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**Codification of the International Law Relating to Diplomatic Intercourse and Immunities
Memorandum prepared by the Secretariat**

Topic:
Diplomatic intercourse and immunities

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DIPLOMATIC INTERCOURSE AND IMMUNITIES

DOCUMENT A/CN.4/98

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Introduction

A. PRELIMINARY OBSERVATIONS

1. During its sixth session, held at Paris from 3 June to 28 July 1954, the International Law Commission briefly examined the question of the codification of the rules governing "Diplomatic intercourse and immunities" and took the following decision:

"In pursuance 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 the topic "Diplomatic intercourse and immunities" and to treat it as a priority topic, the Commission decided to initiate work on this subject. It appointed Mr. A. E. F. Sandström as special rapporteur."¹

2. At its first session, held at New York from 12 April to 9 June 1949, the Commission, in accordance with article 18, paragraph 1, of its Statute, had surveyed "the whole field of international law with a view to selecting topics for codification" (A/CN.4/4). In order to facilitate this task, the Secretariat had submitted a memorandum containing a comprehensive analysis of international law relating to this work of codification. The question of diplomatic immunities is dealt with on pages 53 and 54 of that memorandum; after a short reference to the relevant work of the League of Nations, to the Sixth International Conference of American States at Havana (1928) and to the draft convention published in 1932 by the Harvard Research in International Law, the memorandum concludes:

"The work of the League of Nations Committee of Experts, of the Havana Convention of 1928, and of the Harvard Research, the documentation on which that work was based, as well as the rich sources of judicial practice, of diplomatic correspondence, and of doctrinal writing and exposition, provide sufficient material for a comprehensive effort at codifying this part of international law. The wealth of the available practice need not necessarily mean that such codification would be merely in the nature of systematization and imparting precision to a body of law with regard to which there is otherwise agreement on all details. This is not the case. Practice has shown divergencies, some of them persistent, on such questions as the limits of immunity with regard to acts of a private law nature, the categories of the diplomatic staff which is entitled to full jurisdictional immunities, the immunities of the subordinate staff, the immunities of nationals of the receiving State, the extent of the immunities from various forms of taxation, conditions of waiver of immunities, and the nature of acts from which such waiver will be implied. There may also have to be considered the consequences of the partial amalgamation, in some countries, of the diplomatic and consular services. For the task confronting the International Law Commission in this matter is not only one of diplomatic immunities and privileges, but also of the various aspects of diplomatic intercourse in general."²

3. At the sixth meeting of its first session, the International Law Commission decided that: "... the subject

¹ *Official Records of the General Assembly, Ninth Session, Supplement No. 9*, para. 73.

² A/CN.4/1/Rev. 1, p. 54.

of diplomatic intercourse and immunities would appear in the list of topics to be retained.”³

4. The report of the International Law Commission covering the work of its first session mentions the problem as the twenty-first of the “Topics of international law considered by the Commission”⁴ and among the fourteen provisionally selected for codification.⁵ It was not, however, one of the topics to which the Commission gave priority.⁶

B. THE YUGOSLAV PROPOSAL FOR PLACING THE TOPIC ON THE AGENDA OF THE SEVENTH SESSION OF THE GENERAL ASSEMBLY

5. Subsequently, by a letter dated 7 July 1952 addressed to the Secretary-General, the acting permanent representative of the Federal People’s Republic of Yugoslavia to the United Nations requested the inclusion of the following item in the provisional agenda of the seventh regular session of the General Assembly:

“Giving priority to the codification of the topic ‘Diplomatic intercourse and immunities’ in accordance with article 18 of the Statute of the International Law Commission.”⁷

6. In an “Explanatory memorandum”, sent with a letter addressed to the Secretary-General on 10 October 1952, the acting permanent representative of the Federal People’s Republic of Yugoslavia stated, *inter alia*, that:

“Of late . . . the violations of the rules of diplomatic intercourse and immunities have become increasingly frequent. . . Such a situation makes it imperative to undertake, with all the necessary urgency, the task of codifying the rules of international law relating to diplomatic intercourse and immunities and thus to confirm definite and precise rules of international law . . .”⁸

He added that the purpose of his request for the inclusion of the item in the agenda was to enable the appropriate body urgently to begin the study of the problem and the codification of the pertinent rules, in order to make clear what are the rights and privileges of diplomatic representatives and what are the obligations of the State on whose territory they perform their functions.⁹

C. THE YUGOSLAV DRAFT RESOLUTION AND THE DISCUSSION IN THE SIXTH COMMITTEE

7. On 29 October 1952, the representative of the Federal People’s Republic of Yugoslavia submitted a draft resolution¹⁰ requesting the General Assembly to recommend that the International Law Commission

should: “...undertake the codification of the topic ‘Diplomatic intercourse and immunities’ as a matter of priority”. In support of this request, it was stated in the preamble that the codification of international law relating to this topic “...is necessary and desirable for the purpose of promoting an improvement of relations among States”.

8. The Sixth Committee discussed the item during its 313th to 317th meetings, held from 29 October to 3 November 1952.¹¹ It may be useful to consider very briefly the various amendments of substance which were submitted during these discussions but failed to obtain the Committee’s approval. In this way it will be possible to perceive the true scope of the present study.

9. First, at the 315th meeting, the United States representative expressed the opinion that the scope of the Yugoslav draft resolution should be broadened, “...so as to refer to consular as well as to diplomatic privileges and immunities”.¹²

Similarly, the United States representative and several others wished to include “...such matters as personal privileges and immunities, asylum, protection of premises and archives, and selection and recall of staff”.¹³

10. A Colombian amendment¹⁴ to the Yugoslav draft resolution¹⁵ expressly proposed that the International Law Commission should deal not only with diplomatic privileges and immunities but also with the right of asylum. This amendment was rejected by 24 votes to 17, with 10 abstentions,¹⁶ the majority of the Committee holding that the two questions were distinct and had always been regarded as such by the International Law Commission.¹⁷

D. GENERAL ASSEMBLY RESOLUTION 685 (VII)

11. The Sixth Committee in fact rejected all the amendments mentioned above¹⁸ and submitted to the General Assembly the following resolution, which was adopted on 5 December 1952 at the 400th plenary meeting:

“*The General Assembly,*

“*Recalling* the purposes of the United Nations and the provision of the Preamble of the Charter according to which ‘the peoples of the United Nations’ are determined to ‘practice tolerance and live together in peace with one another as good neighbours’,

“*Expressing* its desire for the common observance by all governments of existing principles and rules and recognized practice concerning diplomatic intercourse and immunities, particularly in regard to the treatment of diplomatic representatives of foreign States,

³ A/CN.4/SR.6.

⁴ *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 15.

⁵ *Ibid.*, para. 16, No. 11.

⁶ *Ibid.*, paras. 19 and 20.

⁷ *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/2144.

⁸ *Ibid.*, document A/2144/Add.1.

⁹ *Ibid.*

¹⁰ *Ibid.*, document A/C.6/L.248.

¹¹ *Ibid.*, document A/2252, para. 3.

¹² *Ibid.*, *Seventh Session, Sixth Committee*, 315th meeting, para. 8.

¹³ *Ibid.*, para. 7.

¹⁴ *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/C.6/L.251.

¹⁵ *Ibid.*, document A/C.6/L.250.

¹⁶ *Ibid.*, document A/2252, para. 32.

¹⁷ *Ibid.*, *Seventh Session, Sixth Committee*, 315th meeting, para. 32 ff.

¹⁸ *Ibid.*, *Seventh Session, Annexes*, agenda item 58, document A/2252, paras 32 and 33.

"Considering that early codification of international law on diplomatic intercourse and immunities is necessary and desirable as a contribution to the improvement of relations between States,

"Noting that the International Law Commission has included the topic 'Diplomatic intercourse and immunities' in its provisional list of topics of international law selected for codification,

"Requests the International Law Commission, as soon as it considers it possible, to undertake the codification of the topic 'Diplomatic intercourse and immunities', and to treat it as a priority topic."

12. The International Law Commission, to which this resolution was communicated at its fifth session, agreed to wait until the following session before deciding when it could undertake the codification of this topic;¹⁹ at its sixth session, it appointed Mr. A. E. F. Sandström as Special Rapporteur on the subject.²⁰

13. From the preamble to resolution 685 (VII) it is clear that the request to the Commission to undertake the codification of the topic "Diplomatic intercourse and immunities" reflects the Assembly's hope that the existing principles and rules and recognized practice would be observed by all Governments, particularly in regard to the treatment of foreign diplomatic representatives.

E. PURPOSE OF THIS STUDY

14. This memorandum, intended for the International Law Commission, was prepared in response to a request made to the Secretariat by Mr. A. E. F. Sandström, Special Rapporteur.

15. The purpose of this study is to present a broad outline of existing principles and rules and of the practice followed by States with regard to the immunities and privileges enjoyed by diplomatic representatives of foreign States.

16. This memorandum will first review the various attempts made by States to reach general agreement on the problem of diplomatic intercourse and immunities, the relevant work of the League of Nations and the proposals made by private authorities; it will then summarize the main theories relating to the juridical basis of the privileges and immunities in question. A final section will briefly discuss some of the problems which the existence of these privileges and immunities involves and refer to a few selected judicial decisions in which these problems have been considered.

CHAPTER I

Review of the attempts to reach General Agreement on the problem of diplomatic privileges and immunities

A. DIPLOMATIC INTERCOURSE AND IMMUNITIES UP TO THE AIX-LA-CHAPELLE REGULATION

17. "There are two maxims in the law of nations

relating to ambassadors which are generally accepted as established rules: the first is that ambassadors must be received and the second that they must suffer no harm."²¹

1. DIPLOMATIC INTERCOURSE BEFORE THE CONGRESS OF VIENNA

18. The sanctity of ambassadors was recognized at a very early date. In Roman times, whenever the priests of College of Fetiales conducted diplomatic negotiations, the Republic demanded and obtained respect for their inviolability; it also refrained, as a general rule, from any interference with the person or property of foreign ambassadors sent on special mission to Rome. As Oppenheim says:

"Legation, as an institution for the purpose of negotiating between different States, is as old as history, whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity, where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct."²²

19. The establishment of permanent legations and embassies is nevertheless a recent historical development:

"The history of diplomacy falls into two clearly distinct periods. The first is the period of non-permanent *ad hoc* embassies, covering antiquity and the Middle Ages and ending in the 15th century. The second period is that of permanent legations, which originated in Italy, particularly in Venice, in the 15th century..."²³

After the Peace of Westphalia (1648), which confirmed the principle of the balance of power in Europe and thus obliged States to keep watch on each other, the establishment of permanent diplomatic missions gradually became the common practice; initially, however, certain States, such as France in the reign of Henri IV and England under Henry VII, vigorously opposed the establishment of embassies or legations. In 1651 the States General of Holland debated whether embassies were of any use,²⁴ and in 1660 Poland proposed that all accredited ambassadors should be sent out of the country.

20. The French Revolution, the wars which followed, and the spectacular industrial development which was then beginning to make itself felt, put an end to the isolation of States. Regular relations were established and it became necessary to seek agreement on some universally binding rules regarding the rights and privileges of foreign diplomats.

2. DECISIONS TAKEN AT THE CONGRESS OF VIENNA (1815) AND AT AIX-LA-CHAPELLE (1818)

21. The first international documents which should be

²¹ Hugo Grotius, *De jure belli ac pacis*, Book II, chap. XVIII.

²² L. Oppenheim, *International Law—A Treatise*, Vol. I, *Peace*, 7th ed., ed. H. Lauterpacht (New York, Longmans, 1948), pp. 687 and 688.

²³ P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Arthur Rousseau, 1926), Vol. I, Part III, p. 29.

²⁴ Sir Cecil Hurst, *International Law, The Collected Papers of Sir Cecil Hurst* (London, Stevens and Sons Limited, 1950), p. 171.

¹⁹ *Ibid.*, *Eighth Session, Supplement No. 9*, para. 170.

²⁰ *Ibid.*, *Ninth Session, Supplement No. 9*, para. 73.

mentioned in this connexion relate to the classification of diplomatic agents. Owing to the frequently irreconcilable claims of sovereigns concerning the relative rank of these agents, this question has often given rise to disputes and to some fairly serious incidents:

"The inequality of European powers", wrote F. Deak "and, to an even greater extent, jealousy and unceasing rivalry... were the principal forces that shaped the policies of the Middle Ages... Mediaeval records give countless accounts of disputes between the diplomatic agents of different powers, each of whom claimed precedence over his colleagues... it is in the light of these facts that we must consider the rules prepared by the Congress of Vienna for the classification of diplomatic agents according to their rank and title..."²⁵

22. The Regulation adopted at Vienna on 19 March 1815 (Annex XVII of the Acts of the Congress) succeeded in putting an end to these disputes over precedence. The Regulation provides:

"XVII. Regulation concerning the relative ranks of diplomatic agents

"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 I. Diplomatic agents shall be divided into three classes:

"That of Ambassadors, Legates, or Nuncios;

"That of Envoys, Ministers or other persons accredited to sovereigns;

"That of *Chargés d'affaires* accredited to Ministers of Foreign Affairs.

"Article II. Only Ambassadors, Legates or Nuncios shall possess the representative character.

"Article III. Diplomatic officials on extraordinary missions shall not *ipso facto* be entitled to any superiority of rank.

"Article IV. Diplomatic officials shall rank in each class according to the date on which their arrival was officially notified. The present regulation shall not in any way modify the position of the Papal representatives.

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

"Article VI. The existence of a relationship by blood or by marriage between Courts shall not confer any rank on their diplomatic officials. Similarly, the existence of a political alliance shall not confer any rank.

²⁵ Francis Deak, "Classification, immunités et privilèges des agents diplomatiques", *Revue de droit international et de législation comparée*, 3rd. ser., Vol. IX (1928), p. 181 (quoted by Raoul Genet, *Traité de diplomatie et de droit diplomatique* (Paris, A. Pedone, 1931), Vol. I, pp. 266 and 267.

"Article VII. 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 signatories of the Treaty of Paris at their meeting on 19 March 1815."²⁶

23. This agreement thus established three categories of public ministers: ambassadors and certain agents of equivalent rank, ministers in the strict sense and *chargés d'affaires*. Articles IV to VII finally put an end to all disputes over precedence by providing, first (article IV), that the relative ranks of diplomatic agents would be determined by the date of their arrival in the country to which they were accredited and, secondly (article V), that each State would establish a uniform procedure for their reception, regardless of the country they represented. Lastly, articles VI and VII, which stipulated that relationship could not be used as a pretext for granting a special rank to the agents concerned (article VI), and laid down the order to be observed in the signing of international treaties or instruments (article VII), eliminated other frequent causes of friction.

24. The Vienna Regulation was supplemented by the Protocol of the Conference of 21 November 1818 (Aix-la-Chapelle), which established a new class of diplomatic agent: that of "ministers resident". These agents, according to the Protocol, "...shall take rank as an intermediate class between ministers of the second class and *chargés d'affaires*."²⁷

25. It should perhaps be noted that the distinction drawn in the Vienna Regulation between ambassadors and agents of the second class is gradually losing its practical significance, because today most States tend more and more to accredit to foreign capitals agents designated as ambassadors. Some authors have asserted that ambassadors enjoy an absolute right to deal directly with the sovereign to whom they are accredited, while ministers plenipotentiary do not possess that prerogative.²⁸

26. The classification established at Vienna nevertheless still holds good. This means that the first class comprises ambassadors, who hold the highest rank which a country's diplomatic representative can attain; the same degree of precedence is enjoyed by legates and nuncios, who are Papal envoys usually entrusted with ecclesiastical missions. Ministers plenipotentiary, who were originally entrusted with extraordinary and temporary missions and as such entitled to take precedence immediately after ambassadors, still occupy second place. The minister resident, who, according to Genet, "...does not represent the dignity of the prince but merely conducts his business",²⁹ occupies a lower hierarchical

²⁶ Géo. Fréd de Martens, *Nouveau recueil de traités* (Gottingen, Librairie de Dieterich, 1818), Vol. II, pp. 449 and 450.

²⁷ The text of this Protocol is reproduced in Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), Vol. III, p. 184 and n. 1.

²⁸ *Ibid.*, p. 187.

²⁹ Raoul Genet, *Traité de diplomatie et de droit diplomatique* (Paris, A. Pedone, 1931), Vol. I, p. 283.

position. However, Oppenheim appears to hold a somewhat different view. He says that:

"The second class, the Ministers Plenipotentiary and Envoys Extraordinary, to which also belong the Papal Internuncios, are not considered to be personal representatives of the heads of their States. Therefore they do not enjoy all the special honours of the Ambassadors, have not the privilege of treating with the Head of the State personally, and cannot at all times ask for an audience with him. But otherwise there is no difference between these two classes, except that Ministers Plenipotentiary receive the title of 'Excellency' by courtesy only, and not by right."³⁰

Lastly we should mention the categories of ordinary *chargés d'affaires* who may be actual heads of missions and acting *chargés d'affaires*; the latter, usually in a temporary capacity, run the diplomatic mission in their chief's absence or, in the event of his recall, pending the designation of a successor.

B. ATTEMPTS TO CODIFY INTERNATIONAL LAW RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES

I. GENERAL OBSERVATIONS

27. The rules relating to diplomatic immunities are essentially based on custom. They originate in the conviction that the absolute independence of the diplomatic agent in his dealings with the sovereign to whom he is accredited is an indispensable condition for the accomplishment of his mission. It is from this principle that the various immunities enjoyed by the diplomatic representatives of States derive. Some of these immunities, such as the inviolability of the agent's person and residence, are undisputed; with regard to some others, however, there is still a certain lack of uniformity in interpretation and application. A number of States give statutory recognition to the principle of the immunity and inviolability of foreign diplomatic representatives; we can cite, for example, the French Decree of 13 *Ventôse*, year II, concerning the representatives of foreign Governments,³¹ the British "Act for preserving the privileges of ambassadors and other public ministers of foreign princes and states" of 1708 (7 Anne, c. 12),³² and the United States Act of 30 April 1790.³³ These statutes, however, in so far as they relate to foreign diplomatic agents, merely incorporate into domestic legislation certain generally recognized rules of international law.

28. Frequent efforts have been made, both officially and privately, to clarify disputed rules and to codify the whole body of international law on this subject. The most important of these draft codifications will be examined briefly below.

³⁰ Oppenheim, *op. cit.*, p. 696.

³¹ A. H. Feller and Manley O. Hudson (ed.), *Diplomatic and Consular Laws and Regulations of Various Countries*, (Washington, D.C., Carnegie Endowment for International Peace, 1933), p. 536.

³² *Ibid.*, pp. 211 and 212.

³³ *Ibid.*, p. 1340.

2. INTERNATIONAL TREATIES RELATING TO DIPLOMATIC INTERCOURSE AND IMMUNITIES

(a) *Bilateral treaties*

29. Generally speaking, provisions concerning diplomatic privileges and immunities have been embodied in treaties between States only since the last century. Express provisions relating to this subject are to be found mainly in conventions which Latin American, Middle Eastern or Far Eastern States have concluded with the United States or European Governments.

"Out of approximately one hundred treaties containing articles on diplomatic agents, Latin American States were parties to about one-half, Near and Middle Eastern States to one-fourth and States of the Far East to the remainder. These treaties were in nearly every case either with the United States or with European nations. Only a very few conventions between European States contained any provisions as to the privileges and immunities to be enjoyed by diplomatic agents."³⁴

30. These treaties show that privileges and immunities are granted to foreign diplomats on a reciprocal basis. To mention only one example, the treaty concluded in 1809 between Great Britain and Portugal contained the following provision:

"His Britannic Majesty and His Royal Highness the Prince Regent of Portugal agree severally to grant the same favours, honours, immunities, privileges and exemptions from duties and imports, to Their respective ambassadors, ministers or accredited agents at the Courts of each of them; and whatever favours either of the two Sovereigns shall grant in this particular at His own Court, the other Sovereign engages to grant the same at His Court."³⁵

31. Many other treaties contain the most-favoured-nation clause. We can cite, as examples, the treaty concluded in 1809 between Great Britain and the Sublime Porte, the treaty of friendship, commerce and navigation concluded in 1826 between Great Britain and Mexico, or the treaties concluded in 1827 between the Netherlands and Mexico, in 1828 between the Netherlands and Brazil and in 1829 between the Netherlands and Colombia.

32. Many such treaties are listed by Harvard Law School on pages 28 and 29 of the work quoted above. The list includes the treaty concluded in 1843 between France and Ecuador, the provisions of which were used as a model for the treaties between France and other Latin American Republics. Article XXVII of this treaty states:

"The two Contracting Parties expressly agree that notwithstanding the foregoing provisions, the diplomatic and consular agents . . . of either State shall be absolutely entitled, in the territory of the other State, to such exemptions, privileges and immunities as are granted or may at any time be granted to the most favoured nation."³⁶

A treaty of commerce and friendship concluded between

³⁴ Harvard Law School, *Research in International Law, I. Diplomatic Privileges and Immunities* (Cambridge, Mass., 1932), p. 26.

³⁵ *Ibid.*, p. 27.

³⁶ *Ibid.*, p. 28, n. 2.

France and Persia in 1885 contained a clause granting most-favoured-nation treatment to the diplomats of the two countries; its text was largely followed in similar conventions concluded by Persia with the United States, Great Britain, the Netherlands, Belgium and other countries.³⁷ Similarly, a treaty concluded between China and Sweden contained the following provision:

“The diplomatic representatives thus accredited shall enjoy all the prerogatives, privileges and immunities accorded by international usage to such representatives, and they shall also in all respects be entitled to the treatment extended to similar representatives of the most favoured nation.”³⁸

33. Other treaties refer to certain specific privileges; for example, in the treaty concluded in 1858 between the United States and China, provision was made for correspondence by American diplomatic agents with Chinese officials on a footing of equality, and for the right of visit and sojourn at the Chinese capital.³⁹

34. Some treaties, such as the one concluded in 1858 between France and China, merely contained a general enumeration of the immunities enjoyed by diplomatic agents:

“At their place of residence, diplomatic agents shall enjoy, on a basis of reciprocity, the privileges and immunities recognized by the law of nations; in pursuance thereof, their person, family, house and correspondence shall be inviolable and they may engage such staff, couriers, interpreters, servants and others as they may require.”⁴⁰

35. As a more recent example, we may mention the provisional agreement of 4 July 1946 between the United States and the Philippines concerning “friendly relations and diplomatic and consular representation.”⁴¹ Article III of this agreement states:

“The diplomatic representatives of each contracting party shall enjoy in the territories of the other the privileges and immunities derived from generally recognized international law . . .”

36. An examination of these texts shows that many treaties, while referring to diplomatic immunities, neither specify nor define them. It is assumed in these treaties that the relevant rules are familiar to all; the texts therefore, merely speak of generally recognized principles of international law. It is also apparent from these various provisions that immunities are granted on a reciprocal basis; this point seems to be of paramount importance. The provision regarding reciprocity is sometimes coupled with a most-favoured-nation clause.

37. The nature and juridical significance of these immunities are dealt with more thoroughly in certain multilateral agreements, such as the Convention regarding Diplomatic Officers, adopted at Havana on 20 February 1928, in the draft conventions proposed by learned

societies, and in the studies of the League of Nations Committee of Experts. Some of these drafts and studies will be discussed below.

(b) *Multilateral treaties*

38. The *Research in International Law*,⁴² notes that the only general instrument dealing with diplomatic privileges and immunities is the Convention regarding Diplomatic Officers, adopted by the Sixth International American Conference and signed at Havana on 20 February 1928.⁴³

39. Diplomatic immunities, in the strict sense are enumerated in article 14 *et seq.* of the Convention in the following sequence:

- | | | |
|-------------|---|---|
| Article 14 | } | (a) Inviolability of the person |
| | | (b) Inviolability of private or official residence |
| | | (c) Inviolability of property |
| Article 15. | | (d) Freedom of communication between the diplomatic agent and his Government |
| Article 16. | | (e) Provisions restraining judicial or administrative functionaries or officials of the State to which the diplomatic officer is accredited from entering the domicile of the latter, or of the mission, without his consent. (This follows from the principle of the “inviolability” of the person and of the residence of diplomatic officers.) |
| Article 18. | | (f) Exemption from all personal taxes, either national or local, from all land taxes on the building of the mission, when it belongs to the respective Government, from customs duties on articles intended for the official use of the mission or of the personal use of the diplomatic officer or his family |
| Article 19. | | (g) Exemption from all civil or criminal jurisdiction of the State to which the diplomatic officers are accredited. (This exemption likewise follows from the “inviolability” of the person of the diplomatic officer.) |

40. Among the immunities listed in the previous paragraph, those which refer to the inviolability of the person of the diplomatic officer and of his official or private residence, to the freedom of communication with his Government and to his exemption from the civil and criminal jurisdiction of the State to which he is accredited are generally recognized in international law and by all Governments. Nor is the exemption from personal taxes contested. By contrast, the exemption of the building of the mission from land taxes and other charges, even when the building belongs to the sending Government, has given rise to some controversy and doubt; similarly, although it may be customary not to levy customs duties on articles intended for the personal use of the diplomatic officer or his family, this privilege is usually extended only on the basis of strict reciprocity and often for a limited period only.

41. The “Exchange of notes constituting an agreement between the United States of America and Poland relating to the granting of certain reciprocal customs

³⁷ *Ibid.*, p. 29.

³⁸ *Ibid.*, p. 31.

³⁹ *Ibid.*, p. 29.

⁴⁰ *Ibid.*, p. 30.

⁴¹ United Nations, *Treaty Series*, Vol. 6 (1947), No. 86.

⁴² Harvard Law School, *op. cit.*, p. 26.

⁴³ League of Nations, *Treaty Series*, Vol. CLV, 1934-1935, No. 3581.

privileges for foreign service personnel," dated October 1945,⁴⁴ seems to be a representative agreement. The two Governments concerned agreed, "on the basis of reciprocity", to grant to their diplomatic and consular staffs free entry of articles imported for their personal use.

3. THE LEAGUE OF NATIONS

(a) Background

42. On 22 September 1924, the Assembly of the League of Nations adopted the following resolution on the report of its First Committee:

"The Assembly,

"...

"Desirous of increasing the contribution of the League of Nations to the progressive codification of international law:

"Requests the Council:

"To convene a committee of experts, not merely possessing individually the required qualifications but also as a body representing the main forms of civilization and the principal legal systems of the world. This committee, after eventually consulting the most authoritative organizations which have devoted themselves to the study of international law, and without trespassing in any way upon the official initiative which may have been taken by particular States, shall have the duty:

"(1) To prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable at the present moment;

"(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and

"(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution."⁴⁵

The Committee mentioned in this resolution was established by a decision of 11 December 1924.⁴⁶ It met at Geneva in April 1925 and selected a provisional list of eleven subjects of international law, the codification of which by international agreement seemed to be both desirable and realizable. It appointed a Sub-Committee to conduct researches into each of these subjects. At its second session, held at Geneva in January 1926, after a study of the reports submitted by the Sub-Committee, it was decided to send to Governments questionnaires on seven subjects; one of these (questionnaire No. 3) related to diplomatic privileges and immunities. At its third session, held from 22 March to 2 April 1927, the Committee of Experts studied the replies to the questionnaires and drew up a list of questions which appeared

ripe for international regulation; that list included diplomatic privileges and immunities.

43. At its eighth session (meeting of 27 September 1927), however, the Assembly retained only three subjects, namely, nationality, the responsibility of States, and territorial waters, as possible topics for codification at the First Conference for the Codification of International Law.⁴⁷ As far as diplomatic privileges and immunities were concerned, it decided, in accordance with the conclusions in the report of its First Committee, not to keep the subject on its agenda; it endorsed the Council's view, which was also that of the First Committee, that the conclusion of a universal agreement on the subject seemed somewhat difficult and was not "important enough to warrant insertion in the agenda of the proposed Conference".⁴⁸

44. At its third session held from 22 March to 2 April 1927, the Committee of Experts prepared a questionnaire (No. 10) on the "Revision of the classification of diplomatic agents".

45. The replies to this questionnaire were studied by the Committee at its fourth session in June 1928. Its report to the Council of the League of Nations stated:

"On the other hand, while noting that the majority of the replies received recommend that the third question above mentioned⁴⁹ should be placed on the agenda, the Committee has found the contrary opinion to be so strongly represented that, for the moment, it does not feel it can declare an international regulation for this subject matter to be realisable."⁵⁰

46. Despite this deferment of the question by the competent organs of the League of Nations, the reports which the Sub-Committee of Experts prepared on diplomatic privileges and immunities and on the classification of diplomatic agents deserve closer consideration.

(b) Analysis of the Sub-Committee's work

47. The Sub-Committee on diplomatic privileges and immunities consisted of Mr. Diena, who acted as Rapporteur, and Mr. Mastny. Its terms of reference had been laid down in a resolution adopted by the Committee of Experts at its meeting of 8 April 1925, as follows:

"The Committee instructs a Sub-Committee to ascertain what are the questions relating to diplomatic privileges and immunities which are suitable for treaty regulation and what provisions might be recommended on this subject."⁵¹

(i) Material suitable for codification

48. The Rapporteur notes at the beginning of this report that his colleague and he were in agreement "in recognising that the whole question of diplomatic privi-

⁴⁷ *Ibid.*, Special Supp. No. 53 (October 1927), p. 9.

⁴⁸ League of Nations publication, *V. Legal*, 1927.V.21 (document A.105.1927.V), p. 2.

⁴⁹ Namely, the "Revision of the classification of diplomatic agents (questionnaire No. 10)".

⁵⁰ League of Nations publication, *V. Legal*, 1928.V.4 (document A.15.1928.V), p. 6.

⁵¹ *Ibid.*, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 78.

⁴⁴ United Nations, *Treaty Series*, Vol. 15 (1948), No. 238.

⁴⁵ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 5.

⁴⁶ League of Nations, *Official Journal* (February 1925), p. 143.

leges and immunities was suitable for treaty regulation".⁵² According to Mr. Diena, there are in fact certain fundamental principles concerning this question which are generally admitted, and although, as regards certain particular points, there

"...is often considerable divergence between the laws and the legal practice of the various countries, these differences can be overcome by an international agreement arrived at either collectively or as the result of a series of bilateral agreements".⁵³

(ii) *Method of work adopted*

49. The two members of the Sub-Committee agreed in recognizing that it was necessary:

"(1) To determine as exactly as possible the existing law...;

"(2) To ascertain which points or, rather, questions are disputed as regards either legal doctrine or practice;

"(3) To indicate the solutions of these questions favoured in one or other country, and which of these would be the most reasonable solution; and

"(4) To indicate possible and desirable alterations and reforms to be introduced into the existing rules—paying due and even critical attention throughout both to the draft prepared on this question by the Institute of International Law at Cambridge in 1895 and to the rules contained in the project for the codification of American international law laid down on March 2nd, 1925, by the American Institute of International Law".⁵⁴

50. In attempting to determine the existing positive law, the Sub-Committee subdivided the problem into two questions: (1) What are the existing prerogatives? and (2) To what persons do they apply?

(iii) *The question of extritoriality*

51. Mr. Diena did not admit the validity of the theory that diplomats should enjoy the right of extritoriality. That theory had been affirmed in articles 7 to 10 of the regulations adopted in 1895 by the Institute of International Law, at its Cambridge session;⁵⁵ it had been rejected, however, by article 23 of the draft of the American Institute,⁵⁶ which states:

"The private residence of the agent and that of the legation shall not enjoy the so-called privilege of extritoriality."

52. The second member of the Sub-Committee, Mr. Mastny, expressed a less categorical opinion on this subject. He declared that he was inclined rather to

"...the restrictive definition given by Strisower: 'the removal of certain persons or certain portions of territory from the legal authority of the country in

respect of matters to which, according to general principles, such persons and such portions of territory ought on the contrary to be subject';"

and to favour the retention of the term "extritoriality" although only as a metaphor. He explained that what he had in mind was:

"...*diplomatic extritoriality* including no more than certain exemptions from the authority and power of the State enjoyed by the diplomatic residence..."

He then added:

"Extritoriality in the limited meaning of the word refers only to the legal exceptions recognized in any particular State, and these must always be interpreted in a restrictive sense."⁵⁷

53. It is common knowledge that most modern authorities share Mr. Diena's opinion and believe that the so-called principle of extritoriality cannot serve as a theoretical basis for the immunities which diplomatic agents enjoy.

(iv) *Inviolability*

54. The second point which engaged the Sub-Committee's attention was the question of the inviolability enjoyed by diplomatic agents, during their mission, with regard to their person, official and private residence, correspondence and personal effects. As the principle of inviolability is generally recognized, Mr. Diena tried to determine the exceptions to the rule. In this connexion, the Rapporteur quoted the regulations of the Institute of International Law mentioned in paragraph 51 above, which state that inviolability may not be invoked in the case of lawful defence, in case of risks run by a diplomatic agent voluntarily or unnecessarily, and in case of reprehensible acts committed by him compelling the State to which he is accredited to take defensive and precautionary measures. The Rapporteur considered that, while the first two exceptions were consistent with existing practice, the third might give rise to controversy, particularly as regards the measures which the local authorities might be authorized to take in cases of extreme urgency.

55. Mr. Mastny apparently agreed with the Rapporteur, but it seemed to him "...difficult... to determine satisfactorily the cases in which inviolability could not be claimed."⁵⁸ At all events, he believed that all immunities should be limited to persons belonging to the official staff of the mission.

(v) *Immunity from taxation*

56. The Rapporteur was of the opinion that immunity from taxation was not strictly necessary for the exercise of diplomatic functions and was recognized mainly for reasons of international courtesy. Hence only bilateral agreements based on reciprocity could satisfactorily regulate the numerous questions which this privilege involved. Mr. Diena did not exclude the possibility of a collective agreement, but, in that case, the text of

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Annuaire de l'Institut de droit international*, Vol. XIV, 1895-1896, (Paris, A. Pedone), p. 240.

⁵⁶ Harvard Law School, *op. cit.*, p. 170.

⁵⁷ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), pp. 86 and 87.

⁵⁸ *Ibid.*, p. 87.

articles 9 and 11 of the Cambridge draft of the Institute of International Law appeared to him to constitute an adequate basis;⁵⁹ those articles would exempt the minister's residence from military quarterings and from the taxes substituted therefor, while the functionaries officially connected with the mission would be exempt from direct and sumptuary taxes, from general taxes on wealth, either on the principal or on the income, war-taxes and customs duties on articles for their personal use.

57. Mr. Mastny drew attention to the practical difficulties which the question of immunity from taxation continually raised. He hoped that the question might be settled along the lines of the "English instructions", which were described by Sir Ernest Satow in his work, *A Guide to Diplomatic Practice*, and which Mr. Mastny considered to be most reasonable and suitable for incorporation in a collective instrument.⁶⁰

(vi) *Immunity from criminal jurisdiction*

58. The Rapporteur stressed that, according to generally recognized custom, this was an absolute immunity enjoyed as long as the mission lasted. According to him, the principle was formulated adequately in article 25 of the draft prepared by the American of International Law Institute which states:

"Diplomatic agents shall be exempt from the civil or criminal jurisdiction of the nation to which they are accredited. They cannot be prosecuted in civil or criminal matters except in the courts of their own countries."⁶¹

59. On the other hand, Mr. Mastny⁶² took the view that articles 6, 12, 13, 15 and 16 of the Cambridge draft of the Institute of International Law faithfully reflected international custom in the matter. Article 6 defines the cases in which inviolability cannot be invoked: lawful defence, risks run voluntarily or unnecessarily by an agent and reprehensible acts committed by him; article 12 provides that the minister and his family shall be exempt from jurisdiction in the State to which he is accredited and notes that these persons remain subject to the jurisdiction of the courts of their own country; article 15 denies these immunities to diplomatic agents who are nationals of the country to which they are accredited; and under article 16 the agent cannot claim immunity from jurisdiction in respect of engagements contracted in the exercise of a profession carried on concurrently with diplomatic duties or with regard to real actions, including possessory actions, relating to movable or immovable property situated in the country to which the agent is accredited. This article provides that immunity from criminal jurisdiction shall remain effective even in case of offences endangering public order or of a crime attacking the security of the State, except that the State maintains its right to adopt the measures of self-protection indicated in article 6, paragraph 3 (to inform the agent's Government of the facts or to request the punishment or recall

of the guilty official and, if necessary, to surround the building of the mission in order to prevent illegal communications with the outside world or public expressions of opinion).

(vii) *Immunity from civil jurisdiction*

60. The Rapporteur compared article 16 (summarized above) of the Cambridge draft of the Institute of International Law with article 27 of the draft of the American Institute of International Law;⁶³ the latter does not admit exemption from civil jurisdiction (1) in the case of real actions, including possessory actions, relative to immovable property which is situated in the territory where the agent is accredited, and which is neither the house he occupies nor that of the legation; (2) in the case of actions resulting from contracts executed by the diplomatic agent which do not refer to the seat or furnishings of the legation, if it has been expressly stipulated that the obligation must be fulfilled in the country where the agent is accredited; (3) in case of waiver of diplomatic immunity, which, however, cannot occur without the consent of the Government which the agent represents.

61. Mr. Diena noted that the two texts are consistent with generally recognized custom only in the case of the exception relating to real actions, including possessory actions relating to immovable property owned in a private capacity. He said:

"The most reasonable solution, however, would be to make no distinction with regard to real actions between those relating to movable property and those relating to immovable property. The nature of the subject-matter of the action in no way affects its legal character."⁶⁴

62. The Rapporteur of the Sub-Committee considered that immunity should not extend to obligations contracted otherwise than in the performance of diplomatic duties and should also be inapplicable in the case mentioned in article 27, paragraph 3, of the draft prepared by the American Institute of International Law, summarized in paragraph 60 above; he noted, however, that the latter exception is not admitted by French jurisprudence. In this connexion, he referred to a decision of the Civil Chamber of the *Cour de Cassation* of 10 January 1891, the principles of which are summarized in Clunet as follows:

"1. As a general rule, diplomatic agents of foreign Powers are not subject to the jurisdiction of French courts;

"2. This lack of jurisdiction of the French courts arises from the need of States and of the persons appointed to represent them to enjoy independence in their reciprocal relations; jurisdiction may thus only be exercised if those persons explicitly and in due form signify their acceptance thereof.

"3. Failing such acceptance by the diplomatic

⁵⁹ *Ibid.*, p. 80.

⁶⁰ *Ibid.*, p. 88.

⁶¹ See above, para. 51 and n. 56.

⁶² League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 88.

⁶³ Harvard Law School, *op. cit.*, p. 170.

⁶⁴ League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 81.

agents, the French courts must declare that they have no jurisdiction, even in civil actions.”⁶⁵

63. Clunet cites the statement of *Avocat Général Desjardins*,⁶⁶ summarizing French theory on this subject; the main points of that statement will be set forth later in this memorandum.

64. The Rapporteur of the Sub-Committee proposed that a diplomatic agent's waiver of his immunity from jurisdiction should be accepted *sic et simpliciter*, provided that the person concerned, whether he be the head of the mission or a subordinate official, has voluntarily submitted to local jurisdiction. He was also of the opinion that in cases where the agent appears as plaintiff and the defendant enters a counter-claim, it would be reasonable, seeing that the diplomatic agent himself has submitted to local jurisdiction, to consider the ordinary law applicable.

65. Finally, Mr. Diena shared the view of most authorities regarding the rule—embodied in article 17 of the Cambridge draft of the Institute of International Law and, in a slightly different form, in article 28 of the American draft—that a diplomatic agent is not compellable to appear as a witness.⁶⁷

66. Mr. Mastny, while not opposed in principle to placing some limitations on the exemption from civil jurisdiction, as suggested by the Rapporteur of the Sub-Committee, thought that such a solution would nevertheless raise a number of objections; these, because of their importance, are reproduced in full below:

“(1) Existing national laws are for the most part inclined to favour absolute exemption (excluding, of course, generally admitted exceptions, such as real actions, trading, etc.). This is especially the case with English law (7 Anne, c. 12, sections 3-6, April 21st, 1709), French law (Decree of the 13th Ventôse, Year II) and the United States statute corresponding to the English statute.

“(2) The principle of complete immunity seems to have been hitherto the rule of the French and English Courts (Judgments of the Cour de Paris, dated July 12th, 1867, and January 21st, 1875, of the Cour de Lyon, dated December 11th, 1883; Case of *Magdalena Steam Navigation Company v. Martin*, etc.).

“(3) Most jurists favour complete immunity. Some of those who uphold this view, however, admit that

⁶⁵ Edouard Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1891), Vol. 18, p. 137.

⁶⁶ *Ibid.*, pp. 144-157.

⁶⁷ The text of these articles, as reproduced in League of Nations, document C.196.M.70.1927.V, p. 82, nn. 1 and 2, reads as follows:

Article 17 of the draft of the Institute of International Law: “Persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the national Courts on condition that they give their evidence, if required to do so through the diplomatic channel, to a magistrate of the country appointed for this purpose, and this evidence may be given even on the premises of the mission”.

Article 28 of the American Institute's draft: “The diplomatic agent may refuse to appear as a witness before the Courts of the Country to which he is accredited. In case the evidence should be necessary, it must be requested in writing through the diplomatic channel.”

liberal interpretation and practice often unduly extend the limits of this privilege and that due caution should be observed.

“(4) The Cambridge draft (articles 12-16) and the Washington draft (articles 25-27) decided in favour of immunity (but see paragraph 3 of article 27).

“(5) As this immunity is one of the immediate consequences of *inviolability* there is no need to distinguish between official and unofficial persons.

“(6) Analogy with exemption from criminal jurisdiction (the full extent of which is not disputed) calls for uniform regulation (see the Cambridge draft).

“(7) In practice it is often very difficult to distinguish the capacity in which a privileged person has acted, and sometimes it is even impossible to give an opinion upon the case before the details have come to light through judicial proceedings.

“(8) The principle of the *prestige of States* demands exceptional protection, particularly in those cases in which the Courts would have to discuss *delicate private affairs* (family matters; publicity of the procedure; publication in the newspapers, etc.).

“(9) Jurists opposed to immunity are assuming ideal conditions of civilization, a degree of protection which is not yet everywhere attained in our times, since there are still divergencies of opinion even on fundamental social ideas and the general principles of civil law (ownership). Take West and East. We cannot be blind to quite recent experiences (China, Russia).

“(10) Material progress allowing direct communication between States (by telephone, telegraph) makes it possible for any matter to be promptly settled through the diplomatic channel.”⁶⁸

67. Mr. Mastny thought that these difficulties could be overcome by introducing an arbitral jurisdiction and a conciliation procedure for the official and private acts of diplomatic agents.⁶⁹ The arbitral tribunal would consist of the doyen of the diplomatic corps, an expert in the person of a professor of international law, another expert in the person of a professor of civil law, another member of the diplomatic corps and a civil court judge. The tribunal would first decide upon the official or unofficial character of the case; in official cases, the file would be sent to the Ministry of Foreign Affairs for diplomatic action; in unofficial cases, resort would be had to arbitration, and refusal by the agent to accept the award would be interpreted as willingness to submit to the national courts of the country in which he resided in his diplomatic capacity. With regard to the duty to give evidence, Mr. Mastny shared the view of the Rapporteur of the Sub-Committee.

(viii) *Beginning and end of the mission*

68. Neither article 5 of the Cambridge draft of the Institute of International Law, nor article 29 of the draft prepared by the American Institute of International Law,

⁶⁸ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 89.

⁶⁹ *Ibid.*, pp. 89 and 90.

appeared to Mr. Diena to offer a satisfactory solution to the problem. Article 5 provides that the diplomatic officer's inviolability lasts for the whole period during which he remains in the country to which he is accredited and, in the event of war between that country and the one he represents, until he is able to leave the State where he is fulfilling his mission, together with his staff and effects. Article 29 of the draft of the American Institute states that:

"The inviolability of the diplomatic agent and his exemption from local jurisdiction shall begin from the moment he crosses the frontier of the nation where he has to exercise his functions; they shall terminate the moment he leaves the said territory."

69. Mr. Diena raised two objections to this line of thought: (a) The official capacity of the diplomatic agent is only proved by the presentation of credentials; and (b) It cannot be accepted absolutely and as a general truth that the prerogative should cease with the departure of the diplomatic agent.⁷⁰

In this connexion, article 14 of the Cambridge draft of the Institute of International Law appeared to the Rapporteur to state a rule of existing positive law:

"Immunity continues after retirement from office in so far as acts connected with the exercise of the said duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

70. In regard to obligations contracted by the agent prior to entering on his duties and the fulfilment of which is demanded by the other contracting party while the diplomat is still exercising his functions, Mr. Diena agreed with the *Cour de Cassation* of Paris⁷¹ that the diplomat could not be sued, in those circumstances, in the courts of the country to which he is accredited.

71. Mr. Mastny preferred the formula in article 5 of the Cambridge draft of the Institute of International Law to that in article 29 of the draft of the American Institute of International Law.⁷²

(ix) *Juridical status of diplomatic agents in the territory of a third State*

72. Mr. Diena considered that, in positive law:

"...diplomatic agents are only entitled to claim their prerogatives in third countries while they are journeying to the country of their mission or returning therefrom."⁷³

By contrast, Mr. Mastny favoured the adoption of the system advocated in article 29, paragraph 2, of the draft of the American Institute of International Law which provides:

"The diplomatic agent who, in going to take pos-

session of his post or in returning therefrom, crosses the territory of an American Republic or is *accidentally there during the exercise of his functions* shall enjoy in that territory the personal immunity and immunity from jurisdiction referred to in the preceding articles."⁷⁴

The exact meaning of the words "is accidentally there during the exercise of his functions" appears vague, as the Rapporteur of the Sub-Committee indeed noted.

(x) *Persons to whom diplomatic privileges extend*

73. The Rapporteur of the Sub-Committee favoured the traditional rule that: "...diplomatic prerogatives extend *only* to heads of mission, members of their families living with them and persons belonging to the *official staff*."⁷⁵

74. He referred to the difficulties involved in extending the prerogatives to non-official personnel and mentioned three different practices:

(a) The English practice, based on the Statute of 1708, as interpreted by English authorities, whereby immunities are extended to any person belonging to the suite of a diplomatic agent, without distinction of nationality;

(b) The practice confirmed in a judgement of the Rome Court of Cassation of 7 November 1881, which held that the prerogative of immunity from jurisdiction cannot be applied to persons other than diplomatic agents in the strict sense;

(c) The German system, which recognizes the prerogative of immunity from jurisdiction as regards non-diplomatic personnel in the service of the diplomatic mission, provided that they are not of German nationality. The last solution is the one most widely adopted in practice; it is reaffirmed in article 30, *in fine*, of the draft of the American Institute of International Law which states that:

"The exemption from local jurisdiction extends likewise to their servants; but if the latter belong to the country where the mission resides, they shall not enjoy such privilege except when they are in the legation building."⁷⁶

Mr. Diena considered this text, which also resembles that of article 2, paragraph 3, of the Cambridge draft of the Institute of International Law, to be unsatisfactory; he felt that the fact that a person was in the legation building could not give rise to any personal privilege. If that solution were adopted, a disguised right of asylum would be created in that person's favour. All that could be said was that those non-diplomatic employees, like anyone else, would benefit from the inviolability of the legation building while they remained on the premises; but that fact did not entitle them to any immunity and it would be superfluous and misleading to introduce such an implication into the text of an international agreement.

75. Mr. Mastny was prepared to endorse Mr. Diena's

⁷⁰ *Ibid.*, p. 82.

⁷¹ *Journal du Palais*, Bulletin des sommaires (Paris, Librairie du Recueil Sirey, 1921), Part. I, p. 121.

⁷² Article 5 is summarized and article 29 reproduced in para. 68 above.

⁷³ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 83.

⁷⁴ Harvard Law School, *op. cit.*, p. 171.

⁷⁵ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 84.

⁷⁶ Harvard Law School, *op. cit.*, p. 171.

proposal, as reproduced at the beginning of paragraph 73 above. He nevertheless stressed that it would involve a change, because "national laws and custom usually regard inviolability as extending also to unofficial personnel"⁷⁷

76. At present this question is of great importance because of the increase in the number of persons employed in embassies, and because certain States have merged the consular with the diplomatic service proper.

(xi) *Questionnaire addressed to States*

77. On 29 January 1926, the Committee of Experts, having considered the report of the Sub-Committee, sent the following questionnaire⁷⁸ to the Governments of Members of the League of Nations:

A. PRIVILEGES AND IMMUNITIES OF DIPLOMATS IN THE TRADITIONAL SENSE OF THE TERM AND OF PERSONS BELONGING TO A LEGATION

I. *Extent of these Privileges and Immunities considered under the following Heads*

1. Inviolability attaching to:
 - (a) The persons themselves;
 - (b) The official premises of the legation, including the archives;
 - (c) The private residence of the persons in question;
 - (d) Correspondence;
 - (e) Goods serving for the personal use of the diplomat.
2. Immunity from civil, administrative or fiscal jurisdiction, with all the limitations and exceptions consistent with the object of the immunity.
3. Immunity from criminal jurisdiction.
4. Fiscal immunities (including customs).

Note 1. The above are merely heads for discussion. It is not suggested that every question falling under them should necessarily be regulated by a general convention. This reservation applies in particular to the question of fiscal immunities, in regard to which it may be desirable to leave details to be the subject of bilateral agreements but may at the same time be possible, as well as desirable, to lay down some general principles by way of a pluralateral or universal convention.

Note 2. Under the head of inviolability should be discussed the question of the existence and, in the affirmative, of the extent of the right to afford asylum to persons threatened with criminal proceedings.

Note 3. In connection with immunity, it would seem desirable to consider whether and to what extent immunity involves exemption from the operation of social legislation and, in particular, legislation concerning social insurance.

Note 4. In connection with immunity from jurisdiction, it would be desirable to consider what should be the position of the privileged person as regards giving evidence before the courts.

II. *Persons entitled to Privileges and Immunities*

It seems not to be disputed that among such persons must be included the chiefs of embassies and legations and the official staff employed exclusively in diplomatic work, and that the privileges and immunities extend to members of the families of such persons

living with them. But there are other questions connected with this head which should be examined and settled:

1. First, the question arises whether, in order to avoid abuses or uncertainty, it should be a condition of possessing privileges that the persons in question should be included in a list delivered to the Foreign Office of the country concerned. In close connection with this point is the question whether and on what grounds (for example, on the ground of the palpably exaggerated number of officials included in the list) the Government would be entitled to refuse or accept the list with or without modification.

2. To what extent may official agents of a foreign State who are not employed in diplomatic work in the proper sense of the term acquire diplomatic privileges and immunities by being included among the personnel of the legation? Under this head falls the case of particular categories of attachés, such as certain commercial attachés, attachés for social questions and others.

3. What is the position of the servants of a diplomatic agent and of the servants of a legation, i.e., its clerks, domestic staff and other employees?

4. In what cases and to what extent may diplomatic privileges and immunities be refused to a person, who would otherwise be granted them: (a) when he is a national of the country concerned; or (b) when, being already domiciled in the country, he occupies a special position intermediate between foreigners and nationals?

5. In regard to some of the above-mentioned categories, it will be necessary to examine the limits of the privileges (if any) which should be enjoyed.

III. *Duration of diplomatic Privileges and Immunities as regards: (1) the Privileged Person; and (2) Premises and Archives.*

Note 1. Under the above point (2), it is intended to raise the question of the treatment to be accorded to privileged premises and archives which have ceased to be occupied or to be in the charge of a diplomatic agent; as may, for example, happen in the case of the decease of a diplomatic agent or when a State ceases to recognize and to receive representatives from the Government of a State which has established a legation in its territory and the legation premises and archives are left without any person entitled to take charge and be responsible for them.

Note 2. In the case of the decease of the diplomatic agent, a similar question may arise as to the members of his family and servants.

IV. *Position of a Diplomatic Agent within, and more particularly, in Transit through, the Territory of a State to which he is not accredited*

[Part B deals with the privileges of officials of the League of Nations.]

78. Twenty-eight Governments answered the questionnaire in detail.⁷⁹

(xii) *Analysis of replies of Governments to the questionnaire*

79. On 27 March 1927, at the seventh meeting of the third session of the Committee of Experts, Mr. Diena briefly analysed the replies of Governments to the questionnaire reproduced in paragraph 77 above.⁸⁰ He said that the United Kingdom was not in favour of convening an international conference, but that twenty-two of the twenty-eight replies received had been in favour of holding such a conference.

80. The replies received by the Committee will be

⁷⁷ League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 87.

⁷⁸ *Ibid.*, pp. 76 and 77.

⁷⁹ *Ibid.*, p. 127.

⁸⁰ *Ibid.*, pp. 266 and 267.

briefly summarised below, in order to show the opinion of Governments at that time.

81. Firstly, the United Kingdom confined itself to stating that, in its opinion, the question was not "... a subject of international law which it would be at present possible or desirable to regulate by international agreement,"⁸¹ while the Government of Australia saw no objection to including the question on the agenda of an international conference.⁸²

82. The German Government took the view that "the exemption from all measures of constraint to be accorded to diplomatic agents... extends to their person and, everything that may seem necessary for the exercise of their functions..."⁸³ It stressed that the exemption should be expressly stated to preclude any enforcement of a "lessor's mortgage" against the diplomat; it felt, however, that the State should be entitled to adopt such measures for its defence and security as might seem to be indispensable in questions of self-defence or to guarantee public safety.

83. It was prepared to admit exceptions to the privilege of exemption from civil jurisdiction in respect of "acts connected with special, professional or commercial transactions", including actions for obtaining possession of immovable property. A diplomatic agent's express or tacit renunciation of his immunity from jurisdiction should be recognized, as should his exemption from the obligation of giving evidence.

84. The matter of fiscal privileges and the exemption of diplomatic agents from the payment of customs duties should be settled by bilateral agreements.

85. Diplomatic privileges and immunities should extend not only to the heads and members of missions, *stricto sensu*, but also to the auxiliary staff of the legation; German nationals employed as domestic would nevertheless be excluded.

86. The question of the duration of immunities could be settled on the basis of articles 5 and 14 of the draft prepared by the Institute of International Law and Cambridge⁸⁴ and article 29 of the draft prepared by the American Institute of International Law.⁸⁵

87. Finally, with regard to the position of diplomatic agents in transit through the territory of a third State, the German Government was prepared to accept the principle that they should enjoy diplomatic privileges and immunities in a third country across which they were proceeding to take up their posts or while returning therefrom.

88. Brazil⁸⁶ raised two objections to Mr. Diena's proposals:

(a) It could not accept the principle set forth in article 27, paragraph 3, of the draft of the American

Institute⁸⁷ (no immunity from jurisdiction in respect of actions arising out of private contracts); in the view of the Brazilian Government, such a provision would imply a renunciation of immunity, which the agent was not free to contract away.

(b) The Brazilian Government saw no need to extend exemption from jurisdiction to servants; it was reasonable, however, that exemption should be extended to the whole auxiliary staff, which constituted the administrative organ of the diplomatic mission.

89. The Danish Government⁸⁸ recommended withdrawal of diplomatic privileges if the diplomatic agent engaged in commercial transactions, whether on behalf of his Government or in his personal capacity; the exclusion of immunity from taxation when the taxes were really in the nature of payment for services rendered by the State or municipality; and the limitation of the number of persons whom the receiving State might be requested to recognize as official diplomatic staff.

90. Estonia⁸⁹ submitted a detailed reply, of which the following are the salient points:

(a) *Inviolability*: The Estonian Government supported the solution suggested in the draft prepared by the Institute of International Law at Cambridge, articles 3 to 6 (protection of the person of the diplomatic agent against all forms of constraint, protection of all property necessary to the accomplishment of his duties, duration of privileges for the full period of the mission, cases in which inviolability may not be invoked). As regards the type of acts which could be regarded as "reprehensible" and leading to the forfeiture of immunity (article 6 of the Cambridge draft), Estonia thought that the stipulations contained in articles 5, 16 and 22 of the draft of the American Institute made the point sufficiently clear. (Article 5 provides that diplomats should exercise their authority without coming into conflict with the laws of the country to which they are accredited; article 16 prohibits foreign diplomats from interfering in the internal and external political life of the nation where they discharge their function; article 22 refers to the obligation to surrender to the competent local authority any individual pursued for crime or misdemeanour under the laws of the country).

(b) *Immunity from criminal jurisdiction*: Estonia agreed with the Rapporteur of the Sub-Committee.

(c) *Immunity from civil jurisdiction*: Estonia adopted the same position.

(d) *Renunciation of privileges*: Estonia agreed with the Rapporteur.

(e) *Giving evidence in court*: Estonia approved the solution recommended in the draft prepared by the Institute of International Law at Cambridge (whereby the diplomatic agent can be compelled to give testimony in the diplomatic residence to a magistrate appointed for the purpose).

(f) With regard to the persons entitled to enjoy these immunities. Estonia agreed with the Rapporteur that the privileges should apply only to the chiefs of mission and the persons belonging to the official staff.

(g) The Estonian Government was also of the opinion that the number of persons entitled to exemption from taxation might reasonably be limited by the Government concerned (reply to part II, question 7 of the questionnaire).

⁸⁷ Harvard Law School, *op. cit.*, p. 170.

⁸⁸ League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 151.

⁸⁹ *Ibid.*, p. 157.

⁸¹ *Ibid.*, p. 145.

⁸² *Ibid.*, p. 136.

⁸³ *Ibid.*, p. 132.

⁸⁴ *Revue générale de droit international public*, (Paris, A. Pedone, 1895), Vol. II, pp. 536 ff. and n. 1.

⁸⁵ Harvard Law School, *op. cit.*, p. 171.

⁸⁶ League of Nations publication, *V. Legal, 1927.V.1* (document C.196.M.70.1927.V), p. 143.

(h) It was also in favour of a precise definition of the rules relating to the question (part II, question 2 of the questionnaire) of the extent to which official agents of a foreign State who are not employed in diplomatic work in the proper sense of the term acquire diplomatic privileges and immunities by being included in the personnel of the legation.

(i) With regard to the duration of privileges, Estonia hoped that the relevant rule would enable diplomats both in time of peace and in time of war to enjoy their prerogatives until they left the country to which they were accredited. It approved the wording in the Cambridge draft of the Institute of International Law, article 14, which reads as follows:

"Immunity continues after retirement from office, in so far as acts connected with the exercise of such duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

91. The Government of Norway⁹⁰ made some suggestions which can be summarized as follows:

Inviolability of domicile and official premises: The proposed codification of the relevant provisions should also cover all related questions, such as:

- (i) Health regulations;
- (ii) Rents;
- (iii) Electric and radio-technical installations;
- (iv) The extent to which rules regarding immunities apply to persons living in hotels;
- (v) Import prohibitions instituted on grounds of social policy;
- (vi) Inviolability of archives;
- (vii) Exemption from taxation on personal and real property.

92. The Romanian Government⁹¹ thought that some limitation should be placed on immunity from civil jurisdiction, particularly with regard to contractual obligations unrelated to the performance of diplomatic functions. It also thought that the privileges should be confined to the official staffs of missions and their families. Judicial documents, both in respect of cases in court and other matters, duly issued by the competent authorities, might be served on diplomats through the Ministry of Foreign Affairs of the country to which they were accredited.

93. As regards the question of executing judgement delivered by the national courts and not subject to further appeal, it was clear that enforcement measures could not be taken inside the legation or the private residence of the diplomat; the Romanian Government thought, however, that execution might be levied at such places as railway stations, warehouses and banks of the country where the diplomat was stationed.

94. The Government of Sweden⁹² also thought that certain restrictions should be imposed on the immunity of diplomats from civil jurisdiction, and it did not think that such exceptions should be limited *a priori* to "real actions" and "actions connected with the exercise of a commercial calling". The Swedish Government also thought it desirable to adopt some conciliation or arbi-

tration procedure for disputes at private law to which diplomats might be parties. Finally, the Swedish Government agreed with the statement in the Sub-Committee's report that the privileges of exemption from taxation and customs duties for diplomats did not lend themselves to detailed regulation in the form of a collective treaty.

95. The Swedish Government thought that a list of persons entitled to diplomatic privileges should be communicated to the Ministry of Foreign Affairs, which should have the right to refuse either "to admit an obviously exaggerated number of diplomatic agents" or "to recognize as diplomatic agents persons whose activities are essentially different from the ordinary activities of diplomatic officials". The office staff of legations should be included in the privileged class, but the Swedish Government wished to exclude "the personal servants" of diplomatic agents.

96. Persons forming part of diplomatic missions who were nationals of the country in which they resided should, in the Swedish Government's view, be granted prerogatives in respect of their official acts but not in respect of "their personal status".

97. Switzerland's⁹³ very detailed reply contains many points of interest; it is summarized below:

(a) *Legal basis of diplomatic immunities:* Switzerland supported the theory that "diplomatic immunities are justified by the necessity of securing the independence of diplomatic agents, and are therefore only to be maintained so far as they are warranted by the functions of the official." It also wished to draw a distinction between privileges and immunities "arising out of international law" and those "whose sole basis was the *comitas gentium*" for the rules of pure courtesy were not rules of law.

(b) *Inviolability of the person:* The Swiss Government agreed that a diplomatic agent's person and personality should be respected by the authorities and that he should have complete freedom of movement. It stressed the differences in the various national legislations with regard to the protection due to diplomats against the acts of private persons. It criticized article 6 of the Cambridge draft regulations which did not distinguish clearly between "cases in which the diplomatic agent may not invoke the laws which protect him against outrage or objectionable treatment and those much more serious cases in which the actual arrest of the Minister becomes possible."

(c) *Inviolability of the premises of diplomatic missions:* The Swiss Government was prepared to accept article 9 of the Cambridge draft regulations of the Institute of International Law, conferring on the diplomatic representative the right to refuse admittance to officers of the public authority in the performance of their duty, but it thought that it might be well to define certain cases in which an official should not be refused admittance to the inviolable premises of a diplomatic mission; moreover, the inviolability of the premises should have "no influence on the personal status of persons living on those premises or entering them".

⁹⁰ *Ibid.*, pp. 175 and 176.

⁹¹ *Ibid.*, p. 200.

⁹² *Ibid.*, pp. 234 and 235.

⁹³ *Ibid.*, pp. 242-249.

(d) *Inviolability of correspondence*: The Swiss Government was prepared to agree that, where there appeared to be a clear case of abuse of the diplomatic mails, the Government concerned should be justified in opening suspected envelopes in the presence of a member of the diplomatic mission.

(e) *Inviolability of property*: Switzerland agreed that measures of execution could not be carried out in the country of residence upon property which was indispensable to the diplomatic agent for the discharge of his duties. It thought, however, that it would be desirable "to avoid the confusion... between inviolability of property and the immunity of its owner from jurisdiction".

(f) *Domicile and legislation applicable*: While venturing no definite answer to the question, the Swiss Government thought that a settlement of the problem would be of considerable practical importance. The question had a vital bearing on such issues as the law applicable both in civil and criminal matters, the nationality of children born in the country where the diplomat was stationed, his right to invoke the laws governing the acquisition of nationality, and so forth.

(g) *Immunity from civil jurisdiction*: Switzerland adhered firmly to the principle that the diplomatic agent was not personally responsible for acts done in his official capacity, and thought that it should be possible to reach some agreement as to the right of the diplomatic agent to waive his immunity from civil jurisdiction, and as to the consequences of such a decision.

(h) *Immunity from criminal jurisdiction*: As that immunity was generally recognized, the Swiss Government did not think that it raised any problem; the question of renunciation might nevertheless be investigated.

(i) *Giving of evidence*: The Swiss Government thought that further study should be given to the question of the right to refuse to give evidence in all circumstances.

(j) *Fiscal immunities*: The Swiss Government was uncertain whether such immunities were legal privileges or prerogatives granted out of pure courtesy. Fiscal exemption could not be said to be based on the nature of the official's functions, but it formed a portion of the *comitas gentium* and was established by general usage. The extent of the exemption would have to be clearly specified.

(k) *Persons entitled to privileges and immunities*: The Swiss Government thought that, on that point, it was most desirable that international usage should be made more uniform. The Swiss Government granted the privilege of full inviolability to heads of diplomatic missions only. Personal inviolability, however, including immunity from civil and criminal jurisdiction and exemption from taxation, was enjoyed in Switzerland by the following:

- (i) Members of the diplomatic agent's family, if they were living with him and had no occupation;
- (ii) Members of the diplomatic staff of a mission, and their families, and the head of the secretarial staff of the mission;

- (iii) The household servants of the head of a diplomatic mission.

The other pertinent points in this connexion were as follows:

- (iv) The rest of the staff enjoyed exemption from taxation;
- (v) As regards customs, exemption in the full sense of the term was granted to the head of a mission in respect of all articles for his personal use and that of his family, and to the other members of the diplomatic corps only in respect of their first installation.

(l) *Duration of diplomatic prerogatives*: In the opinion of the Swiss Government, a minister became eligible for diplomatic privileges and immunities immediately on his arrival at the frontier of the country to which he was accredited; his prerogatives did not terminate, at the end of his mission, until he left the country.

(m) *Position of a diplomatic agent in the territory of a State to which he is not accredited*: It seemed to the Swiss Government quite reasonable to grant diplomatic privileges and immunities to a diplomatic agent passing through a country on an official journey.

(n) *Other persons entitled to enjoy diplomatic privileges and immunities*: In the Swiss Government's opinion, these should include:

"... foreign agents, who, though not holding permanent credentials... nevertheless had a diplomatic standing..."

The Swiss Government thought that it was necessary to specify which of the persons entrusted with a mission to a foreign country should be recognized as having diplomatic status.

98. Czechoslovakia⁹⁴ made the following suggestions:

(a) The inviolability of the official premises of the legation and of the diplomatic agent's private residence did not imply a right of asylum;

(b) The building in which the legation was housed was subject to police regulations;

(c) Exemption from the obligation of giving evidence should always be granted in cases affecting the exercise of diplomatic functions;

(d) With regard to immunity from criminal jurisdiction, the local courts should in all cases be given power to take the necessary precautionary measures in case of emergency;

(e) The question of fiscal immunities should be settled by bilateral agreements;

(f) The case of agents who were not assigned to diplomatic posts in the strict sense of the term should form the subject of a special study;

(g) The legation staff should only enjoy such privileges and immunities as were indispensable to the exercise of the diplomatic agent's functions;

(h) Diplomatic privileges and immunities should be granted even in cases where the diplomatic agent was a

⁹⁴ *Ibid.*, p. 254.

national of the country to whose Government he was accredited;

(i) With regard to the duration of diplomatic privileges, Czechoslovakia supported the proposals of the Institute of International Law, prepared at Cambridge, which read as follows:

(Article 14) "Immunity continues after retirement from office in so far as acts connected with the exercise of the said duties are concerned. As regards acts not connected therewith, immunity may not be claimed except for so long as the individual remains in office."

(xiii) *Some conclusions*

99. The foregoing account of the efforts made under the auspices of the League of Nations to codify the rules governing diplomatic prerogatives leads to the conclusion that most States then thought it both possible and desirable to codify these rules. Out of the twenty-eight replies received, only those of the United Kingdom and Indian Governments were definitely opposed to the conclusion of an agreement, saying that it would not be desirable to lay the problem before an international conference.

100. Both the Sub-Committee and the Governments which answered the questionnaire took the view that the "extritoriality" theory could not be regarded as the rationale of diplomatic immunities. Majority opinion seemed to favour the theory that those immunities derived from the needs of the service and from the principle that the diplomatic agent must be allowed absolute independence in his dealings with the State to which he is accredited.

101. There was a substantial measure of agreement regarding the nature of the immunities necessary to the performance of diplomatic duties. These immunities comprise inviolability of the agent's person, inviolability of his private and official residence, and exemption from the criminal jurisdiction of the country to which he is accredited; they also include exemption from civil jurisdiction, provided that the action arises out of an act done by the agent in the performance of his duties and not in a purely personal capacity. Nevertheless, neither the Sub-Committee's report nor the replies of Governments suggest any juridical criterion to be applied in distinguishing between official and non-official acts, nor do they indicate the authority competent to adjudicate as between the agent and whoever may, in certain circumstances, feel disposed to challenge the official character of his acts. Mr. Mastny, it is true, proposed the introduction of a conciliation procedure and arbitral jurisdiction. But would private parties voluntarily submit to any such special appellate jurisdiction, which, incidentally, the Governments themselves did not apparently view with favour?

102. No serious objections were raised to the right of the diplomatic agent to refuse to give evidence in court, but some Governments appeared disposed to adopt the solution proposed in article 17 of the draft regulations prepared by the Institute of International Law at Cambridge, making it obligatory upon the person concerned

to give his testimony in the diplomatic residence to a magistrate appointed for that purpose.

103. Finally, as regards exemption from taxation, most of the States which specifically dealt with the point in their replies stated that they did not consider this exemption as one of the immunities imposed by international law *erga omnes*, but rather as one of the courtesy privileges accorded by practically every State. They regarded the matter as a suitable subject for bilateral agreements, rather than for a multilateral convention.

104. This general agreement on the principles governing the question, notwithstanding certain divergencies of view concerning some important points of detail, is also a feature of the draft conventions prepared by learned societies or by eminent authorities; some of these will be studied after the analysis contained in the next section of this chapter of the work of the Committee of Experts in connexion with the classification of diplomatic agents.

(xiv) *Classification of diplomatic agents*

105. At its third session, held in March and April 1927, the Committee of Experts decided to include in its list the following questions:

"Is it desirable to revise the classification of diplomatic agents made by the Congresses of Vienna and Aix-la-Chapelle? In the affirmative case, to what extent should the existing classes of diplomatic agents be amalgamated, and should each State be recognized to have the right, in so far as existing differences of class remain, to determine at its discretion in what class its agents are to be ranked?"⁹⁵

106. The Committee reached this decision on the basis of a report, submitted to it by a Sub-Committee consisting of Mr. Guerrero, Rapporteur, and Mr. Mastny. The conclusions of the report may appropriately be analysed here.

107. In the first place, the report points out that one of the aims of the classifications established at Vienna and Aix-la-Chapelle had been "to ensure a higher rank for representatives of the great Powers".⁹⁶ The supposedly representative character attributed to ambassadors, legates and nuncios by article 2 of the Vienna Regulation had been a false concept, even at the time of its introduction; that fact was even more manifest at the time when the report was prepared, as "the sovereign was no longer a crowned head at the apex of supreme power...":

"The credentials by which ambassadors and ministers plenipotentiary are accredited are absolutely identical, as are their rights and duties, the privileges and immunities granted them and the methods of communication with their own Governments and those to which they are accredited."⁹⁷

108. This opinion, shared by many of the authorities

⁹⁵ League of Nations publication, *V. Legal, 1927.V.8* (document C.203.M.77.1927.V), p. 1.

⁹⁶ The text of these regulations is reproduced in paras 22 and 24 of this memorandum.

⁹⁷ League of Nations publication, *V. Legal, 1927.V.8* (document C.203.M.77.1927.V), p. 3.

cited in the Sub-Committee's report, induced it to propose:

"...that ambassadors, legates and nuncios should be included in the same class and designation with envoys or ministers plenipotentiary, including resident ministers."⁹⁸

109. On the other hand, the Sub-Committee thought that *chargés d'affaires* should continue to form a class apart, "...because their credentials are given them by the Minister for Foreign Affairs and are addressed to Ministers for Foreign Affairs."⁹⁹

110. Finally, for the reasons given in its report, the Sub-Committee inclined, in the choice of a common designation to be given to the diplomatic representatives in the first three categories, in favour of the title of ambassador, because "the adoption of the term 'public minister' or 'minister plenipotentiary' might appear to be somewhat derogatory to existing ambassadors..."¹⁰⁰

111. It does not appear necessary to analyse in detail the replies of Governments to the questionnaire on the revision of the classification of diplomatic agents;¹⁰¹ it is sufficient to note that in its second report on the questions which appeared ripe for international regulation, adopted at its fourth session in June 1928 for submission to the Council of the League of Nations, the Committee of Experts stated:

"On the other hand, while noting that the majority of the replies received recommend that the third question above mentioned (revision of the classification of diplomatic agents) should be placed on the agenda, the Committee has found the contrary opinion so strongly represented that, for the moment, it does not feel it can declare an international regulation of this subject matter to be realisable."¹⁰²

112. The Committee of Experts had, in fact, received twenty-seven replies,¹⁰³ only twelve of which had categorically favoured revision;¹⁰⁴ the replies of four States had been neither negative nor affirmative. The eleven negative replies had included those of the British Empire, the United States, France, Germany and Belgium, which doubtless accounts for the recommendation of the Committee of Experts as quoted above. It may perhaps be fitting to mention one of the reasons given by the Belgian Government for its negative attitude:

"The Belgian Government... is of opinion that the classification established by article 1 of the Vienna Protocol should stand. In the principal capitals, the rank of ambassador is a necessity; and another argument in its favour is that some countries may desire to confer a greater lustre on their diplomatic relations in order to mark such special bonds as there may be between them on account of historic relations, racial

⁹⁸ *Ibid.*, p. 4.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ League of Nations publication, *V. Legal, 1928.V.4* (document A.15.1928.V), pp. 58-87.

¹⁰² *Ibid.*, p. 6.

¹⁰³ *Ibid.*, p. 57.

¹⁰⁴ *Ibid.*, p. 91.

affinities, geographical position or a multiplicity of common interests."¹⁰⁵

4. WORK BY PRIVATE AUTHORITIES IN CONNEXION WITH THE CODIFICATION OF REGULATIONS GOVERNING DIPLOMATIC INTERCOURSE AND IMMUNITIES

(a) *Preliminary observations*

113. In the foregoing account of the efforts made under the auspices of the League of Nations to codify the international law concerning diplomatic intercourse and immunities, frequent reference has been made to the main provisions of the draft regulations adopted by the Institute of International Law at Cambridge (1895) and those prepared in 1925 by the American Institute of International Law, as those texts were largely used by members of the League of Nations Sub-Committee. There is accordingly no need to give a further summary of them here. This section will be concerned only with comments on other drafts prepared by scholars and non-governmental organizations.

(b) *Bluntschli's draft code, 1868*¹⁰⁶

114. This draft code is divided into chapters under the respective headings of "exterritoriality", "commencement of the diplomatic mission", "personal rights and obligations of envoys", and "termination of the diplomatic mission".

115. As the title of the first chapter indicates, Bluntschli considers the theory of exterritoriality as the legal basis of immunities, although he himself admits that it is a legal fiction established "for the purpose of safeguarding the independence of persons representing a State in a foreign country" (article 135). From this, he draws the following conclusions:

1. A person enjoying exterritorial status is not subject to the laws or police regulations of the country to which he is accredited, but he must respect the independence and security of that State and must not infringe the police regulations (articles 136/137);
2. Such persons are exempt from taxation, but must pay the usual charges for any public services of which they may make use (article 138);
3. They enjoy immunity from civil jurisdiction, but the courts are nevertheless competent to adjudicate on real actions and actions connected with the exercise of a profession other than diplomatic duties, or in case of waiver of immunity. In any event, execution of a court order may only be levied on the personal assets of the defendant (articles 139/40);
4. The diplomatic agent is not subject to criminal jurisdiction (article 141);
5. The right of self-defence against the agent is recognized (article 144);
6. The agent's immunities extend to his family, employees and suite (article 145); but he may waive immunity with respect to any such person, and if he does so that

¹⁰⁵ *Ibid.*, p. 61.

¹⁰⁶ Harvard Law School, *op. cit.*, pp. 144-153.

- person is subject to the jurisdiction of the judicial authorities in the country of residence (article 149);
7. The immunities extend to the diplomatic residence, but not to immovable property owned by the agent in his private capacity (article 150);
 8. The mission commences as soon as the agent's credentials have been accepted; even before they have been presented, an agent who proves his status is entitled to special consideration as the representative of a foreign State (article 186);
 9. Under the heading "personal rights and obligations of envoys", Bluntschli mentions inviolability (article 191); this does not guarantee protection when the agent voluntarily exposes himself to unreasonable danger (article 193). Inviolability extends to the agent's archives (article 197). With regard to his duties, the agent must not "allow the diplomatic residence to be used for subversive activities directed against the State to which he is accredited" (article 202);
 10. The State of residence may request the recall of an agent who commits a criminal offence; if such an offence is committed by a member of his retinue, the agent must take all the necessary steps to ensure that the offender is brought before the court and upon conviction duly punished (articles 210 to 212);
 11. Under the heading "termination of the mission" the draft code lists the various circumstances in which a mission may come to an end. Article 239 provides that:

"In all circumstances, even in the event of declaration of war, every State shall safeguard the freedom of an envoy to depart unmolested from its territory."

(c) *Fiore's draft code, 1890*¹⁰⁷

116. This draft, which is even more elaborate than Bluntschli's, also recognizes the principle of extritoriality as the theoretical basis of diplomatic immunities. This principle is mentioned in the provisions relating to the persons, premises and objects covered by it. A special chapter deals with the grounds on which extritoriality may be forfeited. According to articles 363 and 366 of the draft, the privilege of extritoriality is assigned to the offices of foreign legations, to the consular archives, and to the private residences of diplomatic agents; in consequence, the authorities of the country of residence may not enter these premises. The persons who enjoy "extritoriality" are the diplomatic agents and (article 471): "persons attached to the legation, who exercise public functions... and who have been officially recognized as such by the Government where the legation is established..." On the other hand, the code (article 474) does not confer upon the family of the agent any other rights and prerogatives beyond those which are due to them in consideration of the high dignity with which the minister as head of the family is invested.

117. What are these rights and privileges which derive

from the "extritoriality" and personal inviolability of the agent? In the first place (article 343), he is exempted from territorial jurisdiction, except in respect of acts which are entirely divorced from his official functions. He is entitled to exemption from inspection of his baggage and of any package sealed with the seal of his Government, and also enjoys immunity from customs duties, and exemption from personal taxes and forced loans (article 453). Similarly, but only on the basis of reciprocity, he is exempted from war taxes, the obligation of billeting, and in general any charges imposed on resident foreigners (article 454). His correspondence is inviolate (article 463), and he cannot be held responsible for acts performed in the exercise of his functions (article 465). The agent may, however, lose these rights and privileges if he uses them improperly or violates territorial law (article 376).

118. If, in travelling to or from his mission station, the agent traverses the territory of a third State, that State, if it has authorized the transit, must respect the diplomatic status of the person concerned and the prerogatives attaching thereto (article 476). Lastly, the agent must abstain from any direct interference with the local administrative or judicial authorities, even with a view to defending the interests of his countrymen (article 482). Upon the termination of the mission, the agent must be granted a reasonable period, during which he will enjoy all his privileges, for returning to his country.

(d) *Pessôa's draft code, 1911*¹⁰⁸

119. This draft, which is divided into three sections dealing respectively with "diplomatic agents", "immunities of diplomatic agents", and "suspension and end of a diplomatic mission", suggests, in addition to the usual proposals, a number of solutions for questions not yet settled in international law.

120. Article 125 proclaims the principle of the "inviolability" of the diplomatic agent, while article 126 extends that privilege to "all classes of diplomatic agents" and all the personnel of the legation, as well as their private effects, papers and archives. The same principle would seem to apply to employees who perform only administrative functions, for the last paragraph of article 126 provides that persons who are not part of the official personnel shall not, if they are nationals of the State to which the legation is accredited, enjoy inviolability except within the premises of the legation.

121. The members of a diplomatic mission travelling through a third State also enjoy inviolability (article 129). Inviolability may not, however, be invoked in cases of lawful defence on the part of individuals against a member of the mission, on account of risks to which he voluntarily or unnecessarily exposes himself, or on account of acts of such gravity that measures of precaution or of defence are taken on the part of the State (article 128).

122. Other articles explain in detail what is meant by "inviolability". Inviolability is extended to the residence

¹⁰⁷ Harvard Law School, *op. cit.*, pp. 153-162.

¹⁰⁸ Harvard Law School, *op. cit.*, pp. 164-168.

of the minister, which no agent of the public authority, administrative or judicial, is permitted to enter and which is exempt from the obligation to give lodgings to military forces or contributions in lieu of this burden (articles 132 and 133). In addition, all diplomatic officials are exempted from the payment of direct personal taxes, taxes on movables, war contributions and customs duties relative to the objects of their personal use (article 135). They also enjoy immunity from civil and criminal jurisdiction—they may not renounce the second (article 142)—and such immunity survives their diplomatic functions as to those acts to which they are related (articles 136 and 137). It does not, however, extend to the members of the mission who are nationals of the State in which the mission serves (article 138), and it may not be claimed (article 139) in the following cases:

1. In actions originating from obligations contracted by the agent in the practice of a profession exercised by him in the State of his residence concurrently with diplomatic functions, or referring to any industrial or commercial activity which he has carried on in the territory of the State;
2. In real actions, including possessory actions, relative to property, movables or immovables situated in the territory, not relating to the residence of the minister, or dependent or accessory thereto;
3. When the agent renounces immunity;
4. In actions resulting from his capacity as heir or legatee of a national of the State of his residence;
5. In actions based on contracts entered into by him in a foreign State, if, by express provision, or by the nature of the action, its execution may be demanded there;
6. In actions of indemnification resulting from a delict or quasi-delict.

The agent is not obliged to appear as witness before the court of the country, but if a deposition is requested through the diplomatic channel, it may be given in the building of the legation (article 141).

123. The diplomatic agent enters upon the enjoyment of his immunities from the moment he passes the frontier (article 145), and he continues to enjoy them after his mission is terminated for a time sufficient for him to withdraw from the territory of the State to which he is accredited (article 146).

(e) *Project of the International Commission of American Jurists*¹⁰⁹

124. After setting forth in sections I, II, III and IV what is meant by "chiefs of mission", "personnel of legations", "special agents" and "duties of diplomatic agents", this project gives in section V a description of the immunities of diplomatic agents which is consistent with what has been said under (d) above. In particular, article 27 of the project contains a list of cases in which immunity from jurisdiction may not be claimed; this list is identical with that contained in Pessôa's draft.

¹⁰⁹ Harvard Law School, *op. cit.*, pp. 171-174.

(f) *Phillimore's draft code, 1926*¹¹⁰

125. From article 20 on, this draft code, which was submitted by Lord Phillimore to the International Law Association at its 34th Conference,¹¹¹ lists the customary immunities. These are the inviolability of the minister's correspondence, exemption from customs duties, immunity from jurisdiction, the right not to testify before a court of law, inviolability of residence, immunity of the official suite, family and servants, etc. It should be noted that, in this draft, a diplomat may not invoke immunity before the courts if he makes himself a plaintiff or in respect of immovables which he owns in his private capacity within the territory of the receiving State, or in respect of any obligations which may result from his engaging in trade.

126. Under articles 29 and 30, diplomatic immunities are granted to "members of the personal suite of a diplomatic agent and the personal suite of the official suite being nationals of the accrediting State", whereas these privileges are denied to persons in this category who are not nationals of the accrediting State.

(g) *Strupp's draft code, 1926*¹¹²

127. This draft deals with diplomatic immunities *stricto sensu* in articles X to XIX. It is stated in article X that the immunities arise out of "the need to safeguard the freedom of foreign envoys in the performance of their functions...". From this theoretical basis, the author draws the conclusion in article II that "inasmuch as any immunity constitutes a derogation from the independence of the State against which it is invoked, the relevant rule should be interpreted restrictively, without any inferences being drawn by analogy." This rule is in agreement with the views clearly indicated by the Rapporteur of the Sub-Committee of the League of Nations Committee of Experts and approved in principle by his colleague, Mr. Mastny.

128. In other respects this draft code covers the same ground as the other drafts discussed above. It should, however, be mentioned that under its article XVIII, "the members of a diplomatic mission do not enjoy any juridical prerogatives in third States".

(h) *Draft code of the Japanese Branch of the International Law Association and the Kokusaiho Gakkwai, 1926*¹¹³

129. The draft lists the immunities customarily accorded to diplomats, their family and their suite. Attention should, however, be drawn to section VI, article I, paragraph 6, according to which the exemption of diplomatic agents from customs duties and from other taxes, and from taxes and imposts in respect of immovables employed for private purposes shall be regulated by usage or "by courtesy".

¹¹⁰ *Ibid.*, pp. 177-180.

¹¹¹ International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, 1927), p. 399.

¹¹² Harvard Law School, *op. cit.*, pp. 181-184.

¹¹³ *Ibid.*, pp. 185 and 186, and International Law Association, *op. cit.*, p. 378.

(i) *Resolution of the Institute of International Law, 1929*¹¹⁴

130. At the session it held in New York in 1929, the Institute of International Law adopted a resolution amending the regulations adopted at Cambridge in 1895, which were "no longer entirely in accord with the recent developments of international law bearing on the subject". Its most important provisions are summarized below.

131. Unlike the Cambridge draft, which based diplomatic immunities on the fiction of extritoriality (articles 7 to 10), this resolution accords the immunities to the agents in question "in the interest of their functions" (article 1). These immunities are enjoyed by the chief of mission, the members of the mission officially recognized as such, and the persons officially in the service of these agents, provided "that they do not belong to the State to which the mission is accredited" (article 2). Article 6 lists four immunities to which the persons mentioned in article 2 are entitled: personal inviolability; inviolability of the legation building; immunity from jurisdiction; and exemption from taxation. Personal inviolability includes that of the official residence of the chief of mission (article 8) and of any dwelling that he may occupy, even temporarily.

132. Immunity from jurisdiction may not be claimed in the cases already considered in the analysis of other drafts (real actions, counter-claims, professional activity unconnected with diplomatic functions (articles 12 and 13)); it is denied to agents who are nationals of the country to which they are accredited (article 15); it continues after the cessation of diplomatic functions in respect of acts relating thereto (article 16). If requested to do so through the diplomatic channel, the agent shall make his deposition in the building of the mission (article 17). Exemption from taxation enjoyed by diplomatic agents applies only to direct taxes, "with the exception of the taxes to which they would be subject by reason of their immovable properties or their personal activities", and they must pay customs duties except on articles intended for their personal use (article 18). Lastly, article 9 states that such official members of missions and their families living with them retain their earlier domicile; and under article 10, a diplomatic agent's child born abroad, in the country of the parent's duty station, does not *ipso facto* acquire the nationality of that country under the *jus soli*.

(j) *Harvard Law School draft on diplomatic privileges and immunities*¹¹⁵

133. It now remains for us to examine the important draft published in 1932 by the Harvard Research in International Law. This draft includes comments on each article and takes into account the work already summarized in the present study, including that of the League of Nations Committee of Experts.

134. The draft is divided into six sections, dealing respectively with the definition of the terms used, the

problem of premises and archives, selection and recall of members of a mission, communications and transit, personal privileges and immunities, and, lastly, interpretation of the draft.

135. In the summary which follows, special attention is given to provisions which, in comparison with the drafts examined above, propose new and different solutions.

136. Attention should be drawn to the following definitions:

"(1) A 'member of a mission' is a person authorized by the sending State to take part in the performance of the diplomatic functions of a mission.

"(2) A 'chief of mission' is a member of a mission authorized by the sending State to act in that capacity.

"(3) The 'administrative personnel' consists of the persons employed by the sending State in the administrative service of a mission.

"(4) The 'service personnel' consists of the persons in the domestic service of a mission or of a member of a mission.

"(5) A 'mission' consists of a person or a group of persons publicly sent by one State to another State to perform diplomatic functions."

137. The comment¹¹⁶ explains the purely formal character of the last definition by the fact that there is no objective standard by which a diplomatic mission may clearly be distinguished from all other official missions, in view of the expansion of the activities entrusted to diplomatic missions and the growth of new types of agencies performing certain tasks for the State in foreign territory.

138. The question of premises and archives is dealt with in articles 2 to 8 of the draft. It should be noted that, under article 2, the State to which the mission is accredited must permit the sending State to acquire land and buildings adequate to the discharge of the mission's functions and to dispose of such land and buildings in accordance with the law of the receiving State. The comment¹¹⁷ justifies this provision by the fact that in modern times the normal functioning of diplomatic services requires "adequate physical instrumentalities". Nevertheless, the sending State acquires over such land not *imperium* (sovereignty), but *dominium* (property) only.¹¹⁸

139. Article 3 of the draft, while guaranteeing the inviolability of diplomatic premises, is so drafted as to obviate the need for any recourse to the fiction of extritoriality and even to such terms as "inviolability", which the authors of the draft consider to be "unfortunate and misleading".¹¹⁹

140. Under article 4, movable and immovable property owned by the sending State is exempted from national and local taxes. Such property is also declared exempt from any form of attachment or execution. It is noted

¹¹⁶ *Ibid.*, p. 43.

¹¹⁷ *Ibid.*, p. 49.

¹¹⁸ *Ibid.*, p. 50.

¹¹⁹ *Ibid.*, p. 52.

¹¹⁴ Harvard Law School, *op. cit.*, pp. 186 and 187.

¹¹⁵ *Ibid.*, pp. 19-43.

in the comment¹²⁰ that there is no legal obligation on the part of the State to which the mission is accredited to grant exemption from taxes levied to pay for special services; however, as the sending State is immune from the jurisdiction of the receiving State, with respect to property occupied by diplomatic missions, no action to recover such taxes is in fact possible. It is doubtful whether a lien will attach to such property.

141. Articles 5 to 7 deal respectively with the protection of premises and archives, the right of asylum, and the protection of premises and archives of a discontinued mission.

142. Article 8, in the section dealing with the selection and recall of members and personnel of a diplomatic mission, provides *in fine* that a State may not send as a member of a mission a national of the receiving State without the express consent of the latter. The authors feel that this rule, which follows closely article 7 of the Havana Convention, expresses the customary rule of international law.¹²¹

143. Articles 9 to 13, which deal with the selection of a chief of mission, selection of administrative and service personnel, official lists, recall of members of a mission, and objectionable personnel, require no comment.

144. Similarly, article 14 (section IV: Communications and transit), which relates to freedom of communications, merely sets forth in detail an established rule of law. Article 15, on the other hand, seems to be less specific than the drafts analysed above. It imposes on the third State, which the members of a mission must cross *en route* to or from their posts, the obligation to accord to these agents "such privileges and immunities as are necessary to facilitate their transit", provided that the third State has recognized the Government employing the agents and has been notified of their official character. It will be seen that the article fails either to define or to enumerate the "necessary" privileges and immunities, and thus increases rather than dispels the uncertainty prevailing on this point. The authors of the draft note that there is disagreement on this problem among authorities and cite some opinions in their comments.¹²² Court decisions, extracts from which are also given, seem no less uncertain of the right solution. Nevertheless, the authors think¹²³ that their draft will adequately safeguard "that freedom for the carrying on of international relations through the instrumentality of diplomatic agents" which is a common interest of all the members of the international community. Furthermore, the rights are accorded to the agent in transit only, and not if, for any reason, he prolongs his stay beyond the time necessary to traverse the country in question.

145. Personal privileges and immunities *stricto sensu* are set forth in section V of the draft. Article 16 specifies the time from which the agent enjoys these immunities, by stating that they begin as from the time of such person's entry into the territory of the State where he is

to exercise his functions or, if he is already there, as from the time of his becoming a member of a diplomatic mission accredited to that State. With regard to this last category of officials, however, the draft does not resolve the problem any more than do the drafts already examined, for it fails to specify at what moment the official concerned becomes a member of the mission in the eyes of the law. Does this occur when he is appointed, or when his appointment is notified to the State where he will serve, or when that State signifies its approval?

146. Article 17 protects "a member of a mission and the members of his family from any interference with their security, peace, or dignity". Stated in this general form, the obligation does not seem to exceed the State's obligation towards all foreigners lawfully within its territory. It is emphasized in the comment¹²⁴ that neither according to national legal practice nor according to the different drafts already studied does the duty of States to exercise special vigilance over diplomatic agents on official mission appear to be a generally accepted rule of international law. It would seem, however, that, where necessary, special protection must be granted in order to avoid placing an unnecessary strain on the relations between the two Governments concerned.

147. Article 18 represents a statement of the existing law. It provides that an agent may not be held responsible by the State to which he is accredited for acts done by him in the performance of his official functions. Article 19, which deals with the exemption from jurisdiction of members of a mission and their families, also sums up the prevailing practice. The comment,¹²⁵ which cites in detail the provisions of the domestic legislation of many countries, as well as the rules established by judicial decisions confirming the principle of immunity from jurisdiction, nevertheless mentions two decisions of the Court of Cassation at Rome which recognize immunity in civil matters only as regards acts performed by the diplomatic agent in the exercise of his official functions. It is pointed out in the comment that the diplomatic corps at Rome protested against these decisions. The French ambassador, as *doyen*, dispatched a note to the Minister of Foreign Affairs, calling attention to the international law in force:

"In this decision", wrote the French Ambassador, "the Court of Cassation of Rome has enunciated the principle... that diplomatic immunity is confined only to those cases in which diplomatic agents act in their official capacity, as representatives of their Governments. This decision is in conflict with the rule hitherto generally recognized and applied by all States. That rule provides that, in principle, diplomatic agents are exempt not only from the criminal but also from the civil jurisdiction of the countries to which they are accredited..."¹²⁶

According to the comment, in 1927 the Tribunal of Rome rejected the previous decisions of the higher Court and observed the established rule.¹²⁷ The comment also cites

¹²⁰ *Ibid.*, p. 58.

¹²¹ *Ibid.*, p. 70.

¹²² *Ibid.*, pp. 85-87.

¹²³ *Ibid.*, p. 88.

¹²⁴ *Ibid.*, pp. 89-97.

¹²⁵ *Ibid.*, pp. 104 and 105.

¹²⁶ *Ibid.*, p. 105.

¹²⁷ *Ibid.*, pp. 105 and 106.

a decision of the Court of Appeal at Lyons, which held that:

"...complete immunity from jurisdiction in civil matters extends to any person vested with the official attributes of one representing a foreign Government in any capacity."¹²⁸

148. Article 20 makes it a mandatory rule, despite a widely held opinion to the contrary, that States must exempt diplomats from payment of customs duties or other import or export charges upon articles intended for the official use of a mission or for the personal use of its members or their families.

149. It is stated in the comment¹²⁹ that an analysis of the provisions of national legislation on this subject fails to reveal any "irreducible minimum" of exemption which may be held to be required by international law. This is a prerogative granted out of courtesy, often on a basis of reciprocity, rather than an exemption which States must accord under international law.

150. Article 21 confirms the right of a State to refuse to permit members of a diplomatic mission to bring in articles the importation of which is prohibited by general laws, or to take out articles the exportation of which is so prohibited.

151. Article 22 lists the national and local taxes which may not be imposed on a diplomatic agent. They are:

- (a) Personal taxes;
- (b) Taxes on salary;
- (c) Taxes on income derived from sources outside the State to which the agent is accredited;
- (d) Taxes on movable property, unless used in a private business or profession;
- (e) Taxes on immovable property used as the residence of the diplomatic agent or for the purposes of the mission.

152. The comment¹³⁰ states that these exemptions are granted out of international courtesy rather than under any rule of positive law. It recognizes that the proposed text does not deny the possibility of a lien,¹³¹ but that under the general procedure of immunity enjoyed by diplomatic agents such liens are not enforceable as against property while owned by a person having diplomatic status.

153. Article 23 restricts to some extent the immunity from jurisdiction enjoyed by a mission's administrative personnel; the State to which the mission is accredited retains its rights in respect of these persons, but must exercise them in such a manner as to avoid undue interference with the business of the mission.

¹²⁸ *Ibid.*, p. 106.

¹²⁹ *Ibid.*, p. 108.

¹³⁰ *Ibid.*, p. 115.

¹³¹ The English common law lien is the right of a person in possession of a thing the ownership of which vests in another to detain it until some debt or demand in connexion therewith is satisfied. The French "droit de rétention" amounts to a lien constituting a privilege or a priority claim. The common law lien has been extended by statute in some countries to cases of non-payment of taxes.

154. The comment¹³² stresses that the article is not declaratory of existing international law, but is rather an attempted recognition of modern international practice and of the views of Governments, which seem practically unanimous in the desire to restrict the privileges accorded to this class.

155. Article 24 attempts to settle the question of non-official activities of a diplomatic agent by stipulating that the State in which he exercises his official functions may refuse to permit him to engage in such private activities (paragraph 1). Furthermore, the State may (paragraph 2) refuse to accord diplomatic privileges and immunities to such a person with respect to acts done in the exercise of a private profession.

156. The comment states that paragraph 2 of the draft probably represents a modification of present practice, which affords immunity from jurisdiction for all acts, whether official or private. The authors of the draft believe, however, that there is sufficient doubt concerning immunity for acts performed in the conduct of a business or profession to justify the provision of article 24, paragraph 2.

157. Article 25 deals with immunity from jurisdiction in case the agent himself institutes a proceeding, and stipulates that in those circumstances the receiving State has jurisdiction for the purposes of that proceeding; nevertheless, unless the agent expressly renounces his privileges, no execution may issue in consequence of that proceeding against him or against his property. The authors of the draft consider this provision to be in conformity with existing international law.

158. The problem of renunciation of immunities is dealt with in article 26 of the draft. In the case of the chief of mission, renunciation must be confirmed by the Government of the sending State; in the case of other members of the mission, the consent of the chief of mission is sufficient.

159. It is stated in the comment that the authors believe that the rule thus laid down in the article fulfils the requirement of international law. However, it may reasonably be asked whether the express or tacit renunciation by the chief of mission should not be regarded as necessary and sufficient in all cases, as it may be presumed that an official of such high rank would not act without first securing the consent of his Government, which he is duly authorized to represent.

160. On the other hand, there seems to be unanimous agreement among the authorities as regards the prohibition of all measures of execution against a diplomatic agent.

161. Articles 27 and 28, which deal respectively with extradition and the nationality of children born within the territory of the country to which the mission is accredited—the State being prohibited from imposing that nationality on them even in the countries where it is acquired *jure soli*—do not call for comment.

162. Article 29, which is concerned with the termination of diplomatic privileges and immunities, is

¹³² Harvard Law School, *op. cit.*, p. 119.

declaratory of existing law. It provides that the State to which the agent is accredited must allow him a reasonable period to enable him and his family to leave the territory, and that such persons shall enjoy full diplomatic privileges and immunities until the expiry of this period.

163. In the comment,¹³³ the authors of the draft sum up the legal reasoning on which they base article 29 as follows:

- (1) Members of missions are immune from the jurisdiction of the receiving State for their official and private acts;
- (2) Immunity from jurisdiction with respect to private acts being conceded only in the interest of the successful and unhindered functioning of the mission, it does not imply an exemption from the substantive law of the receiving State;
- (3) Consequently, immunity for private acts ends with his departure from the receiving State;
- (4) Immunity for official acts is an exemption from both the jurisdiction and the law of the receiving State, and, as a manifestation of the immunity of the sending State acting in a public capacity, it imposes an incompetence *ratione materiae* upon the receiving State;
- (5) Consequently, immunity for official acts survives the cessation of diplomatic character and functions, since it is not attached to the person of the agent but to the sending State itself.

164. Articles 30 and 31 of the draft, which deal respectively with the death of a diplomatic agent and arbitration proceedings in case of disagreement on the interpretation of the convention, do not require comment.

(k) *Some conclusions*

165. In concluding this brief survey of the work undertaken in the field of diplomatic privileges and immunities, we note a striking degree of unanimity on the point that there must be some derogation, in favour of diplomatic agents, from the ordinary law of the States to which they are accredited. The authorities, supported by a substantial volume of judicial precedent, seem to be in full agreement regarding the principle of the "inviolability" of the agent's person or property, the immunities from jurisdiction which he enjoys, his right freely to correspond with his Government, the need to ensure the secrecy of that correspondence and of archives, the privileges which, in addition to immunities, are recognized by international custom as a matter of courtesy, and the prerogatives due to his family.

166. Such disagreement as exists relates to the degree, rather than to the principle, of immunity. To give a few examples, there may be differences of opinion on points such as: the diplomatic agent's immunity from civil jurisdiction in respect of acts performed not in his official but in a private capacity; the applicability of exemption from taxation to the official building of the legation, or, more particularly, to the immovable property which the agent personally owns in the country to which he is

accredited; or, the measure of privilege he must receive from a third State through which he travels on his way to his post or on returning to his country of origin.

167. The most important of these points on which there is disagreement, and the relevant case law, will be dealt with in a later chapter of this study, following a summary of the legal theories most often invoked to justify the immunities enjoyed by diplomats.

CHAPTER II

Diplomatic intercourse and the theoretical basis of diplomatic immunities. Consideration of some specific aspects of the problem

A. DIPLOMATIC INTERCOURSE

1. GENERAL OBSERVATIONS. THE RIGHT OF LEGATION

168. In its resolution 685 (VII), reproduced in paragraph 11 of the present memorandum, the United Nations General Assembly requests the International Law Commission to give priority to the codification of the topic "Diplomatic intercourse and immunities". It might therefore be desirable to dwell for a moment on the meaning of the term "diplomatic intercourse".

169. Calvo writes:

"One of the essential attributes of the sovereignty and independence of nations is the right of legation, which is the right to be represented abroad by diplomatic and consular agents... The right of legation is considered a perfect right in principle but imperfect in practice, since no State is bound to maintain political missions abroad or to receive on its territory representatives from other nations..."¹³⁴

In view of the imperfect character of this right in practice "any State may... refuse to receive diplomatic agents..."¹³⁵

170. The above excerpts from Calvo's work give a concise statement of the theory of diplomatic intercourse, as accepted and defined by most authors.

171. Thus, Fauchille writes in his treatise on public international law:

"The active right of legation, that is to say the capacity to accredit diplomatic agents to other States, and the passive right of legation, which is the capacity to receive envoys from other States, represent essential characteristics of sovereign power... Sovereign States enjoy both an active and a passive sovereign right... No State is under an obligation (in the strict sense of the word) to receive the diplomatic envoys of another State. It is a matter of good relations, not of strict law..."¹³⁶

172. A similar opinion is stated in detail in Bustamante¹³⁷ while Hackworth quotes from a State Depart-

¹³⁴ Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), Vol. III, p. 177.

¹³⁵ *Ibid.*, p. 180.

¹³⁶ Fauchille, *Traité de droit international public*, pp. 32 and 37.

¹³⁷ Antonio Sánchez de Bustamante y Sirvén, *Derecho internacional público* (Havana, Carasa y Cía, 1933) chap. IX.

¹³³ *Ibid.*, p. 137.

ment memorandum dated 6 April 1920 which states:

“Every independent and full sovereign member of the family of nations possesses the right of legation, which is the right of a State to send and receive diplomatic envoys . . .”¹³⁸

We shall conclude these quotations with a brief excerpt from Sir Cecil Hurst's course of lectures delivered at The Hague:

“The right of legation is one of the recognized attributes of every sovereign independent State. The right of legation comprises the right to accredit diplomatic representatives to another State and the obligation to receive diplomatic representatives when accredited by a foreign State.”¹³⁹

173. It is clear from the above excerpts that the basis upon which diplomatic intercourse rests is the right of States to send and to receive diplomatic agents. The authorities seem to agree that there is consequently also an implied right to refuse to maintain diplomatic relations with one or more States; they all, however, take the view that a State refusing to maintain such relations with other States would forfeit its place in the comity of nations and violate a strong moral obligation.

174. Oppenheim expresses this view as follows:

“Obviously a State is not bound to send diplomatic envoys or to receive *permanent* envoys. But, on the other hand, the very existence of the family of nations makes it necessary for the members . . . to negotiate occasionally on certain points . . . The duty of every member to listen, in ordinary circumstances, to a message from another member brought by a diplomatic envoy is, therefore, an outcome of its very membership of the family of nations, and this duty corresponds to the right of every member to send such envoys.”¹⁴⁰

175. The active and passive right of legation belongs, in principle, only to States enjoying full sovereignty and independence. However, some exceptions to this principle have been admitted. Thus, according to the Peace Treaty of Kainardji of 1774 between Russia and Turkey, the principalities of Moldavia and Wallachia had the right of sending *chargés d'affaires* to foreign Powers.¹⁴¹ Member States of a Federal State generally do not have the right of legation, but since the First World War the British self-governing Dominions have acquired, and whenever they find it convenient, do exercise, such right. Likewise, some States of the German Empire before the First World War (Bavaria, for example) used to send and receive diplomatic representatives.

2. ACCEPTANCE (*agrégation*)

176. No State is bound to receive any individual as a foreign diplomatic agent unless it has expressly accepted him. Such acceptance is necessary, and the receiving

¹³⁸ Green Haywood Hackworth, *Digest of International Law* (Washington, U.S. Government Printing Office, 1942), Vol. IV, p. 393.

¹³⁹ Hurst, *International Law, The Collected Papers of Sir Cecil Hurst*, p. 173.

¹⁴⁰ Oppenheim, *International Law—A Treatise*, p. 691.

¹⁴¹ *Ibid.*, p. 692.

State is free to refuse it. Oppenheim says on this point:

“International law gives no right to a State to insist upon the reception of an individual appointed by it as diplomatic envoy. Every State can refuse to receive as envoy a person objectionable to itself.”¹⁴²

Fauchille expresses the same view when he says:

“While membership of the community of nations implies, in principle, acceptance of diplomatic envoys on a basis of reciprocity, a State is nevertheless not bound to accept any given individual as the agent of another State . . . Indeed, the very independence of States in their reciprocal relations precludes a State from seeking to impose upon another an objectionable or unwelcome arrangement . . .”¹⁴³

177. This has led to the practice of asking the receiving State for its acceptance (*agrégation*) of nominees; this practice is followed by all States in their mutual relations. A State wishing to entrust a diplomatic mission to one of its agents ascertains whether the prospective receiving State considers him *persona grata*. This practice has only occasionally given rise to difficulty and its principle has never been challenged.

Hackworth has the following to say on this point:

“Since the establishment and maintenance of diplomatic relations between two States must of necessity be mutually agreeable to them, and since this may, and often does, depend upon the personal characteristics of the chief of mission, his known or reputed attitude towards the receiving State . . . it is the invariable practice of the sending State to inquire . . . whether the person about to be appointed would be acceptable to the receiving State . . .”¹⁴⁴

3. POSITION WHERE AGENT IS A NATIONAL OF THE COUNTRY IN WHICH HE IS TO PERFORM DIPLOMATIC FUNCTIONS

178. In this connexion, we have to determine whether a State is bound to receive one of its own subjects as a diplomatic agent and to what immunities such an agent would be entitled in the event of reception. Oppenheim is explicit on this point. His view is that most States almost invariably refuse to receive one of their own subjects, but a State departing from this principle must grant the agent all the privileges of a diplomatic envoy, including exterritoriality.¹⁴⁵

179. This view was also shared by the Queen's Bench Division in its judgement of 24 February 1890 in *Macartney v. Garbutt*. The Court held that a diplomatic agent accredited by a foreign State to his own country of origin enjoys full diplomatic immunity, provided that the Government of his country of origin accepted him without any reservation in that respect.¹⁴⁶

180. In this particular case, Sir Halliday Macartney, a British subject, had been appointed by the Chinese Government to serve as English secretary to the Chinese

¹⁴² *Ibid.*, p. 701.

¹⁴³ Fauchille, *op. cit.*, pp. 37 and 38.

¹⁴⁴ Hackworth, *op. cit.*, p. 446.

¹⁴⁵ Oppenheim, *op. cit.*, p. 701 and note 1.

¹⁴⁶ 24 *Q.B.D.* 368.

Embassy in London; the Foreign Office had accepted him in that capacity without reservation. He sought to recover a sum of £118, which he had paid under protest in order to obtain the release of furniture seized under a claim for parochial rates. In finding for the plaintiff, the Court based its decision on his *de facto* situation and followed the principle laid down by Cornelius van Bynkershoek in chapter VIII of his *De foro legatorum*. According to this principle, although a State has the right not to accept a member of a foreign embassy, except on such conditions as it deems fit to impose upon him, a member who has been unconditionally accepted enjoys the full *jus legationis*.¹⁴⁷

181. Both Calvo¹⁴⁸ and Oppenheim¹⁴⁹ draw attention to the fact that many countries, including the United States, refuse to receive one of their own subjects as a foreign diplomatic agent, while others make acceptance conditional on the agent and his property remaining subject to the local legislation. Calvo believes that unless such a condition is imposed before the agent is accepted, the receiving nation renounces all claim to jurisdiction over his person.¹⁴⁰ In support of this thesis, he cites such authorities as Wheaton, Sir Robert (later Lord) Phillimore and Vattel.

182. Fauchille takes the same view and recalls the case of Mr. Pozzo di Borgo, a French citizen, received as Ambassador of Russia to Paris with all the prerogatives befitting his rank.¹⁵¹

183. However, attention is drawn to article 15 of the Cambridge draft of the Institute of International Law which states:

"Persons belonging by their nationality to the country to whose Government they are accredited, may not take advantage of the benefits of immunity."¹⁵²

By contrast, article 8 of the draft prepared by Harvard Law School¹⁵³ admits the principle that a national of a State to which a mission is accredited may be sent as a member of that mission, provided the express consent of the receiving State has been obtained. This view is in line with the one taken in article 7 of the Havana Convention and by a number of authorities cited, in the relevant comment, in support of the Harvard text (Westlake, Satow, De Heyking, Weiss and others).

184. On the basis of this cursory analysis, it can be said that the prevailing views of the authorities and the practice followed by States may be summed up as follows: Governments are free to refuse to receive one of their nationals as a foreign diplomatic agent or they may accept him on the condition that certain immunities will not be extended to him; if, however, a State accepts him unconditionally and without first stating that he shall not

be entitled to specific immunities, the agent concerned shall enjoy all the diplomatic prerogatives of his rank.

4. DUTIES OF DIPLOMATIC AGENTS

185. The generous exemptions extended to diplomats, by reason of their position as representatives of a sovereign independent foreign State, obviously entail certain duties on their part. Diplomatic envoys must respect the independence of the country to which they are accredited, comply with its laws, and conduct themselves in a manner befitting their station and rank. A breach of these rules exposes them to action by the host State, and may even result in a request for their recall or in their expulsion.

186. Attempts have been made, in several draft codes on diplomatic immunities, to define these duties and the remedies to be applied in case of misconduct.

187. Thus, under article 142 of Bluntschli's¹⁵⁴ draft code, a diplomatic agent who "commits hostile acts in the country in which he resides" may be treated by the Government as an enemy and, if necessary, put under restraint. Moreover, under article 141, the Government may require the agent to comply with its penal legislation and, if he commits an offence, seek redress from the State to which he is responsible. Article 6, paragraph 3, of the Cambridge draft of the Institute of International Law says:

"Inviolability may not be invoked . . .

"3. In case of reprehensible acts committed by them [persons who enjoy the privilege of inviolability], compelling the State to which the minister is accredited to take defensive or precautionary measures . . ."¹⁵⁵

188. Fiore's draft code¹⁵⁶ states in article 376 that the privilege of extraterritoriality may be lost by a person who abuses it or, for example, if the official residence of the mission is wrongly used for a purpose different from that for which the privilege was granted; article 482 states that the agent must abstain from any direct interference with the local administrative or judicial authorities. He must respect the institutions of the country and must not interfere in the internal affairs of the State to which he is accredited; nor may he make the legation available to conspirators or revolutionaries wishing to overthrow the legally established Government (articles 483 to 485).

189. The project of the International Commission of American Jurists states in article 16 that foreign diplomatic officials may not interfere in the domestic or foreign political life of the State in which they exercise their functions.¹⁵⁷ Article 12 of the Havana Convention¹⁵⁸ is not less emphatic on this point.

190. There can be no doubt that this view is shared by most authorities. Calvo writes:

"The first duty of a diplomatic agent is not to

¹⁴⁷ Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1890), Vol. 17, p. 343.

¹⁴⁸ Calvo, *op. cit.*, p. 181.

¹⁴⁹ See para. 178 above.

¹⁵⁰ Calvo, *op. cit.*, p. 182.

¹⁵¹ Fauchille, *op. cit.*, p. 40.

¹⁵² Harvard Law School, *op. cit.*, p. 69.

¹⁵³ *Ibid.*, pp. 67-71.

¹⁵⁴ *Ibid.*, p. 145.

¹⁵⁵ *Ibid.*, p. 97.

¹⁵⁶ *Ibid.*, pp. 153-162.

¹⁵⁷ *Ibid.*, p. 173.

¹⁵⁸ *Ibid.*, p. 176.

interfere in any manner in the internal affairs of the country to which he is accredited."¹⁵⁹

He cites the case of Lord Sackville, British Minister in Washington, who wrote a private letter to a citizen of the United States, attempting to influence the presidential elections of the year 1888; he was duly recalled, at the United States Government's request. Similarly, in 1892 the Belgian *Chargé d'Affaires* in Venezuela was recalled at the Venezuelan Government's request after that Government had learned of a personal letter which he had addressed to the Italian Minister, informing the latter of a meeting of the diplomatic corps for the purpose of drafting a memorandum to the Governments concerned regarding the insurmountable obstacles encountered by the diplomatic agents in their efforts to secure protection for their nationals.

191. Fauchille writes that:

"... the public minister must refrain from any interference in matters of domestic administration... and from any semblance of insult to the Government and institutions of the foreign country... he must join in national rejoicing... The public minister must never provoke a disturbance, instigate an uprising, or attempt to corrupt Government officials... he must avoid any intrigue with a parliamentary opposition..."¹⁶⁰

Fauchille also gives numerous examples of diplomatic agents whose attempts to interfere in the internal affairs of the State to which they were accredited resulted in their recall and the termination of their mission.

192. Oppenheim says that:

"The presupposition of the privileges he [the diplomatic envoy] enjoys is that he acts and behaves in such a manner as harmonizes with the internal order of the receiving State. He is therefore expected voluntarily to comply with all such commands and injunctions of the municipal law as do not restrict him in the effective exercise of his functions."¹⁶¹

193. With reference to the inviolability of the agent's person, he lists the instance when this privilege cannot be invoked. Thus, when the envoy

"... commits an act of violence which disturbs the internal order of the receiving State in such a manner as makes it necessary to put him under restraint for the purpose of preventing similar acts, or if he conspires against the receiving State and the conspiracy can be made harmless only by putting him under restraint, he may be arrested for the time being..."¹⁶²

In this connexion, he recalls the famous case of Gyllenburg, the Swedish Ambassador in London, who was arrested as an accomplice in a plot against George I. His papers were seized.

194. Similarly, in 1718 Prince Cellamare, the Spanish Ambassador in Paris, having organized a conspiracy with the Duc du Maine against the Regency, was arrested and

subsequently escorted to the Spanish border. Saint-Simon relates the incident in his *Mémoires*:¹⁶³

"Cellamare, the Spanish Ambassador, a man of great intelligence and wit, had long been given to intrigue... The scheme was simply to incite the whole Kingdom to rise up against the Duc d'Orléans, and, although they did not know exactly what to do with him, they wanted to place the King of Spain at the helm of France's affairs... and under him a lieutenant of the Regency, who was none other than the Duc du Maine..."

The French Government, however, having scant respect for the secrecy of correspondence, was well aware of the intentions of the Ambassador, of his superior, Cardinal Alberoni, and of their French connexions. It learned that Cellamare was about to send some important documents to Spain, in the care of a young cleric who called himself the Abbé de Portocarrero:

"It may be that the Abbé de Portocarrero's arrival and the briefness of his stay in Paris aroused the suspicions of the Abbé du Bois [the French Minister of Foreign Affairs] and his emissaries, or that the Abbé had bribed somebody of importance on the Spanish Ambassador's staff..."

The Spanish emissary was, in any case, arrested at Poitiers, on orders from the Abbé du Bois; his papers were seized and taken to Paris. The Spanish Ambassador, upon being notified, "concealed his anxiety by preserving a calm demeanour and called at M. Le Blanc's residence at one o'clock in the afternoon to ask for the return of a package of letters...". It was there that he was arrested.

"M. Le Blanc replied that the package had been inspected, that it contained a number of important things and that not only was its return out of the question but he had been instructed to escort the Ambassador to his residence in the company of the Abbé du Bois, who, having just been informed of Cellamare's arrival at Le Blanc's place, had proceeded there in all haste..."

The Ambassador "retained his composure and calm demeanour throughout the three long hours they spent at his residence searching every desk and coffer... After they were done, the King's seal and the Ambassador's stamp were placed on every desk and coffer which contained papers...". Cellamare was left in his residence, guarded by musketeers and du Libais, "one of the King's gentlemen-in-ordinary, in conformity with the practice usually followed in such unpleasant circumstances". Du Libais later escorted him to the Spanish border, where... "He was immediately appointed Viceroy of Navarre..."

195. Thus ended a well-known incident, as related by a contemporary who had followed it closely. It shows that diplomatic agents and their sending Governments do not always duly abstain from interfering in the internal affairs of the States to which the agents are accredited; that States sometimes violate the secrecy of correspondence and even arrest the couriers of a foreign State if they deem it necessary as a measure of self-defence against

¹⁵⁹ Calvo, *op. cit.*, Vol. VI, p. 232.

¹⁶⁰ Fauchille, *op. cit.*, p. 54.

¹⁶¹ Oppenheim, *op. cit.*, pp. 708 and 709.

¹⁶² *Ibid.*, p. 709.

¹⁶³ *Mémoires du duc de Saint-Simon*, Edition Chéruel (Paris, Librairie Hachette, 1874), Vol. 16, chap. VI, pp. 130 ff.

a dangerous conspiracy; and also that, whatever the offence against the safety of the State imputed to him, a high dignitary, even when deprived of his freedom of movement, is treated with all the courtesy befitting his rank; his mission is terminated and, if he should be a conspirator as dangerous as Prince Cellamare, the Government to which he is accredited has him escorted to the frontier under armed guard. Moreover, his Government, instead of punishing him, frequently rewards him for the activities which evoked criticism beyond the border—"truth on one side of the Pyrenees is error on the other".

5. TERMINATION OF THE MISSION

196. Incidents of this kind may lead, and indeed often have led, to a rupture of diplomatic relations between the States concerned. Frequently, however, the aggrieved State merely requests the recall of the offending agent and his replacement by one both more cautious and more respectful of conventions.

197. Other reasons for the termination of a mission are:

- (1) Accomplishment of the object of the mission;
- (2) Expiration of a letter of credence;
- (3) Recall;
- (4) Promotion of the agent to a higher class;
- (5) Delivery of passports to the agent by the State to which he is accredited;
- (6) Request by the agent for his passport;
- (7) Outbreak of war between the States concerned;
- (8) Death of the sovereign of the monarchy to which the agent is accredited;
- (9) Revolutionary change of government;
- (10) Extinction of one of the States concerned;
- (11) Death of the envoy.

198. These are, in Oppenheim's¹⁶⁴ view, the causes which may terminate a diplomatic mission. They require no comment. Whatever the reasons for an agent's departure from the foreign country in which he performs his functions, that country must allow him a sufficient period in which to prepare to leave with his family and, in cases such as the outbreak of war, with all the members of his official retinue. Until he crosses the border, the State to which he is accredited must afford him every protection, and the immunities he enjoyed survive the cessation of his functions. We shall return to this point when we come to consider which immunities protect an agent indefinitely and which of them lapse after a given time. This question has given rise to difficulties and has led to some conflicting judicial decisions. We might merely recall that in 1936 the question of the severance of diplomatic relations was the subject of debate in the League of Nations.

199. In a letter dated 30 December 1935,¹⁶⁵ Mr. Litvinov, the People's Commissar for Foreign Affairs of the

Union of Soviet Socialist Republics, advised the Secretary-General that, following a communication received from the Government of Uruguay,

"... the diplomatic representatives of the Union of Soviet Socialist Republics at Montevideo and of Uruguay at Moscow have been recalled from their respective posts".

200. The Soviet Government, relying on article 12, paragraph 1, of the Covenant of the League of Nations¹⁶⁶ said that recourse to a severance of diplomatic relations was, in its view, "a grave breach of one of the fundamental principles of the League". It also invoked article 11, paragraph 2, of the Covenant, under which any Member had the right "... to bring to the attention of ... the Council any circumstance whatever affecting international relations which threatens to disturb international peace or the good understanding between nations upon which peace depends..."

201. On 23 January 1936, at the fourth meeting of the ninetieth session of the Council, the representatives of the two Governments stated their respective positions.

202. According to the representative of the Soviet Union, every State was free to establish, or not to establish, diplomatic relations with other States, and States were even free to agree between themselves in a friendly way to discontinue the exchange of diplomatic missions. However, the unilateral rupture of diplomatic relations always had to be regarded as an inimical act, of which an explanation was due to world public opinion. The procedure laid down in article 12, paragraph 1, was designed to settle situations of that kind and to provide the States concerned with an opportunity to offer the necessary explanations.¹⁶⁷ It was the duty of the League of Nations to make every effort to prevent such differences as inevitably arose between States from developing into armed conflict.

203. The representative of Uruguay, on the other hand, maintained that when a nation's internal order was threatened the Government was entitled to take whatever measures it considered necessary to protect the threatened public order and that, when in that position, it could do so "without consulting beforehand any authority other than [its] own conscience...". He further maintained that the circumstances which had given rise to the rupture "come within the category of questions which are the exclusive concern of States..." and that "It is the intrinsic characteristics of a question which determine whether it is of the category of international disputes or whether it is a matter within the internal competence of a State...".¹⁶⁸

204. The validity of that argument was challenged by the Soviet representative at the Council's fifth meeting.

¹⁶⁶ Article 12, para. 1, of the Covenant of the League of Nations provided, *inter alia*, that: "The Members of the League agree that if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or *judicial settlement* or to enquiry by the Council..."

¹⁶⁷ For the debate on this question, see League of Nations *Official Journal* (1936), pp. 90-98 and 100-106.

¹⁶⁸ *Ibid.*, p. 97.

¹⁶⁴ Oppenheim, *op. cit.*, pp. 727 to 733.

¹⁶⁵ League of Nations, *Official Journal*, (February 1936), annex 1586.

He said that:

"... the only State which is absolutely sovereign and free to do whatever it likes is the State which has no international obligations, for as soon as a State assumes such obligations, it sacrifices some of its sovereignty..."¹⁶⁹

In the view of the Soviet Union, some such sacrifice was required by article 12 of the Covenant, and Members of the League were obliged, before breaking off diplomatic relations, to submit to certain procedures outlined in the Covenant.

205. When the representative of Uruguay refused to accept this argument, a "Committee of Three" was appointed with Mr. Titulesco as Rapporteur.¹⁷⁰ The Committee submitted a resolution, subsequently adopted by the Council, expressing the hope that the interruption of diplomatic relations would be temporary.¹⁷¹

206. It was explained in the preamble that both States were prepared "to leave the question to the judgement of international public opinion..."¹⁷² Uruguay had previously refused to produce the evidence, demanded by the Government of the Union of Soviet Socialist Republics, of the acts imputed to the latter, for Uruguay contended that the matter was governed by municipal law.

6. SOME CONCLUSIONS

207. The brief account given above warrants the following conclusions: "diplomatic intercourse" consists chiefly of the active and passive right of legation, which belongs *ipso facto* to every sovereign State and occasionally, in special historical circumstances, to States which are only semi-independent; it is an imperfect right, since no State is strictly bound, under international law, to maintain diplomatic intercourse with other States; there is no well defined rule on this point other than that a sovereign State is free to maintain, with other members of the family of nations, such relations as it deems desirable and convenient; the maintenance of such relations has, since the end of the eighteenth century, become a generally accepted practice; they are established and maintained through officials called diplomatic agents; such agents are entitled to special consideration and protection; the sending State is free to select its agents and the receiving State is free to accept them or to consider them *personae non gratae*; there is nothing to prevent a State from appointing as its agent a national of the receiving State, provided that he is acceptable to that State; the agent thus appointed is entitled to all diplomatic privileges and immunities other than those expressly and previously declared inapplicable by the State to which he is accredited; diplomatic agents and the sending State have some generally recognized duties towards the receiving State, one of the most important being to refrain from interference in that State's internal or foreign affairs; even today, this obligation is not always respected; in the event of a violation, the aggrieved

State is free to impose such sanctions as it deems fit, not excluding a rupture of diplomatic relations; a diplomatic mission may come to an end from a number of causes; whatever the cause, the agent is entitled to full diplomatic immunity until he has crossed the border of the State to which he is accredited. The above principles, which reflect an international usage firmly established throughout the family of nations, may be regarded as rules of positive, albeit unwritten, international law.

B. THEORETICAL BASIS OF DIPLOMATIC IMMUNITIES

I. GENERAL OBSERVATIONS

208. The principal theories, elaborated by learned jurists over the centuries, have at various times gained acceptance as the legal basis of the immunities which States extend, out of considerations of necessity and mutual interest, to the diplomatic agents whom they receive and with whom they negotiate. These theories are "extritoriality", "the representative character of the agent" and the "necessity to protect communications between States", or "functional necessity". All these will be considered below.

2. THE THEORY OF EXTRITORIALITY

209. Bynkershoek gives the following explanation of the special status of a diplomatic agent:

*"Legatus non est civis noster, non incola, non venit, ut apud nos domicilium, hoc est verum et fortunarum sedem transferat: peregrinus est, qui apud nos moratur ut agat rem principis sui."*¹⁷³

The learned writer's explanation resembles the theory advanced by Grotius, who says:

"According to the law of nations, the fiction that an ambassador represents the actual person of his Sovereign engenders the further fiction that he must be regarded as being outside the territory of the Power to which he is accredited..."¹⁷⁴

210. This theory, which was upheld until relatively recent times by many authorities and often cited in judicial decisions, allows ambassadors and persons of equivalent rank immunity from all action by the public authorities of the country in which they are exercising their functions; they are thus held to be exempt from all civil and criminal jurisdiction, police regulations, duties and taxes, and so forth.

211. The fiction of extritoriality is nowadays strongly criticized. It fails to provide an adequate basis for a sound appreciation of the facts, or at least of all the relevant facts, and the scope of exemption which it would allow is never accepted in actual practice. Thus, for example, a foreign minister must observe police regulations and pay certain municipal charges for services actually rendered; if he engages in trade on his own account, the business is governed by the laws in force in

¹⁶⁹ *Ibid.*, p. 101.

¹⁷⁰ *Ibid.*, p. 106.

¹⁷¹ *Ibid.*, pp. 137 and 138.

¹⁷² *Ibid.*, p. 138.

¹⁷³ Cornelius van Bynkershoek, *De foro legatorum* (Classics of International Law; Oxford, Clarendon Press, 1946), chap. VIII.

¹⁷⁴ Grotius, *op. cit.*, chap. XVIII [quoted by Charles Morton, *Les privilèges et immunités diplomatiques* (Lausanne, Imprimerie La Concorde, 1927), p. 29.]

the territory in which it is effectively carried on; and, if he owns, in his private capacity, any real property in the country where he exercises his functions, such property remains subject to that country's laws.

212. It would be superfluous to cite in detail all the judicial opinions and decisions which have led to the present trend against the theory of extritoriality; the main objections, however, are these:

213. Opponents of this theory primarily criticize it because it does not afford a theoretical basis for diplomatic immunity. Moore, for example, says that the learned authorities, in speaking of the extritoriality of the minister's residence, have used the term in a figurative sense and have implicitly, or sometimes even explicitly, rejected the theory that the residence is deemed to be outside the territory where it is actually situated and to form part of the country which the minister represents.¹⁷⁵ Similarly Mastny, a member of the Sub-Committee of the League of Nations Committee of Experts, who thought it desirable to retain the term "extritoriality", stressed that it should be used only as a metaphor, in the limited but clear sense which it had acquired.¹⁷⁶

214. It has also been emphasized that if this fiction were carried to its logical conclusion, the consequences might well be disastrous; an independent country would hesitate to authorize the presence on its territory of a foreign sovereign, even though it were only through his duly qualified representative. Even an advocate of the theory of extritoriality such as Slatin, who states that extritoriality must be understood to mean that "An ambassador, despite the fact that he resides in the State to which he is an envoy, has no domicile there in the juridical sense,"¹⁷⁷ expresses the view that this idea must not be carried too far; if it were, it would lead to the conclusion that an "ambassador could not, for example, invoke the rule of *locus regit actum*..."¹⁷⁸ that the envoy would have difficulty in entering into any business relationship with citizens of the State in which he exercises his functions, and that a crime committed within the embassy would have to be tried in accordance with the laws of the foreign country.

215. It has also been observed that the term "extritoriality" does not faithfully reflect the actual situation we are attempting to define and that such equivocation is contrary to sound legal doctrine. Another argument is that the theory affords no useful guidance towards the determination of the rights and duties of the persons supposed to benefit thereby. Thus, acceptance of the fiction of "extritoriality" in the literal sense of the word may lead to intolerable consequences; if, on the other hand, the term is used in a restricted sense, it becomes necessary to ascertain every usage, custom and other relevant source of international law before the

applicable rule can be determined. In those circumstances, the fiction ceases to serve any purpose.¹⁷⁹

216. Sir Cecil Hurst maintains that the theory

"... may for certain purposes be useful, but it is untrue in fact, it leads to absurd results and it has now been definitely repudiated by the more modern writers and by the decisions of the courts",¹⁸⁰

and he proposes that the term should not be construed to mean

"... that the person enjoying the privileges is to be regarded as remaining in his own country, but merely that he is not subject to the authority, the jurisdiction or the legislation of the State to which he is accredited".¹⁸¹

The word is used in the same sense by J. P. A. François in his lectures at the *Académie de droit international*:

"If, however, it is realized that the word only means that the person concerned may avail himself of certain privileges which, generally speaking, place him outside the authority of the host State, and that this in no way implies the fiction that he is physically outside that State, then there are few objections to its use."¹⁸²

217. Oppenheim, after stating that "extritoriality" is only a fiction, finds that the term nevertheless has some practical value,

"... because it demonstrates clearly the fact that envoys must, in most respects, be treated as though they were not within the territory of the receiving States".¹⁸³

Strisower gives a definition of extritoriality which is equally applicable to diplomatic immunities. He states that it is

"... a special juridical phenomenon, the distinctive feature of which is that it clashes with the general rule that persons and things are subject to the regulation of the State governing the territory..."¹⁸⁴

3. THE THEORIES OF "REPRESENTATIVE CHARACTER" AND "FUNCTIONAL NECESSITY"

218. In his work *De l'esprit des lois*, Montesquieu states this theory as follows:

"Political laws demand that every man be subject to the criminal and civil courts of the country where he resides, and to the censure of the sovereign. The law of nations requires that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either

¹⁷⁵ John Bassett Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), Vol. II, p. 775.

¹⁷⁶ See para. 52 above.

¹⁷⁷ Slatin, "De la juridiction sur les agents diplomatiques" in Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal, Billard et Cie, 1884), Vol. II, p. 335.

¹⁷⁸ *Ibid.*

¹⁷⁹ For a full summary of the theory of diplomatic immunities see Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington, D.C., John Byrne and Co., 1936), where numerous judicial decisions are cited.

¹⁸⁰ Hurst, *op. cit.*, p. 199.

¹⁸¹ *Ibid.*, p. 203.

¹⁸² J. P. A. François, "Règles générales du droit de la paix" in *Recueil des cours de l'Académie de droit international*, 1938, IV., p. 146.

¹⁸³ Oppenheim, *op. cit.*, p. 711.

¹⁸⁴ Leo Strisower, "L'extritorialité et ses principales applications", in *Recueil des cours de l'Académie de droit international*, 1923, pp. 233 ff.

on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office; they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accuses, if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged. Thus a prince, who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had everything to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who becomes either their judge or their accomplice."¹⁸⁵

219. Different theories may be grouped under this head,¹⁸⁶ the oldest being based on the dignity of *majestas* of the State or prince whom the agent represents. Any insult to the ambassador is considered a slight upon the personal dignity of the sovereign whose envoy he is. It was this generally accepted notion which led to the famous Statute of Queen Anne after the Czar's Ambassador to London had been arrested for debt.

220. A second theory, leading to similar results, is that which explains diplomatic immunity by the fact that the ambassador represents a sovereign State whose complete independence must be respected. (See the quotation from Montesquieu in paragraph 218.) It was propounded, for example, by Chief Justice Marshall in the *Schooner Exchange v. M'Faddon and others*, where it was held, *inter alia*:

"One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or his sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence . . . This perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation."¹⁸⁷

221. Mention may also be made here of the memorandum from the Duke d'Aiguillon to the diplomatic corps in Paris. The memorandum was in answer to a protest addressed to the Duke after the King had refused to deliver the passports of Baron de Wrech, whose creditors had made representations; d'Aiguillon defines the basis of diplomatic immunity as follows:

"The immunity of ambassadors and other ministers

is based on two principles: first, the dignity of the representative character with which they are invested; secondly, the accepted practice which derives from the fact that the reception of a foreign minister implies recognition of the rights conferred upon him by usage, or, if the term be preferred, by the law of nations."¹⁸⁸

222. Another theory in this group seeks to justify diplomatic immunities by saying that only completely independent States enjoying full right of legation may be represented by diplomatic agents, and that, consequently, respect for the complete independence of the agent is equivalent to respect for the sovereignty of the sending State.

223. A fourth theory bases immunities on the fact that any slight upon the dignity and independence of a diplomatic representative might lead to international complications and even to war; the energetic action taken by Queen Anne against the persons who had sought to jeopardize the liberty of the Russian ambassador may be cited in support of this contention.

224. It is obvious that none of these theories provides an entirely satisfactory explanation. They may all be criticized as somewhat illogical. The State whose representative enjoys diplomatic immunities is admittedly sovereign, but the receiving State also enjoys that status; it is consequently difficult to see why either State should surrender part of its sovereign rights in the agent's favour. Even if it is argued that diplomatic intercourse is a necessity of international life and that the relevant immunities and restrictions are therefore indispensable, it certainly does not follow that the juridical justification of such immunities is to be found in the sovereign equality of States. It is thus not surprising that the "representative character" theory is less and less frequently invoked. This tendency can be perceived, for example, in Sir Cecil Hurst's comments in "Diplomatic Immunities—Modern Developments",¹⁸⁹ where he states that the purpose of the diplomatic agent's mission is the maintenance of relations between the country which he represents and the country to which he is accredited, and that the privileges which he is accorded are conditioned and limited by that purpose. Consequently, if the representative is called upon by his own sovereign to perform in the State where he is accredited functions other than those of maintaining relations between his own State and the sovereign of the receiving State,

"... the purpose with which the latter acquiesces in his non-subjection to the local jurisdiction ceases to operate in respect to those functions. The extra-territoriality or non-subjection to the local jurisdiction enjoyed by a member of a foreign diplomatic mission is, therefore, due, not to the fact that he is engaged on the business of a foreign government, but to the fact that he is part of the machine for maintaining relations between the two governments."¹⁹⁰

225. Mr. Diena, the Rapporteur of the Sub-Committee

¹⁸⁵ Collected works of Montesquieu: *De l'esprit des lois*, Book XXVI, chap. XXI, "That we should not decide by political laws things which belong to the law of nations" [trans. by Thomas Nugent (New York, Haffner, 1949), Vol. II, p. 7].

¹⁸⁶ See Montell Ogdon, *Juridical Bases of Diplomatic Immunity* (Washington, D.C. John Byrne and Co., 1936), chap. V.

¹⁸⁷ 7 Cranch, 116, 137, quoted by Ogdon, *op. cit.*, p. 108, n. 12.

¹⁸⁸ Charles de Martens, *Causes célèbres du droit des gens*, 2nd ed. (Leipzig, F. A. Brockhaus, 1858), Vol. II, p. 284.

¹⁸⁹ Hurst, *op. cit.*, p. 111.

¹⁹⁰ *Ibid.*, p. 115.

of the League of Nations Committee of Experts¹⁹¹ considered that it would be sufficient, in order to safeguard the agent, to prohibit the serving of any writ on the legation building or on the agent in person and to prohibit the execution of any measures against him; the draft conventions examined earlier in the course of this memorandum, such as the 1925 draft of the American Institute of International Law, the 1929 proposals of the Institute of International Law and the Harvard Research draft, which, in effect, repudiate the theory of extritoriality, also seem highly reluctant to accept the theory of the agent's "representative character".

226. The practice of States—we may refer to the many examples quoted by the authorities, particularly by Montell Ogdon¹⁹²—indicates that the theory of "representative character" is, frequently inapplicable. There is, for instance, no unanimous agreement on the measure of immunity to be accorded to an agent crossing a third State while proceeding to the country where he will exercise his functions; a State may require the agent to comply with laws which, in the general national interest, prohibit the import of certain articles. The fact that the exemption of diplomats from customs duties on objects intended for their personal use is considered to be a matter of comity, based on reciprocity, and the principle that immovable property belonging to a diplomat in his private capacity remains subject to the law of the land in the country where he is stationed, and many other examples, prove that the theory of the "representative character" of diplomatic agents is very commonly opposed.

227. Similarly, the replies of Governments to the questionnaire of the League of Nations Committee of Experts indicate that States are increasingly prone to interpret diplomatic privileges restrictively.¹⁹³ A few examples should suffice: the German Government advocated "... agreement on the principle that diplomatic representatives are amenable to the laws and regulations of the State in which they reside..."¹⁹⁴ and that "the exemption from all measures of constraint... extends to their person and everything that may seem necessary for the exercise of their functions..."¹⁹⁵

Brazil wanted to refuse privileges to the servants of diplomatic personnel;¹⁹⁶ Denmark proposed loss of diplomatic privileges if the agent engaged in commercial transactions,¹⁹⁷ while Sweden considered that "it would be fair to impose by an international convention certain restrictions on the absolute immunity of diplomats from civil jurisdiction".¹⁹⁸

228. Although it seems clear that the theory of the "representative character" of the agent does not always

facilitate a reply to the questions which may arise in practice, the argument which seeks to justify immunities on the grounds of "functional necessity" appears hardly more satisfactory. Its essence is thus expressed by Ogdon:

"In other words, when one is concerned with the problem whether any particular jurisdictional act, upon the part of a receiving State, is contrary to the law of nations as an invasion of the immunity which a diplomatic agent enjoys under the law, he must ask whether the particular act in question violates the security which is necessary for the diplomat's official function as a foreign diplomatic representative. Adequate protection of the diplomatic function thereby becomes the essence of the law and the test of what the law commands."¹⁹⁹

This view appears to be shared by Lawrence Preuss, who writes:

"The scrupulousness with which the diplomatic character is now respected and the growing security of the legal order in most States make possible a reduction of diplomatic prerogatives without jeopardizing the successful and independent fulfilment of the mission which it is their purpose to secure... The need of the envoy for independence exists today no less than formerly, but it no longer requires that complete immunity from the law and jurisdiction of the receiving State which has found a figurative expression in the fiction of extritoriality..."²⁰⁰

229. It is, of course, *petitio principii* to say that the State must ask itself, for example, whether proceedings instituted against a diplomatic agent are likely to violate the security necessary for the agent's official function, as it is still necessary to determine and define that "necessary security" in a manner acceptable to the whole family of nations.

"Certainly", writes Sir Cecil Hurst, "it is not essential to the due performance of his duties that a diplomatic representative should be the owner of a landed estate or should trade in the country in which he is stationed. Nevertheless, principle, convenience, and the practice of governments alike lead to the conclusion that this artificial restriction of diplomatic immunities to what is judged by the writers to be necessary for the due performance of their task is not sound..."²⁰¹

230. The theory of "functional necessity" might nevertheless serve as a basis for an international convention designed to lay down the irreducible minimum of immunities which diplomatic representatives must enjoy wherever they exercise their difficult functions; for it would appear, as Preuss says, in agreement with the League of Nations Committee of Experts and many Governments which replied to its questionnaire, that:

"As a subject involving few of the political factors which have thus far proved to be insurmountable

¹⁹¹ League of Nations publication, *V. Legal*, 1926.V.2 (document C.45.M.22.1926.V), pp. 4 ff.

¹⁹² Montell Ogdon *op. cit.*, pp. 154 ff.

¹⁹³ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), annex II.

¹⁹⁴ *Ibid.*, p. 129.

¹⁹⁵ *Ibid.*, p. 132.

¹⁹⁶ *Ibid.*, p. 143.

¹⁹⁷ *Ibid.*, p. 151.

¹⁹⁸ *Ibid.*, p. 234.

¹⁹⁹ Montell Ogdon, *op. cit.*, p. 175.

²⁰⁰ Lawrence Preuss, "Diplomatic privileges and immunities of agents invested with functions of an international interest", *American Journal of International Law*, (1931), Vol. 25, p. 694.

²⁰¹ Hurst, *op. cit.*, pp. 203 and 204.

obstacles in the way of codification, the law of diplomatic privileges and immunities is eminently suited for restatement and amendment in the form of a general convention . . ." ²⁰²

C. QUESTIONS RAISED BY THE EXISTENCE OF DIPLOMATIC IMMUNITIES, AND ANALYSIS OF CERTAIN RELEVANT JUDICIAL DECISIONS

1. GENERAL OBSERVATIONS

231. The authorities often divide immunities into two categories, essential and non-essential. The first comprises inviolability and the resulting immunity from jurisdiction; the second relates to acts of courtesy, ²⁰³ that is to say privileges which States customarily accord to diplomatic agents, on a basis of reciprocity, although not strictly required to do so by any established rule of international law. An example which springs to mind is the exemption of a diplomat's baggage from customs inspection and import duties.

232. These immunities will be considered below; their scope will, as far as possible, be defined and some relevant judicial decisions will be briefly analysed.

2. INVIOABILITY

233. "Inviolability", says Calvo, "is a quality, or status, which renders any person vested with it immune against any form of constraint or proceedings. The right of public ministers to enjoy this privilege is indisputable; it is based, not merely on convenience, but on necessity." ²⁰⁴

And Fauchille expresses the opinion that "the whole subject is dominated by the principle of inviolability . . . This is the fundamental principle . . ." ²⁰⁵

234. Oppenheim ²⁰⁶ is no less emphatic in this respect, and it seems hardly necessary to quote from other writers; inviolability is a principle of law recognized by most authorities and by the practice of States. However, its scope, that is to say its exact significance, still needs to be determined.

235. In its strictest sense, it means that no measure of constraint may be employed against the person or liberty of a diplomatic agent by the authorities or citizens of the State to which he is accredited. The State owes him assistance and protection; on the other hand, as the draft conventions and the authorities examined in the present memorandum show, a diplomat should not expose himself to needless risks.

236. Fauchille summarizes the "six rules" of inviolability as follows:

"(a) The privilege of inviolability extends to every class of public minister duly representing his sovereign or his country;

"(b) It extends to all persons forming part of the

official staff of the mission, including the minister's family;

"(c) The privilege applies to all things and all acts necessary to the accomplishment of the public minister's mission;

"(d) The privilege begins on the day on which the public minister enters the territory of the country to which he has been sent, provided that his mission has been announced;

"(e) The privilege lasts for the whole duration of the mission and throughout the minister's entire stay in the territory, until he leaves that territory or, at least, until sufficient time has elapsed to enable him to reach the frontier;

"(f) The inviolability of a minister subsists after a rupture of diplomatic relations between the State he represents and that to which he is accredited, and after a declaration of war or even an outbreak of hostilities, until the time when he leaves the territory." ²⁰¹

237. The principle is today embodied in national legislation. In France, the matter is governed by the Decree of 13 Ventôse, year II:

"The National Convention hereby enjoins every established authority not to interfere, in any manner whatsoever, with the person of any envoy of a foreign Government; all complaints against such envoys shall be referred to the Committee of Public Welfare, which enjoys sole competence to adjudicate thereon."

In the United Kingdom, the Diplomatic Privileges Act, section 3, declares null and void

"... all writs and processes . . . whereby the person of any ambassador or other publick minister . . . authorized and received as such by Her Majesty . . . or the domestick servant of any such ambassador or publick minister may be arrested or imprisoned or their goods or chattels may be distrained seized or attached . . ." ²⁰⁸

In the United States, sections 252 to 254 of title 22 of the United States Code ²⁰⁹ contain provisions similar to those of the English statute.

238. These laws and regulations are only declaratory of existing law; they did not create anything new. This was stressed by Sir Cecil Hurst, when recalling Lord Mansfield's dictum in the case of *Triquet v. Bath*:

"The privilege of foreign ministers and their domestic servants depends upon the law of nations. The Act of Parliament is declaratory of it." ²¹⁰

In France, in the case of *Dientz v. de la Jara* the Court stated that "this immunity must be respected by the courts as a supreme rule of a political character, which they are bound to observe and which prevails over all provisions of private law." ²¹¹ Finally, in the United States, in the case *Respublica v. de Longchamps*, which confirmed the principle of the inviolability of the person

²⁰² Preuss, *op. cit.*, p. 694.

²⁰³ Fauchille, *op. cit.*, p. 60.

²⁰⁴ Calvo, *op. cit.*, Vol. III, p. 296.

²⁰⁵ Fauchille, *op. cit.*, p. 63.

²⁰⁶ Oppenheim, *op. cit.*, p. 707.

²⁰⁷ Fauchille, *op. cit.*, pp. 65 to 68.

²⁰⁸ 7 Anne, c. 12. Feller and Hudson, *op. cit.*, p. 212.

²⁰⁹ Hackworth, *op. cit.*, p. 514, reproduces the relevant provisions.

²¹⁰ Hurst, *op. cit.*, p. 193.

²¹¹ *Ibid.*, p. 141.

of a diplomatic agent, Chief Justice McKean held that:

"The person of a public minister is sacred and inviolable. Whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations; he is guilty of a crime against the whole world." (1 Dall.111 1784))²¹²

239. Having established that the principle of inviolability is universally recognized, we shall now discuss the persons and things protected thereby and the general rule.

(a) *Persons entitled to immunities and especially to inviolability*

240. The authorities and the practice of States appear to be largely in favour of extending diplomatic immunities to the official personnel of a mission and to their wives and families. A third category, which includes non-official staff and domestic servants, has given rise to certain problems which will be discussed below.

241. Sir Cecil Hurst divides the personnel entitled to immunities in the following manner:

"1. The official staff, that is to say, the head of the mission and those who participate in the diplomatic work of the post, the counsellor, the secretaries, the attachés. This heading would also include the doctor and the chaplain... The office staff attached to the mission, registrars, archivists, stenographers, typists and porters should also be included under this heading.

"2. The wives and families of the officials comprised in the first category.

"3. The unofficial staff. This comprises the individuals who are in the employment of official members of the staff, personal private secretaries..."

And Sir Cecil finds that

"The distinguishing characteristic between the first and third categories is that the emoluments of the first category are derived from the State; the emoluments of the third are derived from the individual employers..."²¹³

242. As regards the first two categories (official staff and their families), it will suffice to quote a few well-known cases which confirm the accepted trend. The Lord Chancellor decided in 1737, in the case of *Barbuit*,²¹⁴ a commercial agent for the King of Prussia against whom a Bill in equity had been filed for non-payment of debts, that, since the defendant was appointed only for the purpose of assisting Prussian subjects in their commerce, he was entitled to no diplomatic immunity; this shows, according to Sir Cecil Hurst, that such immunity is essentially the prerogative of officials entrusted with diplomatic functions. In the case of *Parkinson v. Potter*²¹⁵ it was decided by the High Court of Justice, Queen's Bench Division, that an attaché of an embassy or legation is entitled in England to all the immunities enjoyed by

an ambassador or head of legation and his retinue. Mathew, J., ruled that under international law protection extends not only to an ambassador, but also to all those associated with the exercise of his functions.²¹⁶ In the United States, in the case of *Girardou v. Angelone*, the Supreme Court of the State of New York held that the appellant, who was commercial attaché at the Royal Italian Embassy, was entitled to diplomatic immunity. This opinion was based on a communication from the State Department, which had advised:

"As such attachés are considered to be exempt from judicial review under our laws, it is believed that the legal proceedings against Signor Romolo Angelone should be dismissed."²¹⁷

In France, the Court of Cassation, Civil Chamber, stated in its judgement of 10 January 1891:

"Whereas one of the consequences of the principle confirmed by the above-mentioned Decree [the Decree of 13 Ventôse, Year II] is that diplomatic agents of foreign powers are, as a general rule, not subject to the jurisdiction of French courts; Whereas this immunity should extend to all persons officially members of the legation..."²¹⁸

243. Perhaps mention should also be made here of the famous case of *Engelke v. Musmann*,²¹⁹ in which the House of Lords recognized the diplomatic immunity of the appellant, who was employed at the German Embassy as "consular secretary" and as such on the staff of the commercial attaché. The Court deferred to a communication from the Foreign Office, which stated that the plaintiff

"...is responsible in all that he does to the German Ambassador."

244. As regards the diplomat's family, the Civil Court of the Seine, in the judgement delivered on 18 November 1907 in *Cottenet and Co. v. Raffalovich*,²²⁰ recognized the immunity of a diplomat's wife who was judicially separated from her husband. The Court held that the principle of immunity extended to persons in the agent's official retinue, and that a wife judicially separated from her husband continued to enjoy such immunity, since such separation was essentially provisional and did not dissolve the conjugal relationship.

245. It should be noted, however, that the Commission on the Reform of the Civil Code, set up in France by the Decree of 7 June 1945, apparently wishes to apply the principle of diplomatic immunities in a considerably less liberal manner. Article 101 of the draft provides:

"Article 101. A diplomatic agent shall enjoy total immunity from jurisdiction throughout his mission.

²¹² *Ibid.*

²¹⁷ H. Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1919-1942, supplementary volume* (London, Butterworth and Co.), pp. 204 and 205.

²¹⁸ Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1891), Vol. 18, p. 157.

²¹⁹ House of Lords [1928] A.C. 433, cited in Herbert W. Briggs (ed.), *The Law of Nations—Cases, Documents and Notes* (New York, F. S. Crofts and Co., 1938), pp. 373-379.

²²⁰ Deak, *op. cit.*, p. 532, n. 153.

²¹² Deak, *loc. cit.*, p. 199.

²¹³ Hurst, *op. cit.*, pp. 205 and 206.

²¹⁴ *Ibid.*, p. 207.

²¹⁵ 16 Q.B.D. (1885), 152.

Such immunity shall cease upon the termination of the mission, even with regard to obligations assumed by the agent while his mission subsisted.

"The immunity of a diplomatic agent shall not extend to his family, nor to his domestic staff.

"The aforesaid immunity from jurisdiction shall be enjoyed only by the head of a mission and by the counsellors and secretaries of an embassy or legation; no other person attached to a diplomatic mission shall be entitled to such immunity."²²¹

(b) *Unofficial staff*

246. The immunities to which unofficial staff are entitled—*Engelke v. Musmann* would appear to be a borderline case—have given rise to numerous questions, some of which have been tested in court. The problem has been recently studied in detail in a monograph by Mr. Michel Mouskhély, Professor of Law.²²²

247. The author first points out that the problem is a difficult one, which the relevant conventions, with the exception of article 14 of the Havana Convention, have largely ignored. Furthermore, it is a critical problem in that it involves a conflict of jurisdiction between the State in which the official performs his functions and the State which he represents. Very convincing arguments can be adduced in favour of territorial jurisdiction:

"(1) A legal argument of general application . . . : territorial jurisdiction prevails over any other; . . ."

Hence immunity is the exception and the relevant rules must be applied restrictively.

"(2) A legal argument of more limited scope: the jurisdiction of the national authority, being a rule of public law, must necessarily prevail over a functional relationship which is private in nature."

Employees who are nationals of the State or country in which the minister resides must be subject to local jurisdiction "for the simple reason that it is the only jurisdiction possible".

248. By contrast, the members of the retinue who are not nationals of the State to which the mission is accredited enjoy some immunities under the laws of many countries. This privilege is extended to administrative staff of foreign nationality under the Statute of Queen Anne in England, under articles 252 to 254 of the United States Code, under a Danish Ordinance of 1708, and under the draft conventions prepared by learned societies. In the opinion of Professor Mouskhély, however, neither these statutory provisions nor the decisions of Anglo-Saxon courts provide sufficient evidence to warrant the assertion that immunities must of necessity be granted to administrative staff of foreign nationality. He refers, for example, to the case of *Novello v. Toogood*, in which the English court held that although such staff enjoyed the privilege of immunity, exemption ought not to be

granted in every instance but only in respect of acts directly connected with the diplomatic service.²²³

249. A tendency to limit the privileges of such employees can also be seen in the replies of States to the questionnaire of the League of Nations Committee of Experts. Germany, Brazil, Greece, Romania, Switzerland and Sweden are among the States which showed reluctance to extend these privileges to unofficial staff. It will be recalled that Mr. Diena, the Rapporteur of the Sub-Committee of the Committee of Experts, also favoured this restrictive approach. Mr. Mouskhély believes that all these considerations justify the conclusion that: "It is apparent, from a constantly increasing number of precedents, that a new *opinio necessitatis* is in the process of formation."²²⁴

250. With regard to unofficial staff who are nationals of the country to which the foreign mission is accredited, the author, while recognizing the cogency of the British and United States precedents (the cases of *Novello v. Toogood*, *Engelke v. Musmann* and, in the United States, *Columbia v. Paris*)²²⁵ concludes that

"The case of staff who are nationals of the State whose territorial jurisdiction is involved . . . comes under a positive rule of customary international law. This rule authorizes States to institute an action . . . and proceed therewith."²²⁶

He recognizes, however, that while the territorial sovereignty remains basically unimpaired, so far as unofficial staff are concerned, it may in practice be subject to certain restrictions, for the general benefit of the diplomatic service, and can only be exercised with due regard to the requirements of diplomatic representation.²²⁷

251. Other authors, however, are less categorical than Mouskhély. Oppenheim, for example, states that

"It is a customary rule of international law that the receiving State must grant to all persons in the private service of the envoy, whether such persons are subjects of the receiving State or not, exemption from civil and criminal jurisdiction."²²⁸

Sir Cecil Hurst states²²⁹ that immunities extend to domestic servants, subject always to the condition that the employment must be genuine and *bona fide*; but he draws attention to the lack of unanimity on this question, both among States, in their application of the principle, and among writers on the subject.²³⁰ He cites article 19 of the German Act of 1898, which grants immunity only to non-German nationals. His considered opinion, however, is that the dictum of Lord Mansfield, to the effect

²²³ *Ibid.*, p. 51 and n. 26.

²²⁴ *Ibid.*, p. 54. See also article 101 of the draft revised Civil Code referred to in para. 245 above.

²²⁵ Mouskhély, *loc. cit.*, p. 56-58.

²²⁶ *Ibid.*, pp. 59 and 60.

²²⁷ *Ibid.*, p. 60.

²²⁸ Oppenheim, *op. cit.*, p. 725 and nn. 3 and 4. See also: Joyce A. C. Gutteridge, "Immunities of the Subordinate Diplomatic Staff", *The British Year Book of International Law*, 1947 pp. 148 ff.

²²⁹ Hurst, *op. cit.*, p. 212.

²³⁰ *Ibid.*, pp. 256-262.

²²¹ *Travaux de la Commission de réforme du Code Civil, 1949-1950* (Paris, Librairie du Recueil Sirey, 1951), p. 744.

²²² "Does diplomatic immunity extend to persons in the retinue of the minister?", Michel Mouskhély, *Revue générale de droit international public*, (Paris, Editions A. Pedone) 3rd ser., Vols. XXI and LIX (1950), pp. 43-64.

that the privilege of a foreign minister extends to his family and servants, is still the general rule of international law.²³¹

252. The learned author is of the opinion that the lack of jurisdiction in respect of domestic servants who are nationals of the country to which the mission is accredited is hardly likely to give rise to difficulties, since the immunity of a domestic servant ceases when his employment is terminated.²³² In short, the immunity is derivative and, as stated in the case of *Novello v. Toogood*, is limited to matters which are connected with the service.²³³

253. In order to show that Sir Cecil Hurst's opinion is not an isolated one, it will suffice to cite the case of *District of Columbia v. Paris*.²³⁴ The defendant, an American citizen employed by the Japanese Embassy, was charged with certain traffic violations. The court held that the privileges and immunities which the defendant had enjoyed throughout his period of service had ceased to exist upon his discharge therefrom, and that diplomatic agents, who could waive the privileges enjoyed in their interest by their domestic servants, would not protect any such servant in cases of wilful violation.

254. In the case of *in re Reinhardt*,²³⁵ where the domestic servant of the second secretary of the Swiss Legation to the Holy See was accused of infanticide, the Court of First Instance of Rome declined jurisdiction on the ground that the immunities accorded to diplomatic agents must be extended to their servants who are not nationals of the receiving State (25 March 1938).

3. EXEMPTION FROM JURISDICTION

(a) *Exemption from criminal jurisdiction*

255. The most important consequence of the personal "inviolability" of the diplomatic agent is his exemption from jurisdiction—whether in criminal proceedings or in civil and commercial cases. However, while the immunity against criminal prosecution is absolute, the exemption in civil cases is subject to qualifications. Almost all the various draft conventions prepared by learned societies which were examined in chapter I of this memorandum uphold the principle that a diplomatic agent who in his purely private capacity engages in commercial transactions or holds real property in the country to which he is accredited, cannot plead diplomatic immunity in answer to a suit resulting from such private business. There is a lack of unanimity, however, in the relevant judicial decisions, which will be considered in detail in the following section.

256. Complete exemption of a diplomatic agent from local criminal jurisdiction is fully justified by the requirements of his functions. Montesquieu's famous dictum (see para. 218) is also relevant in this connexion:

²³¹ *Ibid.*, p. 256.

²³² *Ibid.*, p. 261.

²³³ *Ibid.*

²³⁴ Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1938-1940*, pp. 432 ff.

²³⁵ *Ibid.*, p. 435.

"...they might be wrongfully accused if they were liable to be punished for crimes; if they could be arrested for debts, these might be forged."

This, however, does not necessarily imply that the diplomatic agent is free to commit crimes and offences with impunity. Authorities on the subject unanimously reject any such implication, and point out that a distinction must be drawn between the exemption from jurisdiction, which operates procedurally and not substantively, and the penal liability of the offending agent, which remains unaffected. Moreover, the receiving Government is not powerless to act against such agent. It may request his recall; it may—as noted in the case of Prince Cellamare—confine him to his residence and have him escorted to the frontier in a manner befitting his rank, or it may ask the Government which the agent represents to institute proceedings in its own courts.

257. Oppenheim, summarizes the situation as follows:

"As regards the exemption of diplomatic envoys from criminal jurisdiction, the theory and practice of international law agree nowadays that the receiving States have no right, in any circumstances whatever, to prosecute and punish diplomatic envoys... But this does not mean that a diplomatic envoy must have a right to do what he likes."²³⁶

258. Fauchille does not hesitate to express the same opinion:

"Diplomatic agents, irrespective of rank, enjoy complete exemption from the civil and criminal jurisdiction of the State to which they are accredited";²³⁷ and Sir Cecil Hurst concludes his detailed examination of the question with the statement:

"On the whole it may be stated with confidence that the view that the diplomatic agent and the members of his suite are exempt from the criminal jurisdiction of the country in which they are stationed is not only sound in itself, but is in accordance with the practice of all civilized States."²³⁸

259. Lastly, we should note the opinion of Francis Deak who, after citing a number of decisions in favour of the absolute exemption of diplomatic agents from jurisdiction, states that:

"The conclusion may be deduced that in a general way the exemption of diplomatic agents from local jurisdiction is an universally recognized rule of international law..."²³⁹

(b) *Exemption from civil jurisdiction*

260. As stated in paragraph 255 above, the question of civil immunity, while universally accepted in principle, nevertheless gives rise to a number of problems.

261. The rule of exemption from civil jurisdiction has not always been recognized by States without a struggle. In Holland, for example, the courts of justice claimed jurisdiction over foreign diplomatic representatives until

²³⁶ Oppenheim, *op. cit.*, p. 708.

²³⁷ Fauchille, *op. cit.* p. 85.

²³⁸ Hurst, *op. cit.*, p. 225.

²³⁹ Deak, *op. cit.*, p. 522.

an edict issued by the States General in 1679, to the effect that foreign ambassadors and their suite could not on arrival, departure or while remaining in the country be subjected to process by the courts;²⁴⁰ in England this rule seems to have been established as early as 1657. The whole question was carefully considered there in the case *Re the Republic of Bolivia Exploration Syndicate Ltd.*²⁴¹ in which it was declared that "a diplomatic agent accredited to the Crown by a foreign State is absolutely privileged from being sued in the English courts..."

262. In the case of *Magdalena Steam Navigation Co. v. Martin*, where the Guatemalan Minister in London was sued for the recovery of an amount due in respect of the shares of a corporation in liquidation, the court found that a diplomatic representative duly accredited to the Queen was privileged from all liability to be sued in civil actions. Lord Campbell, C.J., stated:

"He is to be left at liberty to devote himself body and soul to the business of his embassy... It certainly has not hitherto been publicly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all civil actions; but we think that this follows from well-established principles."²⁴²

263. In France, the principle was established in 1891 by the *Court de Cassation*, in the case of *Errembault de Deedzele*²⁴³ after the court had listened to the classic pleading of Desjardins, the *Avocat Général*, who, after reviewing the problem as a whole, concluded as follows:

"But, in my submission, the court will at least have to dispose of the point whether a distinction should be made, with regard to exemption from jurisdiction, between acts performed by the diplomatic agent as a representative of his Government and acts which he performs merely as a private individual. I respectfully submit that such a distinction would be erroneous. If a diplomatic agent were to be subject to the jurisdiction of French courts whenever he acted as a private individual, such creditors as he might have would pursue him mercilessly and their litigious manoeuvres—whether legitimate or merely vexatious—might hinder him in the discharge of his duties; this would lead to the very situation which the law of nations sought to avoid in propounding the maxim: *ne impediatur legatio.*"²⁴⁴

264. The *Court de Cassation* endorsed the conclusions of the *Avocat Général* by setting aside the decision of the Civil Tribunal of the Seine, by which the defendant, the counsellor of the Belgian Legation in Paris, had been ordered in default to pay to Mr. Foureau de la Tour the sum of 377.05 francs in respect of taxes, paid on his behalf, on an apartment which he occupied.

265. The Italian courts, on the other hand, have shown greater reserve on the subject. For example, the Court of First Instance of Rome, in a decision of 12 December 1937, held that immunity from civil process

could only be successfully claimed in respect of acts relating to the exercise of diplomatic functions in the strict sense of the word.²⁴⁵ We know, however, that this judgement, which was beginning to be generally accepted by the Italian courts, was overruled in the decision in *Re de Meeus v. Forzano*, in which the *Court de Cassation* of Rome stated, *inter alia*:

"What is disputed is whether the immunity, as far as the exemption from civil jurisdiction is concerned, must be complete and must therefore be extended also to private transactions which the agent carries out in the country to which he is accredited. If it is admitted that the exemption is derived from the inherent quality of the person invested with a diplomatic office, then it does not appear possible to recognize the exemption in part and to deny it in part..."²⁴⁶

the Court reached the conclusion that:

"For this reason, in the absence of provisions to the contrary in our municipal law... it must be held that the principle that diplomatic agents accredited to our country are exempt from Italian civil jurisdiction, applies in Italy even in respect of acts relating to the necessities of their private affairs."²⁴⁷

266. In a decision of 6 May 1940,²⁴⁸ the Court of Rome went further, by holding that the privilege of diplomatic immunity could be claimed where the agent, although the plaintiff in the original suit, became the defendant in a counterclaim. The Court stated that

"There can be no doubt that the plaintiff in the principal action, who becomes a defendant in a counterclaim, has the incontestable right to raise and to develop all his arguments... and that the court seized with the principal question must examine the preliminary point as to whether the new action falls within its sphere of jurisdiction and competence or not..."²⁴⁹

The Court concluded that a diplomatic representative may plead exemption from jurisdiction even in the case of a counterclaim, that such a plea is well founded and that the counterclaim brought by the defendant cannot therefore be entertained.²⁵⁰

267. This view, however, is not generally accepted. For example, Sir Cecil Hurst²⁵¹ cites a decision by the Court of Paris, rejecting the application of the first secretary of a foreign legation who, having applied to the Court to be put in possession of the fortune of his wife, then desired to rely on his diplomatic immunity to object to counterclaims brought by the guardians of her infant children. The court ruled:

"Diplomatic agents cannot avail themselves of this exemption as a means of preventing the local courts, in which they have themselves instituted proceedings,

²⁴⁰ Hurst, *op. cit.*, pp. 227 ff.

²⁴¹ [1914] I Ch. 139; Hurst, *op. cit.*, p. 229.

²⁴² Deak, *op. cit.*, p. 524.

²⁴³ Clunet, *op. cit.*, pp. 137 ff.

²⁴⁴ *Ibid.*, p. 156.

²⁴⁵ Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1935-1937*, p. 393.

²⁴⁶ *Idem*, 1938-1940, p. 424.

²⁴⁷ *Ibid.*, p. 426.

²⁴⁸ *Idem*, 1941-1942, p. 369.

²⁴⁹ *Ibid.*, p. 372.

²⁵⁰ *Ibid.*, p. 373.

²⁵¹ Hurst, *op. cit.*, pp. 242 and 243.

from hearing arguments against decisions rendered in their favour.”

According to the same writer, the English courts would assume jurisdiction in the event of a set-off (a cross claim for a liquidated amount) pleaded by a defendant against a diplomat plaintiff, or in the event of a cross-action between the same parties arising out of the same facts.

268. Sir Cecil Hurst concludes²⁵² that this obligation to submit to jurisdiction is not really an exception to the general principle of immunity from jurisdiction, but merely a consequence “of the rule that if a diplomatic representative submits to the jurisdiction by initiating proceedings, he must submit to the jurisdiction *in toto* . . .”

269. According to Hackworth,²⁵³ American practice is apparently following the same trend. Thus, when the Ambassador of Great Britain notified the Secretary of State on 16 January 1916 that he had received a summons from the United States District Court of Maine commanding him to appear in a civil suit instituted against him, the Secretary, after investigating the matter, informed the Ambassador that on motion by the District Attorney an order had been entered by the Court dismissing the writ.

270. The numerous other examples cited by Hackworth confirm this practice.

271. A question frequently considered in authoritative works and courts is whether a diplomatic agent, or any of his subordinates entitled to privileges, can be sued in the courts of the country to which the official is accredited for the recovery of debts incurred either before or after he assumed his duties. The reply, as some of the decisions already cited also indicate, must apparently be in the negative.

272. Thus, the French *Court de Cassation*, in the case of *Procureur-Général v. Nazara Aga*, stated:

“However, it is hardly relevant whether the diplomatic agent contracted the debt before or after the beginning of his functions; it is sufficient that he was enjoying official status when proceedings were instituted against him . . .”²⁵⁴

273. The Supreme Court of Czechoslovakia, in a decision of 9 December 1936, in the case of the secretary of a foreign legation, accredited to Prague, who had inherited real property from a Czechoslovak citizen and had been sued in the Czechoslovak courts for the recovery of a deposit made by a third person for the purchase of the property, held that:

“... the defendant, who enjoys on Czechoslovak territory the privileges of extraterritorial persons according to article 9 of the Code of Civil Procedure, has not submitted to the jurisdiction of the Czechoslovak courts in the case under consideration. The fact that he is sued as a legal successor of a Czechoslovak subject

from whom he inherited real property in Czechoslovak territory is irrelevant for the decision of the question whether the Czechoslovak courts have jurisdiction under article 9 of the Code.”²⁵⁵

274. Attention should be drawn, however, to a recent decision of the First Chamber of the Paris Court of Appeal,²⁵⁶ which would appear to indicate a tendency to limit immunity in France. The Court stated that:

“Although the basic purpose of exemption from jurisdiction, which is to afford the representatives of foreign States the necessary freedom for the performance of their diplomatic functions, warrants the extension of the privilege to the wives of such representatives, it would nevertheless be an abuse of the exemption if the wife of a diplomatic agent were able to invoke her status in order to evade liability in respect of personal debts contracted before her marriage and having no connexion with her husband’s functions . . .”

In reporting the case, the *Journal du droit international* adds that, by its decision, the Paris Court of Appeal showed “a desire to limit the scope of an immunity which may in many instances appear excessive *per se*, at a time when there is a substantial increase in the number of persons benefiting therefrom”.

275. It would appear unnecessary to study in detail this particular aspect of the question of exemption from jurisdiction. It should be recalled, however, that the question of debts contracted by diplomatic agents before or after acquiring official status led to the enactment of the Statute of Anne in England, following the arrest of the Russian Ambassador in London for debt and the ensuing diplomatic complications. In the same connexion, in France in 1772 the Minister of Foreign Affairs, the Duke d’Aiguillon, refused to deliver passports to Baron de Wrech, Minister Plenipotentiary of the Landgrave of Hesse-Cassel, who wished to depart leaving his debts unpaid. In the memorandum which he addressed to the diplomatic corps accredited to Paris,²⁵⁷ the Duke d’Aiguillon sought to establish the principle that immunity, being based on a tacit agreement between sovereigns, could have but one purpose: “... to preclude anything that might hinder the minister in the exercise of his functions . . .” and that, having regard to the reciprocal nature of any agreement: “... the minister loses his privilege when he abuses it contrary to the firm intention of both sovereigns.” The Duke d’Aiguillon concluded “... that a public minister cannot avail himself of his privilege in order to evade the payment of any debts he may have contracted in the country in which he resides . . .”, as such a refusal would violate “... the first law of natural justice, which was recognized long before the privileges of the law of nations . . .” It was not until the Landgrave de Hesse-Cassel had assumed

²⁵⁵ Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1938-1940*, p. 429.

²⁵⁶ *Journal du droit international* (Paris, Editions techniques S.A., 1955), p. 391.

²⁵⁷ The correspondence concerning this famous case is reproduced in: Charles De Martens, *Causes célèbres du droit des gens*, 2nd ed. (Leipzig, F. A. Brockhaus, 1858), Vol. II, pp. 282 ff.

²⁵² *Ibid.*, p. 244.

²⁵³ Hackworth, *op. cit.*, pp. 533 ff.

²⁵⁴ Hurst, *op. cit.*, note on p. 230; see also *Journal du Palais*, Bulletin des sommaires (Paris, Librairie du Recueil Sirey, 1921), Part I, p. 121.

responsibility for the obligations of his Minister that the latter was able to obtain his passports and leave Paris.

276. In any event, most authorities and judicial decisions favour the view that debts contracted by the agent in the receiving country before the beginning of his mission are not recoverable therein through legal process, so long as the agent is covered by his immunity.

277. Writers and court decisions also seem to agree that exemption from jurisdiction should be respected even where an agent engages in commercial transactions in the country to which he is accredited.

278. Sir Cecil Hurst is emphatic on this point.²⁵⁸ By contrast, Mr. Charles Dupuis, in the second part of his lectures on international relations, states that, in his opinion, exemption from jurisdiction would not extend to a diplomatic agent who owns real property in the country in which he serves or who engages in commercial transactions in that country. However, he adds that:

"In doubtful cases, it would be the function not of the local courts but of the sending State to determine the dividing line."²⁵⁹

279. Raoul Genet²⁶⁰ shares the opinion of Sir Cecil Hurst. In support of their view, these two writers cite the decision of the Paris Court of Appeal in 1867, in the *Tchitcherine* case, and the argument of the *Avocat-général* Descoutures, who, referring to the lack of civil jurisdiction of French courts over diplomatic agents, concluded that the same principle should apply in commercial cases:

"...for the consequences are the same, the interference is the same and, in the final analysis, a person who has commercial dealings with a diplomatic agent cannot be unaware of the latter's functions, status and privileges."

In support of the opposite view, however, it is possible to cite the decision of 27 June 1930 rendered by the Second Sub-Section of the Contested Matters Chamber of the Council of State in the case of *Thams*, counsellor of the Legation of Monaco in Paris. Mr. Thams represented a number a business firms in Paris and the Council of State concluded:

"...that he is therefore exercising the profession of commercial agent; that, consequently he has lawfully been required to pay the commercial tax and the municipal tax on commercial premises due from him for the years 1918 and 1919 in his capacity as such an agent."²⁶¹

280. However, the Paris Court of Appeal, in the case of *Breilh v. Mora*, found that there was no need to determine: "...the nature of the debts which the plaintiff seeks to recover from the diplomatic agent" and that

"Immunity from jurisdiction also applies to pro-

ceedings for the recovery of commercial debts incurred by the agent before his appointment."²⁶²

281. As regards English practice, we may refer to the case of *Taylor v. Best*.²⁶³ Drouet, a second secretary and later Belgian Minister Resident in England, was one of the directors of a commercial firm. He was sued in the English courts, together with his fellow-directors, and pleaded diplomatic immunity. The Court found that:

"...it is equally clear that, if the privilege does attach, it is not, in the case of an ambassador or public minister, forfeited by the party's engaging in trade, as it would, by virtue of the provision in 7 Anne c. 12 s. 5 in the case of an ambassador's servant..."

282. We may also refer to the case of the *Magdalena Steam Navigation Company v. Martin*, cited above together with the pertinent ruling,²⁶⁴ and the case of *In Re the Republic of Bolivia Exploration Syndicate Ltd.*,²⁶⁵ in which the Court duly upheld the plea of diplomatic immunity.

(c) Attendance as witness

283. Before leaving the subject of personal immunity, we should briefly mention that a diplomatic agent cannot be required to appear as a witness in a court of the country of his sojourn; many authorities nevertheless agree that if a request for his testimony is transmitted through the diplomatic channel, he must give evidence in the embassy building before a commissioner appointed for that purpose. We shall merely give a few examples of the view taken by certain Governments and authorities on this question. Hackworth, for instance, refers to a communication dated 21 October 1922 from the Under Secretary of State to the United States Minister to Poland, requesting him to draw the attention of the Polish Minister of Foreign Affairs to the following:

"...that under the generally recognized principles of international law the registered personnel of a foreign mission are exempt from judicial citation and that this government considers that the course followed by the Polish Government... summoning members of the Legation's staff to appear as witnesses, is not in accord with these principles..."²⁶⁶

284. Fauchille states that a diplomatic agent cannot: "...be summoned to appear as a witness before a criminal court; he may only be requested to submit his testimony in writing..."²⁶⁷ Sir Ernest Satow notes that a diplomatic agent: "...cannot be required to attend in court to give evidence of facts within his knowledge, nor can a member of his family or of his suite be so compelled."²⁶⁸ Calvo refers to the occasion in 1856 when

²⁶² Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1900), Vol. 27, pp. 953 and 954.

²⁶³ Deak, *op. cit.* p. 523, where the main arguments are cited.

²⁶⁴ See para. 262.

²⁶⁵ Deak, *op. cit.*, p. 524.

²⁶⁶ Hackworth, *op. cit.*, p. 553.

²⁶⁷ Fauchille, *op. cit.*, p. 93.

²⁶⁸ Sir Ernest Satow, *A Guide to Diplomatic Practice* (London, Longmans, 1932), p. 187, para. 349.

²⁵⁸ Hurst, *op. cit.*, pp. 241 ff.

²⁵⁹ Charles Dupuis, "Liberté des voies de communications. Relations internationales", *Recueil des cours de l'Académie de droit international*, 1924, I (Paris, Librairie Hachette), p. 303.

²⁶⁰ Genet, *op. cit.*, p. 579.

²⁶¹ E. Clunet et André-Prudhomme, *Journal du droit international* (Paris, Editions Godde, 1931), Vol. 58, p. 363.

the Netherlands Minister to Washington was summoned to appear as a witness in a case involving homicide committed in his presence. The Minister refused, and the Netherlands Government, requested by the Secretary of State to order the Minister to appear, put in a demurrer. The United States Cabinet thereupon demanded the Minister's recall.²⁶⁹

285. Oppenheim states²⁷⁰ that no diplomatic envoy can be obliged to appear as the witness in a criminal or administrative court.

286. Generally speaking, however, the authorities support the view that a diplomatic agent whose evidence has been requested through the diplomatic channel should be authorized by his Government to testify in the embassy building before a duly appointed commissioner. This conclusion seems to be borne out by the drafts considered in chapter I of this memorandum. Nevertheless there seems to be no generally accepted rule on the subject and each case should be decided on its own merits by the Governments concerned.

4. WAIVER OF IMMUNITIES

287. There are several opinions on the question whether the agent can waive his immunities. Some writers maintain that he must be authorized to do so in each specific case by the Government he represents. Others consider that this condition only applies to the head of the mission himself, and maintain that the minister is entitled to waive the immunities of his subordinate staff. The basic argument is that immunities are not the personal prerogative of the individual who enjoys them but are granted to the sending State; consequently, only that State is competent to waive them. Sir Cecil Hurst discusses the question in chapter VI of his course of lectures.²⁷¹ In his opinion "...there must be some act to which the courts can look as embodying the consent of the sovereign of the country which the diplomatist represents." Furthermore, the waiver must be definite and in due form. The diplomat concerned cannot dispute the decision of his government to waive his immunities before the court, although it is "...doubtful whether it is right for either the Government or the court to ask for any formal evidence of the Government's concurrence other than that expressed through the foreign representative himself..." He would agree that it is sufficient for the head of the mission to waive the immunities of his staff on their behalf and that the minister is certainly competent to waive the privileges of his servants (derived immunity). He emphasizes moreover that immunity may be invoked at any stage of the trial, even if the agent does not plead it when the proceedings are first set in motion.

288. Sir Ernest Satow is of the same opinion and mentions a number of legal decisions to support his contention:²⁷²

1. The case of *M. C. Waddington*, son of the Chilean

chargé d'affaires at Brussels, who was accused of murder and took refuge in his country's legation. The Belgian authorities waited for the consent of the Chilean Government before arresting the accused (1906).

2. In 1917, in the case of *Suarez v. Suarez*, the Bolivian Minister in London waived his immunity but failed to comply with a court order to pay a certain sum of money into court in his capacity as administrator of the Suarez estate. The Court held that, even under those circumstances, the diplomat could assert and obtain diplomatic immunity.
3. However, in 1925, the Paris Court of Appeal, in the case of *Drtilék v. Barbier*, held that the chancellor of the Czechoslovak legation could not, after referring a rent restriction matter to the French courts, shelter himself behind diplomatic privilege in the event of a counterclaim.²⁷³

289. In the *Grey* case²⁷⁴ the Paris Court held that persons enjoying diplomatic immunity may waive that immunity without prior leave; such waiver, which may be inferred from the unambiguous circumstances of the case, revives the competence of the French Courts. The facts in this case were that an attaché of the United States Embassy in Paris entered an appearance in the civil Court in which his wife had filed a divorce petition, put in no demurrer at the preliminary hearing when the Court examined the possibilities of a reconciliation, and proceeded to state his case. The Court found that, in those circumstances, he had quite clearly shown that he wished to waive diplomatic immunity, as he was entitled to do, and to accept the jurisdiction of the French Courts as regards the action brought against him and the consequences thereof. The Court decided that it could therefore rule that the respondent was in default and give judgement on the appeal brought by his wife.

290. Lastly, we might recall that article 26 of the Harvard draft²⁷⁵ requires the express authorization of the sending Government only where the waiver concerns the chief of mission; in other cases, the waiver may be made by the chief of mission himself on his Government's behalf. The authors of the draft believe "...that the rule laid down... fulfils the requirements of international law." However, there seems to be general agreement that, even where the waiver is made in due form, a subsequent court order against the diplomat cannot be enforced by execution levied on his property or by constraint of his person. Fauchille is quite emphatic on this point:

"Whether the authorization of the sovereign is express or tacit, no measure of enforcement... may in any circumstances be taken either against the inviolable person of the public minister or against his property...";²⁷⁶

²⁶⁹ Calvo, *op. cit.*, pp. 318 and 319.

²⁷⁰ Oppenheim, *op. cit.*, p. 717.

²⁷¹ Hurst, *op. cit.*, p. 249. See also cases cited therein.

²⁷² Satow, *op. cit.*, pp. 183 ff.

²⁷³ See also the other cases referred to by Sir Ernest Satow.

²⁷⁴ *Journal du droit international* (Paris, Editions techniques S.A., 1953), pp. 887 and 889.

²⁷⁵ Harvard Law School, *op. cit.*, pp. 125 ff.

²⁷⁶ Fauchille, *op. cit.*, p. 97.

this opinion is shared by Genet²⁷⁷ and almost all other writers.

291. In the case of *Rex v. Kent*,²⁷⁸ the Court of Criminal Appeal of England, in a judgement of 4 February 1941 concerning a subordinate official indicted on a number of charges, found that the appellant had been discharged on 20 May 1940 and that on the same day, or the day before, the Ambassador had waived the appellant's diplomatic privilege. The Court consequently rejected the appellant's plea of immunity from jurisdiction, ruling that the privilege of a subordinate official was in fact the privilege of the ambassador, recognized by the receiving State in the interests of the mission. The ambassador could therefore waive it with immediate effect in the case of all staff of the appellant's category.

5. FISCAL IMMUNITIES

(a) General observations

292. Of the immunities that remain to be examined, we should first mention exemption from taxation. Fauchille²⁷⁹ regards this as a privilege extended merely out of courtesy, but it is nevertheless so widely recognized that it may be considered as a generally accepted practice.

293. The points to determine are the scope of the exemption and the charges and taxes to which it usually applies. These questions will be briefly examined below.

(b) Exemption from personal taxes

294. There is no doubt that a diplomatic agent and members of his family living with him are exempt in the receiving State from all taxes upon their person, their salary, and, as a rule, their personal property. This immunity extends, of course, to their personal possessions, furniture, and so forth. The problematic point is the income derived from the agent's private business in the country where he is stationed. The Harvard Law School in its *Research in International Law*²⁸⁰ states that those authorities who seek to distinguish between the official and non-official action of the agent are seemingly inclined not to admit that his income, at least that derived from private sources situated in the receiving State, should be immune; the authors then add:

"Here, as in many other situations, there is a confusion between the liability of a diplomat with respect to taxation of his property, and the immunity of the diplomat from any coercion on the part of the receiving State to assert a lien upon property or to force the person to pay the tax".

However, the Harvard Research admits that a diplomat has to pay taxes on services rendered, and that immovable property privately owned by a diplomatic agent is subject to local taxes. The principle of immunity is now embodied in the legislation of many States, while Sir Cecil Hurst thinks that it is difficult to draw a clear distinction

between immovable property occupied by the agent in his private capacity and that occupied in his official capacity.²⁸¹

(c) Exemptions relating to the official premises of the mission

295. A further problem is raised by immovable property owned by the foreign State or by the agent on its behalf and used for official purposes; this includes the residence of the chief of the mission. The whole question was examined in detail in a decision of the Supreme Court of Canada of 2 April 1943,²⁸² entitled: "In the matter of reference as to the powers of the Corporation of the City of Ottawa and the Corporation of the Village of Rockcliffe Park to levy rates on Foreign Legations and High Commissioner's Residences." The City of Ottawa levied rates on the property of foreign legations and the question arose whether it was competent to do so. The majority of the Court decided that no local taxes could be imposed on such property belonging to foreign States. After rejecting the fiction of "extritoriality", the judgement proceeds to an exhaustive analysis of the question whether such property is liable to assessment. A distinction is drawn between taxes which constitute payment for services rendered and taxes in the strict sense. The Court stated that the imposition of the latter form of tax presupposes a person from whom, or a thing from which, it is exacted or collected "...in virtue of superior political authority. It does not require much argument to establish that... such an exaction cannot be demanded by one equal sovereignty from another, or from its diplomatic agent". The Court then considered whether real estate taxes, imposed by a statute in general terms, can be exacted in respect of diplomatic property, and, after referring to a number of statutes and authorities, concluded that in England such taxes are not recoverable in respect of real property occupied by diplomatic agents or owned by them or the States they represent. The judgement goes on to define these taxes as a lien upon the land, by virtue of which the land may be sold by the competent authorities and the proceeds of the sale applied in payment of taxes due and unpaid. In the opinion of the Court, such a sale involves *coactio* (within the meaning of the term as used by Lord Campbell in the *Magdalena Steam Navigation Company v. Martin* case), which might oblige the foreign State to appear before the local judicial authorities in an attempt to assert its rights. The Court then examined the argument, which is frequently relied upon, that a tax enforceable on its real property is not directly imposed upon the foreign sovereignty; the Court held that this argument did not apply to diplomatic property, and stated *inter alia*: "...the creation of the charge amounts to the creation of a *jus in re aliena*, to a subtraction from the property of the foreign sovereign" (see also *Le Parlement Belge* (1880) 5. P.D. 197); such a proceeding would be inconsistent with the principle *par in parem non habet imperium*. The Court finally held that such taxes could

²⁷⁷ Genet, *op. cit.*, pp. 592 and 593.

²⁷⁸ Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1941-1942*, p. 365.

²⁷⁹ Fauchille, *op. cit.*, p. 98.

²⁸⁰ Harvard Law School, *op. cit.*, pp. 115 ff.

²⁸¹ Hurst, *op. cit.*, pp. 233 ff.

²⁸² Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1941-1942*, pp. 337 ff.

not be collected from a foreign sovereign or from his qualified representative and that consequently such property could not be listed on the assessment roll.

296. This decision deserves careful consideration. It throws light on the frequently debated question whether the receiving State can rely on the argument that the imposition of real estate taxes on the official premises of the mission and on the minister's private residence does not constitute any encroachment on the independence of the sending Government. The Canadian judgement, after scrutinizing every aspect of the problem, rejects this argument outright.

297. This opinion is also borne out by article 4 of the draft prepared by Harvard Law School;²⁸³ the relevant comments cite some convincing excerpts from the legislation of many States. (See also para. 294 above.)

(d) *Exemption from customs duties*

298. There is general agreement among the authorities that the privilege of free entry for articles destined for the official use of the mission, or for the personal or family use of one of its members, rests upon international courtesy alone, and not upon any mandatory rule of the law of nations. We may recall Mastny's opinion in this connexion.²⁸⁴ Many treaties governing the treatment accorded by each contracting party, in its territory, to the nationals of the other contracting party, expressly provide for this exemption on a basis of reciprocity.

299. Fauchille observes that this is "purely an *ex gratia* concession"²⁸⁵ and Oppenheim states that, in practice and as a matter of courtesy, many States allow diplomatic envoys to receive free of duty goods intended for their own use.²⁸⁶ Sir Ernest Satow discusses the provisions governing free entry enacted by various States.²⁸⁷ Hackworth notes that in the United States this exemption is granted on a reciprocal basis.²⁸⁸

6. FRANCHISE DE L'HÔTEL

300. Agreement on the *franchise de l'hôtel* or the inviolability of the official residence of the diplomatic agent is so general that, in the present context, a brief reference to the point should suffice. This privilege is the basis of the rule that officers of justice, police, revenue and customs are forbidden to enter premises occupied by the embassy, or used as a residence by members of the mission, without the express authorization of the chief of the mission. This raises the problem of "diplomatic asylum", which will not be discussed in this memorandum. We need only point out that the minister may not use the official residence to shelter common criminals or, in principle, even persons charged with political offences.

301. Sir Cecil Hurst concludes that "no doubt exists" that the official residence of the Minister and premises used for official purposes are exempt from the local jurisdiction;²⁸⁹ Oppenheim affirms that the immunity of domicile: "... comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys".²⁹⁰

7. POSITION OF THE AGENT IN A THIRD STATE

302. This question may arise when an agent passes through a third State while proceeding to the country to which he is accredited or while returning therefrom. It may also arise with regard to diplomatic couriers.

303. It is accepted as a general rule that diplomatic agents in transit are outside the jurisdiction of the courts of third States, but it is an unsettled point whether they should enjoy the full measure of diplomatic privileges. There is no general rule; however, according to Sir Cecil Hurst, who refers to a number of judicial decisions in support of his opinion,²⁹¹ the authoritative view seems to be that a diplomatic agent passing through a third State on his way to or from his post is exempt from the jurisdiction of the courts. This rule would nevertheless only apply if the Government of the third State has been officially notified of the agent's journey and has raised no objections.

304. We may recall that article 15 of the Harvard draft²⁹² requires the third State to accord only such immunities as are necessary to facilitate the agent's transit; moreover, the third State is only bound by this rule if it has recognized the Government of the agent and is notified of his journey. The article is based on the theory that it is in the common interest of all States to facilitate international intercourse through the agency of duly accredited diplomatic officers.

305. Sir Ernest Satow²⁹³ states that, at the present time, it is usual to extend to diplomats in transit: "... all reasonable facilities and courtesies for the purpose". However, he emphasizes that there is no well-established rule, and cites several authorities, such as Heyking and Deak, who question the absolute right of the diplomatic agent in transit to insist on his diplomatic prerogatives. Deak, for example, states that it is customary to accord special protection to diplomats in transit, but then adds: "There is, nevertheless, no definite rule and certainly no unanimous opinion on this subject..."²⁹⁴

306. In support of the view that the agent in transit should enjoy diplomatic immunity, we may quote the reply of the French Minister of Foreign Affairs in the *Veragua* case; the Minister observed that a diplomatic agent passing through France, even if he only has a temporary mission to perform in the State to which he is proceeding, "... should be regarded as an accredited

²⁸³ Harvard Law School, *op. cit.*, pp. 37 ff.

²⁸⁴ League of Nations publication, *V. Legal*, 1927.V.1 (document C.196.M.70.1927.V), p. 88.

²⁸⁵ Fauchille, *op. cit.*, p. 100.

²⁸⁶ Oppenheim, *op. cit.*, p. 718.

²⁸⁷ Satow, *op. cit.*, pp. 214 ff.

²⁸⁸ Hackworth, *op. cit.*, p. 586.

²⁸⁹ Hurst, *op. cit.*, p. 214.

²⁹⁰ Oppenheim, *op. cit.*, p. 713.

²⁹¹ Hurst, *op. cit.*, pp. 277-284.

²⁹² Harvard Law School, *op. cit.*, pp. 85 ff.

²⁹³ Satow, *op. cit.*, pp. 226 ff.

²⁹⁴ Deak, *op. cit.*, p. 558.

diplomatic agent and, accordingly, as exempt from the local jurisdiction".²⁹⁵

However, in the case of *Sickles v. Sickles*, the Civil Court of the Seine, on the hearing of a divorce petition, rejected the proposition that diplomats in transit: "... could claim the same immunities when on foreign territory for reasons in no way connected with their official duties...".²⁹⁶

307. Lastly, it is obvious that a diplomat cannot claim diplomatic immunity in the third State if his sojourn therein considerably exceeds the time reasonably required for transit.

8. TERMINATION OF THE MISSION

308. Sir Cecil Hurst maintains that the immunities should continue until the agent leaves or has had time to leave the country.²⁹⁷ However, it is uncertain whether the agent remains entitled to the full measure of privileges; it is debatable, for example, whether after the termination of the mission criminal proceedings can be instituted against him, or whether exemption from civil jurisdiction may still be pleaded for some specified time.

309. The learned author concludes his discussion of this matter with these words:

"These cases show that the true rule is that the immunities of a diplomatic agent subsist for a period after his functions have come to an end, long enough to enable him to settle up his affairs and return home."²⁹⁸

This opinion, further confirmed by a number of decisions cited by Sir Cecil Hurst and by the Harvard Research, is shared by most authorities.

310. As an example, supporting this view, we may mention the decision of the Court of Appeal of Rouen of 12 July 1933.²⁹⁹ The defendant was a former United States Commissioner in Austria, where he had leased real estate for his family and himself; he had been ordered by the Austrian Courts, after the cessation of his mission, to make certain payments. The French Courts were later asked to order execution of those judgements, as the defendant had removed to France. The Court of Rouen ruled that it had no jurisdiction in the matter and held, *inter alia*, that the decisions of Austrian Courts related to acts entered into by the defendant during his mission in that country and that the immunity attaching to the functions of the agent and to acts connected therewith lasted beyond the discontinuance of those functions.

CHAPTER III

Summary

311. We have attempted, in this study, to trace the

²⁹⁵ Clunet, *Journal du droit international privé et de la jurisprudence comparée* (Paris, Marchal et Billard, 1901), Vol. 28, p. 343.

²⁹⁶ *Ibid.*, (Paris, Marchal et Godde, 1910), Vol. 37, p. 530.

²⁹⁷ Hurst, *op. cit.*, pp. 292 ff.

²⁹⁸ *Ibid.*, p. 294.

²⁹⁹ Lauterpacht (ed.), *Annual Digest and Reports of Public International Law Cases, 1933-1934*, p. 379.

general outline of the problems raised by the existence of diplomatic immunities and to analyse some related questions.

312. The first step was to review previous attempts at codification; this was followed by a discussion of certain relevant international instruments and draft conventions prepared by learned societies or individual authorities. The work of the League of Nations Committee of Experts and the replies of Governments to the questionnaire submitted to them were then summarized. The next step was to inquire briefly into the meaning usually attributed to the term "diplomatic intercourse" and to determine what it covers. From there we proceeded to indicate the main theories suggested at various times as a rational explanation of the juridical phenomenon which these immunities represent. Finally, we examined each of these immunities in turn, pointing out the aspects which remain controversial; by way of illustration, we cited some pertinent judicial decisions. This survey of the whole field seems to warrant the conclusion that there exists a certain degree of unanimity on the main issues, and that many common rules have either been placed on the statute book of various States or have come to be accepted as part of the law of nations.

313. This consensus of opinion stems from the fact that it is both necessary and in the common interest of the whole family of nations that Governments should maintain relations with each other through agents specially empowered for that purpose. These agents should, in the interests of their mission, enjoy full and unrestricted independence in the performance of their allotted duties. It follows, therefore, that their person, domicile, correspondence and subordinate staff should be inviolable. The principal consequence of this inviolability is that the agent enjoys immunity from criminal and civil jurisdiction throughout the period of his mission and, after the cessation thereof, until he has had reasonable time to leave the country where he was stationed. Furthermore, entry into the official premises of the mission or into the private residence of diplomats is forbidden to all officials of the receiving Government, except with the express authorization of the chief of the mission. The agent's personal income and the immovable property owned by the sending State or by the agent on its behalf are exempt from all charges and taxes, except those imposed in respect of services rendered. No step may lawfully be taken to attach the person of the agent or any article used by him or by his family, nor may execution be levied on any movable or immovable property used by the mission. There is some uncertainty regarding the scope of these immunities where the agent, in his purely private capacity, engages in industry or commerce or practices a liberal profession in the country to which he is accredited. A substantial number of authorities favour a very broad interpretation of the concept of immunity, even in such extreme circumstances; they contend that the State concerned should prevent such situations from arising, either by anticipatory action or by requesting the agent's recall. There is also some doubt regarding the measure of privilege due to an agent passing through a third State while proceeding to the

receiving State; it is agreed, however, that, where official notification is given of his journey, the agent should be protected against any acts which may impede his transit. The immunities survive the cessation of the mission, at least in respect of acts connected with the exercise of the agent's functions. Finally, the agent continues to enjoy immunity in respect of all actions contemporaneous with his mission, even such actions as were of a private nature, until he departs from the country to which he was accredited.

314. Accordingly, it would seem that, apart from some unresolved details, there exists in the field of diplomatic intercourse and immunities a body of rules, recognized and applied by States, which may be regarded as suitable for codification.³⁰⁰

³⁰⁰ See also Lauterpacht, "The Codification of the Law of Diplomatic Immunity", *Problems of Public and Private International Law* (London, The Grotius Society, 1955), Vol. 40, p. 65.