

Draft Articles on Diplomatic Intercourse and Immunities with commentaries

1958

Text adopted by the International Law Commission at its tenth session, in 1958, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 53). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1958*, vol. II.



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Chapter III

DIPLOMATIC INTERCOURSE²⁴ AND IMMUNITIES

I. Introduction

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

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

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

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

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

49. During the present session, at its 448th, 449th, 451st to 468th and 474th to 478th meetings, the Commission examined the text of the provisional draft in the light of the observations of Governments and of the conclusions drawn from them by the special rapporteur

(A/CN.4/116 and Add.1 and 2). In consequence of that examination, the Commission made a number of changes in the provisional draft.

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

51. The draft deals only with permanent diplomatic missions. Diplomatic relations between States also assume other forms that might be placed under the heading of "ad hoc diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them, and requested the special rapporteur to make a study of the question and to submit his report at a future session.

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

II. Text of the draft articles and commentary

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

DRAFT ARTICLES ON DIPLOMATIC INTERCOURSE AND IMMUNITIES

DEFINITIONS

Article 1

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

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

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

(c) The "members of the staff of the mission" are the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission;

(d) The "diplomatic staff" consists of the members of the staff of the mission having diplomatic rank;

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

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

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

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

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

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

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

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

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

SECTION I. DIPLOMATIC INTERCOURSE IN GENERAL

Establishment of diplomatic relations and missions

Article 2

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

Commentary

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

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

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

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

Functions of a diplomatic mission

Article 3

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

Appointment of the head of the mission: agrément

Article 4

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

Appointment to more than one State

Article 5

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

Appointment of the staff of the mission

Article 6

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

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

Appointment of nationals of the receiving State

Article 7

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

Persons declared persona non grata

Article 8

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

Notification of arrival and departure

Article 9

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

Commentary

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

Size of staff

Article 10

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

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

Commentary

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

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

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

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

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

Offices away from the seat of the mission

Article 11

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

Commentary

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

*Commencement of the functions of the head
of the mission*

Article 12

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

Commentary

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

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

Classes of heads of mission

Article 13

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

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

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

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

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

Article 14

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

Precedence

Article 15

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

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

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

Mode of reception

Article 16

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

" . . .

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

This commentary should now be supplemented by the following:

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

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

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

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

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

Ministers or Ministers-Counsellors;
Counsellors;
First Secretaries;

Second Secretaries;
Third Secretaries;
Attachés.

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

Chargé d'affaires ad interim

Article 17

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

Commentary

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

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

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

Use of flag and emblem

Article 18

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

Commentary

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

SECTION II. DIPLOMATIC PRIVILEGES AND IMMUNITIES

General comments

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

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

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

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

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

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

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

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

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

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

- (a) Those relating to the premises of the mission and to its archives;
- (b) Those relating to the work of the mission;
- (c) Personal privileges and immunities.

SUB-SECTION A. MISSION PREMISES AND ARCHIVES

Accommodation

Article 19

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

Commentary

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

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

Inviolability of the mission premises

Article 20

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

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

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

Commentary

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

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

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

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

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

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

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

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

Exemption of mission premises from tax

Article 21

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

Commentary

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

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

Inviolability of the archives

Article 22

The archives and documents of the mission shall be inviolable.

Commentary

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

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

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

article 25 to the correspondence and communications of the mission.

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

Facilities

Article 23

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

Commentary

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

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

Free movement

Article 24

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

Commentary

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

Freedom of communication

Article 25

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

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

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

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

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

Commentary

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

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

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

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

(5) The Commission has noted that the diplomatic bag has on occasion been opened with the permission of the Ministry for Foreign Affairs of the receiving State, and in the presence of a representative of the mission concerned. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph

4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.

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

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

Article 26

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

Commentary

This article states a rule which is universally accepted.

SUB-SECTION C. PERSONAL PRIVILEGES AND IMMUNITIES

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

Personal inviolability

Article 27

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

Commentary

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

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

Inviolability of residence and property

Article 28

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

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

Commentary

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

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

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

Immunity from jurisdiction

Article 29

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

Waiver of immunity

Article 30

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

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

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

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

Commentary

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

(2) In the text adopted at the ninth session in 1957, paragraph 2 read as follows: "In criminal proceedings, waiver must always be effected expressly by the Government of the sending State". The Commission decided to delete the phrase "by the Government of the sending State", because it was open to the misinterpretation that the communication of the waiver should actually emanate from the Government of the sending State. As was pointed out, however, the head of the mission is the rep-

resentative of his Government, and when he communicates a waiver of immunity the courts of the receiving State must accept it as a declaration of the Government of the sending State. In the new text, the question of the authority of the head of the mission to make the declaration is not dealt with, for this is an internal question of concern only to the sending State and to the head of the mission.

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

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

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

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

Exemption from social security legislation

Article 31

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

Commentary

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

*Exemption from taxation**Article 32*

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

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

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

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

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

(e) Charges levied for specific services rendered;

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

Commentary

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

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

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

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

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

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

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

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

*Exemption from personal services and contributions**Article 33*

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

Commentary

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

*Exemption from customs duties and inspection**Article 34*

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

Acquisition of nationality

Article 35

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

Commentary

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

Persons entitled to privileges and immunities

Article 36

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

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

3. Private servants of the head or members of the mission shall, if they are not nationals of the receiving State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may

enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission.

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

did not constitute conclusive proof that the person concerned was not so entitled.

Diplomatic agents who are nationals of the receiving State

Article 37

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

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

Commentary

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

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

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

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

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

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

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

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

Duration of privileges and immunities

Article 38

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

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

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

Commentary

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

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

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

Duties of third States

Article 39

1. If a diplomatic agent passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in case of any members of his family enjoying diplomatic privileges or immunities who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

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

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

Commentary

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

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

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

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

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

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

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

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

Article 40

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

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

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

Commentary

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

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

(3) Paragraph 2 states that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission should conduct all official business entrusted to it by its Government: nevertheless, by agreement (whether express or im-

plied) between the two States, the mission may deal directly with other authorities of the receiving State, as specialist attachés, in particular, frequently do.

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

SECTION IV. END OF THE FUNCTION OF A DIPLOMATIC AGENT

Modes of termination

Article 41

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

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

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

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

Commentary

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

Facilitation of departure

Article 42

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

Commentary

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

Protection of premises, archives and interests

Article 43

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

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

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

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

Commentary

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

SECTION V. NON-DISCRIMINATION

Article 44

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

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

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

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

Commentary

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

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

(3) The first of these cases is that in which the receiving State applies restrictively one of the rules of the

draft because the rule is so applied to its own mission in the sending State. It is assumed that the restrictive application in the sending State concerned is in keeping with the strict terms of the rule in question, and within the limits allowed by the rule; otherwise, there is an infringement of the rule and the action of the receiving State becomes an act of reprisal.

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

SECTION VI. SETTLEMENT OF DISPUTES

Article 45

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

Commentary

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