

Document:-
A/CN.4/110

**Report of the International Law Commission covering the Work of its Ninth session, 23 April -
28 June 1957, Official Records of the General Assembly, Twelfth Session, Supplement No. 9
(A/3623)**

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1957 , vol. II

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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/3623*

Report of the International Law Commission covering the work of its ninth session, 23 April—28 June 1957

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* Also issued as *Official Records of the General Assembly, Twelfth Session, Supplement No. 9.*

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, held its ninth session at the European Office of the United Nations, Geneva, from 23 April to 28 June 1957. The work of the Commission during the session is described in the present report. Chapter II of the report contains a provisional draft on diplomatic intercourse and immunities, which is to be circulated to Governments for their comments, in accordance with the statute of the Commission. Chapter III consists of progress reports on the work on the subjects of State responsibility, arbitral procedure, the law of treaties and consular intercourse and immunities. Chapter IV deals with certain administrative matters.

I. Membership and Attendance

2. The Commission consists of the following members, who were all present at the session:

<i>Name</i>	<i>Nationality</i>
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartos	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Abdullah El-Erian	Egypt
Mr. 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-Khoury	Syria
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. Jean Spiropoulos	Greece
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czechoslovakia

3. The General Assembly, at its eleventh session, by resolution 1103 (XI) of 18 December 1956, decided to increase the membership of the Commission from fifteen to twenty-one. On the same date, the Assembly elected the above-mentioned members for a period of five years from 1 January 1957, in accordance with its resolution 985 (X) of 3 December 1955, by which the term of office of the members was fixed at five years.

II. Officers

4. At its meeting on 23 April 1957, the Commission elected the following officers:

Chairman: Mr. Jaroslav Zourek;

First Vice-Chairman: Mr. Radhabinod Pal;

Second Vice-Chairman: M. Luis Padilla Nervo;

Rapporteur: Sir Gerald Fitzmaurice.

5. 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

6. The Commission adopted an agenda for the ninth session consisting of the following items:

1. Arbitral procedure.
2. Law of treaties.
3. Diplomatic intercourse and immunities.
4. Consular intercourse and immunities.
5. State responsibility.
6. Date and place of the tenth session.
7. Planning of future work of the Commission.
8. Other business.

7. In the course of the session, the Commission held forty-nine meetings. It considered all the items on the agenda with the exception of the law of treaties (item 2) and consular intercourse and immunities (item 4); regarding the two latter items, see chapter III, section III.

CHAPTER II

DIPLOMATIC INTERCOURSE AND IMMUNITIES

I. Introduction

8. In the course of its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered desirable and feasible. Among the items in this list was "Diplomatic intercourse and immunities". The Commission, however, did not include this subject among those to which it accorded priority¹.

9. 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. In view of the fact that the periodical election of members of the Commission was due to take place at the eighth session of the General Assembly beginning in September 1953, the Commission decided to postpone a decision on the matter until its sixth session, to be held in 1954².

10. At its sixth session, the Commission decided to initiate work on the subject, and appointed Mr. A. E. F. Sandström as special rapporteur for it³.

11. "Diplomatic intercourse and immunities" was included as an item on the agenda of the Commission's seventh session. The special rapporteur submitted to the Commission a report (A/CN.4/91) containing a draft for the codification of the law relating to the subject. Because of lack time, the Commission did not, however, consider the item, and referred the study of it to its eighth session⁴. At that session, the Commission had also before it a memorandum on the subject prepared by the Secretariat (A/CN.4/98). The Commission was, however, again obliged, because of work on the law of the sea, to postpone consideration of the item until the following session⁵.

12. During the present session, the Commission, at its 383rd to 413th and 423rd to 430th meetings, considered the topic on the basis of the special rapporteur's above-mentioned report (A/CN.4/91). It adopted a provisional draft with commentaries, which is reproduced in the present chapter. In accordance with articles 16 and 21 of its statute, the Commission decided to transmit the draft through the Secretary-General, to Governments for their observations.

13. The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume

¹ *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20.

² *Ibid.*, *Eighth Session, Supplement No. 9 (A/2456)*, para. 170.

³ *Ibid.*, *Ninth Session, Supplement No. 9 (A/2693)*, para. 73.

⁴ *Ibid.*, *Tenth Session, Supplement No. 9 (A/2934)*, paras. 8 and 9.

⁵ *Ibid.*, *Eleventh Session, Supplement No. 9 (A/3159)*, paras. 5 and 6.

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

14. Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question of the privileges and immunities of the organizations themselves. These matters are, as regards most of the organizations, governed by special conventions.

15. The draft was prepared on the provisional assumption that it would form the basis of a convention. A final decision as to the form in which the draft will be submitted to the General Assembly will be taken in the light of the comments received from Governments.

16. The text of the draft concerning diplomatic intercourse and immunities as adopted by the Commission is reproduced below:

II. Draft articles concerning diplomatic intercourse and immunities

The commentary to the draft should be regarded as provisional. It has been drafted so as to afford the minimum of necessary explanation of the articles. In the final draft which the Commission will prepare at its next session in the light of the comments of Governments, a fuller commentary will be provided.

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

Establishment of diplomatic relations and missions

Article 1

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

Commentary

The Commission here confirms the general practice of States.

Functions of a diplomatic mission

Article 2

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

- (a) Representing the Government of the sending State in the receiving State;
- (b) Protecting the interests of the sending State and of its nationals in the receiving State;
- (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.

Commentary

Without attempting to be exhaustive, this article is believed to reproduce the actual practice of States as it has existed for a very long time.

Appointment of the head of the mission: agrément

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.

Appointment of the staff of the mission

Article 4

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.

Appointment of nationals of the receiving State

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.

Persons declared persona non grata

Article 6

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, according to circumstances, recall this person or terminate his functions with the mission.

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

Commentary

(1) Articles 3-6 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 proper; administrative and technical staff; and service staff. While it is the sending State which makes the appointments, the choice of the persons and, in particular, of the head of the mission, may considerably affect relations between the countries, and it is naturally in the interest of both States concerned that the mission should not contain members whom the receiving State finds unacceptable. In practice, the receiving State can exercise certain powers to that end.

(2) Procedure differs according as the person concerned is the head of the mission or another member of the staff. As regards the former, it was thought desirable that the

sending State should ascertain in advance whether the person it proposes to accredit as head of its mission to another State is *persona grata* with that State. 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.

(3) As regards other members of the mission, they are as a rule freely chosen by the sending State; 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 for the head of mission.

(4) This procedure is sanctioned by articles 3, 4 and 6 of the draft. 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. The words in paragraph 1 of article 6 “or terminate his functions with the mission”, refer mainly to the case of the person concerned being a national of the receiving State.

(5) As is clear from the reservation stated in article 4, 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 (3) of this commentary.

(6) Another exception is that arising out of article 5 of the draft, concerning cases where the sending State wishes to choose as a member of the diplomatic staff a national of the receiving State or 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. While the practice of appointing nationals of the receiving State as members of the diplomatic staff has now become fairly rare, the majority of the members of the Commission think that the case should be mentioned. Certain members of the Commission, however, stated that they were in principle opposed to the appointment of nationals of the receiving State as members of the diplomatic staff, and to according diplomatic privileges and immunities to such persons.

Limitation of staff

Article 7

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

2. The receiving State may also, within similar bounds and on a non-discriminatory basis, refuse to accept officials of a particular category. It may decline to accept any persons as military, naval or air attachés without previous *agrément*.

Commentary

(1) There are also questions other than the choice of the persons comprising the mission, which are connected with the latter's composition and may cause difficulties; in the Commission's view, they require regulation. Article 7 deals with such questions.

(2) 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, but not an absolute right, to limit the size of the staff. Here 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 limitation of the staff must remain within the bounds of what is reasonable and customary.

(3) 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 limit the size of the staff, and must, furthermore, be exercised without discrimination between one State and another. 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.

Commencement of the functions of the head of the mission

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 for Foreign Affairs of the receiving State. (Alternative: when he has presented his letters of credence.)

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.

Chargé d'affaires ad interim

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 after the head of the mission on the mission's diplomatic list shall be presumed to be in charge.

Commentary

This article 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 10, sub-paragraph (c), who is called *chargé d'affaires en pied* and is appointed on a more or less permanent footing.

Classes of heads of mission

Article 10

Heads of mission 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 for Foreign Affairs.

Article 11

States shall agree on the class to which the heads of their missions are to be assigned.

Precedence

Article 12

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 rules of the protocol in the receiving State, which must be applied without discrimination.

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

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

Mode of reception

Article 13

A uniform mode shall be established in each State for the reception of heads of missions of each class.

Commentary

(1) Articles 10-13 are intended to incorporate in the draft the gist of the Vienna Regulation concerning the

rank of diplomats.⁶ Article 10 lists the different classes of heads of mission, the classes conferring rank according to the order on 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.

(3) Although several members of the Commission expressed their support for a change designed to abolish any difference in rank between these two classes of representative, the Commission took the view that unless all States agree—which is rather improbable—difficulties could easily arise, e.g., through the possibility of two different systems existing in the same capital.

(4) The Commission therefore preferred to maintain the broad lines of the Vienna Regulation, the more so since the rate at which the tendency to give heads of mission the title of ambassador is now growing suggests that in time the problem will solve itself.

⁶ 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.

"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.)

(5) In article 10, which corresponds to article 1 of the Vienna Regulation, the Commission does not refer to envoys and ministers as being accredited to "sovereigns", but, in keeping with the changes which have occurred since the Congress of Vienna, has replaced that term by "heads of State".

(6) Nor was it deemed necessary to refer—as was done in the Protocol of the Congress of Aix-la-Chapelle⁷—to a special class of "ministers resident", since appointments of representatives with that title have become very rare.

(7) Having regard to the practice adopted by a number of States of deciding precedence in the respective classes according to the date of presentation of letters of credence, and not according to the date of official notification of arrival, as laid down in article 4 of the Vienna Regulation, the Commission proposes in article 12 of the draft, to give States a choice between one or other of those dates, provided that the alternative adopted is applied uniformly and without discrimination. From the replies received from Governments, the Commission will be able to determine whether a single criterion can be adopted for the final draft.

(8) Paragraph 2 of article 12 establishes the principle that no change in the credentials of the head of a mission, for instance as a result of the death of the head of State by whom he is accredited, shall affect his rank in his class.

(9) The rule stated in article 12, paragraph 3, corresponds to the second paragraph of article 4 of the Vienna Regulation. The object of the amended wording is to remove any possible source of ambiguity. The rules of precedence laid down in the draft will not affect the practice of those countries in which the Pope's representative always has precedence over all other heads of mission.

(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.

Equality of status

Article 14

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

This article requires no commentary.

⁷ The text of the Protocol signed at Aix-la-Chapelle on 21 November 1818 by the plenipotentiaries of Austria, Great Britain, Prussia, Russia and France, is as follows:

"In order to avoid the possibility of unpleasant disputes with regard to a point of diplomatic etiquette for which the Annex to the Decision of Vienna, regulating the question of rank, seems to have made no provision, it is decided, as between the five Courts, that the ministers resident accredited to them shall take rank as an intermediate class between ministers of the second class and *chargés d'affaires*."

(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.)

SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

(1) Among the theories that have exercised an influence on the development of diplomatic privileges and 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; and
- (c) Personal privileges and immunities.

SUBSECTION A. MISSION PREMISES AND ARCHIVES

Accommodation

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.

Commentary

The laws and regulations of a given country may make it impossible for a mission to acquire the necessary premises. 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. If the difficulties are due to a shortage of premises, the receiving State must facilitate the accommodation of the mission as far as possible.

Inviolability of the mission premises

Article 16

1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter the premises, 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 invasion or damage and to prevent any disturbance of the peace of the mission or detraction from 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 deals firstly with the inviolability of the premises of the mission, commonly referred to as the "*franchise de l'hôtel*". 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 act whatsoever (para. 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 detraction from its dignity (para. 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 to ensure order.

(2) A special application of this principle is that no writ shall be served within the premises of the mission, nor shall any summons to appear before a court 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. All judicial notices of this nature must be delivered through the Ministry for Foreign Affairs of the receiving State.

(3) The inviolability confers on the premises, their furnishings and fixtures, immunity from any search, requisition, attachment or execution.

(4) 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.

(5) In connexion with the "*franchise de l'hôtel*" of the head of the mission, it is sometimes stated that the head of the mission may have in his residence a chapel of the faith to which he belongs⁸. The inviolability of the premises of the mission undoubtedly includes freedom of private worship, and nowadays it can hardly be disputed that the head of the mission and his family, together with all members of the staff of the mission and their families, may exercise this right, and that the premises may contain a chapel for the purpose. It was not thought necessary to insert a provision to this effect in the draft.

*Exemption of mission premises from tax**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 pre-

mises of the mission, whether owned or leased, other than such as represent payment for services actually rendered.

This article requires no commentary.

*Inviolability of the archives**Article 18*

The archives and documents of the mission shall be inviolable.

Commentary

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.

SUBSECTION B. FACILITATION OF THE WORK OF THE MISSION,
FREEDOM OF MOVEMENT AND COMMUNICATION*Facilities**Article 19*

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

Commentary

A diplomatic mission may often need assistance to perform its functions satisfactorily. The receiving State (in whose own interests it is that the mission should be able to do this) is obliged to furnish all assistance required, and is under a duty to make every effort to provide the mission with all facilities for the purpose.

*Free movement**Article 20*

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 facilities necessary for the performance of a mission's functions is that its members should enjoy freedom of movement and travel. 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 21*

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

⁸ Article 8 of the 1929 draft of the Institute of International Law on diplomatic immunities. *Annuaire de l'Institut de Droit international*, 1929, Vol. II, p. 307.

may employ all appropriate means, including diplomatic couriers and messages in code or cipher.

2. The diplomatic bag may not be opened or detained.

3. The diplomatic bag may contain only diplomatic documents or articles intended for official use.

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.

Commentary

(1) This article deals with another generally recognized freedom, which is essential for the performance of the mission's functions, namely free communication. In accordance with paragraph 1, this freedom shall be accorded for all official purposes, whether for communications with the Government of the sending State, with the officers and authorities of that Government or the nationals 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 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.

(2) Paragraph 2 states that the diplomatic bag is inviolable, while paragraph 3 indicates what the diplomatic bag may contain. In accordance with the terms of the latter paragraph, the diplomatic bag may be defined as a bag (sack or envelope) containing diplomatic documents or articles intended for official use.

(3) 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 3 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.

(4) Paragraph 4 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 who is not provided with such a document, he is not regarded as a diplomatic courier under the terms of this paragraph.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

Personal inviolability

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.

Commentary

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 a special guard where circumstances so require. Being inviolable, the diplomatic agent is exempted from certain measures that would amount to direct coercion. This principle does not exclude either self-defence or, in exceptional circumstances, measures to prevent the diplomatic agent from committing crimes or offences.

Inviolability of residence and property

Article 23

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

2. His property, papers and correspondence, likewise, shall enjoy inviolability.

Commentary

This article concerns the inviolability attaching to the diplomatic agent's residence and property. As regards movable property, 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 other goods which are for his personal use, or essential to his livelihood.

Immunity from jurisdiction

Article 24

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, held by the diplomatic agent in his private capacity and not 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.

3. A diplomatic agent cannot be subjected to measures of execution, except in the cases coming under sub-paragraphs (a), (b) and (c) of paragraph 1, and provided that the measures of execution 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 shall not exempt him from the jurisdiction of the sending State, to which he shall remain subject in accordance with the law of that State. The competent court for this purpose shall be that of the seat of the Government of the sending State, unless some other is designated under the law of that State.

Commentary

(1) A diplomatic agent is exempt from the receiving State's criminal jurisdiction and, with the exceptions mentioned in paragraph 1 of the article, also from its civil and administrative jurisdiction. On the other hand, it should be recalled that he has the duty to respect the laws and regulations of the receiving State as laid down in article 33 of the present draft.

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

(3) The first exception concerns immovable property belonging to the diplomatic agent personally. All States claim exclusive jurisdiction over immovable property, which is the very substratum of the national 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.

(4) The second exception is based on the consideration that, in view of the general importance of not preventing a succession from proceeding, diplomatic immunity cannot be invoked by a diplomatic agent in order to refuse to appear in a process or action relating to a succession.

(5) 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. If the diplomatic agent engages in such an activity, those with whom he has had dealings in so doing cannot be deprived of their remedy at law.

(6) There may be said to be a fourth exception, in the case referred to in article 25, paragraph 3 (counter-claim directly connected with the diplomatic agent's principal claim).

(7) Paragraph 2 of the article derives from the diplomatic agent's inviolability. Should the diplomatic agent agree to give written or oral testimony, there is nothing to prevent him from doing so.

(8) The effect of immunity from jurisdiction, together with the privileges mentioned in articles 22 and 23, is that the diplomatic agent must also be exempted from measures of execution, with the exceptions mentioned in paragraph 3 of the present article.

(9) The first sentence of 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, on condition, however, that a court in that country is competent under its laws. To bring this jurisdiction into operation, it is not however sufficient that the case should come within the general competence of the country's courts under its laws; these laws must also designate a local court before which the action can be brought. Where no such court exists, the second sentence of paragraph 4 provides that the competent court shall be that of the seat of the Government of the sending State.

Waiver of immunity

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.

Commentary

(1) It is generally held that immunity from jurisdiction can be waived in legal proceedings. As to who is entitled to waive immunity, the Commission took the view that this is a right of the sending State, since the latter represents the end to which the immunity is granted, namely, that the diplomatic agent may discharge his duties in full freedom and with the dignity befitting them. This is the idea underlying the provision contained in paragraph 1.

(2) Another question is how the waiver should be effected in order to be valid. This question is answered in paragraphs 2 and 3, a distinction being drawn between criminal and civil proceedings. In the former case, the waiver must be effected expressly by the Government of the sending State. In civil proceedings, it may be express or implied, and paragraph 3 explains the circumstances in which it is presumed to be implied. Thus, if, in civil 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.

(3) 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 where an express or implied waiver was given in the court of first instance.

(4) 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 to settle the dispute in all stages closely linked to the basic claim.

Exemption from taxation

Article 26

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

- (a) Indirect taxes;
- (b) Dues and taxes on private immovable property, situated in the territory of the receiving State, held by the diplomatic agent in his private capacity and not on behalf of his Government for the purposes of the mission;
- (c) Estate, succession or inheritance duties levied by the receiving State;
- (d) Dues and taxes on income which has its source in the receiving State;
- (e) Charges levied for specific services rendered.

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 exemption exists, subject to certain exceptions.

(2) The Commission's intention in wording sub-paragraph (e) was to indicate that the charge must be in payment for a specific service, rendered or to be rendered.

Exemption from customs duties and inspection

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.

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) As a rule, no customs duties are levied on articles for the personal use of the diplomatic agent or members of his family belonging to his household, including articles intended for his establishment. This exemption has been regarded rather as based on international comity. In view of the widespread nature of this practice, the Commission considers that it should be accepted as a rule of international law.

(3) It is not inconsistent with the exemptions proposed, that the receiving State should, with possible abuses in mind, impose reasonable restrictions on the quantity of goods imported for the diplomatic agent's use, or limit the period during which articles for his establishment must be imported if they are to be exempted from duties.

(4) 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.

(5) In framing the exceptions, 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 prohibited 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.

Persons entitled to privileges and immunities

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 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 enjoy immunity in respect of acts performed in the course of their duties. They shall also, 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.

3. Private servants of the head or members of the mission 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 manner as will avoid undue interference with the conduct of the business of the mission.

4. Private servants who are not nationals of the receiving State shall be exempt from dues and taxes on the emoluments they receive by reason of their employment.

Commentary

(1) It is the general practice to accord 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.

(2) The solutions adopted for this problem will differ according to whether the privileges and immunities re-

quired 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.

(3) 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 reasonable.

(4) A majority of the Commission favoured the latter course, in the knowledge that the rule proposed is a step towards the progressive development of international law.

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

(6) As regards persons belonging to the administrative and technical staff, it took the view that there are good grounds for granting them the same privileges and immunities as members of the diplomatic staff. These occupations, it is true, vary a good deal, and consideration was given to a proposal that each member of this group should be accorded only such privileges and immunities as are required for the performance of his particular duties. By a large majority, however, the Commission adopted the other view, believing that serious difficulties would arise in determining the measure of protection required by the duties in each individual case. Duties are often combined, and conditions in general vary considerably. The Commission accordingly, by majority vote, recommends that the administrative and technical staff as a whole should be given the same privileges and immunities as members of the diplomatic staff (para. 1).

(7) 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 (para. 2). States will, of course, remain free to accord members of this group any additional privileges and immunities they think fit.

(8) 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 lay down either a criterion for determining who should be regarded as a member of the family, or a maximum age for children. The spouse and children under age at least, are universally recognized as members of the family, but cases may arise where other relatives too come into the matter. 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 and special circumstances are necessary qualifications.

(9) 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. However, it thought that, except in the case of nationals of the receiving State, these persons should enjoy 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 will avoid undue interference with the conduct of the mission's business.

(10) 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.

Acquisition of nationality

Article 29

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.

Commentary

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. This rule does not apply to the case of a child of a national of the receiving State.

Diplomatic agents who are nationals of the receiving State

Article 30

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 functions. He shall also enjoy such other privileges and immunities as may be granted to him by the receiving State.

Commentary

(1) This article deals with the privileges and immunities of a diplomatic agent who is a national of the receiving State. On this subject practice is not uniform, while the opinions of writers are also divided. Some 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*, while others are of opinion that he should enjoy only such privileges and immunities as have been expressly granted him by the receiving State.

(2) 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, is immunity from jurisdiction in respect of official acts performed in the exercise of his functions.

(3) The privileges and immunities to be enjoyed beyond this minimum by a diplomatic agent who is a national of the receiving State, will depend on the decision of the receiving State at the time when it agrees to his appointment.

(4) Attention is drawn to the fact that, as is stated in article 22, paragraph 2, the phrase "diplomatic agent" includes not only the head of the mission but also members of the diplomatic staff.

(5) The rule proposed in this article implies that members of the administrative and service staff of a mission who are nationals of the receiving State will not enjoy any privileges and immunities other than those granted to them by that State. The same applies to members of the family of a diplomatic agent who is such a national.

Duration of privileges and immunities

Article 31

1. Any 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 him 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 such property acquired in the country and the export of which was prohibited at the time of his death.

Commentary

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. For those who derive their entitlement from such persons, other dates may apply, namely the dates of commencement and termination of the relationships which constitute the grounds of the entitlement.

Duties of third States

Article 32

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.

2. Third States shall accord diplomatic couriers in transit the same inviolability and protection as the receiving State.

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 problem is whether the third State is under a duty to grant free passage. The view was expressed that it is 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 is entitled to regulate access of foreigners to its territory. The Commission did not think it necessary to resolve this problem, which only arises rarely.

(3) Another problem 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, in suggesting that the third State should accord the agent inviolability, and such other immunities as may be required to ensure his transit or return.

(4) A third State which a diplomatic courier crosses in transit is obliged to afford him the same inviolability and protection as the receiving State.

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

Article 33

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 shall 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) The first sentence of paragraph 1 states 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 court 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. In particular, they must not take part in political campaigns.

(3) Paragraph 2 lays down that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission shall conduct all official business entrusted to it by its Government; in the event, however, of agreement (whether express or tacit) between the two States, the mission may deal directly with other authorities of the receiving State.

(4) Paragraph 3 stipulates that the premises of the mission shall only be used for the legitimate purposes for which they are intended. Among the agreements referred to in the paragraph may be mentioned, as example, certain treaties governing the right to grant asylum in mission premises.

SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

Modes of termination

Articles 34

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

- (a) If it was for a limited period, on the expiry of that period, provided it has not been extended;
- (b) On notification by the Government of the sending State to the Government of the receiving State that it has come to an end (recall);
- (c) On notification to the diplomatic agent by the receiving State that it considers his function to be terminated;
- (d) On the death of the diplomatic agent.

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 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.

This article requires no commentary.

Protection of premises, archives and interests

Article 36

If diplomatic relations are broken off between two States, or if a mission is withdrawn or discontinued:

(a) The receiving State, even in case of armed conflict, shall 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 another State acceptable to the receiving State;

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

This article requires no commentary.

SECTION V. SETTLEMENT OF DISPUTES

Article 37

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

This article requires no commentary.

CHAPTER III

PROGRESS OF WORK ON OTHER SUBJECTS UNDER STUDY BY THE COMMISSION

I. State responsibility

17. By arrangement among the special rapporteurs concerned, the subject of State responsibility was discussed next in order of the agenda after diplomatic intercourse and immunities. Mr. F. V. García-Amador, the special rapporteur, in accordance with the request made by the Commission at its eighth session, submitted at the ninth session a second report (A/CN.4/106) on the subject of "International responsibility", dealing with the particular topic of "Responsibility of the State for injuries caused in its territory to the persons of property of aliens—Part I: Acts and omissions". The Commission, at its 413th to 416th meetings, held a general discussion of this report, and requested the special rapporteur to continue his work.

II. Arbitral procedure

18. At its 404th meeting, the Commission appointed a committee consisting of nine members of the Commission to consider and report to the full Commission on the questions involved by the General Assembly resolution 989 (X) of 14 December 1955, by which the Commission was invited to consider the comments made by Governments, and the discussions in the Sixth Committee, respecting the draft on arbitral procedure prepared by the Commission at its fifth session (1953), insofar as these comments and discussions might contribute further to the value of the draft, and to report to the Assembly at its thirteenth session (1958).

19. The committee came to the conclusion that, in order that detailed work could usefully be accomplished, it would be necessary for the full Commission to take a decision on 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. Accordingly, at its 419th meeting, the Commission considered this question in the light of a report (A/CN.4/109) submitted to it at its present session by the special rapporteur, M. Georges Scelle, and decided in favour of the second alternative. At the request of the special rapporteur, the Commission, with a view to facilitating the preparation, at its next session in 1958, of its final report on the subject to the General Assembly, held a general discussion of certain of the key articles in the revised draft submitted by the special rapporteur in his report mentioned above, in which he took into consideration the comments of Governments and the discussions in the Sixth Committee respecting the Commission's original (1953) draft. The Commission, after taking provisional decisions on certain points, adjourned the matter for final consideration and report at its next session.

III. Law of treaties; consular intercourse and immunities

20. The special rapporteurs on these subjects, Sir Gerald Fitzmaurice and Mr. Jaroslav Zourek, had both submitted reports to the present session (A/CN.4/107 and A/CN.4/108); but for want of time it was not possible to discuss them. Sir Gerald Fitzmaurice informed the Commission that he would present to its next session a report completing the work on the validity of treaties begun in his first two reports. The special rapporteurs were requested to continue their work.

CHAPTER IV

OTHER DECISIONS OF THE COMMISSION

I. Co-operation with other bodies

21. The Commission considered the contents of a letter dated 27 May 1957, addressed to the Secretary of the Commission by the Acting Secretary of the Asian Legal Consultative Committee, requesting co-operation with the Commission; the Chairman drew attention in that connexion to article 26 of the Commission's statute, relating to consultation with international or national organizations, and to the resolutions on co-operation with inter-American bodies adopted by the Commission at its sixth, seventh and eighth sessions.

22. The Secretary to the Commission stated that he wished first to report regarding the resolution adopted by the Commission in 1956 on the subject of co-operation with inter-American bodies. Under that resolution, the Commission requested the Secretary-General of the United Nations to authorize the Secretary of the Commission to attend, as an observer, the fourth meeting of the Inter-American Council of Jurists to be held at Santiago, Chile, in 1958⁹. He had, however, been informed that, owing to the need for further preparatory work by the Rio de

Janeiro Committee, the meeting would have to be postponed until 1959. No further action by the Commission was required in that connexion.

23. The Secretary went on to explain that the Asian Legal Consultative Committee, described by its Acting Secretary as an "inter-governmental committee of legal experts", had been established on 15 November 1956, for an initial period of five years, by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. According to article 3 of the Committee's statute, one of its objects was "to examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said Commission". At the Committee's first meeting at New Delhi, from 18 to 27 April 1957, it had instructed its Acting Secretary to get in touch with the Commission with a view to establishing consultative relations.

24. On the proposal of the Chairman, the Commission authorized the Secretary to reply to the Asian Legal Consultative Committee on the following lines:

(i) The Commission will ask the Secretary-General of the United Nations to put the Asian Legal Consultative Committee on the list of organizations which receive the Commission's documents.

(ii) The Commission requests the Consultative Committee to send, whenever it sees fit, any observations it may wish to make on questions under study by the Commission.

(iii) The Commission has pleasure in acknowledging the Committee's letter and expresses a keen interest in its work. The Commission would welcome any information on the development of the Committee's programme.

II. Planning of future work of the Commission

25. The Commission decided to place on the agenda for its next session, in 1958, the following subjects and to discuss these in the order indicated:

(i) Arbitral procedure—in order to present a final report to the General Assembly at its thirteenth session in 1958, as requested in Assembly resolution 989 (X) of 14 December 1955 (see para. 18 above);

(ii) Diplomatic intercourse and immunities—with a view to presenting a final report on this subject to the General Assembly at its thirteenth session, after reviewing it in the light of the comments of governments on the draft contained in chapter II of the present report;

(iii) The law of treaties;

(iv) State responsibility;

(v) Consular intercourse and immunities.

26. In view of the increased size of the Commission following on the recent additions to the membership of the United Nations, and of the hopes expressed in the discussions in the Sixth Committee of the General Assembly at its eleventh (1956) session that it might be possible to find ways of increasing the speed of the work, the Commission had this matter under consideration. It was pointed out in the course of discussion that there were

⁹ *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), para. 47.*

solid reasons for the Commission's practice of holding only one plenary meeting a day. The nature of the work and the particular task entrusted to the Commission made it essential to leave enough time between meetings for personal preparation, reflexion and research, not only on the basic drafts and reports, but on the new points that were constantly coming up in the course of the discussions, and which required careful attention. For this necessary private and individual work of the members, it would be impossible to find adequate time on the basis of two plenary meetings a day. In addition, it would be impossible on that basis for the special rapporteur for the subject in hand, the general rapporteur and the drafting committee to keep pace with the Commission's work. The latter, indeed, would be compelled to meet mostly at night, since its meetings are usually of more than three hours' duration, and the presence of its members at plenary meetings of the Commission is considered essential.

27. It was also pointed out that, if the Commission only met once a day in plenary session, this did not mean that all activity ceased at other times. Apart from the individual work of members, the rapporteurs were continually at work, and the drafting committee was in being and at work during the greater part of the session. This year, the Commission had also appointed another committee which met outside the normal hours, it had prolonged the duration of its morning plenary meeting; and, in addition, it had held a number of extra plenary meetings, and was always ready to do so, within the limits of the available budgetary and administrative possibilities, if the state of the work so required.

28. Having regard to this position, the Commission felt that, within the confines of a ten-weeks' session, no serious increase in the speed or quantity of the work could be achieved except by the adoption of methods that would be detrimental to its quality—and the Commission believes that the quality of its work is, and must always remain, the primary consideration, both from the Commission's own point of view and that of the Assembly.

29. Nevertheless, the Commission is fully conscious of the need for doing everything possible, consistent with the maintenance of quality, to increase the pace and volume of the work, and is ready to adopt any appropriate measures conducive to that end. It proposes to keep the matter under constant review, and to give it renewed consideration at its next session in the light of the experience gained in the working of the Commission with its present membership of twenty-one.

III. Emoluments of the members of the commission

30. In view of the fact that the present allowance of the Commission's members will, together with the question of a special allowance for members of all technical committees and commissions, come up for consideration at the next session of the General Assembly, the Commission wishes to draw attention to the remarks concerning the emoluments of its members contained in paragraph 42 of its report for 1949¹⁰. In the light of the considerations

therein mentioned, the General Assembly, by resolution 485 (V) of 12 December 1950, in which these considerations were stressed, decided that members of the Commission should receive a special allowance, amended article 13 of the Commission's statute accordingly, and fixed the allowance at \$35 a day.

31. The Commission believes that the case of each technical commission and committee must be decided on its merits. So far as its own position is concerned, it can only draw attention to the fact that the considerations set out in paragraph 42 of its report for 1949, and on which General Assembly resolution 485 (V) was based, have in no way changed in the interval but, on the contrary, have remained fully operative. The work of the Commission makes heavy demands on the members. It meets each year for a long continuous period which, in certain years, has involved for members an absence from home of nearly three months. This means a substantial sacrifice either of time or money, or of both, which many members of the Commission might not be able to bear if conditions were changed; and a similar difficulty would be encountered in finding any suitable replacements. Even if no direct money consideration should arise, a serious burden of additional work is subsequently imposed on all members of the Commission, without exception, by reason of such a long absence from their normal activities or duties. In addition, if adequate progress is to be made with the work at the Commission's sessions, it is necessary for all its members to devote a considerable amount of time to personal research and preparation between the sessions.

32. Having regard to these considerations, and the character of the Commission's work, the Commission believes that the maintenance of this allowance, as a minimum, is essential in the interests of the Commission work and standing.

IV. Date and place of the next session

33. Consultations with the Secretary-General having shown that the period to be allowed for the Conference on the Law of the Sea, to be held in the first quarter of 1958, must extend until Friday, 25 April, the Commission's session cannot start before Monday, 28 April, and a ten weeks' session from that date would take until 4 July. The Commission therefore, subject to the considerations mentioned below, has decided, in accordance with the provisions of article 12 of its statute, as amended by General Assembly resolution 984 (X) of 3 December 1955, to hold its next session in Geneva from 28 April to 4 July 1958.

34. Having regard to the fact that the present pattern of conferences will come up for discussion at the next session of the General Assembly, the Commission wishes to draw attention to the remarks contained in paragraph 175 of its report for 1953¹¹, concerning the difficulty created for a number of the members of the Commission by the present regulations, according to which the Commission must finish its session by or before the opening of

¹⁰ Report of the International Law Commission covering its first session, *Official Records of the General Assembly, Fourth session, Supplement No. 10 (A/925)*.

¹¹ *Ibid.*, Eighth Session, Supplement No. 9 (A/2456).

the summer session of the Economic and Social Council in July, and must therefore, if its own session is not to be unduly curtailed, begin it at a date in the latter half of April. The holding of a shorter session would not be satisfactory, since ten weeks is the minimum period in which the work can be done.

V. Representation at the twelfth session of the General Assembly

35. The Commission decided that it should be represented at the next (twelfth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Jaroslav Zourek.
