviet Socialist Republics) considered that the adoption of the proposal would not in any way facilitate interpretation of the convention. Such unequivocal provisions as, for instance, those of article 29, paragraph 1, should not raise any difficulty of interpretation. If, however, they had to be interpreted according to the principle set forth in the proposal, the difficulties that would arise were obvious.

30. Mr. BOUZIRI (Tunisia) supported the principle stated in the proposal but considered that it should be supplemented by a reference to the "representative character" theory and included in the preamble to give it wider authority. Moreover, as the Swiss representative had said, the proposed provision did not take account of the fact that diplomats' families were entitled to privileges and immunities, and the Mexican delegation should explain the intention of its proposal in that respect.

31. Mr. GLASER (Romania) said that diplomatic privileges and immunities were manifestly not intended to cover abuses and offences committed by diplomats or their families. On the other hand, it was essential — *ne impediatur legatio* — that diplomatic agents should be able to fulfil their functions under immunity without risk of being accused of an offence, particularly on some trumped-up charge. The effect of the provision proposed by Mexico, however, would be that, in any investigation to determine whether or not an offence had been committed in the exercise of diplomatic functions, the receiving State alone would decide — a situation that might lead to dangerous disputes. The proposal was fraught with such risks that it should appear neither in the operative part nor in the preamble. His delegation would vote against it.

32. Mr. VALLAT (United Kingdom) said that, while he understood the purpose of the proposal, he did not think that the principle was stated in any article of the draft. Was the amendment a statement of fact, or the affirmation of a principle, and if so, should each dispute be decided according to the principle? Clearly a difficult situation would thus arise. When preparing the draft, the International Law Commission had had the choice of three theories and selected that of "functional necessity". As the Committee progressed in its discussion of the draft, it would see to what extent the articles took account of that basic principle. It would then no longer consider it necessary to embody that principle in an article but only in the preamble. Accordingly, the drafting committee should be asked to draft a suitable provision, corresponding to the sense of the Mexican proposal, for insertion in the preamble.

33. Mr. DADZIE (Ghana) said that, after studying the Mexican proposal, his delegation had reached the conclusion that its adoption could give rise to divergent

interpretations and to disputes. Although his delegation supported the principle, it did not think it should appear in the convention. The proposal was concerned with a point of legal theory which should not be discussed in the Conference.

34. Mr. PECHOTA (Czechoslovakia) also considered that the Mexican proposal related to theory. Admittedly, rules were based on theories, but the Conference's task was to lay down standards of conduct. It had been said that the proposed provision would offer guidance for purposes of interpretation. His delegation did not agree. The Conference should not propose theories, but adopt practical rules. His delegation did not deny that the Mexican proposal was of interest, but would nevertheless vote against it.

35. Mr. MARISCAL (Mexico) said he had listened very attentively to the Swiss representative and entirely approved his suggestion. The representatives of the United Kingdom and Ghana had also expressed interesting views, and his delegation would be prepared to agree to the insertion of a provision corresponding to its proposal in the preamble.

36. The CHAIRMAN said that, during the discussion on the preamble, the Committee should decide whether a provision corresponding to the Mexican proposal should be inserted in the preamble.<sup>2</sup>

37. Mr. TUNKIN (Union of Soviet Socialist Republics) hoped that one important point, which the United Kingdom representative had omitted to mention, would not be overlooked in the drafting of the preamble: the International Law Commission had expressly mentioned the "representative character" theory.

#### *Article 19 (Accommodation)*

38. The CHAIRMAN invited debate on article 19 and the amendments thereto.<sup>3</sup>

39. Mr. CARMONA (Venezuela) said that his delegation had studied with interest the International Law Commission's commentary on article 19, which had established an excellent basis for the drafting of the article but did not take sufficient account of the law of the various States, some of which were very jealous of their rights. Other States were more liberal but nevertheless imposed some statutory or constitutional restrictions. Venezuela did not object to the acquisition by a diplomatic mission of necessary residences or premises; but, like most Latin American countries and pursuant to article 18 of its 1861 constitution, it was determined to maintain its sovereign rights over all parts of its territory. Some American countries did not allow aliens to acquire any part of the national territory.

40. His delegation could not accept article 19, for its government could not submit to an obligation to permit

the acquisition of real property by aliens except on certain conditions — which, it should be added, would be as liberal as possible. The alternative offered in article 19 was still too imperative. Why should a government in any way "ensure" adequate accommodation for a mission? By virtue of international courtesy and comity the Protocol Office of the Ministry for Foreign Affairs might facilitate the installation of a diplomatic mission; but the receiving State was under no obligation whatsoever to do so.

41. For those reasons his delegation had submitted a less categorical provision which was close to the Indian and Mexican amendments and which laid greater stress on the rights of the receiving State.

42. Mr. MARISCAL (Mexico), like the Venezuelan representative, found article 19 little to his taste. It did not mention the laws of the receiving State, and imposed obligations which his government was not inclined to accept. The International Law Commission, however, observed in its commentary that the laws and regulations of the receiving State might prevent the sending State from acquiring real property. Article 19 did not seem to take account of that commentary, for it imposed a strict obligation.

43. Moreover, "the premises necessary" was a vague phrase. Did it mean the official residence of the head of the mission, the chancery, the various services, the cultural offices, or the private residences of the members of the mission? The Mexican proposal referred to the laws and regulations of the receiving State and was more in keeping with modern trends. However, his delegation would accept a different formula, so long as it mentioned the laws and regulations of the receiving State.

44. Mr. SUFFIAN (Federation of Malaya) said that his delegation's amendment involved a drafting change only. The word "must" was unusual in such a document, and a milder term would therefore be better. Article 19 as a whole seemed satisfactory to his delegation. The various amendments were meant to lighten the receiving State's responsibilities. His delegation was prepared to support them if they were generally acceptable.

45. Mr. de ERICE y O'SHEA (Spain) suggested that in the Indian amendment, after the words "premises necessary for its mission", the words "and for its members" should be added.

46. Mr. HAASTRUP (Nigeria) said it was reasonable that a State should be free to instal its diplomatic mission in the receiving State. Nigeria had not enacted any laws restricting that freedom. His delegation was in favour of the second alternative in article 19, and would support the Indian amendment.

47. Mr. WESTRUP (Sweden) said that his delegation could not assess the exact legal importance which the commentaries in the report of the International Law Commission (A/3859) would have after the signature of a convention. He supposed that question could not be answered at the moment. In order to be able, if neces-

<sup>2</sup> See 39th meeting.

<sup>3</sup> The following amendments had been submitted: Federation of Malaya, A/CONF.20/C.1/L.113; China, A/CONF.20/C.1/L.122; Mexico, A/CONF.20/C.1/L.128; Venezuela, A/CONF.20/C.1/L.142; Switzerland, A/CONF.20/C.1/L.157; India, A/CONF.20/C.1/L.160; Viet-Nam, A/CONF.20/C.1/L.169.

sary, to refer to the summary record, his delegation wished to state that the Swedish Government, in relation to any obligation it might incur under article 19, would rely on those commentaries, according to which the obligation to "ensure" accommodation would operate only if the receiving State could not remove the legal obstacles to the acquisition of the premises necessary for a given mission. Where there were practical difficulties, such as a housing shortage, it was only proper that the authorities of the receiving State should do their utmost to help missions in their search for premises; but they would not be under a conventional obligation to "ensure" the acquisition of premises.

48. Mr. WALDRON (Ireland) said that article 19 was too mandatory. The Chinese amendment seemed to tone it down suitably. He had nothing against the Swiss and Venezuelan amendments, but could not accept the Indian proposal.

49. Mr. BESADA RAMOS (Cuba) supported the Venezuelan amendment. Allowance should be made for the situation in different countries. Under Cuban law aliens could not acquire real property in Cuba. However, he considered that the words "facilitate acquisition by the sending State of the premises" in the Venezuelan amendment should be replaced by "help the sending State to obtain premises".

The meeting rose at 6.15 p.m.

## TWENTY-FIRST MEETING

Monday, 20 March 1961, at 10.45 a.m.

Chairman: Mr. LALL (India)

### Consideration of the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session (A/CONF.20/4) (continued)

#### Article 19 (Accommodation)

1. The CHAIRMAN invited the Committee to continue its debate on article 19 and on the amendments thereto.<sup>1</sup>

2. Mr. HU (China) supported the International Law Commission's draft in principle, but thought the word "ensure" should be replaced by some less imperative verb such as "facilitate" and, further, that the article should expressly mention accommodation for the head of the mission. That was the object of his delegation's amendment (L.122). The Committee could hardly take a decision on article 19, however, so long as the definition of mission premises was not finally settled.

3. Mr. GASIOROWSKI (Poland) thought that the Mexican amendment (L.128) had the serious defect of

<sup>1</sup> For the list of amendments to the article, see 20th meeting, footnote to para. 38. A revised version of the Indian amendment had been circulated (A/CONF.20/C.1/L.160/Rev.1).

entirely reversing the provisions of article 19 and of making a matter of principle out of what the International Law Commission had considered an exception to the general rule. According to the Commission, it was the receiving State's duty to ensure adequate accommodation for the mission only in the exceptional case in which it had not permitted the sending State to acquire such accommodation. The words "without its assistance", in the amendment in question, were particularly dangerous, for they would unfairly impose a heavy burden on countries which, like Poland, had had to set up a housing service to meet the shortage caused by war-time destruction. The Polish Government helped diplomatic missions to obtain a site, and left it to them to build the premises they needed. That equitable procedure might no longer be possible if the Mexican amendment were adopted. The Polish delegation would therefore vote against it. On the other hand, it would vote for the Venezuelan amendment (L.142).

4. Mr. TRAN VAN MINH (Viet-Nam) said that the purpose of his delegation's amendment (L.169) was to reconcile the two diametrically opposed views which had been expressed in the Committee. It took account both of circumstances and conditions in the receiving State, and of the needs of the diplomatic mission of the sending State. While maintaining the obligation imposed by the article as it stood, the amendment made it less absolute. True, the formula used was one which his delegation had criticized during the discussion of article 10 (14th meeting, paras. 20 and 21), but in the case of article 19 it would be difficult to adopt a more precise wording, which would almost certainly be difficult to apply in practice.

5. Mr. KRISHNA RAO (India) said there could be no question of imposing the obligation contained in the article as drafted by the International Law Commission in cases where it conflicted with the legislation of the receiving State or where there was an acute shortage of housing. As several speakers had said, it was therefore desirable to leave greater latitude to the receiving State, and that was the object of his delegation's revised amendment. It took into due account the amendments submitted by the Federation of Malaya, Venezuela and Switzerland, as well as the comments of the representative of Ireland (20th meeting, para. 48) and the sense of the amendments of China and Mexico. The principle expressed in the amendment submitted by Viet-Nam had been accepted during the discussion of article 10.

6. Mr. CARMONA (Venezuela) said he would be prepared to withdraw the first paragraph of his delegation's amendment in favour of the revised Indian amendment if the words "in accordance with its laws" were inserted after the words "on its territory".

7. Mr. KRISHNA RAO (India) accepted that addition.

8. Mr. TUNKIN (Union of Soviet Socialist Republics) said he had no objection to the article as drafted by the International Law Commission. He had, however, intended to vote for the first paragraph of the Venezuelan amendment, but as that had been withdrawn he would vote for the Indian amendment as revised. Nevertheless,