A DIPLOMAT'S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE

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by

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Ad majorem dei gloriam

FOREWORD

It gives me great pleasure to write a foreword to Mr. Sen's excellent book, and for two reasons in particular.

In the first place, in producing it, Mr. Sen has done something which I have long felt needed to be done, and which I at one time had ambitions to do myself. When, over thirty years ago, and after some years of practice at the Bar, I first entered the legal side of the British Foreign Service, I had not been working for long in the Foreign Office before I conceived the idea of writing – or at any rate compiling – a book to which (in my own mind) I gave the title of "A Manual of Foreign Office Law." This work, had I ever produced it in the form in which I visualised it, could probably not have been published consistently with the requirements of official discretion. But this did not worry me as I was only contemplating something for private circulation within the Service and in Government circles. Mr. Sen's aim has been broader and more public-spirited than mine was; but its basis is essentially the same.

When I first entered the British Foreign Service as an assistant legal adviser, I found that despite a thorough academic training in the law, including international law, and some experience of its practice, I was ignorant of many of the essentials, and of most of the details, of my job, which I would have to learn. I also found that the necessary knowledge was by no means so accessible as it might be, and was in other branches of the law. There were of course works on international law; but many of these were too general to be of much use in specific cases, or in regard to the details of the matter in hand. There were indeed monographs on particular topics, which did go into details; but even so they were still often not specific enough. There were also many points and matters not covered by any monograph. Precedents, in the form of the decisions and awards of international tribunals, were

valuable where specifically applicable to the matter in hand; but very far from being comprehensive. Nor could one expect to find a Law Officers' Opinion on everything that came up, especially as regards matters of detail.

There remained what were known as the "previous" or "back" papers – office files on which a more experienced colleague, or a predecessor, had dealt with the same point, or one like it. These were by far the most important single source of information and guidance on specific points; but the material they contained was often scattered, or for other reasons not readily accessible or easy to assemble. How much better, I thought, if all this could be brought together in one volume that would always be at hand for consultation, and in which all the points most liable to come up would be dealt with and would be dealt with specifically as they presented themselves to a Foreign Service lawyer called upon to give his Chiefs definite advice, or to solve a concrete problem, not as an academic exercise, but in relation to the facts of a particular case.

Alas, the daily and hourly pressure of work, over a period excessively and unprecedently strenuous for the Foreign Offices of the world, was to prevent me achieving this laudable ambition. I am very glad that Mr. Sen has been able to produce a work which, if necessarily restricted to certain major topics, has the same aim and goes so far towards realising it.

My other reason for taking pleasure in writing this foreword to Mr. Sen's book is that I feel I may, though very remotely and indirectly, have had a share in its emergence. Some years ago, on the introduction of an old and dear friend, the late Sir Girja Bajpai, I was able to arrange that Mr. Sen, in the course of an extended visit to London, should see something of the legal work of the Foreign Office, what it consisted of, how it came up, and in what sort of way it was dealt with; and also of the work of certain other Government Departments. I hope I am not presumptuous in thinking that this experience may have proved helpful to Mr. Sen, both in his present post and in the production of this book.

The views he expresses are, naturally entirely his own, and it would exceed the scope and purpose of this foreword to comment on the substance of them. Many of the points dealt with are or may be controversial, and legitimately subject to differing opinions. This in no way affects the value of what Mr. Sen has done in bringing under a single cover so much of what the practising diplomat ought to know

about the legal side or aspects of the work of his Service, or which he should at any rate be able to refer to in handy form. This task the author has accomplished with grace, clarity, insight and good sense.

Even as I wish well to the great nation to which he belongs, so also do I wish him and his book every success.

G. G. FITZMAURICE

PREFACE

In preparing this relatively short work, it has not been my intention to present a treatise on international law, but an endeavour is made to put together within a reasonable compass the law and practice with regard to some of the matters which do from time to time arise in the work of a Foreign Service Officer, whether he be posted in the Foreign Office itself or in one of the diplomatic or consular posts of his country. The Foreign Service Officer of today has to concern himself with a number of problems which could hardly arise in the days of his predecessor; and with the ever increasing complexity of international relations, the frequent inter-governmental conferences, and the extension of state activities in what was traditionally regarded as "private spheres", the functions of a diplomat have undergone a rapid and considerable change. Sir Earnest Satow in his book entitled *A Guide to Diplomatic Practice* has described a diplomat's function as "charge of official relations between his home state and the state to which he is accredited." In the modern context, this would seem to imply not only his interpreting and reporting on the political situation and protection of the interests of the nationals of his home state but also looking after the purchasing and trading activities of his government in addition to playing host to innumerable visiting delegations who come on goodwill or cultural missions or to attend international conferences. The military pacts, *coups d'état,* threats of intervention by certain states in the affairs of others, and the various restrictions that are from time to time placed by some states even on the freedoms and immunities of diplomatic officers make a diplomat's task no easier.

There has been a growing tendency in recent years on the part of states and their governments to place reliance on international law and practice in support of their actions, and the inclusion of a special section on international law in the Foreign Offices has been an important

feature in the post-War development. This, no doubt, is attributable to the fact that in the organised community of states of today there is always the possibility of a state's action being criticised and challenged and no state, however powerful, can completely ignore world opinion. It is, therefore, of importance that a diplomat should have a working knowledge of the legal position and the international practice on the matters he has to concern himself with, such as his own functions, privileges and immunities, the immunities and privileges of his staff, the scope and procedure for diplomatic protection of the nationals of his home state, issue of passports and visas, treaties and their interpretation, as also the position regarding trading activities of his government.

It may be stated that although the rules of conduct for international relations were known and respected amongst the Eastern nations before their eclipse as independent states, the international law, as we understand it today, is largely a product of European civilisation which originated in the various customary and conventional rules evolved by European nations for relations between themselves and treatment of each other's nationals. These rules grew out of usage and practice which were suited to the prevailing conditions and were considered to be in the mutual interest of nations. Through the efforts of jurists, authors and learned societies the states in Europe came to regard such rules of conduct as having some kind of a binding force, and these came to be quoted and applied in their dealings *inter se*, whilst many of such rules gradually became incorporated in treaties. In course of time with the growing needs of trade and commerce and in the process of expansion, European nations were brought in contact with nations in other parts of the globe, and in their relations with such states also the European states came to regard the rules of conduct that were developed and practised in Europe to be applicable. Thus we find European nations claiming for their nationals treatment according to their own concepts of international law even when representing with Eastern princes. In fact, some of these rules became embodied in the treaties relating to trade and commerce concluded between the European states and the local rulers. When the United States of America emerged as a free nation, she too in her dealings and transactions with her neighbours freely relied on these rules as would appear from the diplomatic notes and the policy statements issued by the Department of State from time to time on various issues over a period of years.

The main sources of international law, as recognised today, consist in the writings and opinions of jurists and authors, researches carried out by learned societies and institutions, provisions of treaties and conventions, decisions of international courts and arbitral tribunals, judgments of national courts and state practice. Since international law derives its origin from custom, the writings and opinions expressed by jurists must receive considerable weight, and there are several branches of the law where this still remains the principal source. The work of the learned societies is important for elucidation of many of the concepts where material from other sources is lacking. The decisions of the Permanent Court of International Justice, the arbitral tribunals and the International Court of Justice, wherever available, provide the most authoritative and comprehensive source since the pronouncements contained therein are not only decisive but are the result of much study and research on the part of the distinguished jurists who constitute the court or the tribunal. The judgments of the national courts also throw a good deal of light as they help in elucidating the attitude of the particular state or states on the branch of law with which the judgment is concerned. The treaties and conventions in modern times have been greatly relied upon since they contain the acceptance of the states (parties to the treaty) of the particular rule or rules of international law which are incorporated in the treaty or convention. The practice of states as evidenced by diplomatic notes issued by the governments in the past on various issues and the policy statements made from time to time by the Foreign Offices on such matters are increasingly becoming important sources as they are often treated as precedents. Diplomatic notes addressed by one government to another generally contain references of past practice, and it is only natural that precedents should be given due weight in matters of international law which by its very nature must depend on usage and practice of nations.

International law like all other laws must, however, need to be reviewed from time to time since law, so as to command respect, must conform to the needs of the times and be adapted to the changing circumstances in the context of the growth of the world society. The establishment of the International Law Commission by the United Nations with the object of progressive development and codification of international law is a clear recognition of this fact. Many of the rules in vogue today will no doubt be acceptable to all and be of universal application since they have been the result of a continuing process

through the centuries, but there are some rules which may well need to be re-examined and recast in the light of the emergence of new nations of Asia and Africa. The desire of the Asian African nations to examine for themselves the hitherto accepted concepts of international law is evident from the establishment for this purpose of a Legal Consultative Committee by some of the major states of these two continents.[1] There has also been a tendency for some time past towards the development of regional international law on some of its aspects which would be applicable to states of a particular region in their relations *inter se*. Nevertheless, the broad principles of international law by their very nature would need to be of universal application, and one may venture to hope that older nations would be ready to accept any changes that may be brought about in the hitherto accepted concepts of international law by reason of the changed structure of the world society.

In this work a good deal of reference has been made to the recommendations of the International Law Commission and the Reports of the Asian-African Legal Consultative Committee, though from a strictly orthodox standpoint these sources may not have the same authoritative value as court decisions and state practice. It is, however, to be mentioned that in the present context of international society, the work of the International Law Commission is of particular importance since the recommendations of this body reflect the legal thought in the different regions of the world and represent the considered views of some of the most eminent jurists. The Reports of the Asian-African Legal Consultative Committee embody the state practice of some of the more important countries in the Asian African continents which are not easily available from other sources. These materials are, therefore, of considerable significance from the point of view of diplomatic practice.

In dealing with the various topics in this book, I have ventured to touch upon several matters of a controversial nature and have expressed some opinions of my own. It is possible that others may take a different view with regard to some of these questions because in matters of international law it is not unusual to have differing opinions especially when they relate to topics of practical importance. There is one subject which I have not included in this book, namely the law relating to international organisations, although Foreign Service

[1] The Asian–African Legal Consultative Committee was constituted in November 1956. Its membership consists of Burma, Ceylon, Ghana, India, Indonesia, Iraq, Japan, Pakistan, Thailand and the United Arab Republic.

Officers may sometimes have to concern themselves with it, particularly if they are posted in a permanent mission to the United Nations. My reasons for doing so are twofold. In the first place, the subject of international organisations has become so specialised that it may be considered beyond the scope of a general book for diplomats. Secondly, the relevant materials on the subject have assumed such vast proportions that it is difficult to do full justice to it without increasing the size of the book to a considerable extent. I should add that the views and opinions expressed in this book are my personal and they do not necessarily represent the views of any particular government or governments.

I am greatly indebted to Judge Sir Gerald Fitzmaurice, G.C.M.G., Q.C. for writing the Foreword to this book. I am also grateful to Hon. Mr. Justice Tambiah of the Supreme Court of Ceylon, Mr. S. K. Das, former Judge of the Supreme Court of India, and to many other friends in India and abroad for their valuable suggestions.

New Delhi, October 1963. B. SEN

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INTERNATIONAL LAW – SELECTED TOPICS

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ABBREVIATIONS

A.A.L.C.C.	Asian–African Legal Consultative Committee.
A.C.	Appeal Cases (England).
A.D.	Annual Digest and Reports of Public International Law Cases.
A.J.I.L.	American Journal of International Law.
All. E.R.	All England Law Reports.
Annuaire	Annuaire de Droit International.
B. and C.	Barnewell and Cresswell Report of Cases (England).
Barnes.	Barnes's Notes of Cases (England).
B.F.S.P.	British and Foreign State Papers.
Bing.	Bingham's Reports (England).
Burr.	Burrow's Reports of King's Bench Cases (England).
B.Y.I.L.	British Yearbook of International Law.
Camp.	Campbell's Reports (England).
C.B.	Common Bench (England).
Ch. or Ch.D.	Chancery Division of the High Court of Justice, England.
C.L.R.	Commonwealth Law Reports (Australia).
Clunet	Journal du Droit International Privé.
Cranch	Cranch's Reports (United States of America).
Dallas	Dallas' Reports (United States of America).
Dalloz	Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine.
Darras	Revue de droit international privé.
D. and R.	Dowling and Ryland's Reports of King's Bench Cases (England).
D.L.R.	Dominion Law Reports (Canada).
Dods.	Dodson's Admiralty Reports, 1811–22, (England).
E.A.P.	English Annual Practice.

E.R.	English Reports.
F.	Federal Reporter (United States of America).
F. 2d.	Federal Reporter, Second Series, containing the decisions of the U.S. Circuit Courts.
F. It.	Foro Italiano.
F. Suppl.	Federal Supplement containing the decisions of U.S. District Courts.
Gaz. T.M.	Gazette des Tribunaux Mixtes d'Egypte (Alexandrie).
Giu. It.	Giurisprudenza Italiana.
H.L.	House of Lords (England).
H.L.R.	Harvard Law Review.
Hongkong L.R.	Hongkong Law Reports.
Hunt's Report	U.S. Department of State, Arbitration Series No. 6.
I.C.J.	Report of the International Court of Justice.
I.C.L.Q.	International and Comparative Law Quarterly.
I.L.A.	International Law Association.
I.L.C.	United Nations International Law Commission.
I.L.Q.	International Law Quarterly.
I.L.R.	International Law Reports.
I.L.T.	Irish Law Times.
In.L.R.	Indian Law Reports.
J.D.I.	Journal du Droit International Privé (often cited as Clunet).
J.P.	Journal du Palais.
K.B.	King's Bench Division of the High Court of Justice, England.
Knapp. P.C.	Knapp's Report of Privy Council Cases (British Commonwealth).
L.R.	Law Reports (England).
L.T.	The Law Times (England).
M. and S.	Manle and Selwyn's King's Bench Cases (England).
N.B.R.	New Brunswick Reports (Canada).
Nielson's Report	American and British Arbitration, Report of Fred K. Nielson (1926).
N.Y.S.	New York Supplement.
N.Y. Super Ct.	New York Supreme Court Reports.
P.or P.D.	Report of cases of Probate, Divorce and Admiralty Division of the High Court of Justice, (England).
P.B.	Pasicrisie Belge.

P.C.I.J.	Publications of the Permanent Court of International Justice.
Q.B.	Queen's Bench Division of the High Court of Justice, England.
R.D.I.	Revue de Droit International.
R.I.D.M.	Revue International de Droit Maritime.
Rivista	Rivista di diritto internazionale (Italy).
S.	Recueil général des Lois et des Arrêts.
S.A.R.	South African Reporter.
S.C.R.	Canada Supreme Court Reports.
T.A.M.	Recueil des Décisions des Tribunaux Arbitraux Mixtes, 10 Vols. (1922–32).
T.L.R.	Times Law Reports (England).
U.N.R.I.A.A.	United Nations Report of International Arbitral Awards.
U.N.T.S.	United Nations Treaty Series.
U.S.	United States Reports of Supreme Court Cases.
U.S.C.A.	United States Code Annotated.
U.S.F.R.	United States Foreign Relations.
W.C.R.	World Court Reports.
Wheat.	Wheaton's Reports (England).
Wils.	Wilson's Reports (England).
W.L.R.	Weekly Law Reports (England).

PART ONE

DIPLOMATIC RELATIONS, FUNCTIONS AND PRIVILEGES

CHAPTER I

HISTORICAL INTRODUCTION

It has often been said that the institution of diplomacy is as old as history itself.[1] This statement would certainly be accurate if one were to take into account the non-permanent *ad hoc* missions exchanged between the oldest nations in history during a period which may well be regarded as antiquity.

Greeks. History records that in the earliest periods special missions were being exchanged between the Greek City-States. Thucydides, the Greek historian, speaks of diplomatic relations among the Greeks, and it is stated that even at that time ambassadors were ceremoniously received and courteously treated in each other's territory. It is said that by the fifth century B.C. special missions between the City-States had become so frequent that something approaching our own system of regular diplomatic intercourse had been achieved.[2]

Romans. The early Romans too maintained treaty relations with some of their neighbours which were concluded with the active participation of their envoys. The Romans respected the foreign envoys, and as a general rule refrained from interference with the person or property of foreign ambassadors sent on special mission to Rome. Similarly, whenever the Roman priests of the college in charge of management of functions concerning Roman relations with other nations, who were known as *Fetiales,* conducted diplomatic negoti-

[1] 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." (International Law, Volume I: Peace, 8th ed., p. 769.)

[2] Nicholson, Diplomacy.

ations in other states, the Republic demanded and obtained respect for their inviolability.

The Jews. Amongst the Jews the Hebrew Kings maintained diplomatic relations only with certain friendly countries of their choice. They refused to have any kind of relations with most of their neighbouring states whom they regarded either as uncivilised or as enemies. Nevertheless, the Jews had regard for observance of treaty relations, and they respected the ambassadors of friendly powers with whom they maintained relations.

Asian states. The contemporary Asian princes maintained diplomatic relations with their neighbours, and envoys were sent and received from time to time. The existence of a large body of rules in ancient India on foreign affairs, such as those contained in *Artha-Sastra* of *Kautilya*, the *Nitisastra* of *Kamandaka*, and the *Matsya-Purana*, is illustrative of the fact that the diplomatic relations between ancient Indian states were fairly frequent.[1] There is historical evidence to show that after the break-up of Alexander's empire the new states, which had emerged as a consequence, maintained relations with the Mauryan Empire of India. There were several Greek ambassadors accredited to the court of Pataliputra some of whom like Magasthenes were of a very high distinction. The Indian kings also sent their envoys to the Greek courts, and under Emperor Ashoka the exchanges of envoys with other countries became more and more frequent. It is said that his *Dutas* (ambassadors) were sent to distant lands like Syria, Egypt, Macedon, Epirus and Cyrine. Harshavardhana, who ruled as the Emperor of North India in the Seventh Century A.D., maintained diplomatic relations with China. The kingdoms in South and South East Asia also appear to have maintained contacts with China through their envoys. The Emperor of Sumatra and Java and King Meghavarana of Ceylon (A.D. 352–79) had also from time to time sent emissaries to India to facilitate the visit of Buddhist pilgrims.

Islamic countries of West Asia. In West Asia from the time of Prophet Muhammed emissaries were sent abroad for religious or political purposes, and according to Muslim chronicles, the Prophet is reported to have sent envoys to Byzantium, Egypt, Persia, and Ethiopia. In the beginning these emissaries were not concerned with promotion of

[1] Sastri, International Law in Ancient India.

international relations, their functions being limited to certain specified missions, such as negotiations or signing of peace treaties, or exchange of prisoners of war at the conclusion of a *Jihad* (religious war), or in connection with the performance of formalities before such a war could be declared such as an invitation to accept Islam. Later, however, during the period of Abbasid Caliphs, the policy of peaceful and friendly relations between Islamic countries and other nations began to develop, and diplomacy naturally gained increasing significance especially in matters of international trade. Muslim envoys were sent to the courts of several monarchs for various political, commercial, cultural, social, and other purposes. The Fatimid and Mamluk kings sent and received diplomatic missions to and from countries in Central and East Asia as well as Europe, and treaties of friendship and commerce were negotiated through their envoys.[1]

European states. In Europe, the origin of diplomacy may be said to be contemporaneous with the break up of the Roman Empire. Until that time there was neither room nor need for development of international law or diplomatic relations, since the Roman Empire had practically swallowed up the entire civilised world known in Europe. However, after the split of the Empire in 395 A.D. in eastern and western halves, the kings in the eastern part of the Empire freely began the practice of sending envoys to foreign courts for observation and reporting on the political situation which became useful in manoeuvres against potential rivals. Gradually, with the disintegration of the Empire, and the weight of various influences that were gaining ground in Europe, the feudal princes began resorting to the practice of exchanging envoys between themselves.

Rise of modern diplomacy. Though the practice of exchanging envoys was in vogue amongst the ancient Greeks and Romans as also in the countries of Europe and Asia, the establishment of permanent missions is of a comparatively recent origin. Before the 15th century the European princes normally sent temporary diplomatic missions which were to be terminated as soon as the particular purpose of the mission had been fulfilled. Similarly, in the countries of South and South East Asia and the Islamic countries of West Asia the missions by and large were of a temporary character which were sent for a specific purpose whether it be political, economic, or cultural. It was the Italian

[1] Khadduri, War and Peace in the Law of Islam.

Republics, and Venice in particular, which were the first to recognise the advantages of maintaining permanent diplomatic missions at each other's capitals and introduced the practice of so doing. As Fauchille rightly points out, 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 ending in the 15th century. The second period is that of permanent legations which originated in Italy in the 15th century.[1] The ferment of Renaissance, the Reformation, and the Industrial Revolution, changed the face of the contemporary European world which led to more and more contacts between the various nations in Europe; and the need of finding markets for an expanding industry made permanent representations almost essential. At the close of the 15th century, England, France, Spain and Germany had established legations at each other's courts, and in some cases the right to maintain permanent legations was secured by means of treaties, such as the treaty concluded in 1520 between the King of England and the Emperor of Germany. In the 16th century, the Republic of Venice had established permanent legations at Vienna, Paris, Madrid and Rome. After the Treaty of Westphalia (1648), which confirmed the principle of 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 Henry 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, and in 1660 Poland proposed that all accredited ambassadors should be sent out of the country. The French Revolution, the wars which followed, and the spectacular industrial development which was then beginning to make itself felt, however, 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. The practice of accrediting envoys had become so common by then as to enable Grotius to assert "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." [2] The art of diplomacy found fruitful ground for development in the

[1] Fauchille, Traité de Droit International Public, 8th ed., Vol. I, Part III, para 656.
[2] Grotius, De Jure Belli ac Pacis, Book II, Chapter XVIII.

situation that followed the disintegration of the Holy Roman Empire. The constant need for watch for the sake of preservation of balance of power, and the friction amongst the princes of Germany produced diplomats of the calibre of Metternich and Bismark.

The European nations in the course of trade and commerce through the 17th and 18th centuries were brought into contact with nations in other parts of the globe, and the instances of their envoys being sent to the eastern princes for negotiating treaties are not infrequent. Sir Thomas Roe was one of the well known figures sent by the English King to the court of Mughal Emperor Jehangir at Delhi in the 17th century. Gradually, however, in the process of expansion the European powers of the day, like England, France, Spain, Holland and Portugal, conquered or colonised practically the whole of the known world in Asia and Africa as well as the discovered territories of the Americas with the result that the diplomatic relations became practically confined to European states and Turkey. Countries like China or Persia, though not actually conquered or colonised, became subject to many restrictive treaties which greatly reduced their status and thus made it unnecessary to have diplomatic relations with them. The American independence and the gradual elimination of the colonial powers from the Americas gave rise to institution of diplomatic missions in that continent. Now with the emergence of new nations of Asia and Africa, diplomatic relations between states in various parts of the world have become of universal application.

CHAPTER II

RELATIONS BETWEEN NATIONS

The right of legation

It is generally said that every recognised independent state is entitled to the right of legation as one of the attributes of sovereignty. The right of legation, it is asserted, comprises the right to accredit its envoy to other states and the obligation to receive diplomatic representatives when accredited by those states. On a closer examination of the authorities and state practice, it would appear that the "right of legation" is no more than the "competence" of a sovereign state to accredit an envoy to another state and to receive the diplomatic agent of a foreign state.[1] Thus no state is obliged to receive an envoy

[1] According to Fauchille, "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." [Fauchille, Traité de Droit International Public, Vol. I, p. 32: Droit de légation actif et passif, p. 37] Sir Cecil Hurst, however, expressed some doubt about the correctness of the last proposition. According to him a state is not bound to receive a particular individual, but to refuse to receive any representative from a state is to deny it the *jus legationis*. [Collected Papers of Sir Cecil Hurst, p. 173 footnote 4].

Charles Calvo, the well known Latin American jurist, writing on "Diplomatic Intercourse" states, "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." Calvo, Le droit international théorique et pratique, 5th ed., 1896, Vol. III, p.177.

Judge Lauterpacht in the eighth edition of Oppenheim observes. "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." Oppenheim, International Law, Vol. I, 8th ed., p. 770.

The International Law Commission in its Report on Diplomatic Relations adopted at its Tenth Session observed, "There is frequent reference in doctrine to a 'right of legation' said to be enjoyed by every sovereign state. The interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, necessitate the establishment of diplomatic relations between them. However, since no right of legation can be exercised without agreement between the parties, the Commission

accredited by another, nor can it be compelled to send its diplomatic agents to other states. It is not obligatory that a state should be diplomatically represented in every country it recognises nor is it necessary that it should consent to receive envoys from all such states. Diplomatic missions are opened in practice, as will be discussed more fully in the next chapter, by mutual consent of the states concerned. Recognition of a state does not therefore mean that all states recognising the new state are bound to open diplomatic relations with it. The right of legation, which is possessed by sovereign states is, however, important from the standpoint of international law in that it denotes the capacity of a state in law to receive and accredit diplomatic envoys. It is not every state that possesses this right since only independent states, which are recognised, are competent in this respect. Consequently, when a state proposes to open diplomatic relations with another, the first test it has to fulfil is that it is an independent state, and secondly that it is recognised as such by the other state. Its government has similarly to be recognised before any diplomatic relations can be opened.

The state practice also illustrates that there is no absolute right in a state to have diplomatic representation in other states. This perhaps accounts for the fact that in numerous bilateral treaties specific stipulations are made for exchange of resident envoys. For instance, several European countries in their treaties with China and Japan often expressly stipulated for posting of diplomatic representatives. As early as in 1614 the treaties between Holland and Sweden as also the treaties with various German principalities provided for mutual accreditation of resident envoys. The Treaty of Belgrade 1739 between Russia and the Porte stipulated for a resident minister of Russia at Constantinople. Within more recent years a number of treaties have been concluded notably by Turkey and the Union of Soviet Socialist Republics, which by their terms provide for the establishment of diplomatic relations, and lay down the standard of treatment for diplomatic agents. Similar provisions find place in the Treaty of Friendship between Turkey and Poland of July 23, 1923 and in the treaties between Turkey and Austria, Czechoslovakia, Germany, Hungary, the Netherlands, Norway, Spain, Sweden and Yugoslavia. By the Treaty of Rapallo of April 16, 1922 Germany resumed diplomatic relations with Russia. Treaties have since been concluded by the Soviet Union with various countries with the

did not consider that it should mention it in the text of the draft." Report of the International Law Commission, 10th Session. Commentaries on Article 1 of the Draft Articles on Diplomatic Relations.

same object. Similarly, the Pan American Convention on Diplomatic Officers signed at Havana on February 20, 1928, which is a multipartite treaty between the American States, provided in Article I that "States have the right of being represented before each other through diplomatic officers." There are numerous other treaties of friendship in which specific provisions for exchange of diplomatic representatives are made.

Position of states not fully sovereign

As observed earlier the "right of legation," that is, the competence to accredit and receive diplomatic envoys, is possessed normally by states which are fully sovereign. The basis for this rule is that the right of accrediting envoys is an attribute of sovereignty on the part of a state, and it is only those states, which have full sovereignty over their external relations, that can be said to possess this right. Nevertheless, there are certain types of states, which, though not fully sovereign from the point of view of international law, have been known to exercise this right of legation. Cases of this type are, however, rare at present.

States which are not sovereign, that is, non-sovereign states or territories may be classed as (i) colonies and dependencies, (ii) protectorates and vassal states and (iii) the states forming part of a federation.

Colonies. The colonies, colonial territories, and the dependencies from the point of view of international law are part and parcel of the state to which they belong; they do not possess sovereignty either internally or externally. Consequently, they do not possess any right of external relations and much less the right of exchanging envoys, though a few of them are represented in some of the organs of the United Nations or the specialised agencies. It may be mentioned that India even prior to her independence was a member of the League of Nations, and subsequently of the United Nations. But this did not give her the right of exchanging envoys. In some cases, according to their internal laws colonies form part of the metropolitan territory of the colonial power, such as the French and Portuguese possessions overseas. In other cases colonies have separate governments though under the control of the colonial power as in the case of British territories like Hong Kong, Aden etc. Whatever may be the status of these territories from the point of view of their internal laws, it is clear that externally and from the point of view of international law they have no status, and

consequently there can be no question of right of legation on the part of such territories.

Protectorates. A protectorate on the other hand is an independent state which by means of a treaty surrenders itself to the protection of a stronger state. The status of a protectorate depends very much on the terms of the treaty of protection which regulates the relationship between the protectorate and the protecting power. Broadly speaking, many of these states retain their internal sovereignty whilst surrendering the conduct of their external relations and defence to the protecting state. Examples of this type of protectorate were the former Malayan states like Johore and Kelantan, which now form part of the Federation of Malaya, the British Persian Gulf protectorates, the British Protectorate of Tonga, and the Indian Protectorate of Sikkim. The British protectorates in Africa like Basutoland and Bachuanaland, however, are more or less in the same position as colonies since the African rulers of these territories had practically surrendered complete sovereignty to the protecting power retaining authority over only certain local matters. The protectorates of the first type are regarded for many purposes as sovereign; [1] they were sovereign states prior to their entering into the treaty of protection, and the question of their possessing the right of legation would depend upon the extent of the sovereignty which they may still retain under the treaty of protection. In modern times none of the protectorates appears to possess this right since in fact all of them have surrendered their sovereignty over external relations to the protecting state. Some states like Muscat and Oman in the Persian Gulf have, however, a right to receive consular representatives. Formerly in a few rare cases certain protected states under the suzerainty of another enjoyed this right. For instance, by Article 16 of the Treaty of Kutchuk Kainardji between Turkey and Russia concluded in 1774 two half sovereign provinces of Moldavia and Wallachia, which were placed under the protection of Russia, were each entitled to be represented by a charge d'affaires at the court of Constantinople. Similarly, before the Boer war the South African Republic, which was in the opinion of Great Britain a state under British suzerainty, had established certain permanent diplomatic missions in foreign states.

[1] See *Duff Development v. Government of Kelantan*,(1924) A.C. 797.

Federated states. A sovereign state which joins with another state or states into an union of states which are federated into one federal state often lose their identity as sovereign states from the point of view of international law, and as such lose their right of legation. For example, upon the union of Syria and Egypt in 1958 and the formation of the United Arab Republic the former states lost their right of representation. Similarly, the various states constituting the United States of America or Australia have no individual right of legation. However, in former times before the First World War the component states of the German Empire like Bavaria used to send and receive diplomatic envoys from the other states constituting the German Empire as well as foreign states. The position of the member states of U.S.S.R. is, however, not so very clear as two of such states, namely Ukraine and Byelorussia, are members of the United Nations. Nevertheless, from the point of view of international law, it would seem that these states do not possess the right of legation.

The Commonwealth of Nations

The position of the Commonwealth of Nations requires to be specially mentioned. A number of text books had referred to the position of the countries of the British Commonwealth as being examples of semi-sovereign states enjoying the right to receive and accredit diplomatic representatives. Before World War I the British possessions overseas including Canada, Australia, South Africa, New Zealand, the Indian Empire, the colonies and the protectorates together with Great Britain and Ireland constituted one single entity for the purpose of international law with the King Emperor as the head of the state. The active and dominant role played by the several territories of the British Empire in the first World War paved the way for their self-government and ultimate recognition as independent states within the Commonwealth. In the Peace Conference that followed the war the Dominions of Canada, Australia, New Zealand, and South Africa as well as India were given separate seats, and each of them became entitled to the membership of the League of Nations under the Covenant constituting the League. The Imperial Conference of 1926 recognised the Dominions of Canada, Australia, New Zealand and South Africa together with Great Britain as being autonomous communities within the British Empire equal in status and in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Common-

wealth of Nations. The Statute of Westminster passed in 1931 gave legal recognition to this status. The result was that though the Dominions continued to owe allegiance to the King Emperor they became sovereign independant states within the British Commonwealth. The Dominions thus became competent to receive and accredit envoys from and to foreign states whenever they chose to do so. The Dominions amongst themselves, however, could not exchange envoys as the King Emperor, being the head of state of all the Dominions, could not accredit an envoy on behalf of one Dominion to himself as the head of state of another Dominion. Thus the practice of exchanging officials known as High Commissioners between the Commonwealth countries grew up. In 1947 the Dominions of India and Pakistan were formed out of the former Indian Empire and became states equal in status with the other Dominions under the provisions of the Statute of Westminster 1931, and thus acquired the right of legation. In 1948 Ceylon, and subsequently Ghana, Malaya, Nigeria, Cyprus, Sierra Leone and Tanganyika acquired the same status. In the Commonwealth Conference of 1949 the position of the British Commonwealth underwent a radical change. The Commonwealth Conference approved of India's continuance in her full membership of the Commonwealth even after becoming a Republic on the basis of her acceptance of the Crown as the symbol of free association of its independent member nations and as such the head of the Commonwealth. The Conference defined the status of the Crown on the one hand as the head of the Commonwealth, and on the other hand as the head of the member 'nations' of the Commonwealth which accepted the Crown as the head of state as well. In 1950 India declared herself a Republic within the Commonwealth having its own head of state but recognising the British Crown as the head of the Commonwealth. Pakistan and Ghana subsequently also adopted for themselves a similar status. Canada, Australia, New Zealand and Ceylon under their constitutions recognise the British sovereign as their Queen and as the head of state. Malaya has its own elected head of state whilst recognising the British sovereign as the head of the Commonwealth. In practice today almost all the countries of the Commonwealth receive and accredit envoys, and exchange among themselves representatives known as High Commissioners. The countries of the Commonwealth since the Statute of Westminster 1931 are fully independent states both internally and externally, and the fact that some of them recognise the same institution as their common head of state due to historical or sentimental reasons makes no difference

to the position. They are full sovereign states, and as such the right of legation possessed and exercised by them is in keeping with the general principles of international law that sovereign states possess this right. It would therefore not be correct to regard the states of the Commonwealth as species of semi-sovereign states which possess the right of legation.

CHAPTER III

ESTABLISHMENT AND CONDUCT OF DIPLOMATIC RELATIONS

Opening of diplomatic relations

It has already been observed in the previous chapter that though every sovereign independent state possesses the "right of legation," opening of diplomatic relations between states is a matter of agreement between the governments concerned.[1] Even though a state may be fully sovereign and recognised by other states, it is very likely that all states will not be in a position to have diplomatic relations with it. In recent years with the increasing number of newly independent sovereign states in the community of nations, the problem of maintenance of diplomatic relations by establishment of permanent missions is becoming more and more acute, and the smaller nations find it impossible to maintain such missions at too many capitals due to lack of trained personnel and difficulties of having sufficient foreign exchange at their disposal. Accreditation of the same person as envoy to two or more states has helped to solve the problem to some extent but even this solution is not possible in all cases. The proposal of having one person to act as the envoy of two or more states, adopted by the Vienna Conference 1961, will no doubt help in relieving the burden of representation, but it is yet to be seen as to how far this is followed by states in practice in view of certain obvious practical difficulties. Apart from these considerations, it may also be that having regard to the smallness of interest that a state has to protect in another, or due to such factors as disapproval of the policies or practices of the state, or the repercussions that the establishment of a mission may have on neighbouring countries, a state may not be willing to have a permanent diplomatic mission in a particular state or states. Unwillingness on the part of a

[1] Article 2 of the Vienna Convention on Diplomatic Relations 1961 is as follows: "The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent."

state to open permanent diplomatic missions in some cases may give rise to dissatisfaction especially when the other state is keen on establishing such relations. It is, therefore, of the utmost importance to bear in mind that non-establishment of permanent mission by one state in another is in no way derogatory to the latter, nor does it have any effect on the recognition of that state as a sovereign independent member of the Family of Nations.

Steps towards establishment of diplomatic relations. Whenever a state desires to open diplomatic relations with another, the first step it has to take is to approach that state for agreement to establish its mission. Such occasions may arise in the case of two existing states which had not until then opened diplomatic relations but find it necessary or possible to do so either due to the increase in the interests that require to be protected, or availability of personnel or funds the lack of which had stood in the way of establishment of such relations earlier. Occasions for establishment of diplomatic relations arise more frequently perhaps when a new state is admitted into the community of nations as a fully sovereign state. A revolutionary change in the government of an existing state may also in certain circumstances necessitate the establishment of fresh diplomatic relations. In all such cases the government of the country which desires the establishment of diplomatic relations must make the first approach. In the case of newly independent states, the request should normally be made direct on a government to government level; in other cases the approach may be direct or it may be preceded by informal soundings through the intermediary of the diplomatic representative of another state.

When an approach for establishment of diplomatic relations is made, the request is generally examined in the Foreign Office. In considering such a request the first question which the Foreign Office will naturally examine is whether it would itself be in a position to establish its own mission in the country which has sought establishment of diplomatic relations, since the reciprocal establishment of missions by each other is the most effective method of conducting relations between nations. It may, however, be mentioned that there is nothing to prevent two states from agreeing on other methods of conducting their diplomatic relations, namely through their missions in a third state. The next important factor that is normally taken into account is the extent of its interest that requires to be looked after in the other state. Formerly the quantum of such interest was determined by the number of nation-

als resident in each other's territory, the investments made by such nationals, or considerations of development of trade and commerce. Today, in addition to these factors one important matter which governs a country's decision is the question of votes in the United Nations or the Specialised Agencies. The countries which were hitherto considered to be unimportant from the point of view of a country's interest have assumed a much more important role having regard to the fact that in the United Nations each member country has one vote, and in that august assembly, which is the nerve centre of the world politics, no country is too insignificant to be ignored. In addition, the question of propaganda or publicity, and the fact that a country may be considered to be a good listening post often enter the verdict on the question of establishment of permanent missions. States naturally find the expenditure on maintenance of such missions worthwhile for these considerations. The Great Powers as well as those states which desire to take an active role in world politics are consequently anxious to have missions in as many capitals of the world as possible.

Classes of diplomatic agents

When agreement is reached on the question of opening of diplomatic relations, the next matter to be considered is the class of envoys that should be exchanged between the states concerned.[1] Although it is not obligatory that the heads of missions by whom the states are to be represented in each other's territory must be of the same class, it is the normal diplomatic practice, though there are exceptions, to exchange envoys of the same class. In recent years, however, any differentiation based on the class to which an envoy belongs has practically disappeared save in the case of their precedence.[2]

The classification of diplomatic agents in well defined categories was done for the first time in the Congress of Vienna 1815 which was later modified in the Congress of Aix la Chapelle 1818. Under these regulations the diplomatic representatives were divided into following classes:

(1) Ambassadors.

(2) Envoys and Ministers Plenipotentiary.

[1] "The class to which the Heads of their Missions are to be assigned shall be agreed between states." (Article 15 of the Vienna Convention 1961).

[2] Clause 2 of Article 14 of the Vienna Convention 1961 provides: "Except as concerns precedence and etiquette, there shall be no differentiation between Heads of Missions by reason of their class."

(3) Ministers resident accredited to the sovereign, and

(4) Chargé d'Affaires accredited to the Minister of Foreign Affairs.

This classification holds good even today with the exception that Ministers Resident are no longer regarded as heads of mission.[1] The representatives of the Pope were known as legates or nuncios who ranked with the ambassadors, and internuncios who ranked with ministers plenipotentiary.

In the Vienna Regulation 1815 it was stated that ambassadors, legates and nuncios alone have representative character, and by this was meant that diplomatic agents of this class only were considered as representing the person of their sovereign. Their privileges were originally founded on the supposition that they alone were competent to carry on negotiations with the sovereign himself. This, however, has no real significance in the modern context for ambassadors as a rule deal only with the Minister for Foreign Affairs even in countries which preserve a monarchical form of government. It is sometimes supposed that an ambassador can demand access to the person of the head of the state at any time, but this is not the case as the occasions on which the ambassador can speak with the head of the state are limited by the etiquette of the court or the government to which he is accredited.[2]

In the 19th century and in the first two decades of the present century, the diplomatic representatives of the rank of ambassadors were exchanged with a certain amount of discrimination since the theory that ambassadors were personal representatives of their sovereign or the head of state still persisted. Ambassadors were sent usually to Great Powers or to countries which were considered to be traditionally friendly. The United States of America until 1893 did not appoint diplomatic agents of the ambassadorial rank and consequently foreign diplomatic agents accredited to Washington prior to that time were also of a lesser rank. The Swiss Confederation whilst receiving ambassadors from various countries did not until very recently accredit any ambassadors of its own. At the beginning of Queen Victoria's reign United Kingdom had ambassadors only at Vienna, St. Petersburg and Constantinople. An ambassador to Berlin was appointed in 1862, that at Rome in 1876, at Madrid in 1877 and at Washington in 1893.

[1] Article 14 of the Vienna Convention 1961 has adopted the following classification: "Heads of Mission are divided into 3 classes, namely,

(a) that of ambassadors or nuncios accredited to Heads of State, and other heads of mission of equivalent rank;

(b) that of envoys, ministers and internuncios accredited to heads of State;

(c) that of chargés d'affaires accredited to Ministers for Foreign Affairs."

[2] Satow., A Guide to Diplomatic Practice, 4th ed., para 287, p. 167.

In the present century during the first three decades United Kingdom opened embassies only in Tokyo, Brussels, Rio-de-Janeiro, Lisbon, Buenos Aires, Warsaw and at Santiago.

The class of diplomatic agents known as envoy extraordinary and minister plenipotentiary, constituted the second class of diplomatic representatives and Ministers resident formed the third class. Both these classes of diplomatic representatives were accredited to the head of state though unlike ambassadors they were considered not to have any personal right of audience with the sovereign. In modern practice accreditation of Ministers resident as head of a mission appears to have been discontinued. In fact the recent Vienna Convention on Diplomatic Relations mentions only of one class of ministers together with envoys and internuncios as head of mission. However, in the case of a number of important missions it has been customary to give the rank of a Minister (presumably equivalent to Minister resident) to the deputy chief of the mission and occasionally to some of the other senior diplomats.

Until recently envoys extraordinary and ministers plenipotentiar constituted the great majority of diplomatic agents. In recent years, however, and especially since 1940 the tendency has been generally to upgrade the existing legations to embassies and in case of fresh diplomatic relations to have the same on an embassy level. The newly independent countries have not been slow to fall in line with this recent trend, and now it has practically become the universal practice to establish diplomatic relations on an embassy level and to exchange ambassadors. In view of this growing tendency on the part of states to appoint ambassadors rather than ministers, the International Law Commission considered the question of abolishing the title of minister or at any rate to do away with the difference in rank between the class of ministers and of ambassadors. The inevitable result of this trend in multiplication of embassies has diminished the importance and prestige of the title of ambassador, and accreditation of an ambassador is no longer regarded as a compliment from the initiating country to the other. The Vienna Conference of Plenipotentiaries also considered the possibility of abolishing the class of diplomatic agents known as ministers but it was felt that even without any specific provision at present the class would soon disappear by itself.

The chargés d'affaires are accredited to the Minister for Foreign Affairs and not to the head of the state though circumstances have occurred in which their credentials have been addressed to the head of

state.[1] In modern practice a chargé d'affaires is rarely accredited by one state to another as a permanent measure.[2] They are generally accredited to governments which are newly recognised after a civil war or a revolution. For example, Great Britain had posted only a chargé d'affaires in Peking after its recognition of the Communist regime. There are many instances when states opening diplomatic relations with new countries, which had achieved independence by breaking away from a larger entity, or with new governments formed following upon a civil war or revolution had agreed only to accredit a chargé d'affaires at first. The status of their representative was, no doubt, raised to that of ambassador or minister when conditions settled down. Chargés d'affaires *ad interim* are appointed pending the arrival of the head of mission as a temporary measure and on all occasions when the head of the mission is away from his post. The Vienna Convention 1961 provides that if the post of the head of the mission is vacant, or if the head of the mission is unable to perform his functions, a chargé d'affaires shall act provisionally, and the name of the chargé d'affaires shall be notified either by the head of the mission or by the Foreign Office of the sending state to the appropriate Ministry of the receiving state.[3]

As regards the diplomatic relations of the Papal state, it may be stated that legates, who were always cardinals, were papal ambassadors extraordinary charged with special missions, primarily representing the Pope as head of the church. They were sent only to the states which acknowledged the spiritual supremacy of the Pope. The papal representatives of the second class corresponding to ministers plenipotentiay have been designated internuncios. Legates, however, are not at present regarded as heads of missions.[4]

The diplomatic representatives who are exchanged between Commonwealth countries are known as High Commissioners. This designation, as stated earlier, has a historical significance and is still continued in the inter-Commonwealth relations in spite of the changed structure of the Commonwealth. In their precedence and functions High Commissioners are regarded as ambassadors. Originally the High Commissioners were not regarded as diplomatic representatives as they did

[1] Satow, op cit., p. 170.

[2] For a considerable period of time, however, Austria, Chile and Mexico were represented in New Delhi by chargés d'affaires *en pied.*

[3] See Article 19 of the Convention.

[4] See International Law Commission's Report of the Tenth Session – Commentary on Article 13.

not possess the character of the representatives of the sovereign but were merely the representatives of their respective governments. They did not appear in the diplomatic list, nor were they entitled to diplomatic immunities although they were generally granted exemption from fiscal and other dues. With the changed structure of the Commonwealth and the admission of self-governing countries from the continents of Asia and Africa some of whom have their own heads of state, the position and status of High Commissioners have undergone considerable change. In the United Kingdom under a proposal approved by King George VI in 1948, the High Commissioners representing member countries of the Commonwealth were given same precedence as ambassadors, and under the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, the High Commissioners enjoy same immunity from legal process as diplomatic representatives of foreign countries. Though the category known as High Commissioners is not mentioned as a class of diplomatic agents in the Draft Articles prepared by the International Law Commission, it is quite clear that in international practice, having regard to the increasing number of countries in the Commonwealth, the High Commissioners should be regarded as a class of diplomatic agents ranking with ambassadors. This position has been recognised in the Draft Articles prepared by the Asian-African Legal Consultative Committee.[1] In the Vienna Convention 1961 the reference to "other Heads of Missions of equivalent rank" would presumably mean High Commissioners.

Concurrent accreditation of diplomatic agents

It has been observed earlier that though the establishment of a permanent diplomatic mission in the territory of each other is the most effective way of carrying on diplomatic relations, states may agree that the diplomatic relations shall be carried on through their diplomatic missions in a third state. This practice is becoming fairly common in recent years having regard to the increase in the number of full sovereign states in the family of nations and the necessity of maintaining diplomatic relations *inter se*. In such cases what is generally done is to accredit the same person as the ambassador or minister to two or more states. It is also customary to have a permanent mission in the territory of the

[1] See Draft Convention on Functions, Privileges and Immunities of Diplomatic Agents, Article 14 – Proceedings of the Third Session of the Asian–African Legal Consultative Committee.

state with a Secretary in charge and designated as charge d'affaires *ad interim* whilst the ambassador or the minister who is accredited to that state is resident in another capital. For example, the ambassadors of various states accredited to the United States of America and resident in Washington are often accredited concurrently to Mexico, Canada and other American states. The Indian ambassador in Washington was until recently the ambassador to Mexico though there was actually a mission established by India in Mexico which was in the charge of a charge d'affaires. Ambassadors resident in Delhi are sometimes concurrently accredited to Nepal, Burma, or Ceylon and even to Malaya or Indonesia. The ambassadors accredited to the U.S.S.R. are also accredited to some of the Eastern European states.

In deciding upon the question as to whether the same person can be accredited concurrently as the head of mission to a country or countries other than where he is resident, it is important to consider whether there is any conflict of interests between the countries to which the same person is being accredited concurrently as the head of mission. An ambassador or minister is expected to interpret his country's policies to the country where he is accredited and at the same time to show an understanding of the policies of the latter. Consequently if the same person is accredited to two or more countries whose interests on vital matters are in conflict, it would be extremely difficult for him to discharge his functions. There is also the question of his personal embarrassment. An ambassador is often expected by the government of the country to which he is accredited to explain their viewpoint to the ambassador's home government, and to seek support for such point of view in respect of their particular claim or claims against another or other state or states, or in world affairs generally, and if the same person was accredited concurrently to the states who had disputes or whose interests were in conflict he would find it extremely difficult to be a *persona grata* with either government.

There are some states who had objected in the past to the multiple accreditation of an envoy; for instance, the Holy See objected to the accreditation of the same person as ambassador to itself as well as ambassador to Italy. In 1929, the Netherlands objected to the concurrent accreditation of the ambassador of the Serb-Croat-Slovene state to Netherlands and Belgium. It has also often been considered undesirable to accredit the same person to Norway and Sweden due to historical reasons. Instances where accreditation of an envoy to two or more states may cause embarrassment are innumerable. To take an

example, it would be highly undesirable to have the same person accredited as ambassador concurrently to Israel and any of the Arab states. Similarly, concurrent accreditation to India and Pakistan or to the United States and Cuba ought to be avoided. It is, therefore, desirable to proceed with caution whilst deciding upon the question of concurrent accreditation of an envoy to two or more countries.

Though it is not necessary from the point of view of international law to seek the consent of the receiving state in the matter of concurrent accreditation of an envoy, it would seem to be clear that the receiving state is entitled to object to the accreditation of an envoy concurrently with his accreditation to another state. The question was fully discussed in the International Law Commission of the United Nations which recommended that unless objection is offered by any of the receiving states concerned a head of mission to one state may be accredited as head of mission to one or some other states.[1] This position has been accepted in the Vienna Convention 1961. Article 5 of the Convention provides that the sending state may after it has given due notification to the receiving state concerned accredit a head of mission or assign any member of the diplomatic staff to more than one state unless there is express objection by any of the receiving states. This article further embodies the recent practice in providing that where a state accredits a head of mission to more than one state it may establish a diplomatic mission headed by a charge d'affaires *ad interim* in each state where the head of mission has not his permanent seat.

As already stated, the Vienna Conference was agreed on principle to the accreditation of the same person as the envoy to represent two or more states if no objection was raised by the receiving state. Article 6 of the Convention makes special provision for cases of this type. This appears to be a completely novel development in the field of diplomatic relations. The formula seems to have been evolved primarily to meet the requirements of small nations and newly independent countries who may find it difficult to arrange for diplomatic representation at too many capitals of the world. It is difficult to visualise as to how far such an arrangement would be adopted in the practice of states for it is obvious that unless the interests of two states are identical it would not be possible for them to agree to their being diplomatically represented by the same person. There would also be difficulties with regard

[1] See Article 5 of the International Law Commission's Draft adopted at the Tenth Session. See also Summary Record of Discussions of the International Law Commission, Tenth Session, pp. 100–101.

to internal Foreign Service Rules and Regulations of the countries concerned.

Appointment of the head of mission

Appointment of diplomatic representatives is made by and in the name of the head of the state, though he is usually advised by the Minister for Foreign Affairs and such other officials as may be necessary in accordance with constitutional practice in each country. In most cases, the preliminary selection is made by a board of senior officers of the government who report to the Minister for Foreign Affairs. In the United Kingdom and the Commonwealth countries which accept the Queen of England as the head of state, the appointments are made in the name of Her Britannic Majesty though invariably the actual selection is done by the Minister for Foreign or External Affairs, or the cabinet or council of ministers of each country. In the United States of America, the President as the Chief Executive makes the appointment but all appointments of heads of missions require the concurrence of the Senate by reason of the provisions of Article II, Section 2(2) of the Constitution.

Formerly, when the posts of ambassadors were few and carried the distinction of being the personal representatives of monarchs, senior politicians were usually appointed to such posts, and an ambassadorial rank was often considered to be interchangeable with a place in the cabinet. In recent years in the United Kingdom, there have been but a few of such appointments of senior politicians, and the tendency has been to make these appointments exclusively from the personnel of the regular Foreign Service. Of the few senior politicians appointed in recent years by Britain to diplomatic posts, mention may be made of the Earl of Halifax as Ambassador to Washington from 1941–1944, Viscount Templewood as Ambassador to Madrid from 1940–to 1944, Mr. Duff Cooper as Ambassador to Paris, and Mr. Malcolm Macdonald as High Commissioner to India. In the United States of America, though appointments as heads of missions are being made more and more from the regular service there are still a number of posts which are given to politicians who are members or supporters of the political party in power. In the U.S.S.R., appointments are made apparently on political grounds. In France and other West European countries, the heads of missions are generally appointed from career diplomats. In the newly independent countries the question of selection of ambassadors often creates a problem since they do not have at the time of their inde-

pendence a Career Service from which to appoint the heads of their diplomatic missions. In India, the first appointments as heads of missions, upon her attainment of independence, were from the rank of senior politicians or civil servants who had distinguished themselves in internal administration; but gradually during the last few years a strong Foreign Service has been built up, and most of the appointments save to a few major posts are made from their ranks. Of the notable senior politicians who held the headships of Indian diplomatic missions, mention may be made of Dr. S. Radhakrishnan, Ambassador to Moscow, who is now the President of the Indian Republic, and of Mrs. Vijayalakshmi Pandit, a former President of the U.N. General Assembly, as Ambassador to Moscow and Washington and as High Commissioner to London. In Japan, the posts are generally held by Foreign Service personnel though some persons from public life are appointed at times. In the newly independent countries of Asia and Africa, however, the majority of appointments continue to be filled by persons in public life or senior civilian officials. A number of persons who have held cabinet ranks in Indonesia or in Pakistan have since been appointed to ambassadorial posts. Mr. Ali Sostroamidjojo, at one time Prime Minister of Indonesia, and Dr. Ahmad Soebardjo, a former Foreign Minister of Indonesia, are at present holding diplomatic assignments. Mr. Mohammad Ali, a former Prime Minister of Pakistan, also held several ambassadorial posts.

Agrément

When the appointment of a head of mission has been provisionally decided upon, the name of the envoy, who is sought to be appointed, has to be submitted to the government of the receiving state as soon as possible and their *agrément* received for such appointment. Every state has the right to refuse any particular individual, whether it be on the ground of his personal character or of his previous record. For instance, if he is known to have entertained sentiments of enmity towards the state to which it is proposed to accredit him, that state may well object to receive him. In recent years, states have refused to accept particular individuals as diplomatic envoys on various grounds. It is difficult to cite many specific cases since as a rule such refusals are communicated confidentially, and governments are reluctant to divulge them. After World War II, a certain diplomat who was proposed to be accredited to a particular South East Asian country is believed to have been refused on the ground that the individual concerned had been

there as an officer in the Occupation Army during the War. The fact that a particular individual is known to hold a strong political belief in favour of certain ideologies often constitutes a ground for refusal to accept him. In Satow's *A Guide to Diplomatic Practice*, certain past instances are mentioned,[1] such as the refusal of Emperor Nicholas of Russia to receive Sir Stratford Canning in 1832 on the ostensible ground that the appointment was made without previous notice having been given. Sweden in 1757 refused to accept the British envoy Goodrich because after his appointment he had visited a prince with whom Sweden was at war. In 1847, the King of Hanover declined *agrément* to the appointment of an envoy on the ground of his being a Roman catholic. Again in 1891, China refused to accept the United States Minister, Mr. Blair, as he was reported to have "bitterly abused China in the Senate." In 1885, Italy refused to receive Mr. Keily as the United States Minister without assigning any reason. Austria refused the same person on the ground that he was wedded to a Jewess by civil marriage.

Formerly, there was a good deal of controversy as to whether a country could refuse to accept a person who is appointed by another as its envoy. It was asserted by certain states including Great Britain that it was the right of every sovereign state to make its own selection of its diplomatic agent and no one had a right to object to it. The sequel was that at times differences arose between states over the appointment of a particular individual, and this led either to rupture of diplomatic relations or in their being left in the charge of a chargé d'affaires. For instance, the refusal of Russia in 1832 to accept Sir Stratford Canning, as mentioned above resulted in rupture of diplomatic relations between Britain and Russia. Again, the refusal on the part of Austria to accept Mr. Keily as the United States Minister on grounds considered to be insufficient resulted in the United States legation being left in the hands of a Secretary as chargé d'affaires.

Reasons for refusal of agrément. Another question which also arose was whether a state which refused to accept a particular person as the envoy of another state was bound to give its reasons, and if so, whether the state which had appointed the envoy could question the sufficiency or otherwise of the reasons furnished. It is, however, now beyond controversy that the receiving state has a right to object to the accreditation of any particular individual as envoy of a foreign state.[2]

[1] Satow, op. cit., pp. 135–37

[2] Article 8 of the Pan American Convention of February 20, 1928 provides: "No state

In the course of discussions on the subject in the International Law Commission, the question had arisen whether *agrément* was required in the case of chargés d'affaires who were heads of missions. The Commission was of the view that whilst *agrément* was not necessary in the case of chargé d'affaires *ad interim*, it was required in all other cases.[1] It was debated at length both in the International Law Commission and in the Asian-African Legal Consultative Committee as to whether a state could refuse *agrément* except on reasonable grounds, but no definite recommendation was made on this aspect of the matter. The question as to whether a state should or should not give reasons for its refusal to give *agrément* is left to the discretion of each individual state.[2] Satow mentions that it is a matter of dispute as to whether a refusal must or must not be accompanied by a statement of the grounds on which it is made but if in such a case the reasons are asked for and they are not given, or if it appears to the government whose candidate has been refused that the grounds alleged are inadequate that power may refuse to make an appointment, and prefer to leave its diplomatic representation in the hands of a chargé d'affaires.[3]

The normal practice today is to submit the name of the person, whom it is desired to appoint, before hand to the head of the state to whom he is proposed to be accredited. This is done confidentially and the views of the receiving state are also communicated confidentially. Until the *agrément* is received, the practice now is not to make any announcement of the appointment. In the case of appointment to the headship of a mission newly opened, the communication is usually sent by the Foreign Minister of one state to the Foreign Minister of the other. In the case of existing missions, the request for *agrément* is either sent through the retiring envoy or through the chargé d'affaires *ad interim*.

Appointment of a national of the receiving state

Appointment of a national of the receiving state to a diplomatic post can be but a rare occurrence in the present day. Even in the past, a

may accredit its diplomatic officers to other states without previous agreement with the latter. States may decline to receive an officer from another, or having already accepted him may request his recall without being obliged to state the reasons for such a decision." Article 4 of the Vienna Convention 1961 prescribes that "The sending states must make certain that the *agrément* of the receiving states has been given for the person it proposes to accredit as head of the mission to that state (and that)the receiving state is not obliged to give reasons to the sending state for a refusal of *agrément*."

[1] Yearbook of International Law Commission, 1958, p. 100

[2] Ibid.

[3] Satow, op. cit., p. 135

national of a state was seldom received as the envoy of a foreign state in his own country. In France, it appears to have been for some time settled as a constitutional maxim that French citizens are not admissible as foreign ambassadors or ministers in Paris, and for nearly a hundred years past the British Government has refused to receive British subjects as heads of foreign missions. For instance, in 1878 Mr. M. Hopkins, who in the absence of the Hawaiian envoy desired to be recognised as the chargé d'affaires, was informed that being a British subject he could not be received in that capacity. In Britain, the objection to receiving British subjects as members of a foreign mission was not applied to posts of Secretaries in missions of certain oriental countries in the past. The Chinese, Japanese and Siamese missions had from time to time employed British subjects in that capacity. But even in these cases the government of the United Kingdom made it a condition of their reception that they were not to be regarded as entitled to diplomatic immunities and privileges or to protection afforded to the diplomatic body in the Statute of Queen Anne. In the United States of America, it is a rule of the Department of State that no citizen of the United States shall be received by it as the diplomatic representative of a foreign country, but this rule appears to have been of a flexible character in its application. For instance, in the year 1880 one Mr. Camacho, a native of Venezuela but a naturalised citizen of the United States, was accepted by Washington as the Venezuelan Minister to the United States. On the other hand the State Department refused to recognise General O'Beirne who was accredited as the diplomatic representative of the Transval Republic to the United States. In the 19th century several smaller German states were, however, represented at Vienna by Austrians.[1]

Though the accreditation of a national of the receiving state as the diplomatic envoy or as a diplomatic officer in a foreign mission is neither encouraged nor recognised in many countries, the possibility of such cases arising cannot altogether be ruled out especially in the case of countries which have recently attained their independence. For instance, in 1948 shortly after achieving independence, Pakistan accredited to India as its High Commissioner one Mr. Mohd. Ismail who was an Indian national. This case is, however, not a direct illustration of a national of the receiving state being received as a diplomatic envoy since both India and Pakistan at that time were dominions owing allegiance to the Crown and the Indian and Pakistani citizenship

[1] Satow, op. cit., p. 138.

laws had not been finalised. But since occasions may arise for accreditation of a national of a receiving state, the International Law Commission recommended that such appointments should be made only with the express consent of the receiving state.[1] The requirement of obtaining such consent would apply also to cases of persons who are at the same time nationals of both the receiving and the sending states. It is open to the receiving state to stipulate at the time of giving its consent that the person received shall not be entitled to diplomatic immunities or privileges as had been done in some cases in the past by the Government of the United Kingdom. In fact, in the Pan-American Convention of 1928, it has been provided in Article 8 that states are free in the selection of their diplomatic officers but they may not invest with such functions the nationals of a state in which the mission must function without its consent. The Asian-African Legal Consultative Committee in its Draft Convention on the subject has recommended that even if a state gives such consent, it can withdraw the consent at any time.[2] Article 8 of the Vienna Convention 1961 provides that members of the diplomatic staff of the mission should in principle be of the nationality of the sending state. It is further provided that members of the diplomatic staff may not be appointed from the nationals of the receiving state except with the consent of that state which may be withdrawn at any time. The position is the same with regard to nationals of third states.

Size of diplomatic mission

It had hitherto been recognised that once agreement was reached on the question of opening of a diplomatic mission, it was up to the sending state to determine upon the size of its mission, namely the number of officials and staff that should be posted in its mission having regard to the volume of work and the interest it had to protect in the receiving state. In recent years, however, a real problem has arisen by an inordinate increase in the staff of some of the diplomatic missions due to a variety of factors which create difficulties for the receiving states in some cases. The question had, therefore, arisen as to whether the receiving state could in any way object to having a very large staff in a diplomatic mission having regard to the fact that the hitherto accepted practice had been to leave the discretion as regards the size of a mission to the sending state. The International Law Commission had

[1] See Article 7 of the Draft Articles prepared by the International Law Commission.
[2] See the Report of the Asian-African Legal Consultative Committee, 3rd Session.

discussed the problem in some detail, and it recommended that in the absence of specific agreement as to the size of the mission, the receiving state may refuse to accept a size exceeding what is reasonable and normal having regard to circumstances and conditions in the receiving state and to the needs of a particular mission.[1] The formula recommended by the Commission, it would be seen, is somewhat vague and is capable of resulting in disagreement or disputes. There was no corresponding provision in the Havana Convention on Diplomatic Officers but the Asian-African Legal Consultative Committee in its Draft Articles on the subject has taken the same view as the International Law Commission. The Commission was of the opinion that a provision regarding limitation of the size of the staff of a diplomatic mission did not form part of existing international law because the problem was new. The Commission felt that by adoption of the principle concerning limitation of the staff, the needs of a diplomatic mission were not jeopardised in any way, since in deciding upon the strength of the staff the mission's needs must constitute one of the decisive considerations. The Commission recommended that in a given case, should the receiving state consider the staff of a mission unduly large, it should first endeavour to reach an agreement with the sending state. The majority in the Commission took the view that failing such agreement, the receiving state should be given the right within certain limits to refuse to accept a size exceeding what is reasonable and normal.[2] The Government of the United States was, however, of the view that the limitation should be on the basis of reciprocity.[3] The Vienna Conference of Plenipotentiaries accepted the recommendations regarding the limitation of staff. The Vienna Convention now provides in Article II that in the absence of specific agreement as to the size of the mission, the receiving state may require that the size of a mission be kept within limits considered by it to be reasonable and normal having regard to circumstances and conditions in the receiving state and to the needs of the particular mission. It is further provided that the receiving state may equally within similar bounds and on a non-discriminatory basis refuse to accept officials of a particular category.

Appointment of the staff of the mission

The staff of a mission is broadly divided into two categories, namely

[1] See Article 10 of the International Law Commission's Draft Articles.
[2] See Commentaries on Articles 10 of the Draft.
[3] See the comments of the United States Government on Draft Articles of the International Law Commission. U.N. Doc.A/CN. 4/116.

diplomatic and non-diplomatic. In addition, there are various types of attachés who perform certain specialised functions in the missions. Very often the attachés are equated for the purposes of their rank, precedence and immunities with members of the diplomatic staff.

The diplomatic staff, that is, those who perform or are supposed to perform functions of a political and diplomatic character falls within the categories of Minister or Minister-Counsellor, Counsellor, First Secretary, Second Secretary and Third Secretary. In some cases, diplomatic officers on training who are posted at a mission are designated as 'Attachés.' It is not always that a diplomatic mission will have officers of all these categories, and in fact it is only in important missions that one may expect to find a minister, minister-counsellor or counsellor. The number of secretaries of various grades again would depend upon the size of the mission and the volume of work that may have to be handled. Formerly, when possession of some private means was considered to be essential for the appointment to posts in diplomatic missions, appointments were often made *ad hoc*, and younger sons of noble families sometimes preferred to spend a tenure abroad as an attaché in a diplomatic mission before going in for a political career. The diplomatic posts of those days, confined practically to a few capitals in Europe, such as London, Paris, Vienna, Madrid, St. Petersburg and Istanbul, usually offered enough attractions to young men of the aristocracy. Gradually, however, with the increase in the number of diplomatic missions located in various parts of the world and the changes brought about in the functions of diplomatic officers the need for specialisation was strongly felt which led to the formation of Career Diplomatic Services. Today it has become almost the invariable practice to restrict appointments in the staff of the diplomatic missions to members of a Career Service. Britain, United States, Japan and most of the Western European countries have maintained such Career Services for some time past. The Commonwealth countries and many of the newly independent countries in Asia have also built up their Foreign Services within the past few years. In Britain, recruitment to the diplomatic service is made on the basis of open competition based on a written examination and a personality test. The qualification of possession of private income had been abolished some years ago. The Commonwealth countries like Canada, Australia, India, Pakistan and Ceylon follow more or less the same pattern. The countries of the European continent as well as Asian countries, which follow the continental system, have a more rigid and intensive scheme of training

for their entrants to the Foreign Service. A number of eastern European and South American countries, however, appear to prefer making appointments to the posts in their missions on an *ad hoc* basis and on political grounds. It has been inevitable in the case of the newly independent countries to make appointments to their Career Services initially on the basis of "open market recruitment" or to make appointments on an *ad hoc* basis, but gradually the system of competitive examination is becoming the only basis for recruitment into the service.

Whatever may be the method of appointment of the diplomatic staff of a mission, it is well accepted that the sending state may freely make appointments to these posts. It is entirely at the discretion of that state to choose the personnel of its mission. It would, however, appear to be clearly in the interests of both states that the mission should not have among its members persons whom the receiving state finds unacceptable. Unlike the case of a head of mission, it is not necessary in the case of other members of the mission to submit their names in advance to the government of the receiving state and to obtain their *agrément*. The receiving state can, nevertheless, declare any such person as a "persona non-grata" if it has objection to the appointment of the person concerned. In such a case, the sending state is bound to recall him. A practice has therefore been growing up in recent years of furnishing the *curriculum vitae* of all diplomatic officers to the Foreign Office of the receiving state, so that if the Foreign Office has any objection to receiving any individual officer it can convey its objection confidentially without making a public declaration of "*persona non-grata.*" Since all diplomatic officers are as much "public ministers" as the head of the mission, and since it is they who assist the head in the performance of his diplomatic functions, it is of importance that they should be acceptable to the receiving state without reservation. In the diplomatic practice of today, there are hardly any instances where non-acceptance of a particular individual leads to controversy, as the states generally pay due regard to the objections of the receiving state and do not insist on their choice. However, difficulties are sometimes created by appointment of "under cover" men to diplomatic posts by certain countries, that is, persons, who though appointed to diplomatic posts, do not in reality perform diplomatic functions. Making of such appointments can well be regarded as abuse on the part of a state of its right to make appointments to diplomatic posts. In such cases, the person is bound to be declared *persona non-grata* if the receiving state is able to detect the true functions of the official concerned. If the

practice of furnishing *curriculum vitae* in respect of all officials becomes of universal application, instances of abuse of right in this manner are likely to become less.

Non-diplomatic staff

Non-diplomatic staff of a mission, who are sometimes termed as the subordinate diplomatic staff, consists of various categories of personnel. They range from office superintendents and registrars to stenographers, typists, clerical assistants, cypher clerks, messengers and chauffeurs. It is inevitable that some members of staff of these categories would need to be locally recruited as the expenditure on having home based staff even for such minor posts would be much too heavy. Moreover, every diplomatic mission finds it necessary to have some persons in the staff with a good knowledge of the local language and local conditions, and persons with these qualifications would be more easily found from the nationals of the receiving state. In some countries, it has been found convenient to engage also nationals of third states to such posts for reasons of economy. For instance, the diplomatic missions in the United States often find it cheaper to employ Canadian nationals who are equally well conversant with local language and conditions.

In the case of appointment of subordinate staff also, the right of making the appointment belongs to the sending state. Though a member of the subordinate staff cannot be declared *persona non-grata*, as that term applies only to diplomatic officers, the receiving state may object to the appointment of any particular individual who may be found objectionable to the receiving state. In the case of "home-based" staff, that is, the nationals of the sending state who are appointed by the Foreign Office of the sending state, it would therefore be desirable to follow the practice of furnishing *curriculum vitae* to the Foreign Office of the receiving state to avoid any possible misunderstanding. It may be stated that many states have now formed Career Services to which the home based staff appointed to subordinate posts in their diplomatic missions belong. In Britain and India, most of such personnel belong to the Division "B" of the Foreign Service.

Locally recruited staff. In cases where the subordinate staff is to be locally recruited, it is possible to recruit such personnel from the nationals of the sending state who may be residing there, the nationals of the receiving state, or even nationals of third states. These appointments are made generally on a temporary basis. Although there

are no restrictions in respect of such appointments subject, however, to the right of the receiving state to object to the appointment of any particular individual, it is necessary that the Foreign Office of the receiving state should be notified of all appointments. It is important to bear in mind that nationals of third states, which are not on friendly terms with the receiving state, ought not to be appointed. It should be mentioned that the local laws of many countries require their citizens not to work in the diplomatic missions of foreign states without the express permission of their governments. Although such rules govern the relations only between the citizens and their government, it is best to ensure before making an appointment that the person concerned has obtained the permission of the government of the receiving state.

Attachés

One of the modern trends in diplomatic practice has been the appointment of a number of attachés in the staff of the mission to deal with specialised types of work. Such persons are by agreement between the sending and the receiving states usually given diplomatic rank, or are equated to such rank for the purpose of their precedence and immunities. To this class falls the Military, Air or Naval Attachés, the Commercial Attachés (who are sometimes designated Commercial Counsellor or Secretary according to the seniority of the person) and the Press and Information Attachés.

Service attachés. The posting of Military, Naval or Air Attachés has been in vogue for some time past. The main function of these officials is to liaison between the armed forces of the two countries. These officers do not come under the Foreign Office, though they are subjected to the control of the head of the mission. The rank of an Army Attaché would vary from that of a Major General to that of a Lieutenant Colonel according to the importance of the work and the size of the mission. Having regard to the fact that some states have been found to be carrying on military intelligence through such attachés, the International Law Commission in its Draft Articles has recommended that in the case of Service Attachés, the receiving state may require their names to be submitted before hand for its approval.[1] This position was accepted by the Vienna Conference of Plenipotentiaries and incorporated in the Convention.

[1] See Article 6 of the International Law Commission's Draft Articles. Article 7 of the Vienna Convention 1961.

Commercial attachés. The Commercial Counsellors, Secretaries or Attachés, howsoever they may be designated, play an important role in the relations between the sending and the receiving states. They not only help in developing trade and commerce between the two countries, but they also assist in the purchasing activities of their governments or state trading agencies. The nationals of their home state who visit the country for purposes of trade often receive help from these officials in establishing proper contacts for their business.

The Press or Information Attaché is mainly concerned in keeping into touch with the local Press or information services and to acquaint them with the news from his home state. The information staff also help in interpreting and in furnishing the true background of any news of importance from home. When an important person comes on a visit, the Press Attaché helps in preparing the right atmosphere for such visit. Indeed, in modern times the Press Attaché has gradually become an important limb in the set up of a diplomatic mission.

Offices of the diplomatic mission

Since a diplomatic agent is accredited to the head of the receiving state or to the Foreign Minister of the government of that state as in the case of a charge d'affaires, it is to be expected that the offices of the mission should be located in the place which is the seat of the government. Until recently this had invariably been the practice, but during the past few years instances have occurred where certain countries had expressed the desire to locate their missions in a city which is not the capital of the receiving state. Again, requests are known to have been made to receiving states by sending states for permission to have more than one office for their missions, the proposal being to locate the principal office of the mission in the capital and sub-offices in certain other cities. This undoubtedly is due to the fact that the functions of a diplomatic mission in the present day are not confined to the conventional type of diplomatic activity. A considerable portion of the work of a mission is taken up with the promotion of trade and commerce between the two countries as also in keeping the public of the receiving state informed of the events, policies and practices of the home state. Consequently, smaller countries may well desire to locate the offices of the mission in a place which is more important from the point of view of trade and commerce than the capital of the receiving state. For instance, in the United States, New York would appear to be more suitable from this view point than Washington. Similarly, Amsterdam

in preference to The Hague, Sydney in preference to Canberra, and Calcutta or Bombay in preference to New Delhi would be the obvious choice from the commercial point of view. The small missions, which have little activity, may even prefer a health resort for the offices of the mission. The larger countries, on the other hand, which have to undertake a very wide range of activities in their diplomatic missions, would certainly prefer to have the principal office of the mission in the capital with a number of subordinate offices in various other important cities. Such a mission may like to have commercial sections of the embassy located in three or four different places which are considered to be important from the point of view of trade and commerce together possibly with a number of information posts. It is to be observed that if a diplomatic mission were allowed to have its offices away from the seat of the government or if a mission could be permitted to have more than one office in the country, it is likely to create quite a problem for the receiving state. It would be appreciated that the government of the receiving state by allowing a diplomatic mission to be established in its territory is deemed to assure a certain degree of protection to the mission as well as to its personnel. It would be difficult for the receiving state to ensure such protection, or to accord the immunities and privileges which are generally given to the diplomatic representatives if the offices of the mission were scattered all over the country. Again, there are many matters on which the government of the receiving state has to deal with the diplomatic corps as a body, and the location of the offices of a mission away from the capital would prove to be inconvenient both from the point of view of the government of the receiving state and of the diplomatic body as a whole. There is also one other factor which it is not possible to ignore. It is fairly well known that in recent years, some missions have been found to indulge in intelligence and even subversive activities. If a mission has offices at different places it might be difficult to detect such activities, which are clearly outside the scope of diplomatic functions. It is true that such activities are generally confined to only a few missions, but having regard to the fact that discrimination cannot be practised between various diplomatic missions in a country, it would be difficult to object to a particular mission having its offices away from the seat of the government, or to refuse permission to its having more than one office located in different parts of the country, if this was allowed in the case of other missions. The general policy of the states is clearly against allowing such practices. For example, the Netherlands Government had objected

to transfer of parts of diplomatic missions to Amsterdam or Rotterdam away from The Hague. In India, the practice has been not to allow the opening of offices of diplomatic missions in any place outside the capital. The International Law Commission after considering this matter has recommended that the sending state may not, without the consent of the receiving state, establish offices in towns other than those in which the mission itself is established.[1] The Asian-African Legal Consultative Committee in its draft on diplomatic immunities has also taken the same view. The Vienna Convention 1961 in Article 12 provides that the sending state may not, without the prior express consent of the receiving state, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Diplomatic agent proceeding to his post

A diplomatic agent whether he be an ambassador or a minister is given a commission of appointment signed by and in the name of head of state which requests all those whom it may concern to receive and acknowledge the new ambassador or minister, and to freely communicate with him upon all matters which may appertain to the objects of his mission. He is also given his credentials, or Letters of Credence, addressed to the head of the state to which he is appointed. If he is a chargé d'affaires, a letter accrediting him in that capacity is given addressed to the Minister for Foreign Affairs of the state. In case of High Commissioners, who are sent by one Commonwealth country to another, they are generally given a Letter of Introduction, which has the same purpose as a Letter of Credence. Formerly, printed instructions for the guidance of their conduct were furnished to British ambassadors and ministers on taking up their appointments, but these were mainly of a formal nature relating to matters which have become stereotyped by usage and the custom no longer exists.

A diplomatic agent, before he commences his journey to take up his post, has to make sure that the probable date of his intended arrival in the receiving state is notified to the Ministry of Foreign Affairs of that state, in order that when he reaches the frontier he may at once enter upon the enjoyment of the immunities and privileges attaching to his high office, and also receive treatment befitting his position. It is also desirable that the countries through which he may pass are notified of his programme, so that he may receive the treatment which third states

[1] See International Law Commission's Draft Articles, Article 11.

are expected under international law and custom to accord to the diplomatic representatives of other countries. In modern times, however, when most of the diplomatic agents proceed to their posts by air, the question of their treatment in third states is no longer of much importance.

A diplomatic agent is given a passport in which his official status is fully detailed. In most countries, it is the practice to give diplomatic passports to the heads of missions and other members of the diplomatic service, but in Britain the practice is to issue ordinary passports to such persons whilst indicating their full status in the passport itself.

In the past, when ambassadors were few, it was the custom for them to make a formal state entry in the capital of the country where they were posted but this practice is no longer observed. An ambassador upon his arrival is usually received by the Chief of Protocol, and in Britain by the Vice-Marshal of the Diplomatic Corps in his capacity as the head of the protocol department of the Foreign Office. The Vienna Convention 1961 lays down in Article 18 that the procedure to be observed in each state for the reception of heads of missions shall be uniform in respect of each class.

It is the accepted practice that on reaching the capital, the ambassador or the minister designate should at once formally notify his arrival to the Minister of Foreign Affairs, and to ask when it will be convenient to the latter to receive him. Since the head of a mission cannot commence functioning until he has presented his credentials, the ambassador or the minister-designate should make an endeavour to present his credentials as early as possible. In some countries, it is the practice that credentials cannot be presented during the period of court mourning, and in such cases it is always desirable that the ambassador designate should not arrive at his post until the period of mourning is over. An ambassador-designate who is unable to present his credentials finds himself in a very awkward situation since he cannot be publicly received either by the government of the receiving state or by his colleagues in the diplomatic corps. As the ambassador-designate, he would probably perform the duties of the head of the mission inside his office whilst on all public occasions and in communications with the governments of the receiving states, it will be his counsellor or first secretary who will have to deal in his capacity as chargé d'affaires. For example, an ambassador-designate in Buenos Aires, who arrived during the court mourning following upon the death of Madame Peron, found that he could not present his credentials for months which was prescribed as the period of mourning. It was difficult for him to return to

his country which was thousands of miles away, and the problem was ultimately solved by including him in his country's delegation to the United Nations as a delegate. There is also a tendency in some countries to put off presentation of credentials by heads of missions in order to allow precedence to the ambassador of a friendly state who is shortly expected to arrive at the capital. In order to get over difficulties of this type, it was suggested that the head of a mission should be considered as having taken up his functions in the receiving state upon notification of his arrival and presentation of a true copy of his credentials to the Ministry of Foreign Affairs. This proposal, however, was not found acceptable to a number of governments who favoured the retention of the old practice of the commencement of functions of a diplomatic agent dating from the presentation of his credentials. It is argued that there is good reason for adhering to this practice, for the transmittal of letters of credence signed by the head of the sending state to the head of the receiving state is an act of some importance, and it is right that its importance should be reflected in the practice. The International Law Commission had recommended in Article 12 of its Draft that the commencement of the functions of the head of the mission would either date from the notification or presentation of a true copy of his credentials to the Ministry of Foreign Affairs of the receiving state or from the date of his presentation of his letters of credence according to the practice prevailing in the receiving state. The Vienna Convention 1961 has adopted the recommendation of the Commission. This question was also discussed in the Asian-African Legal Consultative Committee, which made a similar recommendation [1] as the International Law Commission. The delegate of the United Arab Republic in that Committee, however, desired that the practice should be developed among the Asian-African countries for the commencement of the functions of a head of the mission to date from the presentation of a copy of the letter of credence to the Ministry of Foreign Affairs of the receiving state. Though it would be desirable to have uniformity in practice, it is hardly likely that this can be achieved. The ambassador-designate would therefore have to find out in each case the practice prevalent in the receiving state and to act in accordance with that practice.

Presentation of Credentials and Calls

The letters of credence or credentials as they are generally called are signed by the head of the sending state and addressed to the head of the

[1] See the Report of the A.A. L.C.C., Third Session, p. 44.

receiving state. In the past, it was customary to use highly ornate phraseology in the letters of credence especially when an ambassador was accredited by one sovereign to another. This, however, in modern times has given way to a more simple style of address. The actual phraseology to be used may differ from one country to another according to its traditions and largely depending on whether the sending state is a monarchy or a republic. The credentials in all cases must, however, contain a clause asking that credit may be given to all that the diplomatic agent may say in the name of his sovereign or the government and this constitutes the essential part of a letter of credence. The credentials are presented to the head of the receiving state at an audience which is arranged through the Ministry for Foreign Affairs. It is customary in almost all countries for the diplomatic agent to make a formal speech on such an occasion. Such a speech should be of a general character, and a copy ought to be furnished in advance to the Ministry of Foreign Affairs so that any changes that may be indicated by the government of the receiving state may be carried out in the speech to ensure that the envoy does not give any offence to the government of the receiving state at the outset of his mission. The speech may be made in his own national language. Formerly, the speech could also be given in French which was considered to be the language of diplomacy. However, since World War II English has gradually replaced French in diplomatic intercourse. Sir Earnest Satow in his *A Guide to Diplomatic Practice* suggests that the speech might, for instance, begin by expressing the agent's satisfaction at having been appointed to represent his country; convey assurances of friendship on the part of his own sovereign, and his own wishes for the prosperity and welfare of the sovereign or President he is addressing, state that he will do all in his power to strengthen the friendly relations existing between the two countries; and bespeak the friendly cooperation of the sovereign's or President's ministers in his endeavour to fulfil the purpose of his mission.[1]

The actual ceremony for presentation of credentials varies from capital to capital. In certain states, there is a marked distinction between the reception of an ambassador and other heads of mission. This, however, is gradually disappearing having regard to the fact that since the World War II, accreditation in the vast majority of cases has been on the level of ambassadors, and all distinction between diplomatic agents of various classes except in the matter of precedence has practically disap-

[1] Satow, op. cit., p. 145.

peared. It is customary in most countries to have some formal ceremony for the presentation of credentials. In the United Kingdom, it is the practice to bring the ambassador-designate to the Palace, which is the official residence of the Queen, by court or state officials while envoys use their own carriages and arrive at the palace. In the majority of cases, however, both ambassadors and ministers are received in the same manner. On arrival at the official residence of the head of state, the ambassador or the minister-designate is usually received by the chief of protocol or a Foreign Office or court official, and he is introduced to the sovereign or the President, as the case may be, by the Minister for Foreign Affairs or the senior official of the Foreign Office. After his speech and presentation of credentials, it is customary for the ambassador to introduce members of the diplomatic staff of his mission collectively to the head of the state.

Calls. After the head of a mission presents his letters of credence, he is supposed to commence his functions officially, unless by the practice of the receiving state his functions commence earlier, that is, on the presentation of a copy of his credentials to the Ministry of Foreign Affairs. However, it is after the presentation of the letters of credence that he is expected to pay calls on his diplomatic colleagues and receive calls from them. It is customary for an ambassador after presentation of his credentials to make official calls on the other ambassadors in the capital. These calls are returned by his colleagues. An ambassador, however, receives the first call from the envoys extraordinary and ministers, whose call he later returns. If the ambassador is married and he is accompanied by his wife, the calls must be paid to and received from the wives of the ambassadors and ministers. It is also customary in some capitals for an ambassador to hold a reception to introduce himself to the other members of the diplomatic corps and the members of the government. Sometimes the chargé d'affaires *ad interim*, who had headed the mission prior to the arrival of the ambassador, gives a reception in order to introduce him. In Britain, however, it is not customary to hold such a reception. The ambassador may pay calls to the officials of the Ministry of Foreign Affairs but generally such calls are not returned. Although an ambassador-designate is not supposed to pay calls on his diplomatic colleagues prior to the presentation of his credentials, there is no harm in paying private visits especially when the ambassador-designate has already been acquainted with some of them in his previous posts.

The diplomatic corps and their precedence

The diplomatic corps comprises of all heads of missions and their diplomatic staff including counsellors, secretaries and attachés. In almost all capitals a list of persons who are included in the diplomatic body is compiled by the Foreign Office, and published from time to time. This is generally done from the information supplied to the Foreign Office by the diplomatic missions themselves. The entry of a person's name in the diplomatic list is often accepted as the conclusive evidence of a person's having that status, and for this reason the Foreign Offices may make enquiries regarding the functions to be performed by the person concerned before entering his name in the diplomatic list. Previously, the governments were somewhat strict in giving diplomatic status to persons who did not perform normal diplomatic functions in a mission, but at present the tendency seems to be to give this status to all senior officers in a mission.

The question of precedence of the heads of missions, which in former times used to give rise to a good deal of controversy, does not present any problem now. Prior to the Congress of Vienna 1815, the precedence among the heads of missions was fixed *ad hoc* by the court of the receiving state having regard to various considerations. In Catholic countries, the representative of the Pope was given a higher order of precedence. Again, amongst countries of an alliance, the diplomatic representatives of each other were often given preference and precedence over the envoys of other countries, but since the Congress of Vienna 1815, which was followed by the Congress of Aix-la-Chapelle 1818, the rule of precedence has been firmly established which holds good even today. According to the regulations adopted at these congresses, the ambassadors take precedence over the envoys extraordinary and ministers plenipotentiary, and the envoys and ministers take precedence over chargés d'affaires. Within their own class the precedence dates from the time of the presentation of the credentials. It has, however, been suggested that in countries where an envoy is deemed to commence his functions from the date of presentation of a copy of his credentials to the Ministry of Foreign Affairs, the precedence should commence from that date. Article 16 of the Vienna Convention 1961 provides that heads of missions should take precedence in their respective classes in the order of the date and time of taking up their functions, which may either be the date of presentation of credentials or the date of presentation of a true copy of their letters of credence in accordance with the practice of the receiving state. This

was expressly made subject to the practice of the receiving state in the matter of precedence of the representative of the Holy See. The High Commissioners of Commonwealth countries rank as ambassadors for purposes of precedence. An envoy extraordinary or minister plenipotentiary who upon the upgrading of his mission becomes the ambassador of his country takes precedence as an ambassador only from the date of presentation of his credentials as ambassador. But presentation of any fresh credentials on the part of an ambassador or minister due to the change in the form of his government or the death of his monarch does not affect his seniority, since his precedence would date from his original presentation of his letter of credence.

The members of the diplomatic corps other than the heads of missions take precedence after the heads of missions in the order of Minister-Counsellors, Counsellors, First Secretaries, Second Secretaries and Third Secretaries. Attachés dealing with specialised work are ranked along with these categories of diplomatic officers according to their seniority and rank as determined by the sending state. Diplomatic officers take precedence within their own class on the basis of the notification of their date of arrival in the receiving state. In every capital, the Foreign Office or the Palace Officials usually in consultation with the doyen of the diplomatic corps fix the precedence of the heads of diplomatic missions and their staff *vis-à-vis* the ministers and senior officials of the government of the receiving state. Formerly, the practice followed in many countries had been to give higher precedence to the ambassadors of foreign countries over the ministers of the government, but having regard to the gradual decline in the prestige of ambassadorial rank in recent years, the ministers of the government of the receiving state are now given precedence over the ambassadors.

Doyen of the diplomatic corps. The senior-most ambassador from the point of view of precedence i.e. the ambassador who has been longest in the capital is called the doyen of the diplomatic corps. It may be mentioned that in some Commonwealth countries, the High Commissioners who for all other purposes rank as ambassadors, cannot become doyen of the diplomatic corps. The doyen of the diplomatic corps is supposed to be the head of the diplomatic body, and may sometimes be regarded as the mouthpiece of his colleagues on public occasions. He is also the defender of the privileges and immunities of the diplomatic body from injuries or encroachment on the part of the government to which they are accredited and protests on behalf of the

diplomatic corps to any action on the part of the government of the receiving state are often made by the doyen. Nowadays, however, the functions of a doyen are becoming more and more limited in character. He is in no case entitled to write or speak on behalf of his colleagues without having previously consulted them and obtained their approval of the step which is proposed to be taken and of the wording of any written or spoken representation on their behalf. In the present day, no head of a mission will take part with his colleagues in a joint representation to the government of the country without special authorisation from his home government or accept summons from the doyen to attend a meeting for the discussions of international matters unless he has received instructions to take such joint action.

Persona Grata

As observed earlier, it is always open to the government of the receiving state to declare a diplomat *persona non-grata* even after his reception. Upon such declaration, the diplomat ceases to function in that state, and he must leave the country. If he refuses to do so, the government of the receiving state may avail of the means at its disposal to enforce its decision. A declaration of *persona non-grata* is made when the diplomatic agent becomes no longer acceptable to the government of the receiving state due to some action of his which has given offence to the government. In recent years, declaration of *persona non-grata* has sometimes been made in cases where the person concerned has indulged in activities which do not fall within the legitimate functions of a diplomatic agent. Governments are known to have taken action in cases where a diplomat had been found taking part in intelligence or espionage activities, or of harbouring foreign agents and allowing them to carry on their activities from the premises of the diplomatic mission, or of wrongfully giving shelter to fugitives from justice. There have, however, been cases where governments have clearly abused the right of declaring a diplomat as *persona non-grata* which a receiving state possesses. Instances have occurred when as a weapon of the cold war, a state has declared a diplomatic agent as *persona non-grata* merely on the ground that one of its own agents has been so declared by the other state.

It is not quite clear as to whether a state was bound to give reasons for declaring a diplomat *persona non-grata*, but it seems to have been invariably the practice for the aggrieved state to require such reasons, and if such reasons are not given or not found satisfactory to resort to

reciprocal action including cessation of diplomatic relations. The position has, however, been now settled in the Vienna Convention 1961, wherein it is provided that the receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is *persona non-grata* or that any other member of the staff of the mission is not acceptable; in any such case, it is provided that the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non-grata* or not acceptable before arriving in the territory of the receiving state. It is further provided that if the sending state refuses or fails within a reasonable period to carry out its obligations, the receiving state may refuse to recognise the person concerned as a member of the mission.[1]

[1] Article 9 of the Vienna Convention 1961.

CHAPTER IV

FUNCTIONS OF A DIPLOMATIC AGENT

From the traditional point of view, the functions of an envoy or diplomatic agent can be said to consist in representing his home state by acting as the mouthpiece of his government and as the official channel of communication between the governments of the sending and receiving states. His functions would also include reporting on the conditions and developments in the state where he is appointed to reside as well as protecting the interests of his home state and its nationals in the receiving state. The Vienna Convention on Diplomatic Relations [1] in laying down the functions of a diplomatic mission has followed these broad heads whilst indicating certain other functions, such as, promoting friendly relations between the sending state and the receiving state, and developing their economic, cultural and scientific relations, which in consequence of the establishment of the United Nations and of present day developments have steadily acquired importance. Reporting on conditions and developments in the receiving state, though originally meant to refer only to political matters, would appear to include in the modern context cultural, social and economic activities of the country, and generally all aspects of life which may be of interest to the sending state. Mr. Lansing, a former Secretary of State of the United States of America, once observed:

> Formerly diplomacy was confined almost exclusively to political and legal subjects, and the training of the members of the Diplomatic Service was devoted

[1] Article 3(1) of the Vienna Convention on Diplomatic Relations, 1961, is in the following terms: "The functions of a Diplomatic Mission consist inter alia in

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

(b) Protecting in the receiving State the interests of the sending State and of its nationals within the limits permitted by international law;

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

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

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

to that branch of international intercourse. Today our embassies and legations are dealing more and more with commercial, financial and industrial questions.

These observations are even truer today than at the time they were made. A diplomatic representative does also perform functions which were traditionally regarded as falling within the scope of consular functions.[1] In fact, in the matter of protection of the nationals of the home state, the diplomatic and consular activities overlap to a large extent. There is at present some divergence in state practice as to how far commercial representation may be said to fall within the functions of a diplomatic envoy. Whilst it is clear that protection of a country's trade relations would fall within the legitimate activities of a diplomatic mission, it is doubtful whether commercial dealings with the citizens of the receiving state even on behalf of the government could be regarded as included within the functions of a mission. By and large, the practice of the states has been to treat the commercial counsellors or attachès, who are the advisers to the head of the mission on commercial matters, as part of the personnel of the mission, but trade representatives, who actively engage in commercial transactions, have not been so regarded. Their status, immunities and privileges are usually determined by means of bilateral agreements.

Representation and negotiation

The first and foremost function of an envoy is to represent the sending state in the receiving state and to act as the channel of official relations between the governments of the two states. The primary purpose of maintenance of diplomatic relations being to facilitate official communication between the states, the diplomatic agent is frequently called upon to perform the task of negotiating with and communicating his government's view point on various matters to the government of the state to which he is accredited. The diplomatic representative is the official agent and the mouthpiece of his government. The credentials which he is given on his appointment, and which he carries with him to his post makes this position clear by conveying a request in the name of the head of the sending state to the head of the receiving state to give credence to him and to all that he may say in the name of his sovereign or his government. Communications between governments are generally of a varied type and on a variety of subjects.

[1] Article 3(2) of the Vienna Convention 1961 provides: "Nothing in the present Convention shall be construed as preventing the performance of consular functions by a Diplomatic Mission."

They range from negotiations relating to conclusion of a treaty between the states concerned to making of representations on behalf of their nationals as well as soliciting support for the respective policies and view points of the governments on world affairs. In the international community of today with the growing interdependence of nations, the need for mutual consultations among governments have proved to be of much greater importance than it was in the past, and in this sphere the diplomatic agent plays an important role.

Negotiations with the government of the receiving state. Whenever a government wishes to enter into a treaty with another, whether it be a treaty of friendship and commerce, or it be a treaty of extradition, or an air agreement relating to flights of its aircrafts, the formal negotiations are often preceded by preliminary soundings and exploratory talks which have invariably to be conducted by the diplomatic agent. The actual negotiations for a treaty may sometimes be entrusted to a special mission, especially if the subject matter is of a technical nature. It is, however, obvious to those who have anything to do with the international affairs of a state that long before the negotiations start, much careful preparation and planning on the part of the diplomatic envoy is necessary. From the time he receives intimation from his home government regarding their interest in the conclusion of a particular treaty, the work of the diplomatic agent begins. He is to proceed cautiously and tactfully, and in the beginning, informally perhaps by throwing feelers to see whether the government of the receiving state are at all interested in principle to conclusion of such a treaty. The need for caution and tact is all the more when the proposed treaty is of a political character, such as a treaty of friendship or mutual aid. If the initial response is favourable, he may then, with the concurrence of his government, take up the matter officially with the Director of Division of the Foreign Office who is charged with the conduct of relations with his country and make a tentative proposal. There are times when the initial proposal or the informal soundings do not meet with sufficient response; again there are occasions when persistent attempts by the diplomatic agent are necessary before his host government may be persuaded to negotiate on the matter or to receive a delegation for the purposes of negotiations. All these activities, whether one is successful on a particular occasion or not, fall within a diplomat's daily routine.

In cases where a government wishes to obtain some privileges or advantages for its nationals in the receiving state, whether it be in

respect of their commercial interests or otherwise, the approach is generally made through the diplomatic envoy. Similarly, it is the diplomatic envoy who has to negotiate with the government of the receiving state in all matters where his government wishes to represent or prefer a claim on behalf of one of its nationals on account of his having suffered harm or injury.

Lodging of protests. There are occasions when a government being dissatisfied with the attitude or action of another involving international relations may wish to deliver a protest. This also is done through the diplomatic agent. It may be stated that protests are even lodged by one government on another with whom it may be on very friendly terms. Lodging of protest is a method by which a government shows its disapproval of the particular action on the part of the other government or its agents.

Interpretation of viewpoints and soliciting support. It is difficult to enumerate the various matters on which a diplomat may have to negotiate since they cover almost the entire gamut of human activities. Perhaps the more important task of a diplomatic agent today lies in explaining the point of view and the policies of his government and in soliciting support of the receiving state on the problems with which his government may be concerned. Ambassador Grew of the United States whilst explaining the duties of an ambassador once said that he must be, "first and foremost an interpreter, and his function of interpreting acts both ways. First of all, he tries to understand the country which he serves, its conditions, its mentality, its actions and its underlying motives, and to explain these things clearly to his own government. And then contrariwise, he seeks means of making known to the government and the people of the country to which he is accredited the purposes and hopes and desires of his native land." [1] This certainly summarises accurately the position of an envoy. A recent trend, which has been marked since World War II, is that governments often seek support for their points of view from other nations in respect of their claims or international disputes in which they may be involved, the reason being that in the international community of today world opinion has become a powerful factor which cannot be ignored even by the most powerful of nations. Thus, states often find it necessary to explain their case on territorial claims, border disputes, and other issues which may give rise

[1] Grew, Ten Years in Japan, p. 262.

to controversy with another nation, and seek support for their case. It falls on the diplomatic agents to perform this task.

Consultations on world affairs. The developments in world affairs from time to time call for a good deal of diplomatic activity. Some states, especially those which may be directly involved in a particular situation, would have a definite stand to take, and they would naturally try to seek support for their view point from other states. States which are not directly concerned usually have recourse to mutual consultations with a view to formulating their attitude on the particular issue. The question of unification of Germany, the Indo-China question, recognition of the Peoples Government of China, the position of Israel, the British and French actions against Egypt, the Chinese position in Tibet, the Russian intervention in Hungary, the intervention in Lebanon, recognition of the new government in Iraq following upon the assassination of the King, and the situation in the Congo are some of the matters which have resulted in a good deal of diplomatic activity in recent years in practically all the major capitals of the world. It is true that such mutual consultations were not unknown in the past, since in the matter of recognition of states and governments, the governments of the U.S.A. and Great Britain often acted in concert as they did in the case of recognition of the Latin American Republics and the new states in Europe which emerged after the First World War. Similarly, European powers often acted together in respect of recognition of new regimes in Europe. The fact, however, remains that whilst such consultations were confined to a few nations in the past, it has become practically universal in the present day. The questions which come up for discussion before the United Nations also result in consultations among the various Foreign Offices, and a good deal of canvassing takes place for votes. In all such matters, the diplomatic representatives have to take a leading role. The question of disarmament, the banning of nuclear tests, the recent conference of plenipotentiaries sponsored by the United Nations to fix the breadth of territorial waters and the summit conferences between the heads of Big Powers have given the diplomats of the world much scope for activity.

Consultations between groups of states. Mutual consultations or approaches for support of their views on major political questions take place practically between all the states of the world. There are, however, certain groups of states having closer contacts *inter se*, who maintain

constant touch with each other on all international questions. Examples of this type are the British Commonwealth of Nations, the countries of the North Atlantic Treaty Organisation, the member states of the South East Asia Treaty Organisation, the former Baghdad Pact countries now known as the Central Treaty Organisation, the countries of the Arab League, the Asian-African group, the countries belonging to the Warsaw Pact and the Pan American Union. As in the case of all official relations between states, here again the diplomatic envoy has to take his due share of responsibility.

Visits of heads of states or governments. The diplomatic representative has also to undertake a number of other activities, such as arranging for exchange of visits of heads of states or the Prime Ministers of the two states. In modern times, the exchange of visits of state dignitaries has been an important development in the relations between nations as it has been found that such visits leading to informal consultations between the leaders of the governments prove fruitful in betterment of relations and easing world tensions. The proposals for such visits and invitations are usually routed through the diplomatic channels, and in many a case a good deal of preparation is necessary before such visits can be finally fixed.

Procedure for communication with the government of the receiving state. There is no hard and fast rule regarding the procedure to be followed in communications between governments. The days when an ambassador could deliver personal messages from his sovereign to the head of the receiving state at an audience specially granted for the purpose already seem so remote that no account of the same need be taken in the matter of normal diplomatic intercourse. The invariable rule today is to carry on relations through the Foreign Office. In some countries there has been a tendency on the part of envoys to deal directly with other government departments in respect of matters concerning them, but this practice should be discouraged since conduct of international relations in respect of all matters falls within the particular province of the Foreign Office by international custom and practice. When an ambassador or an envoy has a message to deliver or to make a protest, the normal practice for him is to seek an appointment with the appropriate official of the Foreign Office and to deliver his message or note of protest. An *aide mémoire* or memorandum is often presented when a particular point of view is to be explained or when any action is requested. In vast majority of cases, however, points are put forward or information

sought informally in the course of an interview. The official of the Foreign Office whom he had seen would perhaps make a note for his record and send it up to his superiors for information. The level at which the approach should be made would depend largely on the importance of the matter in issue. Normally the head of a mission should seek an interview with the permanent head of the Foreign Office, or where the permanent head is too busy, he may see the Director of the Division in the Foreign Office who may be dealing with the matter. In rare cases, however, he may need to see the Foreign Minister himself. Since it is not possible for the head of the mission to handle all matters himself, part of his functions in dealing with the Foreign Office are generally entrusted to other diplomatic officers of the mission. The diplomatic officers, whether they be counsellors or secretaries should seek interviews, as far as possible, with the officials in the Foreign Office of their own status, who no doubt would place the matter before their superiors.

In cases where the government of the receiving state wishes to make use of the diplomatic agent of the sending state for communication of its views to his government or for delivering a note of protest, the normal practice is to summon the envoy to the Foreign Office. If the summons are received from the Minister of Foreign Affairs, or the permanent head, or a director, who has the rank of an ambassador, the head of the mission should try to go to the Foreign Office himself. In all other cases he will be well within his rights to send one of his officers.

One may legitimately ask the question as to what exactly an envoy should do when he is sent for at the Foreign Office and is handed a note of protest over some action which his government has taken, or when he is told of the displeasure of the government of the receiving state over a particular event or in cases when the Foreign Office of the receiving state explains its points of view over certain matters of international importance and solicits the support of his home government. In cases, when the envoy calls at the Foreign Office at his own request to deliver some message, he is already briefed by his government on the matter. He receives detailed instructions from his government though there are rare occasions when he himself at his own initiative has to make a representation at the Foreign Office. With the facilities of communication, it is not difficult for him to obtain full instructions from his government in the course of a few hours, and it is only in cases of riots or sudden civil commotion when the lives or property of the nationals of his home state are in danger, that he may have to take an initiative without waiting for instructions from his

government. But on the occasions when he is sent for by the Foreign Office of the receiving state, he will not normally be in possession of the instructions of his government. Since a diplomat's task is to promote friendly relations between the two countries, it would be desirable for him to refrain from saying anything which might offend his host government, but at the same time he has to uphold the honour and dignity of his own government and justify their actions. It is often difficult to strike a balance between the two conflicting duties and a diplomat will do well in saying nothing if he is not sufficiently acquainted with the facts of the situation. It would be better for him to make another call at the Foreign Office when the instructions of his government are received and inform them of the views of his own government.

Reporting on conditions and developments in the receiving state

Another important branch of an envoy's duties relates to reporting to his own government on the conditions and developments in the country where he is appointed to reside. Preparation of periodic reports is therefore a regular feature of the work of diplomatic missions. In former times, diplomats were often considered to be official spies, and for this reason envoys resident in the Muslim countries of West Asia were looked upon with much suspicion.[1] Even in Europe, diplomatic representatives were regarded as honourable spies as they supplied the information necessary to guide their respective governments in shaping their foreign policies. It was for this reason that King Henry VII of England was disinclined to have an ambassador of any foreign king within his realm though he himself occasionally sent ambassadors to transact state business with foreign rulers. In modern times, however, an envoy's right to report to his home government on the conditions in the state to which he is accredited is not only regarded as legitimate but is also considered to be in the mutual interest of nations. With the growing contacts between nations practically in every sphere of life consequent upon the increased facilities of communication, the welfare of one state has become closely linked with the welfare of others. Thus the political instability or upheaval in one country is likely to create problems for other states such as from mass movement of population and influx of refugees. For instance, the policies pursued by Nazi-Germany in pre-War years resulted in the United States of America, Britain, France, and the Netherlands being inundated with Jewish

[1] Khadduri, War and Peace in the Law of Islam.

refugees. The persecutions carried out in some of the countries of Eastern Europe against political opponents of the regimes in power, and particularly the Soviet intervention in Hungary in 1956, resulted in large scale migrations to Western Europe. Similarly, the Chinese action in Tibet created the problem of refugees for the neighbouring countries. The creation of the Jewish state of Israel confronted the Arab states in West Asia with the task of rehabilitating the Arab refugees who had to migrate from Palestine. To take other examples, the armaments race between the Great Powers, creation of military bases or existence of military pacts concern practically all the states in the world because these necessarily increase world tension with the possibility of breach in international peace. For instance, the location of American bases in one state may well be the concern of its neighbour, since the risk or even threats of Soviet action against such bases automatically affect the interests of the neighbouring countries in more ways than one, particularly having regard to the destructive force of modern weapons of war. Denial of human rights by a state or conditions of slavery in which a state may choose to keep its people may also affect other states since such a situation may sow the seeds of a revolution whose repercussions may not be confined within the boundary of the particular state. It is thus clear that matters which are normally regarded as the internal affairs of a state are capable of having adverse effects on the interests of other states. It is therefore important that a state should be kept abreast of the conditions, trends and developments in other states and particularly its neighbours. The legitimate way by which a state can keep itself informed of such matters is through the reports of its diplomatic agents. A diplomat has a heavy responsibility, since by interpreting correctly the political conditions in the country where he is resident, or by predicting a likely development well in advance, he may be able to help in averting a crucial situation which might otherwise lead to a threat or breach of peace. A well experienced diplomat will in many cases be in a position to make a correct forecast regarding possible events by his observation of the situation which may be brewing. If he keeps his government informed of the true picture in the political sphere and the government acts on his information, many a calamity might be avoided. Thus, for example, if from the political report of its envoy a state is informed in advance that its neighbour was negotiating with another state for a military alliance, it could make its representations before the pact is finalised, and it is possible that on many an occasion such representation would carry due weight. As

between the power blocs, such information would be extremely useful in preventing a country from falling into the other bloc. The information that a government intended to call in foreign help in an impending civil war would equally be useful to a neighbouring country by helping it to be prepared against any possible conflagration that such intervention might lead to. Advance information regarding the political instability of a regime or the possibility of *coups d'état* can help a country to keep itself prepared for reception of refugees so that by a sudden influx the internal economy of the state is not upset.

Apart from these larger issues which have an impact on the world community as a whole, a state is interested in keeping itself informed about the political situation in other countries directly from the point of view of its own interest. It is of a vital concern to a state to find out the attitude of the other countries and their governments towards it. This is particularly so in the case of countries which have come to power as a result of civil war or by coup d'etat. It is of particular interest to states to know the true character and intentions of such regimes, especially on the question as to whether they can be relied upon to honour their international commitments in the future. The true character of such regimes may not always be apparent, and a government must make sure before dealing with them, particularly on matters which may have long term effect. Since governments are largely dependent on their envoys for giving them the correct reports of facts and situations from which such matters can be judged or predicted, a large share of credit or blame for the success or failure of a government's policy towards other governments must go to its own envoys. Again, a state would be interested to know about the stability or otherwise of the government in power in a particular country and the strength of the various political parties. A state which may wish to enter into treaty relations with another state involving important commitments, such as granting of military or financial aid in return for bases or most-favoured-nation treatment for its nationals, would need to be satisfied before it embarks on such a venture about the stability of the government in power, and especially as to whether the government is in a position to commit the country in advance in respect of the reciprocal rights and obligations under the treaty over a period of years. If the government is a weak one and there is no guarantee of its continuance, other states may be slow in entering into long term arrangements with it. The position or strength of the political parties is of importance as this might indicate the pattern of administration which a country is likely to have

in the near future. The position, strength, and attitude of the armed forces on the political life of the country also needs to be observed in view of the number of coup d'etats carried out by the army commanders in recent years. A number of states which or whose nationals may be interested in investments in underdeveloped countries, would particularly be keen to know of the attitude of the government in power regarding nationalisation of foreign property. They would also be interested to be kept informed of the views of various political parties towards such matters.

The political situation in a country, except in those which have enjoyed stability in government for a period of years, is often changeable, and constant vigilance on the part of foreign envoys is therefore necessary so as to enable them to correctly report the position to their home states. In recent years there have been so many changes in the attitudes or policies of states owing to sudden dispossession of governments in power that it has become difficult even for an experienced envoy to make forecasts about the situation. Nevertheless, one resident on the spot can always look for signs and symptoms in the political horizon to give him some indication of an upheaval.

Reporting on economic developments in the receiving state. Though an envoy's chief concern is and must be on the political sphere since everything else in a country must of necessity be dependent on the political stability of the state, the diplomatic representative cannot overlook the economic and commercial aspects whilst reporting on the conditions and developments in the state to which he is accredited. The position of trade and commerce as well as economic development in a country are of considerable interest to other countries, and indeed such matters have assumed an increasing importance in the relations of nations in the present day. This is evident from the increasing number of trade delegations that are sent out by practically all governments as well as from the fact that every diplomatic mission today finds it necessary to have a good proportion of its staff engaged on the commercial side. The countries which are highly developed industrially would naturally be anxious to find markets for their produce as also opportunities for investment of capital which might be lying idle, and under-developed countries with a programme of industrial expansion are likely to be most suited for such purposes. From the periodic reports of its diplomatic mission, the government will be able to judge the type of produce that is likely to have a ready market in a particular

country. Information regarding tariffs, taxation and competition that can be expected from other countries would provide a useful guide to the government to plan its exports as well as to undertake negotiations with other governments for preferential terms for its commodities. A government would also be interested to be kept informed of the plans for industrial expansion in other countries and particularly whether foreign capital is being invited for such purposes. The progress of development plans, the attitude of the population and political parties in the matter of foreign aid as well as the attitude of the government towards nationalisation are all factors which help other governments to formulate their economic policies. The countries which produce raw materials are interested in getting the highest possible price for their produce, and though the prices of essential commodities like tin, rubber and wheat are standardised by means of international agreements, the market trends in consuming countries help them to negotiate on the prices. The newly independent countries which are embarking on schemes of industrial expansion are greatly interested in obtaining financial as well as technical aid, and in deciding upon its approach to other countries in such matters a country is naturally dependent on the report of its diplomatic agent.

Means of ascertaining conditions and developments in the receiving state. An important point which arises in this connection is the means an envoy should employ to ascertain the conditions and developments in the state of his residence in order to enable him to give a true picture to his government. The Vienna Convention on Diplomatic Relations provides that an envoy should ascertain the conditions and developments by lawful means. It, however, gives no guidance as to what should be regarded as lawful. In countries with a democratic form of government, where freedom of the Press is respected, the newspapers would form one of his most useful sources of information. The news items on both local and foreign events together with editorial comments, the reports of the speeches of political leaders on domestic and international issues, policy statements by members of the government and parliamentary debates would provide him with much useful material not only on the conditions and developments inside the country and the view point of the political parties on such matters but also the country's attitude towards events of international importance. The newspaper comments are of significance in more ways than one since in democratic countries the Press is often known to mould public

opinion. An envoy will, therefore, do well to subscribe to the leading newspapers of the country especially if they represent varying political opinions. In addition to newspaper reports, it would be useful for him to attend occasionally sittings of the parliament especially when debates are held on important matters of policy following upon a statement from a member of the government. The Press conferences held by the heads of governments are also important and it is now customary to invite the Press attachés of the diplomatic missions to such conferences. But even in these countries all the facts and information which an envoy may need to know to arrive at a correct assessment of the conditions and developments would not be forthcoming from these sources alone. There are matters which are regarded as of a confidential nature or too premature for public disclosure, such as a proposal or progress of negotiations for a treaty or an agreement with a foreign state, or matters concerning formulation of government policy before it is finalised. Again, there are matters which are of little interest to the reader of the daily newspaper such as those relating to internal organisation of a political party or possible investments in industrial undertakings. A diplomat has, therefore, to find out many things informally and his social contacts are most helpful to him in this respect, though occasionally he may obtain information on certain matters directly from the officials of the government by seeking an interview for the purpose. The diplomat has to cultivate a wide range of social acquaintances which would include the officials of the Foreign Office and other important government departments, his own colleagues in the diplomatic corps, and a variety of others such as newspaper editors, journalists, parliamentarians, leaders of political parties, industrialists and businessmen. It is needless to emphasize the desirability of close social contacts with the senior officials of the government since on many an occasion a broad hint from one of them may put the envoy on the right track. The editors and journalists are often in possession of useful information which make them good judges of political situations, and a discussion with them over a meal may help an envoy in clarifying his own ideas. The parliamentarians and party leaders, who invariably have their own viewpoints, may help an envoy to acquaint himself with different points of view on various problems. The industrialists and businessmen are the best people to give him the correct news regarding the position of the markets, the industrial needs of the country, the capital which is available within the country and a variety of other information on industrial or commercial matters. An exchange of

information with his diplomatic colleagues may help him to pick up a good many things which he might have otherwise missed. The diplomatic receptions and informal dinner parties usually help an envoy to maintain his social contacts.

It should be stated at the outset that there is nothing improper for an envoy to gather information in the course of social conversation in an informal manner as long as an envoy does not have recourse to unfair means. Except in totalitarian countries where any contacts with foreign diplomatic missions render a person liable to suspicion by the secret police, the normal social intercourse between foreign diplomats and the citizens of the country is an accepted thing, and if in the course of conversation an envoy is able to gather some information, which he needs to know, no objection could be taken. On the other hand, if an envoy were to suborn one of his social acquaintances to divulge official secrets, or if he were to attempt to obtain information by bribery, or induce a person to do so for reasons of ideology, his conduct will be regarded as having overstepped the bounds of propriety. It would probably be unwise for him to attempt to gather information by asking questions directly of the persons he knows socially which would in many countries be considered to be bad taste and may lead to his company being avoided. As regards bribery, Sir Earnest Satow says:

> The books generally condemn the employment of bribes to obtain secret information or to influence of negotiation. Many cases are, however, recorded in history of such proceedings being practised on a large scale, and with considerable effect. — It may be that the Law of Nations is not concerned with bribery. It seems rather a question of morality.[1]
>
> But if an envoy seeks by means of presents to secure the goodwill or friendship of those who can assist him in attaining his objects but without either expressly or tacitly asking from them anything wrong, this is not to be regarded as bribery.[2]

According to Schmalz

> It must be left to the ingenuity of the envoy to form connections which will enable him to obtain news and to verify what he receives. The Law of Nations appears to hold that it is not forbidden to obtain information by means of bribery; at least no one doubts the daily practice of this expedient, and though it has often been censured, in other cases it has been not obscurely admitted.[3]

[1] Satow, op. cit., p. 103.
[2] de Martens, Recueil des Traités etc., Vol. XI, p. 212.
[3] Schmalz, Europäisches Völkerrecht, p. 98.

A clear distinction, however, can be drawn between bribery and bestowal and acceptance of ordinary presents. In some countries, it is the custom to give small presents or flowers on certain occasions such as the Christmas or the New Year Day.

It is considerably more difficult for an envoy to form a correct impression of the true conditions or the developments that may be taking place inside a country where there is a totalitarian form of government. The newspapers, which can but express only one view, have their utility inasmuch as they can be relied on as portraying the views of the government which they wish to be released for public consumption. The parliamentarians, even in countries where there is a legislature in existence, will not be of much use since there could be no opposition party, and in any case if an envoy were to cultivate an acquaintance, he would soon become a suspect of the secret police. People in such countries are often afraid to talk, and there is nothing much that one could pick up through normal social intercourse. But even here a certain amount of social contacts with high government officials or party leaders will pay. There are times when they wish to relax and they may not be averse to having discussions especially after a meal.

It must not be supposed that the diplomatic envoy or the head of the mission would do all the collecting of information or discussions himself. He is assisted by the staff of the mission on the political and economic side as well as by the attachés who deal with the various specialised branches. The periodic reports that go to the home government is the result of observations and assessment on the part of all the diplomatic officials of the mission. Each official starting from the head of the mission down to the junior most secretary cultivates acquaintances at his own level and records his observations. The scrutiny of daily newspapers, attendance at various parties, receptions and meetings is also shared between the various officials.

Protection of the interests of the sending state and its nationals

Protection of the interests of the sending state and its nationals is one of the primary duties of an envoy. The interests of his home state, whether it be on the political field or it be related to commercial matters, are entrusted to his care and an envoy has to be ever vigilant in order to protect such interests in the state to which he is accredited. The interests of a state in its relation to other states are manifold and on a variety of subjects. They range from territorial questions as

between neighbours to trade and commerce, flights for its aircrafts, preferential tariffs for its produce, financial and military aid, investments in industrial projects, and facilities for its citizens. An envoy has to take all possible steps and precautions to see that any existing advantage which his government or his nationals may enjoy in the state of his residence is not jeopardised. He has also to seize at every opportunity of increasing such advantages. His government may enjoy a position of confidence with the government of the receiving state, or it may be that the produce of his country is allowed entry at a preferential tariff, or that the nationals of his home state are allowed freely to reside, carry on trade, or invest their moneys in that country. Sometimes due to a change in the government, or changes in the policy of the existing government, or due to some misunderstanding, or as a result of representations made by other countries, the government of the receiving state may be contemplating a change in the existing position. An envoy has to be ever vigilant to prevent, if he possibly can, any such situation. If he detects even the remotest possibility of this happening, he must take immediate steps, after obtaining the approval of his government, to arrest its development by making representations and drawing attention of the receiving state to mutual advantages which devolve from the existing arrangements. Whenever an envoy scents an opportunity of obtaining some advantage for his country or its nationals and finds the conditions in the receiving state developing favourably towards his country, he must act with rapidity by initiating negotiations and by advising his government to make formal approaches.

Protection of interests of the nationals of the home state. Protection of the interests of the nationals of the envoy's home state falls broadly under two heads, namely, promotion of their interests generally in the matter of immigration, trade, residence, travel etc. on the one hand, the other being protection of an individual citizen when he suffers harm or injury to his person, life or property in the receiving state. The first category of cases may be said to be included within the envoy's function of protection of the interests of the sending state itself, whilst the second would fall within the right of a state of rendering diplomatic protection of its citizens abroad. There is a good deal of material derived mainly from state practice on this topic and it would be useful for an envoy to familiarise himself with some aspects of it [1] especially as the

[1] This subject is dealt with more fully in Chapter X.

Vienna Convention of 1961 on Diplomatic Relations has laid down that an envoy's functions relating to protection of nationals of the home state shall be within the limits permissible under international law.

Though the peoples of various lands in this modern age have been brought in closer contact through facilities and quickness of communication and travel, it is well accepted as a canon of international law and practice that no state is obliged to receive foreign nationals into its territory. Consequently, a person who wishes to visit a country other than his own not only requires a passport which signifies the consent of his home state to allow him to go abroad, but he also requires a visa from the appropriate authorities of the receiving state allowing him to enter or remain in its territory. Whilst states and their governments can be persuaded to grant visas without much difficulty to persons who wish to come for the purpose of transit or temporary stay for the sake of study or tourism, they are generally averse to allowing foreigners to come and reside in their territories for long periods, especially if the purpose of stay is carrying on of trade or business or pursuing any profession. This tendency had been even more marked in the case of the governments of some of the newly independent countries where a certain amount of suspicion still exists about the foreigner. States which are overpopulated, or countries whose economy depends on the export trade and participation in the development of industries in underdeveloped countries, or states which wish to encourage its citizens to continue their occupations or avocations abroad where they may be resident at the time, will no doubt have to seek for suitable arrangement to obtain such facilities for their nationals. It would be observed that during the past 100 years, citizens of European states particularly the British, the Dutch, and the French, had not only settled down in business and in the professions but had also made vast investments in the countries which then were comprised in the colonial empire of European powers in Asia and Africa. The nationals of Britain and the United States had also acquired large interests in China and some of the Latin American countries. During the last century persons of Indian origin had migrated and settled down in various countries of Asia and Africa which formed part of the British Empire such as Ceylon, Malaya, Singapore, Kenya, South Africa, and helped in the development of their trade and in building up of their economy by working as doctors, teachers, traders, and even as plantation workers. No problem, of course, is encountered in respect of persons who are absorbed as the citizens of the new states which have emerged out of

the European empires. But in the case of China where the situation has changed completely ever since the communist regime took over, or in the case of Latin American republics where so many changes in the attitudes and policies have taken place, or in the case of the newly independent countries of Asia and Africa, the question of entry or continuance of foreign nationals in their territories for the purpose of trade or business or pursuit of other occupation would certainly require approaches by the governments of the home states. Protection of such interests of the nationals invariably falls on their respective diplomatic envoys.

In making any representation to the government of the receiving state to allow entry to the nationals of his home state, or to permit such of those nationals as may be resident in the receiving state for the purpose of trade or business to continue to reside there and pursue their occupation, an envoy has to take into account that according to the generally accepted views of writers on international law,[1] which is also borne out by the practice of the states and the decisions of national and international tribunals, it is the sovereign right of a state either to admit or to exclude an alien from its territory. In order, therefore, to safeguard the rights of their citizens and to ensure their entry into the territory of other states in advance, states have sometimes entered into treaties of friendship and commerce wherein the right of entry to each other's citizens has been guaranteed. In some countries, the law or practice allows free entry and right of residence to nationals of a certain group of states. For instance, citizens of Commonwealth countries, until recently, were allowed to enter Britain and reside there for any period they liked without any restriction. The British nationals also enjoyed a similar right in all the Commonwealth countries. Similarly, as between a group of European states no entry visa is required for each other's nationals. These are, however, in the nature of exceptions based either on traditional grounds, as in the case of

[1] Vattel in Le Droit Des Gens (1758)observes: "A sovereign may prohibit entrance into its territory, either to all foreigners in general or to certain persons, or for certain particular purposes according as the welfare of the state may require." Trans. Fenwick, The Classics of International Law.

Hackworth considers that a state is under no duty in the absence of treaty obligations to admit aliens into its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interests. Hackworth, Digest of International Law, Vol. III, pp. 717–18.

According to Oppenheim, no state can claim the right for its subjects to enter into and reside on the territory of a foreign state apart from special treaties of commerce and the like. The reception of aliens is a matter of discretion and every state is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory. See Oppenheim, International Law, Vol. I, 8th ed., pp. 675–78.

Commonwealth countries or on the basis of specific clauses in bilateral treaties and conventions. The almost invariable practice on the part of states is to regard admission of foreign nationals and their residence in the country as a matter of discretion for the government concerned to be regulated by the provisions of its municipal laws, regulations and executive orders. Again, it should be stated that even if a foreign national is allowed entry into a country, there is no obligation on the part of the state to permit him to take up permanent residence or to practice any trade or profession. Such matters are at the absolute discretion of the receiving state. According to Oppenheim:

> Apart from protection of person and property, and apart from the equal protection before courts of the rights enjoyed by aliens by virtue of the law of the land, every state can treat aliens according to its discretion except in so far as its discretion is restricted through international treaties. Thus a state can exclude aliens from certain professions and trade. ——

Some countries like Indonesia and the United Arab Republic permit foreign nationals to take up permanent residence only if the latter are considered to be capable of contributing to the culture or the wealth of the country.[1] In a number of countries including the United States of America foreign nationals are excluded from engaging in certain professions, trades and occupations, such as accountancy, architecture medicine, engineering, law, teaching etc.[2] In Ceylon, India and Japan, aliens are not excluded from practice of trade or professions but in Burma, Indonesia and Iraq, they are excluded from certain professions. While Burma and Iraq would allow employment of aliens only to temporary posts, Japan favours foreign experts for short periods. Foreign nationals are permitted to enter government service in Ceylon, India and Indonesia but in Burma and Iraq, this is possible only in respect of temporary posts.[3] In respect of foreigners' enjoyment of right to property, it should be mentioned that states enjoy exclusive rights to regulate the conditions upon which property within its territory, whether real or personal, shall be held or transmitted.[4] A state may be unwilling to permit the succession to and retention of title to immovable property within its borders by persons other than its own nationals or by aliens who are non-residents.

[1] A.A.L.C.C., "Principles concerning Admission and Treatment of Aliens", Third Session Report, 1960.
[2] Hackworth, Digest of International Law, Vol. III, p. 618.
[3] A.A.L.C.C., Proceedings, Third Session.
[4] Moore, Digest of International Law, Vol. II, p. 33.

It is thus clear that in so far as international law or state practice is concerned, the questions of entry and residence of foreign nationals as well as their right to carry on any profession or trade, and their property rights are matters which are to be regulated entirely at the discretion of the receiving state. There is no doubt that in such matters a state will be governed by its own constitution, provisions of its municipal laws, regulations and executive orders. Consequently, when a state wishes to ensure for its citizens special rights which would curtail the discretion of the receiving state, it can only be done by means of a bilateral treaty. States would normally require to be convinced of some reciprocal advantages which they would derive by granting such special privileges to the nationals of another state. Again, a state may not always find it easy to enter into formal treaty arrangements on these matters specially in the present day since such formal arrangements may affect its relations with other states, or it may be faced with the obligations of entering into such arrangements with several other states. These matters, therefore, need to be arranged on the basis of informal understanding and reciprocity.

Protection of the nationals of the home state against harm or injury. Perhaps the more important function of an envoy in the matter of protection of the interests of his nationals, which is likely to arise often, is to afford protection to their lives and properties in individual cases or collectively, and to afford them such assistance as they may need. To a person who is resident abroad, the diplomatic agent of his country is his friend in need, and it is to the envoy that he has to turn when he suffers harm, or his interests are adversely affected either by reason of some action of the government or governmental agencies or in the hands of a private person. Thus in the case of a riot or civil commotion the diplomatic agent will be well within his rights to ask the government of the receiving state to take adequate measures to protect the lives and properties of his citizens and to protest to the government if it fails to do so. Again, if by reason of governmental actions or discriminatory laws, the nationals of his home state find themselves adversely affected in the matter of carrying on of their business or profession, he would be justified in representing to the local government on their behalf and to seek redress of their grievances. If one of his nationals is arrested, or if he is denied fair trial, or if his property is confiscated, or if he is expelled from the country, the envoy can well ask the government for the reasons of such action, and demand redress if the action of the

government is considered to be wrongful according to standards of international law. The approaches in all such matters are first made informally in the shape of seeking information and requesting relief; if no redress is had by such informal moves, a formal protest may be lodged, and ultimately in certain circumstances, international claims on behalf of the aggrieved national may be preferred if he fails to obtain relief even after exhausting such remedies as may be available to him under the local laws. An envoy would undoubtedly seek the instructions of his government before lodging a protest or preferring any claim on behalf of the aggrieved national.

The first and foremost rule which has to be observed before an envoy can represent to the local government on behalf of a person is to satisfy himself that the person concerned is a citizen of his home state. This will be easy to determine when the person carries the passport of his home state and his nationality is indicated therein. Though possession of the passport is not conclusive on the question of his possessing the nationality of his home state, an envoy will be within his rights to afford protection to a person carrying the passport of his state because by issuing such a passport his government is deemed to have undertaken the duty to afford him protection [1] whilst he is abroad, and the envoy is acting on behalf of his government. Similarly, there will be no difficulty if the person is registered in the embassy as a citizen of his country. But invariably, as practice has shown, there are often a large number of persons, who do not possess passports and are not registered in the embassy as citizens, who seek the help of the envoy in cases of need claiming to be citizens of his country though the embassy had not seen or heard of them previously. Such classes of persons are usually those who have been resident in the country for long periods, who had practically identified themselves with the country of their residence, but due to changes in the policies or practices of the receiving state find themselves in difficulty and seek the protection of the envoy of the country from which they came. It is in these cases that the real difficulty arises. The envoy must judge whether they can be regarded as citizens of his country and this has to be determined by the nationality laws of his country. The mere fact that the person or persons concerned came originally from his country is not enough to qualify for citizenship. There are, for instance, a large number of persons of Indian origin who are resident abroad but few of them will be treated as citizens of India.

[1] See the judgment of the House of Lords in the case of *Joyce* v. *Director of Public Prosecutions*, (1946) A. C. 347.

The envoy will also have to take into account as to whether these persons are considered by the receiving state as its nationals.[1]

Promotion of friendly relations

Another important function of an envoy, which has been paid scant attention until recent years, is promoting of friendly relations between the peoples of the sending and the receiving states. Hitherto, an envoy had been looked upon as an official agent of his government charged with the function of conducting official relations between the two states. During the last few decades, and particularly since the establishment of the United Nations, it had been recognised that an envoy's functions must include the active promotion of understanding between the sending and the receiving states and their peoples as also promotion of their economic, cultural and scientific relations. It is now realised that war often begins in the minds of men caused by misunderstandings and lack of knowledge on the part of the people of one country about the conditions, feelings and ideals of the people of other lands, which is often exploited by political leaders for their own advantage. Peoples of all countries love peace, and if they are brought into contact with each other, if they could be acquainted with their culture, their ways of life, their struggles and their sympathies, the chances of future wars could be greatly minimised. An envoy's task in promoting understanding between the two states therefore involves not only in his dealing with the government of the receiving state but also in explaining the policies and practices of his government and their view point to the people of the country through suitable media and at proper occasions as well as making known to the government and the people the purposes, hopes and desires of his native land. There are various means or media which are used by envoys for fulfilment of this object. One of the most effective ways is for the envoy to speak on as many occasions as possible and to arrange for its proper reporting. The old concept that an envoy should not make public utterances, which was in vogue when a diplomat was supposed to deal only with the government, is happily a thing of the past. Today, diplomatic representatives are often invited to speak on public occasions and particularly on occasions where a special programme featuring his country is arranged. Many countries welcome such public contacts of ambassadors which facilitate the means of creating understanding. In Britain and the United States, television interviews are often arranged with the heads of diplomatic missions.

[1] The topic of Diplomatic Protection of Citizens is dealt with fully in Chapter X.

In India, the All India Radio had for some time organised a fortnightly programme of "Lands and People" in which every head of mission was invited to give a talk about his country.

A good speech, whether delivered on a public occasion or on the wireless, usually creates a greater effect than any other media. A question may be asked as to whether an ambassador should speak on matters of a controversial character. The answer is if the matter in question relates to the policies of his government, there can be no objection to his speaking on such matters, but in doing so he must avoid criticising the policies of the government of the receiving state since that may amount to interference with its internal affairs. On October 9, 1958, when the American Ambassador in Britain, Mr. J. H. Whitney, made speeches in London defending the policies of his government towards Communist China, a question was raised whether such speeches were proper since the view expressed by the ambassador was different from that of the government of the United Kingdom. Sir William Hayter of New College, Oxford, defending the action of the ambassador stated:

> It has long been the standard practice for ambassadors to make speeches in the country where they reside, defending the policies of their own governments. Such speeches may easily involve controversial questions and it is for the ambassador to decide whether his mission is better served by raising these questions or by letting them alone."

Mr. Harold Nicholson's view on this point is

> It is part of the functions of an ambassador to explain his government's attitude in matters that have led to controversy. If he does so in moderate and reasoned terms he is fulfiling one of his most important duties.

Information Bulletins. Another means commonly used by diplomatic missions in recent years to inform the public about their countries is through information bulletins issued by the mission at weekly or fortnightly intervals. The inclusion of information sections in the diplomatic posts is one of the important developments in recent years and some countries like Britain, United States, and India have formed career services for their information officers who serve in the missions. The information bulletins generally contain important news items at home, and include news about the developments which may be of special interest to the people of the receiving state, news about visits of important personalities of the sending or receiving states to each

other's country and details regarding aid rendered by one to the other or participation in each other's projects. For instance, the gifts or loans made by the United States or assistance rendered by that country in particular projects in India are naturally highlighted. This helps in illustrating that the problems of the Indian people are understood in the United States who are prepared to help in India's hour of need. The bulletins often include pictures of famous landmarks, or holiday resorts or of national festivals which familiarise the people of one country with the traditions, dress and custom of the people of other lands. The information films also serve a very useful purpose. A mission should, however, be careful to avoid making any adverse comments on the policies or practices of the receiving state in the bulletins because the duty of non-interference in the internal affairs of the state on the part of an envoy is still an accepted concept of international law.

There are, however, some states which do not allow foreign missions to bring out such bulletins. Indeed, there are many countries in the world today whose governments are anxious to prevent their people from knowing about the conditions, freedoms and ways of life enjoyed by peoples of other lands. A question may properly be asked whether prohibition to publish news bulletins can be regarded as interference with the functions of a diplomatic envoy. In the text books of international law one would hardly find any discussion on this issue since the traditional functions of an envoy did not include publication of news bulletins. A reasonable view to take is that as long as such news bulletins do not encroach upon the internal affairs of the receiving state, or refer to matters in controversy between the sending and the receiving states, it would be improper to stop publication of such bulletins, since it is through these bulletins that an envoy can hope to convey the news about his country, the hopes, and desires of his people which is of utmost importance in creating an understanding between nations. The bulletins and especially the pictures help in attracting the sentiments of the peoples towards each other. For example, at the time of the engagement of Princess Elizabeth (as Her Majesty then was) with the Duke of Edinburgh the portrait of the young couple in the windows of the British Information Services in Prague drew a large crowd of people – a people who had the closest cultural links with Britain.

There are a number of other ways through which efforts can be made to create an understanding and good relations between the peoples of different countries. Exchange of goodwill missions and cultural delegations by various states has been an important feature in recent

years and the diplomatic envoys have had to concern themselves with the promotion and planning of such visits no less than the regular government delegations. The cultural delegations consisting of leading artistes often help in acquainting the peoples of other countries with the art, music of famous composers, and the traditional and classical dances. Exchange of students and visiting professors between universities, provision of facilities to learn the language of other countries, distribution of books and literature also help in creating better understanding. In many countries, societies for cultural relations are formed and the diplomatic envoy is often called upon to be either the president or a patron of such organisations.

Looking after the interests of minorities

One of the tasks which a diplomat has sometimes to undertake is to keep a protecting eye and watchful interest over the conditions and treatment of minorities in the state of his residence. This, however, is not a part of his functions of protection which he has in respect of the nationals of his home state because persons who belong to minorities are in fact citizens of the receiving state. Whilst international law recognises the right of an envoy to afford protection to the nationals of his own state, there is no such right in respect of the minorities, and strictly from the point of view of traditional international law a state would be entitled to treat its citizens including those belonging to minorities in any manner it likes. Nevertheless, it has been recognised over a number of decades and more so since the first World War that the position and treatment of minorities in certain circumstances could become the concern of other nations, and it is in this context that some of the Peace Treaties concluded after World War I and several bipartite treaties contained provisions concerning the position and treatment of minorities. The minorities in a state generally consist of racial, religious and linguistic groups. Religious minorities have been known to exist in almost all states ever since the dawn of history, and cases of persecution in respect of such minorities have been too frequent to need any specific mention. Even in recent years, persecution of religious minorities by state organs as well as by members of other communities have been known to be taking place. Such persecution often takes the shape of infliction of bodily harm to individual members of the community, destruction of their property, denial of protection by the police and state authorities, and denial of opportunities in the matter of trade, occupation and service. Existence of racial minorities has resulted

sometimes from the creation of new states as a result of dismemberment of an old established state. Thus after the First World War when several new states were created out of the old Germany and the Austro-Hungarian Empire, new states like Czechoslovakia and Poland (whose boundaries were altered under the Peace Treaties) were left with certain minority groups of German origin. Specific provisions were made in the Peace Treaties for safeguarding of the rights including the cultural rights of such minority groups. Again, after the Second World War the transformation of the British Empire into the Commonwealth of Nations resulting in the creation of several new states has given rise to the problems of minorities in these newly independent states. The partition of the old Indian Empire into two independent states of India and Pakistan has resulted in having religious minorities in the two countries. Persons of Indian origin constitute racial minority groups in Burma, Ceylon, Malaya, East and South Africa.

As already stated, members of minorities are citizens of the states concerned, and in international law, it is up to those states to determine as to how they should be treated. But on every occasion when a state has been known to violate the rights of its minority communities in persistent disregard to the dictates of humanity, other states have not been slow in registering their protest. Thus, at the time of Nazi persecution of persons of Jewish origin, the whole of the civilised world raised its voice in protest. Again, the attitude of the South African government in regard to persons of Indian origin and their treatment called for condemnation of South Africa's policies and actions. States have in such cases acted not in pursuance of international law but on humanitarian grounds. The humanitarian aspects have now acquired a special significance in the context of the United Nations Charter and the Declaration of Human Rights, and it would be reasonable to say that every state is entitled to remonstrate in the event of maltreatment of minorities by a particular state. Some states, of course, would have a special interest in particular cases. Thus in the case of persons of Indian origin in other countries, India and Pakistan could be expected to take a more prominent part in claiming proper treatment for such minorities by reason of the fact that the relatives of these persons would be citizens of India or Pakistan whose anxiety for the well-being of persons of Indian origin must necessarily be reflected in the attitude of a democratically elected government. In cases where there are treaties, protection of minorities may be enforced as a treaty obligation by a

state which is a party to the treaty. For example, India and Pakistan entered into an agreement in 1951 under which each of those states undertook the obligation to see that members of their minorities were properly treated. Under this agreement, each government appointed a minister responsible for minority affairs and the two ministers jointly undertook tours of areas where there was any possibility of the interests of the minorities being adversely affected.

In cases where there are no treaties in existence to govern the matter, the task of a diplomat in remonstrating with the government of the receiving state with regard to treatment of minorities is somewhat delicate and has to be approached with caution. Unlike the case of one of his own nationals, the aggrieved minorities cannot seek his help, and whatever he does it has to be on his own initiative. Whilst an isolated case of maltreatment of a member of the minority may not justify his interference, he need not keep quiet if there is a persistent and systematic violation of the rights of the minorities, particularly when his home state has a special interest in the well being of such minorities. It is true that governments are often touchy on this issue, and resent any interference by foreign governments and their envoys on such matters, but by and large with a little tactful handling it is found that governments are not altogether unresponsive to the enquiries of diplomatic agents. Any step which may give the impression of interference in the internal affairs of state by a diplomat is, however, bound to be resented. Consequently, an envoy should avoid being too intimately connected with the affairs of the minorities, particularly on matters where it concerns governmental policy. Where there are minority treaties in force, things would however be different as the extent of an envoy's activities with regard to safeguarding the interest of the minorities would depend upon the terms of the treaty itself. The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a state, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside the population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs. The envoy of the state which is a party to such a treaty would, therefore, be well within his rights to ensure that these obligations are duly carried out by the state of his residence.

Miscellaneous duties and notarial functions

In addition to the various functions of a diplomatic agent as discussed above, the diplomatic missions have also to undertake certain miscellaneous duties and functions of a notarial character. These include registration of births, deaths, and marriages, maintenance of Register of Citizens, authentication of documents, service of summons and issue of passports and visas. Such duties are generally performed in the consular sections of the missions, and may also be undertaken by consular officers.

Registration of births and marriages. The municipal laws of almost all states consider the children born to their citizens even when abroad as their nationals on the basis of *jus sanguinis,* and for the purpose of evidence of such birth most of the nationality laws require that the parents of the children born abroad should have the birth registered in the embassy or consulate of the home state. The diplomatic missions are therefore authorised under the laws of the sending state, which are recognised invariably by the receiving state, to register the birth of the children of their own nationals as also to issue certificates of birth. The laws of several states authorise their diplomatic officers to perform the functions of a registrar in solemnising marriages between parties at least one of whom is a citizen of the sending state. The mission in such cases is entitled to issue a certificate of marriage. It is customary for diplomatic missions to maintain a register of the citizens of the home state, and it is advisable for persons resident or sojourning abroad to get themselves registered with their embassy or consulate. The registration of citizens helps in ensuring that diplomatic protection can be afforded to them readily in case of need.

Authentication of documents. Authentication of documents also takes up a considerable portion of the activities of the consular section of a diplomatic mission. In the normal course of international trade, commerce and intercourse, citizens as well as others resident in a particular country have occasion to take recourse to actions or proceedings before the courts or administrative authorities of another country. The most common and obvious method in such cases is to authorise someone in the other state where the suit or the proceeding is sought to be instituted to take action on his behalf. This can be done by executing a power of attorney. Such a document is used practically in all cases where a person seeks to appoint another as his agent for

whatever purpose it may be. It is fairly obvious that such a document must be drawn up and executed in accordance with the laws of the country where it is executed. The practice followed by most of the courts and administrative authorities is not to accept a power of attorney executed in a foreign state unless it is authenticated by its own diplomatic or consular agent in that country. Such authentication is regarded as proof that the document has been validly executed in accordance with the laws of the country where it has been executed. The same is the position with regard to all documents which are sought to be used in any proceedings in another country. For example, an affidavit, a will or a deed of trust may have to be used in a litigation or before the taxation authorities for the purpose of income-tax or estate duty, or for establishing claims to property. Such documents can be used in a foreign country only if they are authenticated by the diplomatic mission of that state. The consular sections of diplomatic missions are, therefore, often approached with the request for authentication of documents of the type just mentioned. The diplomatic officer in all such cases has to be satisfied that the document he is asked to put his seal on is a valid document according to the local laws of the country because his authentication would be *prima facie* proof that it is so before the courts and administrative authorities of his own country. Now, a diplomatic officer cannot be expected to investigate into such matters which would involve a consideration of facts and law in each case not only because of lack of time at his disposal but also because of lack of means at his disposal for holding such an enquiry. For example, if he were to conduct an enquiry on the question as to whether a power of attorney was validly executed, he would not only need to know the local law on the subject but he would also have to enquire whether the person who is purported to have signed the document was in fact the person who signed it and whether the notary before whom the document was signed was in fact a person who is authorised to authenticate the document. To obviate the necessity of holding such enquiries by the diplomatic officer, it is now the usual practice to authenticate documents only if they are certified by a named official of the foreign office of the receiving state.

A diplomatic mission is authorised to charge such fees as may be laid down by his own government for authentication of documents of various categories.

Service of summons. The diplomatic missions are also used as the channel of communication for service of summons issued by the courts of the sending state. When a suit is instituted in the court of a country against a person resident outside, it becomes necessary to serve him with a writ of summons issued by the court to appear and defend the action. Similarly, it may be necessary to serve a copy of the judgment or decree on the defendant. In cases where there is an agreement in force between the two countries for service of summons and reciprocal enforcement of judgments, this work is not inconsiderable.

Extradition. The diplomatic missions have also to handle requests for extradition in respect of fugitive criminals who have fled from the sending state after committing a crime there and taken refuge in the receiving state.

Issue of passports and visas, in all probability, constitute the bulk of the consular work of an embassy.[1]

Duty of non-interference in the internal affairs of the receiving state

It is fairly obvious that the diplomatic agent in order to discharge his functions effectively must receive the cooperation and assistance of the state to which he is accredited. The receiving state is thus under an obligation in conformity with international law and practice to allow him every opportunity to carry on his activities without let or hindrance, and for this purpose to treat him in a manner befitting his position and to accord him the necessary immunities and privileges. The diplomatic agent has, however, certain corresponding duties towards the receiving state, that is, his duty of non-interference in the internal affairs of the state, the obligation to respect the local laws and regulations, and the duty not to abuse his rights and privileges. This position is now expressly recognised in Article 41 of the Vienna Convention 1961 which provides that without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving state.

The express prohibition imposed on an envoy in Article 41 of the Vienna Convention not to interfere in the internal affairs of the receiving state appears to be correct both on principle and in the interest of comity of nations. In principle it would appear to be a sound proposition to say that a diplomatic officer is not within his rights to interfere in the

[1] The principles concerning extradition of fugitive offenders and issue of passports and visas are discussed fully in chapters XI and XII.

internal affairs of the state. A diplomat's duty, as has already been stated above, broadly is to represent his own state in the receiving state and to protect the interests of his home state and its nationals in the state of his residence. Looked at from a true perspective it would appear that the internal affairs of the state are hardly of any consequence to him in discharging his functions, and it may well be said that he has only to do his best in the circumstances and conditions that may be obtaining in the receiving state. It may, however, be argued that the diplomat must strive to increase the influence of his government in the receiving state and to obtain advantages for his nationals by all possible means at his disposal including the overthrow of the government in power by rendering aid and assistance to opposition parties if the attitude and policies of the government are detrimental to the interests of his home state or its nationals. If this position were to be accepted, it would not only lead to chaos but would also strike at the very root of diplomatic relations. The situation may well be envisaged where diplomatic agents, who are dissatisfied with the policies of the government of the day, may decide to plot for its overthrow; and in democratically held elections, the instances of diplomats of different countries supporting various political parties according to their affiliations would become too common. There have been various cases in the past when diplomatic agents have been known to have plotted against the monarch or the government of the day in the receiving state; and even in modern times rendering of monetary help and other assistance to political parties of known affiliations by certain diplomats are not unknown, but the important point is that such activities are not regarded as legitimate. International law and state practice have recognised the right of the receiving state to declare a diplomatic agent as *persona non-grata* in such circumstances and thereby condemn his actions. The diplomatic representative is meant to promote friendly relations between the states concerned. If diplomats were to be allowed to indulge or interfere in the internal affairs of the state, it would completely destroy this object. No government would be free in such circumstances to pursue its own policies according to the wishes of its people, but must give way to the wish of the country or countries which is or are in a position to put the strongest pressure.

There is, of course, considerable scope for difference in views as to what would consitute interference in the internal affairs and this would vary according to circumstances of each case. For instance, it is well accepted that there is nothing wrong on the part of a diplomat to take

an interest in the internal affairs of the state – indeed in the fulfilment of his duties he has to correctly appraise the internal situation in the country of his residence with a view to reporting to his government. But the question is when can such interest be said to constitute interference? A diplomat has every right to remonstrate against the policy of the government, particularly if they are against the interest of his home state. He may even try to convince them to alter such policies by argument or explanations. These would fall within the legitimate functions of a diplomat. But an attempt to interfere with governmental functions in shaping its policy by means of approaches to opposition parties, or to organise opposition or criticism of the government would be overstepping the bounds of propriety. In such circumstances, he may be said to be interfering in the internal affairs of the state. In a democratic country, a diplomat can cultivate the acquaintance of the leaders of different political parties though they may be opposed to the government of the day, but any intercourse with the opposition in a totalitarian country may well render an envoy *persona non grata* on the excuse of his interference in the internal affairs of the state. Rendering of aid or active assistance or show of sympathy in favour of a party in the national elections would certainly amount to interference. Expression of views publicly in favour of or against a party would have the same effect.

Apart from his duty of non-interference, the diplomat is expected to respect the laws and regulations of the receiving state. He should do nothing to violate such laws himself nor should he encourage or connive at violation of the laws by others. A diplomat is, no doubt, exempt from the jurisdiction of the receiving state but this only means that he cannot be proceeded against in that state for any violation of the laws. His immunity does not mean that he need not observe the laws – in fact he is expected to respect such laws in the interest of comity. Thus, a diplomat is expected to observe the traffic rules, which are framed for the well being of the citizens, and the health regulations necessary for public health. It is also his duty to see that servants and persons under his control do not violate the laws and regulations of the receiving state, and if they do so, to see that they are adequately punished. He should also refrain from giving shelter to fugitives from justice and surrender persons wanted in connection with violation of local laws.

Another important duty of a diplomat is not to abuse the privileges accorded to him by the receiving state. It would be a violation of his

duty if he uses the diplomatic premises for a purpose for which it is not legitimate to use such premises. For example, if he allowed any part of such premises to be used for the purpose of trade or business, or if he used the premises for wrongful confinement of a person, as happened in the Kasenkina case in New York, it would amount to an abuse of his privilege. The diplomatic representatives are entitled to a number of fiscal privileges, such as free importation of motor cars, liquors and other household goods. It is clear that free importation is permitted for their own consumption and use. If a diplomat were to trade in such commodities, or if he were to import a car solely with the view of making a profit by its sale, such conduct would amount to gross abuse of privilege.

The concept of a diplomat's duty towards the receiving state has long been recognised by jurists and writers on international law as also in the practice of the states. The practice and competence of the receiving state in international law to declare an offending diplomat *persona non-grata* itself shows that the diplomat owes a duty to the receiving state for the dereliction of which the receiving state can take action by refusing to receive him any longer in the capacity of an accredited diplomatic agent. Calvo, the celebrated South American jurist, in his *Treatise on International Law* clearly asserted that the first duty of a diplomatic agent is not to interfere in any manner in the internal affairs of the country to which he is accredited.[1] This statement is most significant because it is in the Latin American countries more than in any other part of the world that the interference by diplomatic agents in the internal affairs of the states has been most prevalent in modern times. The European writers have also laid down the same proposition in no less clear terms. Fauchille writes:

> 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.[2]

Oppenheim says:

> The presupposition of the privileges he (the diplomatic envoy) enjoys is that he acts and behaves in such a manner as harmonises with the internal order of the receiving state. He is therefore expected voluntarily to comply with all

[1] Calvo, Le droit international théorique et pratique, Vol. VI, p. 232.
[2] Fauchille, Traité de Droit International Public, 8th ed., p. 54.

such commands and injunctions of the municipal law as do not restrict him in the effective exercise of his functions.[1]

The same principle has been embodied in Article 12 of the Havana Convention on Diplomatic Officers, Article 40 of the Draft Articles drawn up by the Asian-African Legal Consultative Committee and Article 40 of the Draft Articles drawn up by the International Law Commission. The position has now been accepted by the Vienna Convention on Diplomatic Relations and can be regarded as universally acceptable. It is of interest to every state that diplomatic agents of other states accredited to it refrain from interference in its internal affairs and also observe its laws and regulations. It may, therefore, be expected that states would ensure the observance of such conduct by their own diplomats so as to remove any ground for complaint. It would be difficult to completely eradicate the indirect interference so long as states continue to remain divided into *blocs*, but as long as certain limits of propriety are maintained, the interest of diplomatic relations would not be adversely affected.

[1] Oppenheim, International Law, 8th ed., pp. 708–709.

CHAPTER V

DIPLOMATIC IMMUNITIES AND PRIVILEGES

It is well recognised that under the customary rules of international law each state is expected and required to allow certain rights and immunities to diplomatic agents of other states accredited to it. These rules, which are of ancient origin and perhaps as old as diplomacy itself, are founded on common usage and tacit consent; they are essential to the conduct of the relations between independent sovereign states; they are given on the understanding that they will be reciprocally accorded, and their infringement by a state would lead to protest by the diplomatic body resident therein, and would prejudicially affect its own representatives abroad.[1]

Theoretical basis of diplomatic immunities

There are various theories regarding the legal basis of these immunities which a diplomat enjoys in the territories of the receiving state.

Exterritoriality. The first and oldest appears to be the doctrine of "exterritoriality", which implies that the premises of a mission in theory are outside the territory of the receiving state and represent a sort of extension of the territory of the sending state. Similarly, an ambassador who represents by fiction the actual person of his sovereign must be regarded by a further fiction as being outside the territory of the Power to which he is accredited.[2] This doctrine which held the field for a considerable period both among text writers and in judicial decisions has come to be adversely criticised [3] in recent years though it

[1] Satow, A Guide to Diplomatic Practice, 4th ed., p. 175; Hurst, International Law: The Collected Papers of Sir Cecil B. Hurst, 1950, p. 175.

[2] Grotius, De Jure Belli ac Pacis, Book II, Vol. II, Ch. VII; Bynkershoek, De Foro Legatorum, Chapter VIII.

[3] See Moore, Digest of International Law, Vol. II, p. 775; Slatin, "De la Juridiction sur des agents diplomatiques," Journal du droit international, Vol. II, p. 329;

is still referred to in a somewhat restricted sense. It is said that the fiction of "exterritoriality" fails to provide an adequate basis because the extent of exemption that would flow from this doctrine has never been accepted in practice, as both the premises of the mission and the diplomatic agent come within the jurisdiction of the receiving state for certain purposes. Thus for example, a diplomatic agent is expected to act in conformity with the laws of the receiving state and observe its police regulations though he cannot be prosecuted for violation of the same. Again, if he engages in trade or business in his private capacity or owns real property, he is not exempted from local legislation and is required to pay rates and taxes. Moreover, even in respect of the premises of the mission municipal charges are normally required to be paid for beneficial services rendered and crimes committed within the premises of the mission are to be tried in accordance with the laws of the receiving state. Oppenheim, however, considers that the term "exterritoriality" has nevertheless 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 state.[1]

Representative character. Another basis for grant of diplomatic immunities, which has been advanced from time to time, is the "representative character" of the envoy, that is to say, the diplomatic agent as representing a sovereign state owes no allegiance to the state to which he is accredited and as such he could not be subjected to the laws and jurisdiction of the receiving state. According to this theory, any insult to the ambassador is considered a slight upon the personal dignity of the sovereign whose envoy he is and consequently the receiving state is obliged to treat the envoy in a manner befitting his representative character. The dictum of the Supreme Court of the United States of America in *Exchange v. MacFaddon,*[2] which appears to support this view, is relevant in this connection.[3] In that case Marshall C. J. observed:

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 more modern writers and by decision of the courts. – See Hurst, Collected Papers, 1950, p. 199.

[1] Oppenheim, International Law, 8th ed., p. 793.

[2] Per Marshall C. J. in *Exchange* v. *MacFaddon*, 7 Cranch. 116. See also *Agostini* v. *De Antueno*, 99 N.Y.S. 2d 247, where the court observed that ambassador represents his master.

[3] For same views – See Vattel, Le droit des Gens, Vol. IV, Ch. 7, para 92; Montesquieu, Collected Works, De l'Esprit des Lois, Book XXVI, Ch. 21; Lord Chancellor Talbot in Barbuit's Case – Hudson, Cases on International Law, p. 875.

A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for the purpose cannot intend to subject his Minister in any degree to that power; and therefore a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

Functional necessity. The modern tendency is, however, to allow immunities and privileges to an envoy on the basis of "functional necessity", that is to say, the immunities are to be granted to the diplomats because they could not exercise their functions perfectly unless they enjoyed such privileges. It is obvious that were they liable to ordinary legal and political interference from the state or other individuals, and thus more or less be dependent on the goodwill of the government of the state to which they are accredited, they might be influenced by considerations of safety and comfort in a degree which would materially hamper them in the exercise of their functions. It is this concept of "functional necessity" which, it is said, casts an obligation on states to grant a certain minimum of immunities, and that minimum comprises such immunities and privileges as will permit the diplomatic envoy to carry out his functions without hindrance or avoidable difficulty. Nothing less will ensure compliance with the maxim *ne impediatur legato.* It is on the basis of "functional necessity" that the International Law Commission proceeded in preparation of the Draft Articles on the subject,[1] and the Vienna Convention on Diplomatic Relations 1961 also appears to have proceeded on this footing for it is stated in the preamble to the convention that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states."

It would, however, appear that the concept of functional necessity is not altogether a satisfactory basis as there can always be scope for difference in views and attitude of the states as to what kinds of jurisdictional acts on the part of a state would constitute interference with the legitimate functions of a diplomatic agent. Modern writers have sought to make some distinction on the basis of "functional necessity" between the various immunities and privileges of diplomatic agents, and this distinction has been adopted in the practice of some states. Consequently, there has been some divergence in the practice of states as regards the content and extent of diplomatic immunities; and the scope for such difference in state practice is not altogether ruled out

[1] See the Report of the Tenth Session of the International Law Commission, p. 47.

even in the Vienna Convention of 1961. For example, countries like the United Kingdom, United States of America, and some of the Commonwealth countries believe in the complete immunity of the diplomatic agent in respect of all his acts as long as he remains accredited to the government, whilst other states like Italy, Soviet Russia, Czechoslovakia, and various continental countries have always sought to draw a distinction between acts which the envoy performs in his official capacity as a diplomat and his other acts which may be said to be of a private nature, such as non-payment of debts or rent of premises leased by him for his residence. The doctrine of "functional necessity" would appear to make such difference in state practice possible, and indeed permissible. Sir Cecil Hurst once thought that 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.[1] Nevertheless, the doctrine of "functional necessity" would appear to be the only practicable basis for the immunities of diplomats especially having regard to the modern state practice.

Whatever may be the theoretical basis for grant of diplomatic immunities, which form an exception to the rule that all persons and things within a sovereign state are subject to its jurisdiction, it is and has been an acknowledged rule of law that states are under an obligation to allow the diplomatic agent to enjoy full and unrestricted independence in the performance of his allotted duties, which necessarily implies immunity from jurisdiction in respect of his person, his acts, and the premises of the diplomatic mission.

Basis for grant of diplomatic immunities in municipal law

The law and practice varies from state to state regarding the basis on which such immunities are granted under their municipal law. In some countries the rules of international law regarding the position of an envoy are recognised in the common law of the land, whilst in others specific statutory provisions have been enacted to give force to these rules arising out of usage of nations in the municipal law of the country. In so far as international law is concerned, it would appear to make no difference as to the method which a state may employ in discharging its duties and obligations regarding immunities of foreign envoys; and the matter must, therefore, be left to be determined by the constitutional practice of each state. In Britain, for example, the immunities

[1] Hurst, Collected Papers, pp. 203–204.

of the foreign envoy are based on common law. The Statute of Queen Anne 1708, which was enacted to prevent the arrest of the Russian Ambassador for non-payment of debt and which provides for exemption from civil jurisdiction, is regarded merely as declaratory of the common law. In Canada and Australia, the position is that the general principles touching the position of a foreign envoy are regarded as part of the common law of the land as they have been so adopted by the common law of England, and as such, into the common law of those dominions.[1] In the remaining Commonwealth countries, the position is that whilst usual immunities are accorded to the diplomatic representatives, no declaration about the basis for grant of such immunities under their municipal law is available either in the pronouncements of the national courts or in executive statements. In some of these countries specific legislation has been enacted to provide for immunities of the representatives of Commonwealth countries, the legislation being necessitated for historical reasons. In the United States of America, however, the matter is provided for by positive law.[2] In Europe, the practice appears to vary to a considerable extent. Whilst in Norway, Sweden, Netherlands and Turkey, there is no statutory law in force on this subject, the constitutions and laws of Portugal, Belgium, Germany, Czechoslovakia, Hungary and the U.S.S.R.,[3] contain provisions dealing with certain aspects of diplomatic immunities. Among Asian countries, there does not appear to be any statutory law on this subject except in Iraq where there is a specific provision by which the certificate issued by the Foreign Ministry about the diplomatic status or immunity of a person is made conclusive and binding on the courts. In the African countries also, there are no statutory laws.

Steps towards codification and uniformity

In recent years a number of jurists and societies of international lawyers have expressed the opinion that the immunities and privileges of diplomatic agents should be put on a statutory footing either by means of domestic legislation in various countries or by adoption of one or more multilateral conventions. The reasons for this would appear to be twofold. Firstly, the immunity of an envoy being based on customary and conventional rules arising out of usage of nations, difficulties arise

[1] See the decision of the Supreme Court of Canada in the matter of a Reference by the Governor General (Per Duff C. J.), 1943 S.C.R. 208.

[2] United States Code, Sections 252 to 254 of title 22; Act of April 30, 1790, Sections 25 to 27.

[3] Decree of the Supreme Soviet of 1927; See also the Decree of 1956.

on occasions as to what the given rule is, and doubts might also arise regarding the basis and foundation of such immunities in the municipal law of the states, since international law as such does not grant any immunity but the rights have to be given by the municipal law of the country in compliance with its international obligations.[1] It is also generally considered that international law as such is not binding on the municipal courts of a state; so far as the courts are concerned, international law is the body of doctrines regarding international rights and duties of states which have been adopted and made part of the law of the land.[2] The second reason is that the practice of the states over a number of years has varied so much on the scope and extent of diplomatic immunity that it is difficult to ascertain with any precision as to what is required to be given under the recognised principles of international law. A good deal of conflict arose in the past on the question of immunity of an envoy in respect of trading and other private activities as also on the question of immunities of the subordinate staff of diplomatic missions. For example, whilst the United States and the United Kingdom allow complete immunity in respect of all acts of a diplomatic officer, the Italian Court of Cassation had as early as in 1922 taken the view that "absolute immunity put forward from historical times is now ended and is one of the political doctrines that have been superseded" and that the acts which a diplomatic agent does outside his public functions have no relation to the exercise of sovereignty, and consequently it is not necessary for them to be protected by the principle of immunity in respect of such acts.[3] A similar decision was taken by the Supreme Court of Poland; and the practice in the U.S.S.R. has been to restrict diplomatic immunity as much as possible. In the matter of subordinate staff there has been a wide divergence in state practice. Having regard to this uncertain position, the American states had entered into a Convention among themselves on February 20, 1928, which is known as the Havana Convention, indicating with some precision the functions, duties and immunities of diplomatic envoys. The status of diplomatic agents was also defined in the preamble to that convention as being the representatives of their governments and not as the representative of the person of the chief of state. It was further stated in the preamble that

[1] Oppenheim, International Law, 8th ed., p. 45.

[2] See the decision of the Scottish Court of Session in *Mortensen* v. *Peters*, 8 F. (J. C.) 93, and that of the Privy Council in *Chung Chi Cheung* v. *The King*, (1939) A. C. 166.

[3] *Comina* v. *Kite*, F.It. (1922)–I–343.

acknowledging the fact that diplomatic officers represent their respective states and should not claim immunities which are not essential to the discharge of their official duties, and acknowledging also that it would seem desirable that either the officer himself or the state represented by him renounce diplomatic immunity whenever touching upon a civil action entirely alien to the fulfilment of his mission.

The convention, which became binding between the various American states, helped to arrive at some uniformity of practice as between those states by adopting the doctrine of "functional necessity" as the legal basis for grant of immunities. This convention, however, being limited in application could do little to prevent the divergence of state practice which was growing in other parts of the world.

Learned societies, individual jurists, and research institutions like the Harvard Law School have been attempting through studies and research drafts to formulate the existing principles on the subject.[1] The matter also received consideration of the Committee of Experts appointed by the League of Nations, and it was referred by the United Nations to the International Law Commission as being a priority topic for progressive development and codification.[2] The Commission adopted its recommendations at its Tenth Session in the form of certain Draft Articles. The Asian-African Legal Consultative Committee shortly after its formation in 1956 was also entrusted with the work of examination of the subject taking into account the special needs of the region. The Committee in its report adopted at its Third Session in 1960 formulated certain principles dealing with the nature and extent of diplomatic immunities and privileges in the form of a Draft Convention. It took the view, however, that the question as to whether a country should adopt these principles by means of a convention or domestic legislation should be left to the government of each member country to decide.[3] The Conference of Plenipotentiaries convoked by the United Nations which met in Vienna in March 1961 succeeded in drawing up a convention, which if ratified will be binding among most of the nations of the world. The convention has attempted to lay down a uniform practice to be followed by all the states, but whether it has succeeded in doing so is somewhat doutbful. The International Law Commission had itself noticed that practice of states has shown some

[1] Research in International Law, Harvard Law School. I. Diplomatic Privileges, 1932; Bluntschli's Draft Code 1868; Fiore's Draft Code 1890; Pessoa's Draft Code 1911; Phillimore's Draft submitted before the 34th Conference of the International Law Associa'ion; Strupp's Draft Code 1926; Draft Code of the Japanese Branch of the International Law Association, 1926; Resolution of the Institute of International Law, 1929.

[2] U.N. General Assembly, Resolution 685 (VII) of 5 December 1592.

[3] A.A.L.C.C. Report of the Third Session, 1960.

divergence which has persisted on such questions as the limits of immunity with regard to acts of a private law nature, the categories of diplomatic staff which are 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 and conditions for waiver of immunities.[1] But the Commission in its recommendations as well as the Vienna Convention 1961 do not appear to have found a complete solution to the problem of settling the conflict in these fields. Article 47 of the convention which broadly follows the recommendations of the International Law Commission contained in Article 44 of its Draft Articles would appear to contemplate that the divergence in state practice would continue in regard to diplomatic immunities even after the adoption of the convention, because it provides that a state could apply the provisions of the convention in a restrictive manner in relation to the envoy of a state which applies the provisions of the convention restrictively. The Article further provides for according of a more favourable treatment than laid down in the convention on the basis of custom or agreement. It is therefore reasonable to assume that it would be open to a state party to the Vienna Convention 1961 to interpret the provisions relating to diplomatic immunities in a manner consistent with its own notions, and that it would be free to decide upon the extent of the immunities and privileges and the classes of persons entitled to them in accordance with its own practice. It could perhaps be expected that the Vienna Convention 1961 would lead to a certain amount of uniformity, but having regard to the flexibility in the application of the provisions one may not be justified in the hope that states would be prepared to abandon their existing practices. In dealing with the various aspects of diplomatic immunity, it would, therefore, become necessary to examine the practice of the states as contained in executive statements and judicial decisions particularly with regard to matters where there is some divergence.

Reciprocity and discrimination

Another point which arises for consideration in this connection is the question of reciprocity and discrimination. As already observed, there is divergence of state practice in regard to the scope and extent of immunities that are to be accorded to diplomatic agents. Now, the question is whether it is permissible for a receiving state to disallow the

[1] See U.N. Doc. No. A/CN. 4/1/Rev. 1, p. 54.

diplomats of a particular country certain immunities and privileges, which it grants to diplomatic agents of other states, on the ground that the particular state does not grant those immunities and privileges to the envoys accredited to it. The provisions of Article 47 of the Vienna Convention would appear to permit such a practice. Nevertheless, it is for consideration whether this is desirable and whether attempts should not be made to prevent such tendencies becoming a general practice among nations. It is quite clear that immunities of an envoy, as distinct from privileges, are granted by each state under international law in order to enable the envoy to perform the functions of his mission without let or hindrance. It is on this basis that a state decides for itself what jurisdictional and other immunities it will accord to the envoys of foreign states within its territory. Consequently, when a state grants immunities to a particular envoy to a lesser extent than it accords to others, can the receiving state be said to be allowing him the immunities under international law even though this may be on account of the restrictions imposed by the home state of the particular envoy? It is to be observed that in recent years some states have been resorting to curtailment of the rights and immunities of diplomatic agents, especially as regards their freedom of movement and communication as a weapon of cold war practised against the envoys of certain countries. Now, such steps constitute clear violation of international law and deserve to be condemned. As a result what has in practice happened is that those states whose envoys have been subjected to such restrictions have reciprocated by imposing restrictions themselves. In fact, in certain countries like Britain, Australia and New Zealand, legislation was enacted to enable their governments to impose restrictions on envoys of states whose governments apply such restrictions. It is submitted that in the interest of each state and for diplomatic relations in general the time has come to put a stop to such practices. It is recognised universally that a certain minimum of rights and guarantees are necessary for effective functioning of a mission, and the minimum could well be said to be those which are known as immunities under international law, such as inviolability, freedom of movement and communication, and immunity from jurisdiction, both civil and criminal. If any state refuses to grant these minimum rights to the diplomatic agent accredited to it or to the diplomatic agent of any particular country or countries, the state concerned should be held to have violated the rules of international law. It is submitted that it ought not to be permissible for other states to restrict immunities of the envoy of the offending state, but

appropriate steps should be taken against the offending state for its violation of international law. It may be argued that the immunities of an envoy are to be granted on the basis of reciprocity, but in the modern context of international society, application of the principle of reciprocity in so far as the minimum rights of an envoy are concerned would not appear to advance the cause of better international relations. If the basis of reciprocity is to be adopted, it would mean that sooner or later many states would be faced with the problem of having varying sets of rules regarding the immunities of envoys accredited to it, the more liberal ones applicable to a set of envoys whilst the restrictive rules are applied in respect of the envoys of certain other countries. This can only lead to confusion and uncertainty for the administrative authorities of the state as well as for the municipal courts of the country. To take an example, if a state were to have different rules regarding the freedom of movement of the diplomatic agents within its territory on a basis of reciprocity, the police and minor administrative authorities would have the task of finding out on each occasion whether the particular diplomat, who might be found travelling in some part of the country, belonged to the category which was permitted to travel there. This would lead to waste of time and even harrassment of diplomatic personnel could not be prevented on all occasions.

In so far as privileges are concerned, that is, those rights which are not essential for the fulfilment of the mission and which are given as a matter of international courtesy over and above the immunities, the principle of reciprocity ought to be the proper basis, since no state can insist upon such privileges as a matter of international law. For example, exemption from customs duties on articles imported by the mission or the envoy for his own use rest on international courtesy, and in such matters the principle of reciprocity may be applied. If a state refused to grant such benefits, it cannot expect that its envoys will be given these privileges in other states especially as they are not essential to their effective functioning.

Immunities and privileges

The International Law Commission in dealing with the question of diplomatic immunities and privileges had divided the subject under three heads, namely, (i) immunities relating to the premises of the mission and to its archives, (ii) those concerning the work of the mission and (iii) personal immunities and privileges of the envoy.

It is, however, difficult to draw a clear cut division in this manner as many of the personal immunities of an envoy are intermixed with the immunities relating to his work or the premises of his mission; indeed the immunities of a diplomat, whether they be for his person, or related to his work, office, or residence are all calculated to enable the envoy to discharge his mission in an effective manner. The subject will therefore be considered in this chapter under the traditional heads, namely, (i) inviolability of the person, mission premises, archives and residence, (ii) freedom of movement, (iii) freedom of communication, (iv) immunity from civil and criminal jurisdiction, (v) exemption from taxation, and (vi) other immunities and privileges.

Inviolability

The principle of inviolability in respect of the person of the diplomatic agent originally arose out of the concept that the diplomat represented the person of his sovereign and that any insult to him constituted an affront to the Prince who had sent him. In course of time, however, it came to be recognised on the basis that it was essential to ensure inviolability of the person of the ambassador in order to allow him to perform his functions without any hindrance from the government of the receiving state, its officials and even private persons. The term 'inviolability' means that the envoy shall be immune from any form of arrest or detention. The receiving state shall treat him with due respect, and it is required to take all appropriate steps to prevent any attack on his person, freedom or dignity.[1] It implies that the receiving state is obliged to afford a higher degree of protection to the person of the diplomatic agent than is accorded to a private person. It is the duty of the government to which the envoy is accredited to take all necessary measures to safeguard the inviolability of the diplomatic agent.[2] Should an act violating the immunity of the envoy be committed by a public official, adequate reparation is due.[3] Inviolability attaches from the moment the diplomatic agent sets his foot in the country if previous notice has been received by the government; in any case it attaches as

[1] See Article 29 of the Vienna Convention 1961, which provides, "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

[2] Satow, op. cit., pp. 176–77.

[3] For example, see the case of M. de Mattueof, the Russian Ambassador in London, for whose arrest in 1708 a special Ambassador was accredited by Britain to convey to the Czar at a public audience the expression of the Queen's regret for the insult offered to the Ambassador. de Martens, Causes célèbres du droit des gens, Vol. I, p. 68

soon as the envoy makes known his public character by production of his passport. It extends over the period occupied by him on his arrival, sojourn, and departure within a reasonable time after the termination of his mission.[1] This is not affected by the breaking out of war between his country and that to which he is accredited. In respect of acts of private persons resulting in violation of the person or dignity of an ambassador, the receiving state is bound to take all reasonable steps to bring the offenders to justice. Failure to do so would amount to a breach of duty on the part of the receiving state for which reparation may be claimed. The receiving state is also under a duty to take proper steps to prevent such acts on the part of private persons by providing for adequate police protection in times of need taking into account the exigencies of the situation. Any negligence on the part of the receiving state would call for protests from the home state of the envoy.[2]

According to English criminal law, every one is guilty of misdemeanour who by force or personal restraint violates any of the privileges conferred upon the diplomatic representatives of foreign countries.[3] Domestic legislations of several countries provide specifically for punishment for infraction of inviolability as infractions of international law such as the statute law of the United States of America[4] and the law of Belgium. The United States Supreme Court in giving expression to its view had held that the person of a public minister is sacred and inviolable, and whoever offers any violence hurts the common safety and well being of nations.[5] International conventions as well as research drafts prepared by official and non-official bodies have also recognised the principle of inviolability of the person of an envoy.[6]

It is, however, expected that a diplomatic representative will pay due regard to the laws and regulations for the maintenance of public order and safety in the state where he is appointed to reside. The best guarantee of the diplomat's immunity is the correctness of his own

In the case of an assault on the Third Secretary of the American Embassy at Nanking by a Japanese soldier on 26th January 1938, a public apology was demanded and received.

[1] Satow, op. cit., pp. 177 and 179.

[2] See the instances cited in Satow, op. cit., at pp. 177–178 regarding the assassination of the German Minister and the Japanese Chancellor by the Chinese troops during the Boxer rising in 1899; the assassination at Moscow and Petrograd in 1918 of the German Ambassador and the British Naval Attaché; the assassination in Poland in 1927 of the Soviet Minister in Warsaw.

[3] See Stephen's Digest of Criminal Law, Arts. 96–97.

[4] U.S.A. Revised Statutes, para 4062; U.S.C.A. para 251.

[5] Per Mackean C. J. in *Res Publica* v. *de Longchamps*, 1 Dallas 111–116.

[6] See the Havana Convention on Diplomatic Officers 1928, Article 14; A.A.L.C.C., Draft Convention, Article 27; Harvard Draft Convention on Diplomatic Privileges and Immunities, Article 17.

conduct. If the commission of an offence against a diplomatic agent is the logical consequence of the conduct and situation brought about by the diplomat himself, it may well be said that the offence is not a violation of his diplomatic immunity.[1] For example, if an envoy were to commit an assault on a person and was assaulted in retaliation, it may be said that the envoy brought about the attack on himself by his own conduct and he should not be heard to complain about violation of his immunity. The same would be the position if he unreasonably places himself in a disorderly crowd.[2] A diplomat is also expected to comply with all such regulations as do not restrict him in the effective exercise of his functions. This position is recognised in the practice of the states. For instance, in November 1935 the car of the Iranian Minister in Washington was stopped for exceeding the speed limit and the Minister was handcuffed when he offered violence to the police officers. The United States Government while expressing formal regret for the incident intimated that the privilege of the diplomatic immunity imposes upon the person in question the obligation to observe the laws of the country.

It may be mentioned that when antipathy towards the policies of a particular state arouses the feeling of the populace, the task of adequate protection may demand the taking of special precautionary measures, such as posting of police guards at the embassy premises or provision of an armed escort for the envoy. In times of war a special obligation towards a diplomatic officer is owed. Every endeavour must be made not only to protect his person and property, but the state must also facilitate the departure of the officer from its territory.[3]

The diplomatic representative is also entitled to the same degree of protection to his reputation. The person who defames him ought also to be prosecuted.[4]

If there is any violation of his immunity, the remedy of the envoy is to complain to the Foreign Office of the government of the receiving state and failing redress, to turn to his own government.[5] If the injury is done by a private person and proceedings are to be instituted in a court of law, the criminal laws of many countries require that the complaint must be lodged by the person assaulted or a witness to the

[1] See the decision in *State* v. *Acuna Araya*, A.D. 1927–1928, Case No. 243.

[2] American Institute of International Law, Article 6 of the Rules adopted in 1895.

[3] American Institute of International Law. Article 5 of the Resolutions adopted in 1895. See also Satow, op. cit., p. 180, para 320.

[4] See the opinion of Mr. Bradford A. G. in Moore's Digest, Vol. IV, p. 629–30.

[5] See the Statement of Secretary of State to the Minister for Haiti dated July 10, 1883; Moore's Digest, Vol. IV, p. 625. See also Satow, op. cit., p. 180.

assault upon oath. In such a case the diplomat should co-operate with the authorities of the receiving state to bring the offender to justice.

Inviolability of the premises of the mission. The principle of inviolability of the premises of the mission and that of the residence of the envoy had been treated by writers on international law on the same footing,[1] namely "*franchise de l'hôtel,*" either on the basis of exterritoriality or as a necessity for effective functioning of the envoy. The International Law Commission, however, regards the inviolability of the mission premises to be an attribute of the sending state and not as a consequence of the inviolability of the head of the mission, by reason of the fact that the premises are used as the headquarters of the mission. The inviolability of the residence is, on the other hand, regarded as a personal immunity of the envoy.[2] Notwithstanding this difference in approach it would appear that both the mission premises and the residence of the envoy are inviolable exactly to the same extent.[3] The term "inviolability" in respect of premises implies that the receiving state is obliged to prevent its officials and agents from entering or performing any official acts within the premises. It is also under a special duty to take all appropriate steps to protect the premises from being entered into or damaged by private persons and to prevent any disturbance or breach of peace in front of the premises. The government of the receiving state is thus under a duty to adopt special measures over and above those it takes to discharge its general duty of ensuring order. Inviolability attaches to all premises irrespective of whether leased or rented by the government of the home state. The premises are deemed to include all buildings, appurtenances, garden and the car park.[4] The rule of inviolability of the premises of the mission as well as the residence of the envoy has been universally recognised in the practice of the states. It has now been adopted in the Vienna Convention 1961.[5]

[1] Hurst, Collected Papers, 1950, p. 214; Satow, op. cit., p. 213; Oppenheim, op. cit., 8th ed., Vol. I, p. 793.

[2] See Commentaries to Article 20 of the Draft Articles adopted at the Tenth Session of the Commission.

[3] See Article 28 of the Commission's Draft; Article 30 of the Vienna Convention 1961.

[4] See Commentaries to Article 20 of the Commission's Draft adopted at the Tenth Session.

[5] Article 22 of the Vienna Convention 1961 provides:

1. The premises of the mission shall be inviolable. The agents of the receiving state may not enter them except with the consent of the head of the mission.

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

3. The premises of the mission, their furnishings and other property thereon and the

The need for this immunity can be best expressed in the words of Vattel:

> The independence of the Ambassador would be very imperfect and his security very precarious if the house in which he lives were not to enjoy a perfect immunity and to be inaccessible to the ordinary officers of justice. The Ambassador might be molested under a thousand pretexts, his secrets might be discovered by searching his papers, and his person exposed to insults. Thus all the reasons which establish his independence and inviolability concern likewise in securing the freedom of his house.[1]

The principle requires that the premises of the mission shall in all cases be inaccessible to officers of justice, police, revenue, and customs, but practice shows that there may be many an occasion when the diplomatic agent may himself require the assistance of the local authorities, for example, to prevent a fire, to arrest a criminal, or for investigation when a crime, theft or burglary has been committed within the premises. Again, it may be necessary for the officials to enter the premises in an emergency and the head of the mission may give his consent to their doing so in his own interest. It is, however, the accepted rule that unless the head of the mission gives an express authorisation no public official shall enter the premises nor exercise any functions therein; thus no writ may be served within the premises of the mission, and summons to appear before a court may not be served in the premises by a process server. Even if process servers do not enter the premises but carry out their duty at the door, such an act would constitute an infringement of the respect due to the mission.[2]

In Britain, the British dominions, and in the United States, the immunities relating to diplomatic premises are recognised by the common law of the land and applied by the courts as such. By Article 4 of the Decree of the Supreme Soviet 1927, similar immunities are granted in the Soviet Union. The Decree provides that search or seizure inside the embassy buildings can be permitted at the request of or by agreement with the diplomatic representative provided it takes place in the presence of a person from the prosecutor's department and a repre-

means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 30 of the same convention states:

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

2. His papers, correspondence and except as provided in paragraph 3 of Article 31, his property shall likewise enjoy inviolability.

[1] Vattel, Le droit des Gens, Vol. IV, Ch. 9.

[2] See Commentaries on Article 20 adopted by the International Law Commission at its Tenth Session.

sentative from the Ministry of Foreign Affairs. Article 16 of the Havana Convention is also specific in regard to this right.

Cases of emergency. There appears to be some difference of opinion as to whether the diplomatic premises can be entered by local officials for taking appropriate steps in cases of extreme emergency to ensure the safety of human life jeopardised by civil commotion, aerial bombardment, fire or other national calamity. It is observed that in such an emergency, it may be necessary to take immediate action, and if the envoy cannot be contacted with a view to obtaining his permission, much damage and even loss of himan life may be caused. There was considerable discussion on this question in the International Law Commission, but the prevailing view was that such a power in the hands of the receiving state may well lead to abuse as situations could be created as a pretext to enable the local officials to enter the premises, such as by throwing an incendiary bomb. It was felt that the possible threat to property through failure to deal with an emergency promptly was far less formidable than the danger of embittering relations between states through failure to respect the inviolability of the premises of the diplomatic mission.[1] In the Asian-African Legal Consultative Committee, India and Japan had, however, expressed a reservation in regard to the competence of the receiving state to enter the premises of a mission in cases of extreme emergency.[2]

Surrender of criminals taking shelter within the mission premises. It is generally agreed that the immunity affords no justification for an envoy to give shelter to a criminal within the premises. An envoy is expected to act with due regard to the law and order in the receiving state. If a person wanted by the authorities of the state on a criminal charge takes refuge within the diplomatic premises, he should either be surrendered to the police or the authorities should be permitted to apprehend the offender within the premises. If a crime is committed within the premises, the offender should be handed over to the local authorities. The Pan American Convention of 1928 provides that if a crime is committed within the embassy or legation by a person from without, the offender should be handed over to the local authorities.[3] This is consistent with

[1] See Yearbook of the International Law Commission, 1958, Vol. I, p. 128 – Statements of Mr. Bartos and Mr. Tunkin.

[2] See A.A.L.C.C., "Report on Diplomatic Immunities," Article 20, Third Session Report.

[3] Article 17 of the Convention provides: "Diplomatic officers are obliged to deliver to the competent local authority that requests it any person accused or condemned for ordinary crimes, who may have taken refuge in the mission."

the views that have been expressed from time to time by various national tribunals. For example, in a case decided in 1865 by the Supreme Court of the French Republic, it was held that the French courts had jurisdiction to investigate into the case where a Russian subject assaulted an attachè inside the Russian embassy in Paris; [1] and this decision was followed in 1909 in the case of a Bulgarian who committed a crime against the personnel of the Bulgarian Legation in Paris.[2] Similar decisions were taken by the courts in Germany and Italy.[3] The receiving state may also protest if a private person is detained within a foreign embassy, as such an act will amount to an abuse of the right of the envoy to inviolability in respect of his premises. In the case of Sun-Yat-Sen, a political refugee from China, who was detained within the Chinese Legation in London, the Foreign Office intervened with the result that he was released although the courts felt some difficulty in issuing a writ of *habeas corpus* and ordering Sen's release having regard to the immunity of the diplomatic premises.[4] The Vienna Convention 1961 also provides that the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the convention or by other rules of general international law.[5]

It was considered at times that if an envoy harbours a criminal inside the diplomatic premises, the government of the receiving state would be justified in taking measures to compel the surrender of the criminal. It was said that the state officials might surround the house by police to prevent the escape of the fugitive and complain to the government which had accredited the agent and demand his recall.[6] According to Oppenheim, if an envoy abuses his immunity, the receiving government need not bear it passively.[7] It should, however, be stated that there is no obligation on an envoy to deny entrance to criminals desirous of taking refuge in his premises, but he must surrender them to the prosecuting government at its request. Oppenheim further observes that if an envoy refuses to surrender the criminal, any measures may be taken to induce him to do so, short of such as would involve an attack on his person. Thus the embassy may be surrounded by soldiers and eventually the criminal may even forcibly be taken out of the

[1] *Re Mickilchinkoff*, Clunet (1882), p. 326.
[2] *Re Trochanoff*, Clunet (1910), p. 551.
[3] See the instances cited by Sir Cecil Hurst in his Collected Papers, pp. 147–49.
[4] See Satow, op. cit., p. 218.
[5] See clause (3) of Article 41 of the Vienna Convention 1961.
[6] Satow, op. cit., p. 214.
[7] Oppenheim, International Law, 8th ed., p. 796.

embassy. But such measures of force are justifiable only if the case is an urgent one and after the envoy has been requested in vain to surrender the criminal.[1]

In the course of discussions in the Asian-African Legal Consultative Committee, it was maintained by the delegation of India that the receiving state should have the right to enter the premises to apprehend its nationals who are fugitives from local justice and have taken shelter therein.[2] Though this view appears to be in accord with the opinions expressed by text writers, the limitation suggested on the inviolability of diplomatic premises was not accepted by the Committee nor does such a provision find place in the Vienna Convention of 1961 presumably because of the need at the present time to zealously guard the immunities attaching to diplomatic premises.

The question of inviolability of diplomatic premises necessarily leads to the discussion of the right of an envoy to give refuge to political offenders and refugees in the premises of the mission. This matter will be dealt with separately together with the right of territorial asylum.

Duty of protection of the mission premises. Another aspect of the right of inviolability of diplomatic premises namely, the duty of protection which the receiving state owes, has already been noted. There does not appear to be any controversy on this point and it has now been expressly mentioned in the Vienna Convention 1961. This duty of protection means that the receiving state must ensure by taking such appropriate steps as may be necessary to prevent damage or any intrusion into the premises. It thus casts a positive duty on the authorities of the receiving state. The Supreme Court of the United States had in the case of the *United States v. Hand* [3] expressed the view that an attack upon the house of an envoy is equivalent to an attack upon his person, that precautions must be taken against mob violence and if it was not done, an apology was necessary. Protection should also be afforded against crowds or mobs collected in the vicinity of the premises for expressing hostile views, contempt, or even disapprobation of a foreign state or of its mission.[4] It is sometimes the case that

[1] Oppenheim, op. cit., p. 797.

[2] See the reservation of India in Article 20 of the A.A.L.C.C. Draft Articles on Diplomatic Relations – Third Session Report.

[3] Moore, Digest., Vol. VI, p. 62. This case was concerning an attack upon the houses of the Russian representatives in Philadelphia. The note of Sir Edward Goschen, British Ambassador in Berlin, to Sir Edward Gray with regard to mob violence in the British Embassy on 4.8. 1914 was on the same lines.

[4] Prof. R. Reeves in A.J.I.L. Suppl., 1932, Vol. XXVI, pp. 56–57.

individuals or organisations may wish to demonstrate in front of the embassy premises to show their resentment over certain actions of the government of the home state of the envoy. In a democratic country, it may not be possible to completely ban such demonstrations having regard to the freedom of speech and expression that the citizens of the country may enjoy under the constitutional rights guaranteed to them. Nevertheless, it is necessary for the receiving state to ensure that such demonstrations do not overstep the limits of propriety or infringe on the immunities of the envoy in any manner. The government should, therefore, prescribe a certain area around the mission premises in which such demonstrations will not be permitted. In any case the demonstrators cannot be permitted to enter the premises of the mission or to cause damage to the buildings. As soon as the government comes to know of the likelihood of a demonstration taking place, it would be its duty to post police constables outside and in the vicinity of the mission to ensure that the demonstration remains within certain bounds. If any infringement takes place, that is, if any of the demonstrators tries to trespass into the mission premises, or attempts to throw leaflets within the premises, or behaves in a hostile manner, he should be stopped at once and, if necessary, be arrested. It may be mentioned that the United States Congress through a joint resolution, approved on the 15th December 1938, declared it unlawful to display any banner, or placard, or device designed or adopted to intimidate, coerce, or bring into public odium any foreign government, or any officer or officers thereof, or to interfere with the free and safe pursuit of the duties of any diplomatic or consular representative of any foreign government within 500 feet of any building or premises within the district of Columbia except by and in accordance with a permit issued by the Superintendent of Police, or to congregate within 500 feet of any such building, or to refuse to disperse after having been ordered to do so by the police authorities.[1]

Inviolability of carriages, motor cars etc. The principle of inviolability of diplomatic premises equally applies to carriages, motor cars, boats and aeroplanes, if used for diplomatic purposes or for the use of the envoy. It follows that these should not be used for giving shelter to criminals.[2]

[1] 52 Statutes 30; 22 U.S.C.A., para 255A.
[2] See Satow, op. cit., pp. 213–14.

Inviolability of archives. It has long been recognised that the archives of the mission are inviolable wherever they may be situated. They are immune from search and seizure, whether it be at the instance of the executive authorities or in pursuance of a judicial order. They cannot be seized nor can they be required to be produced before any court of law or executive authority. The inviolability applies to archives regardless of the place in which they may be kept. As in the case of the premises, the receiving state is obliged to respect the inviolability of the archives and to prevent its infringement by private parties. The International Law Commission has now extended this doctrine to cover all diplomatic documents even though separated from the archives and irrespective of their physical whereabouts. Thus, inviolability attaches to such documents while being carried in the person of a member of the mission.[1] The Vienna Convention 1961 has adopted the principle of inviolability both as regards the archives and the documents of the mission.[2] It is needless to mention that the reasons which make it imperative to recognise the inviolability of diplomatic missions apply with equal force in the case of archives and documents of the mission as the envoy's rights would be too imperfect and his secrets divulged if his archives were liable to be searched, seized, or required to be produced in court.

Private papers, goods and property of an envoy. The same principle applies in the case of the envoy's private papers, correspondence and his property.[3] If these could be seized or taken in satisfaction of an execution warrant, many an excuse could be found to harrass or coerce the envoy.

An interesting question arises as to whether it is open to private persons to detain an envoy's property to enforce payment of his debts, such as, repair charges on his motor car or piano. It would seem that such detention would be wrongful in view of the complete inviolability of the envoy's property and it would be the duty of the receiving state to ensure against such violation of his immunity. It may be argued that a person, who has carried out repairs to the envoy's car or has transported it, is entitled to his remuneration, and until he is paid he is not obliged to deliver the car which he may keep to ensure payment of his

[1] See Commentaries on Article 22 of the International Law Commission's Draft Articles adopted at the Tenth Session.

[2] Article 24 of the Convention provides: "The archives and documents of the mission shall be inviolable."

[3] See Article 30 of the Vienna Convention 1961.

dues, particularly when he cannot sue the envoy in a court of law. However hard a particular case may be, it is of utmost importance that in the interest of the comity of nations the absolute inviolability of the envoy, his goods and belongings is respected. There is, however, one exception to the rule of inviolability of private papers, that is, if the envoy carries on professional or commercial activity outside his official functions, his papers relating to such functions will not come within the purview of diplomatic immunity. This appears to be both reasonable and just in principle. The immunities of an envoy are accorded to-day out of functional necessity, that is, in order to enable him to discharge his official duties. Now, if an envoy were to enter into activities which are not within his functions as an envoy, and if he incurs liability in respect of those activities, his papers relating to them ought not to be clothed with the immunity which attaches to his other papers.

Freedom of movement

The right of an envoy to move about freely in the territory of the receiving state would appear to be one of the essentials to effective functioning of his mission. As already noticed, the all embracing duties of an envoy to-day include not only his reporting on the situation in the state where he is appointed to reside both in respect of political and economic matters, but he has also to strive towards creating greater understanding between the peoples of his native land and those of the receiving state in addition to his other functions of protection of the interests of his home state and its nationals. An envoy, in order to be effective, would often need to familiarise himself with the various parts of the country and its people. He should also see for himself the economic developments that may be taking place in the different regions of the country. It is almost impossible to get a true picture if one were to remain only in the capital, and for this reason it is necessary that the envoy should during his term of office undertake extensive tour of the country. If the receiving state refuses to allow him free movement for this purpose, it would be frustrating the very object of his mission. It is true that since the receiving state is under an obligation to ensure the safety of the person of the envoy, it may reasonably ask him not to visit places where such safety could not be guaranteed, such as in areas which may be disturbed due to riots or civil commotion. Again, if at a particular time there is a strong public feeling in the country or in any particular area against the home state of the envoy, the receiving state will be well within its rights to advise

the envoy not to undertake tours at that time or in the specified places. There may also happen to be certain areas in a country which are closed to the citizens of the state in the interest of national security, such as border areas, military and security zones, and if an envoy were not allowed to enter such areas, no exception could reasonably be taken. In time of war or national emergency, it may also be necessary to restrict the movement of the envoys both on the ground of security and for the protection of the person of the envoy. But apart from these exceptional cases, it would appear to be wrong on the part of the receiving state to place restrictions on the envoy's right of free movement. Instead, it is the duty of the receiving state, in the interest of international cooperation, to provide facilities for the diplomatic agent to know the country, its achievements and its people. Unfortunately, however, there has been a growing tendency on the part of several states, especially those with a totalitarian form of government, to restrict the movement of diplomats and to deny them access to places where they would be able to assess the true conditions or the feelings of the people. This tendency has been so marked in certain countries as a result of the cold war that envoys of particular states have been confined to the capital or to a few zones near the capital. This, again, has resulted in retaliatory measures by the states whose envoys have been subjected to such restrictions in movement. In the world to-day, there appear to be two different trends among the states in regard to the right of free movement and the International Law Commission in reaching at a compromise recommended that "subject to its laws and regulations concerning zones, entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure to all members of the mission freedom of movement and travel in its territory." [1] The provision of the Vienna Convention in this regard is in identical terms.[2] From the provisions of this Article one could perhaps get the impression that the receiving state is free to enact laws and regulations prohibiting or regulating entry into certain areas which would apply specifically to members of diplomatic mission, but it appears that the International Law Commission in making its recommendations had in mind only laws and regulations on the subject applying to the general public.[3] The Commission had further qualified the position in the commentaries to the Articles adopted in the Tenth

[1] Article 24 of the Draft Articles adopted by the Commission at its Tenth Session.

[2] Article 26 of the Vienna Convention.

[3] See Yearbook of the International Law Commission, 1958, Vol. I p. 137 – Statement of Mr. Yokota.

Session by stating that the establishment of prohibited zones must not be so extensive as to render freedom of movement and travel illusory.[1] If these conditions are respected by the governments in exercising their right to place restrictions on free movement of diplomats, there could hardly be any ground for complaint. It may be argued that if diplomats were allowed unrestricted right of movement and travel, some of them may be inclined to abuse the privilege and may engage in activities detrimental to the interest of the receiving state. The answer is that if a diplomat is found doing so he can be declared *persona non-grata*, and that because of such a possibility the freedom of movement and travel, which is one of the facilities so necessary for the effective functioning of a mission, cannot be denied or unreasonably restricted.

Freedom of communication

It has been an accepted principle of international law that for the proper discharge of his duties, and hence as a necessary incident of the right of legation, an envoy should be entitled to correspond freely and in all secrecy with his own government.[2] It is well recognised that the freedom of communication should extend to all official correspondence of the mission which the receiving state is under an obligation to permit and protect. This will include communications by an envoy with the diplomatic missions and consular posts of his country in other states, the diplomatic corps in the capital where he is appointed to reside as well as with the nationals of his country within the receiving state and agencies of international or inter-governmental organisations. In communicating with his government and the diplomatic missions or consular posts of his country in other states, the envoy may avail himself of all appropriate means including use of diplomatic couriers, and he may send his messages in code or cypher. Formerly, the freedom of communication was limited in principle to the diplomatic mission's exchanges with the government of the sending state and with the consulates under its authority within the receiving state. At present with the increase in air communication, the practice appears to have changed. Communications with embassies and consulates in other countries need no longer necessarily pass through the Ministry of Foreign Affairs of the home state of the envoy, and use is often made

[1] Commentaries on Article 24 adopted at the Tenth Session of the International Law Commission.

[2] Moore, Digest., Vol. IV, p. 699.

of certain intermediate posts from which despatches are carried to the various capitals to which they are addressed. The International Law Commission in its recommendations took note of this prevalent practice and it has now been embodied in the Vienna Convention 1961.[1]

Wireless Transmitters. The bulk of diplomatic correspondence is normally carried through the ordinary post, or telegraph, or in bags carried by diplomatic couriers. Nowadays, however, having regard to the increase in the volume of such correspondence between the envoy and his government and the need for expeditious communication, several countries have taken to having their own wireless transmitting stations in their embassies for direct communication with the Foreign Office of the home state. As installation of a number of such stations may interfere with the wireless network system of the receiving state, the International Law Commission considered that if a mission wishes to make use of its own wireless transmitter, it must in accordance with the international conventions on telecommunication apply to the receiving state for specific permission. This view was endorsed by the Asian-African Legal Consultative Committee, and has now been incorporated in the Vienna Convention.[2] It would, however, be reasonable to expect that the permission will not be unduly withheld by the receiving state.

Diplomatic bag. The freedom of communication necessarily implies that the official correspondence of the missions whether carried by mail or through messengers shall be inviolable, which means that the same shall not be liable to search, seizure, or censorship by the authorities of the receiving state. That state is also under a duty to see that such correspondence is not violated either by its agents or private persons within its territory. In order, however, to facilitate identification of the diplomatic mail, it is necessary that the diplomatic bag, whether it is a sack, pouch, envelope, or package, should bear visible and external

[1] See Article 25 of the Draft Articles adopted by the International Law Commission at its Tenth Session together with commentaries; Article 27(1) of the Vienna Convention 1961 provides: "The receiving state shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and the other missions and consultates of the sending state, wherever situated, the mission may employ all appropriate means ..."

[2] See Article 25 of the Draft Articles adopted by the International Law Commission at its Tenth Session together with Commentaries; See also Article 25 of the Draft Convention drawn up by the Asian–African Legal Consultative Committee. Article 27(1) of the Vienna wonvention provides: "However, the mission may install and use a wireless transmitter only Cith the consent of the receiving state."

marks of its character, such as the seal of the Foreign Office or the mission as the case may be. It is important to bear in mind that whilst inviolability of official correspondence is essential in the interests of the diplomat's functions, it is necessary to ensure that the diplomatic bag, which comes under the protection of international law, contains only diplomatic documents and articles for official use. There have been a number of instances of abuse of privilege, and diplomatic bags have on occasions been opened with the permission of the Ministry of Foreign Affairs of the receiving state and in the presence of a representative of the mission concerned. States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used for a purpose contrary to its legitimate use and to the detriment of the interests of the receiving state. The International Law Commission nevertheless emphasized the overriding importance which it attached to the observance of the principle of inviolability of the diplomatic bag by recommending that the diplomatic bag shall not be opened or detained. The Vienna Convention has adopted this principle also.[1]

Diplomatic couriers. It has been the age old practice to use diplomatic couriers for carrying of official mail, and the traditional courier services which used to be run by the Great Powers of Europe between their Foreign Offices and the diplomatic posts from London to St. Petersburg with Paris and Vienna on their way came within the protection of international law. It came to be recognised that couriers who bear official despatches to and from the missions were exempt from local jurisdiction even in third states which they had to traverse while engaged in the performance of their duties. They were, of course, to be provided with official passports clearly defining their status which they were to carry on their persons. Oppenheim observes that to ensure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction, and afforded special protection during the exercise of their office. It is particularly important to observe that they must have the right of innocent passage through third states and that, according to general

[1] See clauses (2), (3) and (4) of the Vienna Convention which provide:

(2) The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

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

(4) The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

usage, those parts of their luggage which contain diplomatic despatches and are sealed with the official seal, must not be opened and searched.[1] The Vienna Convention also contains provisions to this effect.[2] The sending state or the diplomatic mission may designate couriers *ad hoc*. In such cases the immunities of the courier shall cease as soon as he has delivered the diplomatic bag in his charge.[3] In recent years it has been the practice for some countries to entrust the diplomatic bag to the captain of commercial aircrafts scheduled to land at an authorised port of entry in the receiving state. This is especially so in the case where the commercial flights are undertaken by the governments themselves, or by government departments or state owned corporations like the British European Airways, the British Overseas Airways Corporation or the Air India International. In such cases, the captain of the aircraft is not regarded as a courier, but the package which he may carry will come under the protection of international law provided the captain of the aircraft has in his possession an official document indicating the number of packages constituting the bag. The diplomatic mission for which the mail is intended may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.[4] Some countries like Britain and the United States of America have, however, special aircrafts intended for courier service, and courier pilots who are designated as such must in these cases be treated as diplomatic couriers and entitled to all immunities admissible to the class. It would not make any difference if the plane carried non-fare paying passengers or cargo provided the main purpose for which the flight is undertaken is courier service.[5]

Communication in time of war. It is somewhat doubtful as to whether in time of war a belligerent state can place any restriction on the freedom of communication between an envoy and his home state. The U.S. State Department has asserted that the right of correspondence should be available to an American diplomatic officer at his post in a state engaged in war to which the United States is not a party. An envoy

[1] Oppenheim, International Law, 8th ed., Vol. I, p. 813; Satow, op. cit., p. 180.

[2] Clause (5) of Article 27 of the Vienna Convention provides that "The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving state in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention."

[3] See clause (6) of Article 27 of the Vienna Convention.

[4] See clause (7) of Article 27 of the Vienna Convention.

[5] See Commentaries to Article 25 of the Draft Articles adopted by the International Law Commission at its Tenth Session.

should, however, under such circumstances have unfailing regard for the safety of the state of his residence. He should be scrupulous to ascertain that in the exercise of his rights, he is not unwittingly opening a forbidden and unlawful channel of communication to outsiders. Persistent abuse of his privilege would justify its curtailment.[1] For example, on May 31, 1918 the British Government announced that in as much as communications of a personal and business nature had been exchanged through the media of diplomatic missions in Germany under "neutral covers" thereby deceiving the Allied Governments, it was no longer possible to continue the practice of exempting censorship whenever there was reason to suspect that an abuse of the confidence of the British Government had been attempted. But during the civil war in Spain when an official letter addressed to the American embassy in Madrid had been opened and censored, the Minister of Communications on a protest being received issued instructions to take all necessary measures in order that official as well as personal correspondence of diplomatic representatives accredited to Spain be completely exempt from all censorship.[2]

Exemption from local jurisdiction

Immunity from criminal jurisdiction. The most important consequence of the personal inviolability of the envoy is his right to exemption from the jurisdiction of the receiving state in respect of criminal matters. The immunity of a diplomatic agent in this regard is absolute, and he cannot under any circumstances be tried or punished by the local criminal courts of the country to which he is accredited. It is, of course, open to the government of the sending state and the head of a mission acting on behalf of his government to waive the immunity of a diplomat, and if this is done there could be no bar to his being tried by the local courts of the receiving state. It is, however, to be observed that though in respect of civil cases states have been known to have waived the claim to immunity on several occasions, there does not appear to be even a single instance where immunity has been waived in respect of a criminal action against a diplomat. It may further be mentioned that the immunity in respect of acts committed during the tenure of a diplomat's mission continues even after his term of office has expired, though this principle has been doubted in one or two cases. The immunity from criminal jurisdiction does not, however, mean that a

[1] Moore, Digest. Vol. IV, pp. 695–99.
[2] Department of Press Release, 29 August 1936.

diplomat is completely immune in respect of any criminal acts he may commit; it only means that he cannot be tried by the courts of the receiving state. He can certainly be prosecuted and punished by the judicial authorities of his home state, especially as the criminal laws of most states empower the courts to try and punish their citizens for crimes committed abroad. The receiving state may, in the event of a crime being committed by a diplomat, report the matter to his home government, and in serious cases ask for his recall and punishment according to the law in his own country. If, however, the offence is of a flagrant character, such as taking part in a conspiracy to overthrow the government, the receiving state may perhaps be justified in putting restraint on him, or seizing his person and expelling him.[1] According to Sir Cecil Hurst, such action, which a state may take in its own self defence, does not amount to exercise of criminal jurisdiction.[2]

Complete exemption of a diplomatic agent from local criminal jurisdiction appears to be fully justified by the requirement of his functions – otherwise the inviolability of his person could hardly be guaranteed. The authorities on international law appear to be unanimous on this question.[3] The same view has been taken by learned societies like the American Institute of International Law,[4] and the Harvard Law School in the drafts of international conventions prepared by these bodies. The Havana Convention on Diplomatic Officers 1928 in Article 19 provides:

> Diplomatic officers are exempt from all civil or criminal jurisdiction of the state to which they are accredited; they may not, except in the case when duly authorised by their government, waive immunity, be prosecuted or tried unless it be by the courts of their own country.

The decree of the Supreme Soviet of 14 January 1927 provides that diplomats of stated categories are not amenable to the jurisdiction of

[1] Satow, op. cit., p. 181.

[2] Hurst, Collected Papers, pp. 218 and 225.

[3] Oppenheim in summarising the position states, "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". Oppenheim, op. cit., 8th ed., p. 790.
According to Fauchille "diplomatic agents, irrespective of rank, enjoy complete exemption from the civil and criminal jurisdiction of the state to which they are accredited." (Fauchille, Traité de Droit International Public, 8th ed., Vol. I, p. 85).
Sir Cecil Hurst in a course of lectures before the Hague Academy after a detailed examination of the question stated: "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 civilised states." Hurst, Collected Papers, p. 225.

[4] Article 25 of the Draft of the American Institute of International Law.

the judicial institutions of the U.S.S.R. and of Allied Republics on a criminal charge except with the consent of the foreign state concerned. The International Law Commission in its Draft Articles [1] and the Final Report of the Asian-African Legal Consultative Committee on Diplomatic Relations recommended complete exemption from criminal jurisdiction. [2]This principle has also been incorporated in the Vienna Convention, 1961.[3]

It would, therefore, be correct to say and it can be regarded as a settled principle of law, that a diplomatic agent can under no circumstances be prosecuted in the receiving state for any criminal offence which he may commit. It is clear that this absolute immunity attaches also to acts committed in his private capacity, because it is difficult to see as to how a crime can be committed by a diplomatic agent in the exercise of his official functions. It has, however, to be remembered that notwithstanding his complete immunity from jurisdiction, an envoy is expected both in his own interest and for the sake of maintenance of reputation of his home state to pay due regard to the laws and regulations of the receiving state, and not to indulge in activities which may lead to contravention of the provisions of such laws. There had been some cases in the past where diplomats have been known to have taken part in harmful activities against the receiving state including participation in conspiracies to assassinate the sovereign.[4] These are, however, merely of historical interest today.

In recent years, the types of cases in which diplomats have been generally involved are cases of assault, violations of traffic regulations or motoring accidents, though there have been some cases of crimes of a

[1] See Article 29 of the Draft Articles adopted by the Commission at its Tenth Session.

[2] Articie 29 of the Draft Convention prepared by A.A.L.C.C.

[3] Article 31 of the Vienna Convention 1961 provides, "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state."

[4] For instance, in 1584 the Spanish Ambassador in London, Mendoza, plotted to depose Queen Elizabeth; and in 1587 the French Ambassador, L'Aubespine, conspired against the life of the Queen. In 1654, the French Ambassador in London took part in a conspiracy to assassinate Cromwell. In all these cases when the plot was discovered the envoy was ordered to leave. (See Adair, The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries, 1929, pp. 64–90; Phillimore, Commentaries upon International Law, 3rd ed., Vol. II, pp. 160–65.)

In the case of Count Gyttenburg, the Swedish Minister in London in 1716, who had entered into a plot with the leading Jacobites, the object of which was to depose King George I, the envoy was, however, arrested on the plot being discovered, but he had to be released when the British Minister in Sweden, Mr. Jackson, was arrested as a retaliatory measure. See Martens, Causes célèbres du droit des gens, 1858–61, Vol. I, p. 83.

In 1718, Prince de Cellamare, Spanish Ambassador in Paris, conspired to deprive the Duc d'Orleans of the Regency and transfer it to his master, the King of Spain. The conspiracy was discovered and Cellamare was placed under arrest. Subsequently, he was conducted to the frontier and expelled from France. See Martens, op. cit., p. 139.

more serious character. In no case, however, has any punishment been awarded. Where prosecutions had taken place by mistake, suitable apologies had been tendered.[1] There are a few instances where diplomats have been known to have indulged in activities prejudicial to the receiving state in concert with some nationals of the state itself. In all such cases, even when the conspiracies had been discovered and the nationals arrested, the diplomat concerned has merely been asked to leave.

It may be of interest to take note of a few cases in point. On April 17, 1916, one Wolf Von Igel, who was attached to the German Embassy in Washington, was indicted with three others in New York for violation of the Criminal Code for "beginning, setting on foot, and providing and preparing the means of military enterprises." He was released on bail after being arrested. The German Ambassador asked for his immediate release and for the return of the papers, which were seized at the time of the arrest of Von Igel, without their being read or copied by any American official. The U.S. Secretary of State in his communication to the German Ambassador stated that the crimes with which Von Igel was charged were so serious, some of them having been directed against the Government of the United States and liable to endanger its peace with other nations, that he felt sure that the German Government, even if it had the right under international law to interpose the plea of diplomatic immunity would not so interfere with the course of justice or permit its privileges to shield the perpetrator of such crimes from just punishment. The immunity was nevertheless claimed and no further action was taken since Von Igel left the United States upon declaration of war.[2]

In August 1919, the Assistant Military Attaché to the American Legation in Switzerland ran over and killed two people near Rolle, Canton of Vaud. The U.S. Government claimed that the Attaché was immune from judicial process in that country so long as he was accredited to it. The Swiss Political Department expressed the opinion that in countries where equality before the law is respected, the course of justice should not be stopped by a claim of diplomatic immunity. It was suggested that the Swiss Federal Council might request the State Department to agree to a renunciation of the Attaché's immunity but

[1] The only reported decision in which an exception seems to have been made is the case of *Greek State* v. *X* (1953 I.L.R. 378) where the First Secretary of the British Embassy at Athens was not granted immunity in respect of a criminal act (misdemeanour) which had no connection with his official functions.

[2] Moore, Digest., Vol. IV, pp. 517–19.

it refrained from doing so and the Attaché was tried by a U.S. court martial.[1]

In the event of involvement of a diplomat in any crime, it is customary for his home state to recall him, as it may be rather difficult for him to discharge his functions in the receiving state even though the government may not formally request for his withdrawal. For example, in 1927 Mr. Entezam, an official in the Iranian Legation in Washington, was recalled following upon a fatal car accident in which his wife was involved. In a similar case involving an Indonesian diplomat in New Delhi in 1956, the diplomat was recalled by his government when a car driven by him caused a fatal accident.

In one case relating to a car accident in the United States the diplomat concerned was known to have been arrested by the police, but a letter of apology was sent as soon as the matter was brought to the notice of the authorities. This related to the case of the Second Secretary of the Turkish Embassy at Washington who collided with another automobile on August 22, 1928 while driving in Trenton, New Jersey. The other case was that of Iranian Minister in Washington in 1935 who was accused of violating traffic regulations and assaulting police officials. An apology was tendered.

Since observance of traffic regulations in most of the cities of the world is essential for the safety of the population, it is now usual for the local authorities to inform the head of the mission of cases of violation of these safety regulations on the part of the members of his mission, and it is expected that the head of the mission would take appropriate action against such persons.

As already stated, if a diplomat by his own conduct puts himself in a position where it becomes necessary for the authorities in charge of law and order to put him under a temporary arrest for his own safety or in the interest of public peace, there can be no ground for complaint. This would be so where he himself commits an assault in a public place, or drives a car in disregard of his own safety and safety of others, or behaves in a drunk or disorderly fashion. It is very unlikely in these days when most of the diplomatic posts are manned by career officers that any one will intentionally indulge in any criminal activity or act in disregard of the local laws or regulations. Foreign offices of most states take a very serious view of such conduct on the part of their officers and disciplinary actions are usually taken if any report is received of an officer behaving in a manner unbecoming a diplomat.

[1] Ibid., pp. 519–20.

Immunity from civil jurisdiction. Immunity from jurisdiction is also enjoyed by diplomatic agents in respect of civil actions as well as proceedings before administrative tribunals as a necessary concomitant of the principle of inviolability. Whilst the majority of text writers have advocated absolute immunity even in respect of their exemption from civil jurisdiction,[1] the views expressed by judicial tribunals in various countries have not been quite uniform. Some of the draft conventions prepared by learned societies, however, favour the view that in principle a diplomatic agent, who in his 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.[2] The International Law Commission in its Draft Articles on the subject [3] recommended that the exemption from civil jurisdiction should be subject to certain exceptions: namely, that immunity should not extend to (i) real actions (actions *in rem*) relating to a diplomat's private immovable property situated in the territory of the receiving state, unless he holds it on behalf of his government for the purpose of the mission; (ii) actions relating to a succession in which the diplomatic agent is involved as an executor, administrator, heir or legatee; and (iii) suits or other actions relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state and outside his official functions.

In so far as the first exception is concerned, there could hardly be any doubt in principle as all states claim exclusive jurisdiction over immovable property in their territory, and even the immunity of a sovereign prince is subject to the same exception. The position is, however, a little different with regard to the second and third exceptions. Such exceptions cannot be said to have been recognised hitherto under international law or state practice, but the Commission incorporated these exceptions in its Draft Articles on the subject on the basis of what may be described as progressive development of international law. It may be observed that in several instances an envoy is nominated as executor or administrator of the estates of a deceased national of his own country, and in discharging such functions, the envoy acts in his official capacity to which normally

[1] Oppenheim, International Law, 8th ed., Vol. I, p. 111; Hyde, International Law, Vol. II, p. 222; Hall, Treatise on International Law, 8th ed., p. 224

[2] Article 16 of the Draft of the Institute of International Law prepared in 1895–96. Article 27 of the American Institute of International Law, 1927.

[3] Article 29 of the Draft Articles adopted by the International Law Commission at its Tenth Session.

the principle of exemption from jurisdiction should be applicable. The Commission, however, felt that it is of general importance that succession proceedings should not be hampered by the diplomatic agent refusing to appear in a suit or action relating to a succession.

As regards the business or professional activities of an envoy, it is clear that activities of this kind are wholly inconsistent with the position of a diplomatic agent, and one possible consequence of engaging in them might be that he would be declared *persona non-grata*. Writers on international law and decisions of courts seem to agree that should an envoy engage in commercial transactions in the country to which he is accredited, the principle of exemption from jurisdiction should be respected even in regard to actions arising out of such activities. In support of this view, it may be urged as was done by Advocat-General Des Coutures before the court of appeal in Paris in the case of Tchitcherine [1] (1867) that "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." The International Law Commission, on the other hand, took the view that persons with whom the diplomatic agent has had commercial or professional relations cannot be deprived of their ordinary remedies.[2] This is in line with the principle embodied in the drafts of international conventions prepared by learned societies, and appears to be in accord with the modern trend of restricting immunities in respect of commercial transactions carried on even by states or governments themselves. The question as to whether an envoy in carrying on trading activities on behalf of his government is entitled to jurisdictionality in respect of such acts is still unsettled and the matter will be discussed in a subsequent chapter. The Asian-African Legal Consultative Committee took the same view as that of the Commission regarding the three exceptions to the diplomat's immunity from civil jurisdiction. The Havana Convention 1928 appears to have adopted the traditional view of absolute immunity even with regard to civil matters,[3] but Article 24 of the Convention provides that a receiving state may refuse to accord the privileges and immunities to a member of a mission, who engages in business or practises a profession, in respect of such activities.

[1] *Re Tchitcherine*, J.P. (1868),p. 815.

[2] Commentaries on Article 29 of the Draft Articles adopted by the International Law Commission at its Tenth Session.

[3] See Article 19 of the Havana Convention 1928, but see also Article 24 of the Convention.

The Vienna Convention 1961 adopts the restrictive principle [1] as recommended by the International Law Commission, and the matter may well have been regarded as settled as between the states parties to the Convention but for the provisions of Article 47 of that very Convention, which permits states to accord to each other more favourable treatment than is required by the provisions of that Convention on the basis of custom or agreement of states.[2] It would, therefore, be relevant to consider the practice of states and the judicial decisions as pronounced by national courts and tribunals from time to time, since the existing national laws of several states are inclined to favour complete immunity from jurisdiction.

Another exception to the principle of exemption from jurisdiction, which may perhaps be put on the ground of waiver, is when the diplomat himself invokes the jurisdiction of the courts by instituting an action. If he does so, it is expected that he will submit to the jurisdiction of the court including all appellate stages both in respect of his claim and order for costs as well as any set off that may be claimed against him by the defendant. A diplomat may take steps to defend an action instituted against him and it may then be said that he had waived his immunity. The better view, however, seems to be that a diplomat can object to the jurisdiction of the court at any stage, and that the immunity being the immunity of his sovereign, it can only be waived by the head of the mission, or by the government of the sending state.

The occasions for taking recourse to civil action against a diplomat may arise in a number of circumstances, such as non-payment of debts or tradesman's bills for articles supplied for his consumption, non-payment of rent or violation of the conditions of a lease, recovery of hire charges or repair bills and compensation for loss or injury caused to a person or property due to motor car accidents. Since these types of cases will not be covered by the exceptions mentioned in the Vienna Convention, no suit can be maintained in local courts in respect of such claims. The usual procedure which is adopted is for the aggrieved person to approach the Protocol Division of the Ministry of Foreign

[1] Article 31(1) of the Vienna Convention 1961 provides as follows: "He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:

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

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;

(c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving state outside his official functions.

[2] See Article 47 of the Vienna Convention, 1961.

Affairs with the full particulars of the claims. If the Ministry is satisfied with the genuineness of a claim, it will in all probability approach the head of the mission of the diplomat concerned for settlement of the claim, and any diplomatic agent who is anxious to maintain the reputation of his country and his mission will not be slow to respond to such a request. In extreme cases, however, when a diplomat persists in abuse of his position by non-payment of his debts or just dues and by taking shelter behind his diplomatic immunity, the government of the receiving state may request his recall. In several countries, having regard to large number of traffic accidents that take place, diplomats are required to take out third party insurance policies so that the claims arising out of such accidents may be proceeded against insurance companies and are not defeated on the plea of the diplomatic immunity by the owner of the vehicle. But even in such cases it may be difficult to enforce the claim without the diplomatic agent's cooperation. Since the insurance company merely acts on behalf of the insured, and if the insured cannot be sued in a court of law, the question may arise whether the insurer can be called upon to satisfy the claim. The answer would perhaps be that the immunity from jurisdiction does not mean that the diplomat has no liability in the matter, and if that is so, there is no reason as to why the insurer should not be called upon to satisfy any claims arising out of such liability even though the insured diplomat cannot be sued in respect of the same by reason of the exemption from jurisdiction which he enjoys. It may be stated that in a number of instances envoys have been known to have voluntarily paid for medical expenses of persons injured in car accidents as also compensation for harm or injury suffered by some act of a member of the mission.[1]

State practice. The rule of exemption from civil jurisdiction in respect of foreign diplomatic representatives appears to have been based generally on the application and enforcement of the unwritten rule of international law. But in many countries these rules have been put on a statutory footing. For example, in 1679 the States-General in Holland issued an edict 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. In England, this rule seems to

[1] In 1925, the British Ambassador in Washington is reported to have offered all assistance to a girl who was injured by his son driving his car. The American Ambassador in Japan, Mr. Ronald S. Morris, is also reported to have volunteered aid to the family of an injured girl who was struck by his chauffeur causing an injury to her necessitating amputation of a foot.

have been established since 1657 though it was put on a statutory footing by the famous Statute of Queen Anne 1708,[1] which was described in 1823 by Lord Chief Justice Abbott as being declaratory of the common law.[2] In the United States of America, there is express statutory provision to provide that any writ or process under which any ambassador, public minister or any domestic servant of such minister is arrested or imprisoned or his goods or chattels are distrained, seized or attached shall be deemed void.[3] In France, the law and practice is the same and this is provided for under the Decree of *13 Ventôse II an.* (*1794*). In Austria, the Civil Code confers on a diplomatic agent whatever immunities are established by international law. The old German Code also contained provisions for exemption of diplomatic agents and their suites from local jurisdiction. In India, Section 86 of the Code of Civil Procedure provides that no court shall take cognisance of any suit against a foreign envoy except on a certificate given by the Government of India. In the Soviet Union, the Decree of January 14, 1927 declares that diplomatic representatives and the members of their missions are amenable to the jurisdiction of the judicial institutions of the U.S.S.R. and of the allied republics for civil offence only within the limits laid down by international law or by agreement with the states concerned. Article 19 of the Pan American Convention 1928 provides for immunity of diplomatic agents in respect of civil actions. The convention further provides that immunity may not be waived except when duly authorised by their governments. It may be observed that the position under these various national legislations except in the U.S.S.R. and India is for absolute immunity. The approach under the Soviet Decree and the Indian Code of Civil Procedure is rather flexible. In the U.S.S.R., the law being to provide for immunity within the limits of international law it is a matter of interpretation for the courts as to the classes of cases which would be so immune. In India, it is a matter for executive discretion to decide on each occasion as to whether the particular suit or action ought to be barred by reason of jurisdictional immunity.

Decisions of national courts. It may be of interest to notice some of the decisions of the municipal courts with regard to principles governing

[1] The Statute of Queen Anne provided that "all writs and processes that shall at any time hereafter be issued forth or presented, whereby the person of an Ambassador or the Public Minister of any foreign prince or state ... may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized or attached, shall be deemed and adjudged to be utterly null and void."

[2] Per Abbott L. C. J. in *Novello* v.*Toogood*, I B. and C. 554.

[3] Revised Statutes, para 4063; 22 U.S. Code, 252–255.

this rule, the possible exceptions to jurisdictional immunities, and cases relating to waiver of such immunity.

Great Britain. In England, the general principle regarding the exemption from jurisdiction, as laid down by the English courts, is that both under the common law and the Diplomatic Privileges Act 1708 (7 Anne Ch. 12) a diplomatic agent accredited to the Crown by a foreign state is absolutely privileged from being sued in the English courts. This was held in the case of *In re Republic of Bolivia Exploration Syndicate Ltd*[1]., where summons were issued against one M. R. E. Lembocke, Second Secretary of the Peruvian Legation in London in his capacity as a Director of the Syndicate which had gone into liquidation. At the hearing of the summons Lembocke asserted diplomatic privilege, and this was upheld although he had previously entered an unconditional appearance to the summons. This case, which can be taken as a correct enunciation of the law in England at present, established two important principles, namely (i) that in England a diplomat is to enjoy absolute immunity in so far as the civil jurisdiction of the courts is concerned and that the immunity attaches even in respect of trading and other activities of an envoy unconnected with his mission; (ii) that the plea of immunity can be asserted at any stage of the proceedings, and is available in spite of a diplomat's earlier submission to jurisdiction. Even in the earlier case of *Taylor v. Best* (1854),[2] the English courts had held that M. Droiet, First Secretary and Chargé d'Affaires of the Belgian Embassy, being a Public Minister, did not lose his immunity by trading in England as one of the Directors of a mining company. Here, however, the claim to immunity was rejected as he had accepted service of the writ through his attorney.

France. In France, it was laid down in broad terms in a decision of the Court of Appeal in Paris handed down in 1811, that the immunity from jurisdiction existed.[3] In 1868 that Court decided in the leading case of Techitcherine, Counsellor of the Russian Embassy in Paris, that the commercial court of the Seine had no jurisdiction in an action instituted against him in respect of a journal called "*La Nation*" which had been financed and supported by him in the interest of his government. The commercial court had held that it had jurisdiction on the

[1] (1914) 1 Ch. 139.
[2] 14 C. B. 487, 519.
[3] Dalloz, 29 Juin 1811.

ground that the diplomatic immunities belong to the representatives of foreign governments in order that they should not be molested in the discharge of their functions and that these immunities could not be extended to them when they entered into commercial transactions in their private interest. The Court of Appeal in reversing the decision observed that the principle of immunity had been specially recognised by the decree of *13th Ventôse an II*, and held that even if an exception could be made to this principle in the case of diplomatic agents who devote their attention to commercial operations in their private interest, the contract by which Techitcherine secured the right of directing the newspaper was not a commercial speculation in his private interest. Here, the Court of Appeal without deciding the point as to whether immunity was admissible in respect of commercial transactions appears to have made a distinction between commercial transactions carried on by diplomats in their own private interest and those in the interest of their governments. In 1891, the Cour de Cassation affirmed the principle of immunity by quashing a judgment in default which had been pronounced by the Tribunal Civil de la Seine against the Counsellor of the Belgian Legation against whom proceedings had been initiated to recover a personal debt, but had ignored the case and allowed judgment to go by default.[1]

Belgium. Similarly, in 1897 the Cour de Cassation at Brussels quashed a judgment which had been given by default in the lower court against the Turkish Military Attache in Belgium for non-payment of the bill of a veterinary surgeon. The decision was given at the instance of the Ministry of Justice.[2]

Italy. The courts in Italy at one time appeared to take a narrower view of the extent of jurisdictional immunity, but that view seems to have been subsequently revised. In 1915, the Court of Cassation in Rome had held that private acts accomplished by a diplomatic agent are subject to the local jurisdiction.[3] The same observations were repeated by the court in 1922 in the well known case of *Comina v. Kite.*[4] The court held against the doctrine of absolute immunity, declaring that this was born of theories long rejected and contrary to justice and

[1] J. P., 1886–815.
[2] Clunet, J. D. I. P., 1897–839.
[3] *Re Rinaldi*, F. It., 1915–I–1330; Moore's Digest. Vol. IV, p. 550.
[4] F. It., 1922–I–344; Annual Digest, 1919–22, Case No. 202.

law; it was inadmissible that a diplomatic agent should contract a debt, or conclude a contract without any existing means to make him pay, or obliging him to fulfil his engagements. The court observed that a representative of a foreign government was subject to the civil jurisdiction of the Kingdom of Italy for all acts for which the competence of the Italian courts was admitted according to common law (Article 105 of the Code of Civil Procedure) except when he had acted as a representative of a foreign state.[1] This decision resulted in a formal protest by the diplomatic body, and in a *note verbale* from the doyen of the corps to the Minister of Foreign Affairs it was stated that the decision was contrary to the rule and practice in all states.[2] In the case of *Harrie Lurie v. Steinmann* (1927), however, the court of Rome held that it was obvious that when questions of immunities of diplomatic agents arise such immunity could refer only to the persons of diplomatic agents with regard to their private affairs, since one could hardly speak of immunity in cases where they act as agents of states.[3] But in 1928 the same tribunal held that it had jurisdiction in a suit against the Mexican Ambassador arising out of a dispute as to a contract which he had entered into for the purchase of certain property to be used as the Mexican Embassy building.[4] Again, the court held in another case that there was no immunity for the wife of the diplomatic agent of Colombia to the Holy See in an action on contract, diplomatic agents being subject to jurisdiction of Italian courts except where they have acted as representatives of or at the order of their own state.[5] The same view was taken by the civil court of Florence in 1934 [6] which refused to sustain a plea to the jurisdiction in a suit against the Chilean Ambassador to the Holy See arising out of an automobile accident on the ground that immunity could not be extended to acts of diplomatic agents and their suites outside the sphere of their functions. The law, however, was finally settled by the Italian Court of Cassation in 1940 in the case of *De Meeus v. Forzan.*[7] The court after reviewing the various decisions and state practice in other countries and provisions of certain conventions finally held:

In respect of acts which those agents carry out in their capacity as representatives of a foreign state or by order of their government in the exercise of

[1] 47 F. It., 1922–IV–344; Annual Digest, 1919–22, Case No. 202.
[2] 26 A. J. I. L., Suppl. (1932), p. 105.
[3] Annual Digest, 1927–28, Case No. 246.
[4] Annual Digest, 1927–28, Case No. 247.
[5] Annual Digest, 1929–30,Case No. 196.
[6] Annual Digest, 1933–34, Case No. 164.
[7] F. It., 1940–I–336; Annual Digest, 1938–40, Case No. 164.

their public activity connected with the relations between the two states, the recognition of their immunity has never been questioned. 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 — it must be held, in view of the purpose and of the guiding principles underlying the exemption, that the *consensus gentium* on the basis of which international custom has developed must be understood in the wider sense ... that is to say, as an exemption from civil jurisdiction even in respect of acts concerning the private life of the diplomatic representative, acts which constitute the necessary foundation for the exercise of public functions.

This decision thus amounts to a reversal of the earlier decision in *Comina v. Kite.* In *Lagos v. Baggianini* [1] the Tribunal of Rome following the decision in *De Meeus v. Forzan* held that the Italian courts had no jurisdiction in an action against a foreign diplomat whether or not the action arose out of acts of a private character.

Poland. The Supreme Court of Poland in a case decided in 1925 held that the municipal courts have jurisdiction in regard to public immovable property except where it is devoted to the official use of the mission. Nevertheless, it was held by the court that actions arising out of a contract of lease are personal actions and these could not be maintained against a diplomat. It further held that a clause in a contract to the effect that diplomatic immunity shall not be invoked is of no consequence.[2]

United States of America. In the United States of America, where a "suggestion" from the State Department in the matter of diplomatic immunities appears to have been treated by the courts as decisive, the practice shows that jurisdiction has never been exercised as against a diplomat. Where writs or summons have been issued, they have been quashed or withdrawn as a result of intervention by the State Department with the Governor of the state concerned. In 1915, a power company in Connecticut procured the attachment of the goods of the Military Attache to the Russian Embassy and caused him to be served with a summons to appear before a Justice of the Peace. The State Department informed the Governor of Connecticut of the diplomatic immunity of the person and requested him to take steps to ensure the return of the attached property and to quash the summons. An apology

[1] (1955) I. L. R., p. 533.
[2] Annual Digest, 1925, Case No. 246.

was also tendered to the Russian Ambassador.[1] On January 15, 1916, the British Ambassador informed the U.S. Secretary of State that he had received a summons from the district court of Maine commanding him to appear in a civil suit instituted against him. The court dismissed the writ on a motion by the District Attorney.[2] In 1920 it was brought to the attention of the Department of State that a verdict had been obtained in a New York court against the Second Secretary of the Peruvian Embassy in Washington. The Department thereupon invited the Governor's attention to the relevant statutory law regarding immunity of diplomats, and requested him to bring the matter to the attention of proper legal authorities of the State of New York in order that the Secretary might be relieved from any process. In 1940, an action was brought in the Supreme Court of the United States against the First Secretary of the Brazilian Embassy and some others. The proceedings were dropped at the instance of the State Department.

Argentina. The Federal Court of Buenos Aires as early as in 1888 in an action concerning the goods of the Paraguyan Minister rejected the opinion expressed by some writers like Fiore and Laurent that the immunity accorded to foreign representatives should be confined to cases where submission to the jurisdiction hindered the free exercise of their functions, and declared that the more generally accepted rule was that foreign representatives should not be subjected to the local jurisdiction unless they renounced the privilege with the authority of their government.[3]

Conclusion. A review of the above decisions illustrates the position that immunity from civil jurisdiction is recognised in respect of all activities of a diplomatic agent irrespective of whether such acts were done in connection with the functions of his mission or they were his private acts. Indeed, it would be difficult to distinguish acts done in a representative capacity from his other acts, and it would be practically impossible to determine where the line should be drawn between what is necessary for the due performance of his functions and what are outside those limits. For any authority of the country in which he was stationed to take upon itself to decide whether or not a particular matter was or was not incidental to the functions of a diplomatic

[1] Moore, Digest, Vol. IV, p. 533.
[2] Ibid.
[3] *L'Affaire Saguier*, J. D. I. P., 1891–I–990.

representative would subject the diplomatic agent, in so far as related to the settlement of that point, to the local jurisdiction, and would infringe the essential principle upon which all diplomatic immunities are founded. He himself would have no guarantee against abusive exercise of its authority by the government to which he was accredited and his position would always be insecure because of the vagueness and uncertainty in which the extent of his privileges would become involved. If a diplomat were liable to civil proceedings in connection with unofficial acts, he might be hampered in the discharge of his official duties and the effect would be the same as if he were liable to civil proceedings in connection with official acts.[1] It would be noticed that the Vienna Convention had not made any distinction either in respect of various acts of a diplomat except in the three specified types of cases as already mentioned.

As regards the exception concerning suits relating to immovable properties, the decision of the Supreme Court of Poland in 1925 would appear to support the view, but even there it has been held that any action arising out of a contract or lease of immovable property would not be maintainable. There are two decisions of the courts in France where immunity was granted in respect of actions relating to immovable property, and in one case the premises had no connection with official purposes of the mission.[2] It should, however, be mentioned that classic authorities like Vattel had asserted that exemption from local jurisdiction enjoyed by a foreign representative did not extend to actions connected with immovable property held by him in a personal capacity in the country to which he was accredited.[3] This view is also put forward by other writers such as Pradier Fodéré.[4] Even Sir Cecil Hurst, who had opposed any exception being made to the general rule of jurisdictional immunity, observed:

> If it were possible to make an exception to the general rule of exemption from the local jurisdiction in civil cases with regard to actions relating to immovable property, there would be one great advantage. If such actions come into court, they must be decided in accordance with the law of the country where the land is situated. The law relating to immovable property is often intricate and the court in the country where the land is situated is far better qualified to apply this law than the court in the diplomatic agent's own country.[5]

[1] See Hurst, Collected Papers, pp. 232–33; Fenwick, International Law, p. 363.

[2] Decision of the Civil Tribunal of the Seine in 1916 in a case relating to the house occupied by the Norwegian Minister in France, and the case of Comte de Bruc decided by the Court of Appeal at Lyons in 1883.

[3] Le droit des Gens, Book IV, Ch. VIII, para 115.

[4] Cours de droit Diplomatique, Vol. II, p. 139.

[5] Hurst, Collected Papers, p. 237.

It would, therefore, appear that the recommendation made by the International Law Commission, and now incorporated in the Vienna Convention is sound both in principle and upon authority, though there are the two decisions of the French courts to the contrary. In fact the later case relating to the Norwegian Minister would not be inconsistent with principles laid down in the Vienna Convention, since in that case the premises, though privately owned, were used for the purposes of the mission.

With regard to the business and professional activities of a diplomatic agent, if he carries on such activities for his own purposes, the Harvard Research Draft proposed that the receiving state may refuse to accord diplomatic privileges and immunities in relation thereto. The courts in England have, however, accorded absolute immunity from jurisdiction even in such cases as is evident from the decisions referred to above. In so far as the courts in France are concerned, the position appears to have been kept open in the *Techtcherine case*. There the court held the commercial activity of the diplomat to be in the interest of his government. Sir Cecil Hurst was of the opinion that

> If a government allows a foreign diplomat stationed in its territory to engage in commercial operations, that is to say, if they do not at the time of his appointment make it a condition of receiving him that he shall not engage in trade, the normal principle of exemption from the civil jurisdiction will apply in all cases.[1]

The municipal courts appear to have applied the general rule of immunity from jurisdiction even in cases where the debt, in respect of which the proceedings were initiated, was contracted before the period when the person sued became entitled to diplomatic immunity. For example, the French Court of Cassation in the *case of Nazre Aga*, Secretary of the Persian Legation, held that it was immaterial whether the obligation was contracted by the diplomatic agent before or after he began to exercise his functions; it is sufficient that he is invested with his official character at the moment when the judicial proceedings are taken against him.[2] The same principle was laid down by the Court of Appeal in Paris in an earlier case concerning M. Morla, Venezuelan Minister in France, in respect of an action for recovery of a sum of 60,000 francs advanced to him prior to his appointment to the diplomatic post. The court by its decision dated the 8th August 1900 held that the suit would not lie and that the immunity applied to debts

[1] Ibid., p. 241.
[2] Clunet, J. D. I. P., 1900–839.

incurred before appointment.[1] This principle would appear to hold good today.

Execution and attachment. It follows from the principle of exemption from the civil jurisdiction of the receiving state that no writ, whether judicial or executive, can be levied against the properties of a diplomatic agent. Thus, no court can pass an order for attachment or seizure of the goods of an envoy including his motor car, household furniture, horses or wearing apparel in satisfaction of a decree or as a measure of attachment before judgment. Similarly, the police or executive authorities of the state cannot seize any articles belonging to a diplomat in pursuance of their powers under the local laws. This is clearly recognised in the Vienna Convention 1961 and the courts also appear to have applied this principle uniformly. For example, in the *Magdalena Steam Navigation Company v. Martin*,[2] it was held by the English courts that in accordance with established principles there could be no execution against an ambassador while he is accredited, nor even when he is recalled if he only remains for a reasonable time in the country after his recall. The same view was taken in a later case *Musurus Bey v. Gadban*.[3]

The exceptions proposed to the jurisdictional immunities by the International Law Commission and adopted in the Vienna Convention would naturally mean making of certain exceptions in respect of execution and attachment. It would be idle to vest jurisdiction in the local courts in respect of private immovable properties of a diplomat in the receiving state, his business and professional activities, and cases where he acts as executor and administrator unless it is possible to satisfy the judgment by levying execution, if need be. But at the same time it is important to ensure that the inviolability of his person or residence is not infringed. The Commission has not been unmindful of this aspect of the matter, and it has been stipulated both in the recommendations of the Commission and in the Vienna Convention that execution measures can be taken in respect of these actions provided they can be taken without infringing the inviolability of the diplomat's person or of his residence.[4]

[1] Clunet, J. D. I. P., 1921–953.

[2] (1859) 2 E. and S. 94.

[3] (1894) 2 Q.B. 352, 358.

[4] Article 31(3) of the Vienna Convention provides: "No measures of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of Paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence."

Giving of testimony

Closely connected with the questions relating to immunity from jurisdiction is the matter of giving of testimony by diplomatic agents before a court of law or in administrative proceedings. The views of writers on international law, the decisions of national courts, and state practice all lead to the conclusion that a diplomatic representative cannot be compelled to appear as a witness and to give testimony in respect of any proceeding before the courts, civil or criminal, or the administrative tribunals of the receiving state. The Vienna Convention now specifically provides that a diplomatic agent is not obliged to give evidence as a witness. Nevertheless, the question has often been raised as to whether it is not the duty of the envoy in the interest of justice to come forward voluntarily and testify as to matters within his knowledge particularly when a crime has been committed and he is an eye witness to it. The views expressed on this aspect of the matter have not been uniform.

According to the British practice, 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 suite be so compelled.[1] The Soviet practice, according to the Decree of January 14, 1927, recognises that diplomatic representatives and members of their missions are not obliged to give evidence in court. The Pan American Convention also provides in Article 21 that persons enjoying immunity from jurisdiction may refuse to appear as witnesses before the territorial courts.

According to Fauchille, 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.[2] Hall, another well known authority on the subject, however, maintains that where by the laws of the country evidence has to be given orally before the court and in the presence of the accused, it is proper for the minister or the member of the mission whose evidence is needed to submit himself for examination in the usual manner. Calvo considers that the principle of the law of nations does not allow him to refuse to appear in court and give evidence in the presence of the accused where the laws of the country absolutely require this to be done. Oppenheim, on the other hand, is of the view that no envoy can be obliged or even requested to appear as a witness in a civil, criminal, or administrative court, or to give evidence before a commission sent to his house.

[1] Satow, op. cit., p. 201.
[2] Fauchille, Traité de Droit International Public, (8th ed.), Vol. I, p. 93.

It is to be observed that there is a difference in principle between duty and compulsion, and many authorities maintain that though an envoy cannot be compelled to do an act such as giving of evidence, good sense and the well being of the nation may often require the doing of that act, and in such circumstances it may be regarded as his duty. Consequently, reluctance or failure to do so may be regarded as improper, and the receiving state may in appropriate circumstances request his recall. Thus, the Government of the United States, which fully recognises the principle that envoys cannot be compelled to give evidence and which has on occasions protested when this principle has been violated,[1] requested the recall of the Minister for the Netherlands in 1856 for failure to appear as a witness in a case involving homicide committed in his presence.[2] In that case the Minister's evidence was absolutely necessary for the trial, and even after the United States Government had represented to the Netherlands Government in the matter, the latter whilst authorising the Minister to give his evidence in writing refused to permit him to appear in court and subject himself to cross-examination. The U.S. State Department's attitude as evidenced from a note sent to the Prussian Minister, Baron Von Gerolt, in the year 1852, is that

> If the diplomatic agent should be the only person who had witnessed the acts of an aggressor, and therefore the only person capable of testifying in regard to them, it could not be perceived why it should be considered incompatible with either his dignity, or the exemption from jurisdiction of the country to which he is entitled, for him voluntarily to offer his testimony in the usual form.[3]

The International Law Commission in its commentary on the subject had observed that though there is no obligation on a diplomatic agent to testify, that does not mean that a diplomatic agent ought necessarily to refuse to cooperate with the authorities of the receiving state. On the contrary it may be proper for him to give the authorities the information he possesses.[4]

There have been numerous instances where diplomatic agents have voluntarily appeared to give evidence under instructions from or with

[1] In October 1922, the Under Secretary of State in a communication to the U.S. Minister in Poland requested him to draw the attention of the Polish Minister of Foreign Affairs to the fact that the course followed by the Polish Government in summoning the members of the Legation's staff to appear as witnesses is not in accord with the principles of international law. See Hackworth, op. cit., Vol., IV p. 553.

[2] Calvo, Le droit international théorique et pratique, (5th ed.), p. 318.

[3] Moore, Digest, Vol. IV, p. 662.

[4] See comments of the International Law Commission on Article 29 as adopted at its Tenth Session.

the concurrence of their governments. Thus in 1881, the Venezuelan Minister, who was called as a witness for the prosecution at the trial of Guiteau for the murder of President Garfield, waived his privilege and appeared as a witness owing to the friendship of his government for the United States.[1] It is, however, a well established rule that no diplomat can testify in a civil or criminal case without the authorisation of his government or the head of the mission. It is also true that the testimony can be given only on terms consistent with the representative character of the envoy.

In several countries including the U.S.S.R. it is possible for an envoy, even when he desires to testify, to give his evidence in writing before an appropriate authority in his own embassy. In such cases, the evidence is generally taken down in writing by a secretary of the mission or by an official whom the diplomatic agent may consent to receive for that purpose. The evidence is then communicated to the court in the form of a signed written statement. It is believed that this is the practice in continental Europe, the Latin American countries, and in the Asian African countries whose laws are patterned on the continental practice. If such a procedure is permissible under the laws of the receiving state, then the diplomat may well decline to give his evidence in court and insist on giving his testimony in the premises of his mission in the form of a written statement. But in the common law countries like Britain, United States, and the Commonwealth countries, such a procedure may not be permissible under the laws in force. It is of the essence especially in criminal trials that all witnesses are liable to be cross-examined by the opposite party or his lawyer, and this principle, which may be regarded as part of natural justice or fair trial, will be applicable equally to a diplomat who may decide to give evidence in any proceeding before the courts, civil or criminal. It is, however, possible in some cases for the court to issue a commission for the examination of a witness, and this could perhaps be done in the case of a diplomat. This will mean that a commissioner will come to the embassy with the consent of the envoy to record his evidence. He could be cross-examined by the opposite side even if he gives his evidence on commission and the whole deposition will be taken down by the commissioner in question and answer form and transmitted to the court trying the case. Issue of commissions for the purpose of recording evidence especially where the court and the diplomatic mission are in the same place would rather be in the nature of an exception.

[1] Moore, Digest. Vol. IV, p. 662.

There are certain other important aspects which need to be considered in this connection, namely the position when the envoy himself invokes the jurisdiction of the court or lodges a complaint leading to the prosecution of an offender, as also the position in cases where an action is instituted against the envoy in respect of matters which the local court is competent to deal with such as those relating to immovable property, private commercial and professional activities, as well as matters relating to succession.

In respect of cases falling within the first category, that is, where an envoy lodges a complaint with the police against some offender for violation of his person or property, or in respect of a theft committed in the premises of the mission, the attitude of the common law countries is that unless the complainant, even though he be a diplomat, comes forward and testifies, the judiciary may be justified in refusing to issue process. This position is in accord with the fundamental laws prevalent in those countries. Though an envoy cannot be compelled to appear as a witness but if he seeks the protection of the local laws, he must comply with the requirements thereof. Thus, in the case of Baron Von Gerolt, the Prussian Minister in the United States, it was held that the Justices of the Peace were justified in refusing to issue a warrant for the arrest of a German named Diplessis, who was alleged to have threatened or committed violence on the Minister and his household, as the complaint was not accompanied by a declaration upon oath of some person against the alleged aggressor. In this case the Minister who was the only witness of the incident refused to give evidence.[1]

In India, the same view was taken in a case tried before the District Magistrate of Delhi in 1951 where a complaint preferred by the Argentine Ambassador against an Englishman on the ground of assault was dismissed in accordance with the provisions of the Criminal Procedure Code on the ground that the complainant (the ambassador) had not come forward to testify, and as such there was no statement of any person on oath on which process could be issued.

In the case of a robbery committed in 1886 in the house of the Chilean Minister in Washington, the State Department in acknowledging the Minister's note conveying appreciation for the prompt action taken by the police stated:

> Although fully aware of the immunity from judicial citation which pertains to your position as the envoy of a foreign government, yet in as much as our constitutional procedure requires that the person accused of crime shall be confronted

[1] Moore, Digest. Vol. IV, p. 662.

with the witnesses against him, and as yourself and the members of your household are best qualified to give evidence necessary to prevent a possible miscarriage of justice, I may be permitted to express the hope that you will courteously offer your aid towards the vindication of the laws in this case.[1]

In cases where the envoy institutes a civil action, the question may arise whether he can thereby be said to waive his privilege regarding giving of testimony. The matter was discussed at length in the International Law Commission, and the view that was adopted is that even in such a case he is not obliged to give evidence. The practical view of the matter, however, is that if he chooses to rely upon his immunity, he may find his action dismissed for want of evidence. According to the rules of procedure prevalent in many countries, suits or actions are liable to be dismissed unless the plaintiff gives evidence on oath. It may, however, be possible, as already stated, to record his evidence on commission in some cases.

The position would exactly be the same in respect of cases instituted against him. Though the International Law Commission recommended certain categories of cases where an action could be maintained against a diplomatic agent in the local courts, it did not consider it necessary to make any exception to the general rule that the envoy may not be compelled to testify or give evidence. It is, however, in the interest of the envoy himself in such cases to appear in court; otherwise he may have to face the consequences of a judgment being passed against him.

It may finally be said that unless some embarrassment is likely to be caused to the envoy or the country he represents by his giving testimony in court, there is no reason as to why an envoy should withhold the facts within his knowledge from the competent court or tribunal of the receiving state. In cases involving political questions, it may be embarrassing for him to subject himself to cross-examination as many delicate questions may well arise. But in ordinary civil or criminal cases, and particularly where he is the only witness to the commission of a crime, it would be his duty to come forward to prevent a possible miscarriage of justice. It is to be expected that courts of the country would treat the envoy in a manner befitting his position as the representative of a sovereign state by showing him all courtesy and by disallowing all such questions in cross-examination which are not directly relevant to the charge or issue and particularly those questions which may embarrass him or his government.

[1] Ibid.

Waiver of immunity

Although diplomatic agents are entitled to claim exemption from the jurisdiction of the courts and tribunals of the receiving state both in respect of civil and criminal matters, it is now well recognised that such immunity can be waived,[1] though certain doubts were expressed in this regard in the past.[2] If the immunity is waived, the local courts can entertain the action or the suit against the diplomat and decide it on merits.[3] The questions that arise for consideration are: (i) whose right is it to waive the privilege and (ii) what acts can be said to consitute a waiver? On the first question, it may be observed that the immunity which the diplomat possesses is not his personal prerogative but the immunity of his government, and consequently it is for the sending state to decide whether the immunity of the diplomat should or should not be waived on a particular occasion. The diplomat cannot himself waive his immunity without the permission of his government, nor can he object if his government decides to waive his immunity.[4] But how is the court or the government of the receiving state to be satisfied that the immunity has properly been waived by the government of the sending state? Sir Cecil Hurst was of the opinion that 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, but at the same time he recognised that it was doubtful whether it was 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.[5] The International Law Commission took the

[1] Hyde, International Law, Vol. I, p. 750; Hall, International Law, p. 225.

[2] Pradier Fodéré appears to have suggested in his Cours de droit diplomatique, Vol. II, p. 137, that there can be no renunciation of the diplomatic privilege of exemptions from the jurisdiction of the local courts at all. The dictum of Talbot L. C. in the *Barbuit's case* (Scott's Cases, p. 311) appears to lend support to this view. It is, however, clear in view of the decisions of various courts and state practice that this view is not correct. See Hurst, Collected Papers, p. 249.

[3] *Re Robayo* (Decision of the Argentine Supreme Court) 26 I.L.R., p. 537.

[4] *Dickinson* v. *Del Solar Mobile and General Insurance Co. Ltd.*, (1930) 1 K.B. 376; In *Montwid-Biallozor* v. *Ivaldy*, A.D. 1925–26, Case No. 245, the Polish Supreme Court held that the immunity could not be waived by a diplomat in a private contract since the privilege accorded to him was not his personal privilege.

The point that the right of waiver belongs to the sending state and not to the diplomat himself has now been placed beyond controversy by the International Law Commission, and in the Vienna Convention 1961 wherein it is provided that "The immunity from jurisdiction of diplomatic agents ... may be waived by the sending state." (Article 32 of the Vienna Convention).

See also *Cottenet* v. *Dame Raffalowich*,Clunet, 36 (1909) 151; *Bolasco* v. *Wolter*,(1957)I.L.R., p. 525; *Re Cano* (1957)I.L.R.,p. 527;*Blaga De Coman* v. *Moisecu et Al.*,(1957) I.L.R.,p. 528; *Acuna De Arce* v. *Solorzano Y Menocal*,(1956) I.L.R.,p. 422.

[5] Hurst, Collected Papers, pp. 249 and 251.

view, which appears to be correct and the only practicable one to take, that when the head of mission as the representative of his government communicates a waiver of immunity, the courts of the receiving state must accept it as a declaration of the government of the sending state.[1] The authority of the head of mission must be preserved, and it is no concern of the courts to enquire as to whether he had received the consent of his government or not. In this connection it may be of interest to note the case of Mr. M. C. Waddington, son of the Chilean Charge d'Affaires in Brussells, who was accused of murder in 1906. The Belgian Government refrained from arresting him, even though the Charge d'Affaires had waived the immunity in respect of his son, until the consent of the Chilean Government had been received.[2] The view was held at one time that the immunities of the members of the families of the diplomats and their servants could be waived by the diplomat himself,[3] but it is now beyond doubt that immunities of all persons irrespective of whether they are diplomatic agents or members of their families or members of the subordinate staff or servants, can be waived only by the government of the sending state.[4] It is needless to repeat that the consent of the government would be presumed if the head of the mission communicates the waiver.

On the question as to what would amount to waiver of immunity, the International Law Commission had recommended that in criminal proceedings the waiver should be express whereas in civil or administrative proceedings the waiver could be express or implied. Such waiver could be presumed if the diplomatic agent did appear as defendant without claiming any immunity. This was certainly the existing practice, but complications sometimes arose from the fact that though the defendant diplomat might have entered appearance without claiming immunity, he did claim immunity at a later date, and on occasions his government intervened and claimed immunity on his behalf. The question had to be decided as to whether the diplomat had waived his immunity, and this was by no means simple. On the one

[1] See commentaries on Draft Article 30 adopted by the International Law Commission at its Tenth Session.

[2] *Revue Générale du Droit International Public*, Vol. XIV, p. 159.

[3] In *Herman* v. *Apetz* (A.D., 1927-28, Case No. 244) the New York Supreme Court took this view. In *Rex* v. *Kent* (A.D., 1941–42, Case No. 110) the Court of Criminal Appeal of England held in a judgment dated the 4th February 1941 concerning a subordinate official that the immunity of the official was that of the ambassador and since the ambassador had waived the privilege, the court had jurisdiction. See also Hurst, op. cit., p. 253.

[4] Article 32 of the Vienna Convention 1961 lays down: "The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state."

hand his appearance before the court and his contest of the claim could be regarded as waiver but on the other hand it could be said that his government, whose right it is to waive the privilege, had not done so.[1] Again, on occasions it has been said that the diplomat could raise the plea of immunity at any stage of the proceedings.[2] The courts have also held that mere failure by the person entitled to diplomatic immunity either to make an appearance or to oppose the case upon its merits is not by itself sufficient to constitute a waiver of the privilege.[3]

Having regard to the conflict of views in the decisions of municipal courts on the point as to what would constitute waiver by implication, and in order presumably to obviate the necessity of a decision in every case, the Vienna Convention 1961 has now provided that waiver in each case whether civil or criminal must be express.[4] This means that mere entering of appearance by a diplomat for the purpose of defending an action would not constitute waiver.[5] The court must insist on a communication from the head of the mission containing waiver of immunity in respect of the diplomat concerned before it can proceed to hear the suit or the action.[6] But once such waiver is made, there would be no question of raising the plea of immunity in a later stage of the proceeding in the suit.

There has, however, been no controversy on the point that a diplomat who institutes an action himself before the courts of the receiving state is deemed thereby to have submitted himself to the jurisdiction of the court and waived his immunity. The diplomatic agent who chooses to bring an action before the local tribunal has therefore to comply with the rules of the court. He is liable to pay costs if the suit fails, and he may be required to give security for costs under the normal rules of the court.[7] If he succeeds and the defendant wishes to go on appeal, the

[1] In *Taylor* v. *Best* (1854) supra, acceptance of the service of the writ by the attorney upon the instructions of M. Droit, First Secretary of the Belgian Legation in London, was held to constitute waiver of immunity. It was consequently held that M. Droit could not succeed in his application to have the suit stayed or to have his name struck out of the proceedings. The same view was taken in the case of *Dickinson* v. *Del Solar*, (1930) 1 K.B. 376.

[2] In England, this view was expressed in *Re Republic of Bolivia Exploration Syndicate*, (1914) 1 Ch. 139 and in France in the case of *Duval* v. *Maussabée*, (1886) J.D.I.P. 597 and *Rondeau* v. *Castenheira*, (1907) J.D.I.P. 1090.

[3] Decision of the Cour de Cassation in Paris in *Errembault* v. *Dudzeele*, (1891) J.D.I.P., 157; *Zborowski* v. *de Stuers*, (1893) J.D.I.P., 365; *Re Franco-Franco*, (1954) I.L.R., p. 248.

[4] Article 32 clause (2) of the Vienna Convention 1961 provides "waiver must always be express."

[5] See *Friedberg* v. *Santa Cruz et al.*, A.D. 1949, Case No. 100

[6] The courts, however, have no jurisdiction until immunity is waived. *Re Pastrana*, 26 I.L.R. 538; *Re Hillhouse*, (1955) I.L.R. 538.

[7] The point is not settled as to whether a person entitled to immunity can be required to furnish security for costs but it seems that since he is required to comply with the rules of

diplomatic agent must also submit to the jurisdiction of the superior court as the appellate proceedings are regarded as a continuation of the original proceedings instituted by him. The diplomat is also liable to be met by defences in the shape of set off or counter claims by the defendant in respect of the same subject matter.[1] But he cannot be subjected to a counter claim in respect of a different matter though it is between the same parties, namely, the diplomat and the defendant in the original suit. The Vienna Convention 1961 has recognised this position.[2] It may be mentioned that though a diplomat cannot waive his immunity himself, there is no precedent to show that before he can file a suit in the local courts he has to prove that he has obtained the consent of his government. It is no doubt true that it would only be on very rare occasions that a diplomat would wish or need to invoke the jurisdiction of the local courts, and in such cases he would doubtless obtain the consent of the head of the mission or his government as the case may be.

Execution proceedings. Though a diplomatic agent may waive his immunity with the consent of his government and subject himself to the local jurisdiction, that waiver would not be sufficient to authorise the courts or executive authorities to proceed to execute the judgment that may be passed against him. This means that if the diplomat loses in an action in respect of which he has waived his immunity and the judgment or decree is passed against him, no steps may be taken even if he fails to satisfy the decree unless he waives his immunity once again in respect of execution proceedings. Before a court or executive authority can proceed either upon its own motion or at the instance of the successful claimant to execute the decree, the diplomat must waive his immunity specifically in relation to the execution proceedings, and unless this is done the court or the authorities have no jurisdiction to proceed in the matter. This view, which has consistently been taken by

the court, he must also furnish the security if the rules so provide. See the case cited in Hurst, Collected Papers, p. 244.

[1] In 1925, a Secretary of the Chilean Embassy in Berlin, having bought a motor car and paid part of the price, brought an action to claim possession, offering to pay the balance and a provisional order was issued decreeing the delivery of the car. The defendant, who claimed that the contract had lapsed owing to delay in payment, brought a cross suit claiming restitution of the car. The Secretary objected to the counter claim on the ground of extraterritoriality, but the plea was dismissed by the *Reichsgericht.* (A.D. 1925–26, Case No. 243.)

[2] Clause (3) of Article 32 of the Vienna Convention 1961 is in the following terms: "The initiation of proceedings by a diplomatic agent ... shall preclude him from invoking immunity from jurisdiction in respect of any counter claim directly connected with the principal claim."

the municipal courts, was accepted as correct by the International Law Commission. It is now embodied in the Vienna Convention 1961. The rationale behind this principle would appear to be two-fold. Firstly, execution proceedings in many countries are regarded as separate from the original suit which resulted in the decree sought to be executed even though the executing court cannot go behind the decree. Consequently, it becomes necessary to have fresh submission to jurisdiction by the diplomatic agent in respect of such proceedings. Secondly, it would appear that execution of a decree or judgment may affect the immunities of a diplomat in other spheres such as inviolability of his person and the inviolability of his residence. If a bailiff were to attach his motor car or furniture, and to take the same in satisfaction of the judgment, the diplomatic agent will be greatly hampered in the performance of his task in his representative character. It is possible that a state may agree to waive the immunity of one of its diplomatic agents and allow him to be sued before the local courts in order to ascertain his liability, if any, under the local laws, which are best administered by the courts of the country, but it may decline to subject its agent to the processes of execution. It has, therefore, always been the rule that unless a separate waiver of immunity is made, the execution cannot proceed even though immunity was waived in the original proceedings. This view was taken in the case of *Taylor v. Best*[1] where, though the claim to immunity was not upheld, it was observed that if the question of executing a judgment against the diplomat, M. Droit, had arisen, his privilege would have protected him. The same was the opinion of the court in *Suarez v. Suarez*.[2] The Vienna Convention 1961 places the matter beyond controversy.[3]

Method of claiming immunity

The question arises as to how a diplomatic agent is to claim immunity if he is brought before a court or tribunal for some alleged violation of the laws of the country, or if he is made a defendant in a civil action before a local tribunal; and how are the courts to be satisfied that the person claiming the immunity belongs to the class of persons who are to be clothed with immunity? It is clear that an application must be made to the court, since the court is not in a position to know the

[1] 14 C.B. 407.

[2] (1917) 2 Ch. 131.

[3] Article 32(4) of the Vienna Convention provides: "Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary."

accuracy of the allegations which may appear even on the face of the record. It is not the function of the tribunal to dismiss the suit unless it is asked to do so by a party, nor is it for the court of its own motion to declare that it has no jurisdiction.[1] For a long time the practice followed had been for the diplomat to prove his status on any given occasion before the court in which the claim or suit was pending against him, and it was a matter for the court to decide the question of immunity as a preliminary issue. In recent years, however, it has been felt that such a practice was not very satisfactory. On the one hand it seems rather strange that a diplomatic officer should be required to prove before a court that he is entitled to immunity whilst he is claiming exemption from the jurisdiction of that very court, but on the other hand the procedure and practice of every court or tribunal requires some formal proof of the fact that the person belongs to the class entitled to be exempt from the jurisdiction of the courts. In the United Kingdom, it is now the usual practice for the courts to accept as conclusive the statements made to them by the Executive as to the existence of certain facts of international law nature, such as the status of a person, or the extent of the immunity that the government of the United Kingdom recognises as consonant with international law. The long line of decided cases in the United Kingdom, the United States of America, and countries of continental Europe show that courts have more and more been inclined to be guided by the attitude of the Executive in such matters. There are several instances in Britain, France and Belgium where the Chief Law Officer of the government had appeared in court under instructions from the government to claim immunity on behalf of the diplomat concerned.[2] It would be useful to consider some of the decisions of the national courts in this regard.

British practice. The current general practice of looking to the executive in the United Kingdom is of fairly recent origin. A study of reported decisions demonstrates clearly that this practice was not speedily or easily accepted by the English courts. The tendency has been a continued but a diminishing reluctance on the part of the courts to refer to the executive. At first no reference was made to the Crown at all, but gradually it was admitted that there were some categories of fact of which the executive had knowledge peculiar to itself, and it was

[1] Hurst, Collected Papers, p. 246.

[2] The Attorney General made an application for dismissal of the suit in the *Carolino's case*, (1744) 1 Wils. 78. The French Procureur General moved for quashing the proceedings in *Errembault* v. *Dudzeele*, (1891) J.D.I.P. 157.

proper for the courts to enquire of the executive in such matters. In the older cases it is not clear as to how the claim was supported. Sometimes a certificate from the ambassador appears to have been produced and accepted by courts.[1] Later the question used to be fought out by means of affidavits.[2] But as early as 1743, the Crown received mention in *Carolino's case* [3] where the Attorney General applied for dismissal of the suit. In *Delvalle v. Plumer* [4] the Crown was asked to support a claim for diplomatic immunity; and in *Viveash v. Becker* [5] the claimant applied directly to the Crown to assist him in his claim. By the second decade of the 19th century, the practice grew up under which the Crown was asked to certify the status of the Public Minister who in his turn certified that the *de cujus* was in his employ. In *Parkinson v. Potter* [6] the court somewhat complacently accepted the oral evidence of diplomatic status. In *Re Suarez* [7] direct application was made to the Foreign Office by the court to confirm the status of the person claiming to be entitled to diplomatic immunity.

The usual method today is for the defendant to produce a copy of the Foreign Office list which is published periodically or to prove his status by producing a certificate from the Foreign Secretary certifying that the person's name appears in the list. The significance is that the publication of the name of the person concerned in the list constitutes his acceptance by the government as a person entitled to diplomatic status and this may be said to some extent to invest him with diplomatic immunity.[8] In *Engelke v. Mussmann* [9] the House of Lords finally laid down the basis on which the courts apply to the Foreign Office regarding the status of a foreign envoy in the following terms:

> It was for the court to determine as a matter of law whether, the diplomatic status of a person having been proved by the Foreign Office statement that recognition had been accorded, immunity from process necessarily followed. If the courts could go behind the statement and investigate into facts, it would involve a breach of diplomatic immunity. The certificate is not a piece of hearsay evidence. The status has been created by virtue of its prerogative by the Crown.

[1] See *Seacomb* v. *Bowlny*, (1763) 1 Wils. 20.
[2] *English* v. *Cabalero*. (1823) 3 D and R 25; *Triquet* v. *Bath* (1764) 4 Bing .1478.
[3] 1 Wils. 78.
[4] (1811) 3 Camp. 47.
[5] (1814) 3 M. and S. 284.
[6] (1885) 16 Q.B.D. 152.
[7] (1918) 1 Ch. 176.
[8] *Exp. Cloete*, (1891) 65 T.L.R. 102; A person does not acquire diplomatic status for the purpose of immunities unless he is accepted as such by the receiving state. – *In re Vitianu*, A.D. 1949, Case No. 94.
[9] (1928) A.C. 433.

Now, under the provisions of Diplomatic Privileges Extension Acts, 1941, 1944 and 1946, the Secretary of State is required to compile a list of persons entitled to diplomatic privilege and publish it in the London, Edinburgh, and Belfast Gazettes, and the production of the gazette in the court appears to obviate the necessity of applying to the Foreign Office for a certificate. In a recent case, however, the Foreign Office at the request of the United States Chargé d'Affaires wrote to the court claiming immunity on behalf of a secretary and vice-consul of the embassy. It was received and read by the judge (Birkett J.) before the case was called on and it was accepted by the judge as precluding him from continuing with the case.[1] This procedure is without precedent, as normally the claim to immunity is made during the process of the trial and the court then refers the matter to the Foreign Office. It thus appears that in some cases the judge himself sends for information from the Secretary of State for Foreign Affairs; in some others the Attorney General or a counsel for the Crown appears in court and produces the certificate from the Foreign Office, whilst in rare cases the Foreign Office may communicate its certificate to the judge on the application of the ambassador.

Practice in the United States. In the United States of America, the courts have also adopted the practice of accepting the views of the executive as conclusive on matters concerning international relations. The prevalent practice appears to be for the Attorney General to file a "suggestion" in the court at the request of the State Department, and the "suggestion" is regarded by the courts as conclusive and binding both on fact and law.[2] The "suggestion" is issued by the State Department on the application of the foreign government or the ambassador if the Department is satisfied that the claim to immunity is well founded. The Department has, therefore, to consider on the materials placed before it the question as to whether under the existing practice the government of the United States would recognise the particular claim to immunity. This type of scrutiny would appear to be more satisfactory than a public hearing in a court of law particularly where the immunity is based on reciprocity.

The procedure adopted is as follows: when litigation is commenced or threatened, the ambassador presents a note to the Secretary of State setting out the facts upon which immunity is claimed and requesting the

[1] *Price* v. *Griffin*, (unreported) decided on 20th February 1948.
[2] *In re Baz*, 135 U.S. 403; *Carrera* v. *Carrera*, 174 F. 2d. 496.

Secretary to cause them to be conveyed to the court. The State Department then conveys to the Attorney General a copy of the note with a request that it should be communicated to the court and the court be informed that the Department of State accept as true the statement of facts alleged therein. Since 1941 the "suggestion" of the State Department amounts to recognition and allowance of claim to immunity and is taken as conclusive on the matter. Sometimes, however, the Department of State may decide to leave the matter to be determined by the courts, and in such cases the courts would be free to do so. A survey of 150 years history prior to 1941 shows that the courts have fluctuated in the matter of weight and respect shown to the "suggestion" of the State Department. In the earlier cases the State Department merely transmitted a claim to immunity leaving it to the courts to examine the truth of the allegation of fact on which it was based. There were, however, cases where the courts proceeded to decide the question of immunity without any references to the executive. In *Fields v. Predionica I Tkanica* [1] the New York Supreme Court dispensed altogether with the services of State Department and was able to decide the question of immunity before it by reference to general rules of comity.

Continental practice. In the countries of continental Europe, the principle of separation of power results in specific assertion of the independence of the courts from the executive in the carrying out of their judicial duties. The effect is that the judiciary itself has to decide first according to its procedural laws as to whether application should be made to the executive for information, or whether reliance should be placed on other sources of evidence and general principles of law.

For example, in Germany the prevailing view was that the courts were not bound by the official diplomatic list as being evidence of the diplomatic status of the defendant and that the German courts need not consider themselves bound by a certificate of the Foreign Office to the effect that the claimant appeared in the diplomatic list.[2]

In Switzerland, the inclusion of a person's name in the diplomatic list prepared by the Ministry of Foreign Affairs does not appear to imply any legal consequences. When a claim for immunity is raised, the court has to decide the issue by reference to evidence and procedure. The absence of express provisions leaves the court at liberty to have

[1] A.D. 1941–42, Case No. 54.
[2] See A.D. 1925–26, Case No. 244.

regard to evidence other than that supplied by the executive. In practice, however, the courts regard any communication received from the protocol division of the Foreign Office as conclusive of the matter regarding the status of the claimant.

In France, however, it is common practice for the courts to apply to the executive for information as to the status of a claimant for diplomatic immunity.

In Austria, the position also appears to be the same. In *re Kahn*,[1] a statement of the Department of Foreign Affairs was read in court. In *re Legation Building Case*,[2] the court of appeal referred to a declaration received from the Minister of Justice to the effect that a legation building is inviolable and held that the opinion was legally binding. The Supreme Court took the view that the opinion of the Minister was rightly applied for.

In Czechoslovakia, the practice is for the Minister of Justice to certify by a declaration whether and to what extent any person enjoys extra-territorial rights. The court is required in case of doubt to submit a report to the ministry and to apply for its opinion. The ministry makes its own enquiries and issues its declaration in conjunction with the Ministry of Foreign Affairs. The court is bound by such declaration and cannot enquire further.[3]

There are no decisions of the courts in Belgium on the point, but the practice appears to be for the parties themselves to consult the diplomatic list kept at the Ministry of Foreign Affairs.

In Greece, the practice is for the party himself, who claims diplomatic immunity, to obtain the certificate from the ministry showing the diplomatic status. In criminal cases the court itself may request the ministry for such a certificate. In one case, however, that is of the *Armenian Chargé d'Affaires*,[4] the court disregarded the certificate and held that it had jurisdiction. The court observed that only the judiciary had the right to determine as to whether the condition for diplomatic status existed.

In the Netherlands, the executive directly intervenes at the request of the foreign power. For instance, *In re Mrs. J.*[5] the court renounced, jurisdiction at the request of the Ministry of Foreign Affairs. The view held in that country is that the recognition of a foreign diplomatic agent

[1] A.D. 1931–32, Case No. 182.
[2] A.D. 1919–22, Case No. 208.
[3] Bulletin of Ministry of Justice, No. 38 of 1924. See also cases reported in A.D. 1925–26, Case No. 44 and A.D. 1927–28, Case No. 251.
[4] A.D. 1923–24, Case No. 172.
[5] A.D. 1933–34, Case No. 165.

is a matter for prerogative. If the court is in doubt as to how the prerogative has been exercised, it may ask the Minister for Foreign Affairs.

In Hungary, the Minister charged with the chief supervisory authority in consultation with the Minister for Foreign Affairs decides on the claim of the person to immunity as well as on the limits on his immunity. Such decision is binding on the courts and authorities who may be concerned.[1]

Latin American countries. In the Latin-American countries, enquiry by the court from the executive seems to be rather rare. What often happens is that a question of fact, whether or not of an international law nature, is referred to an officer known as the *Fiscal* for determination. The *Fiscal* is not a part of the executive but is an officer of the court. The communication of the *Fiscal* is regarded as binding.

Iraq. In Iraq, the certificate of the Ministry of Foreign Affairs is regarded as conclusive on the question whether the person is entitled to diplomatic immunity and also on the question of the extent of his immunity. If a person claims that he is entitled to immunity, the judicial or other proceeding in respect of which he has made the claim is required to be stayed until the certificate of the Ministry of Foreign Affairs has been obtained.

Conclusion. It would be evident from the above survey that the method which a diplomat should adopt when the occasion arises for him to claim immunity from jurisdiction of the courts is not uniform. The proof which the courts may require in support of his claim also varies from country to country depending on their laws or practice. It would have been desirable to have some uniform practice in this regard. The International Law Commission does not, however, appear to have dealt with this problem. A reference was made to the Asian-African Legal Consultative Committee for its opinion as to whether a practice should be adopted whereby the courts will be bound by a certificate of the Foreign Ministry not only as to the status of the person but also on the actual extent of the immunity.[2] The Committee in its Final Report expressed the view that a certificate of the Foreign Office in so

[1] Hungarian Law No. XVIII of 1937.

[2] Memorandum of the Government of India on Diplomatic Immunities to A.A. L.C.C. See the 3rd Session Report of the Committee.

far as questions of facts are concerned, such as the status of the person or the extent of immunities or privileges admissible to the diplomat concerned under the practice followed by the state, should be conclusive and binding since these were matters within the particular knowledge of the Foreign Office. In so far as questions of law were concerned, the majority was in favour of leaving the matter to the courts.[1]

Immunity from taxation

Fiscal immunities which an envoy enjoys may be regarded as falling under three broad heads, namely (i) exemption from payment of rates and taxes in respect of the mission and its premises, (ii) exemption from payment of taxes on his personal emoluments and (iii) exemption from customs duties in regard to importation of goods for the purposes of the mission and for his personal use.

Taxes are levied by a state on its citizens and aliens residing or sojourning in its territory by virtue of the territorial sovereignty of the state and it is, therefore, clear in principle that taxes as such, as distinct from rates or charges for services provided, cannot be levied either on the mission or on the diplomatic agent personally. Hall says that the person of a diplomatic agent, his personal effects, and the property belonging to him as representative of his sovereign, are not subject to taxation. Otherwise he enjoys no exemption from taxes or duties as of right.[2] As an envoy is considered not to be subject to the territorial supremacy of the receiving state, he must be exempt from all direct personal taxes and therefore need not pay income-tax or any other direct tax. But levy of local rates by municipal or other authorities stands on a different footing in so far as the beneficial portion of such rates is concerned. These generally represent charges for water, electricity, sewerage, and nightwatch. Since the envoy derives benefit from these services, it would be legitimate to ask him to pay such rates, though in some countries the envoy is exempt even from payment of these charges as a matter of courtesy especially when the rate levied by the local authority on buildings is a consolidated rate and includes within it a tax element. The distinction between a tax and a rate for beneficial services rendered was recognised by the Supreme Court of Canada in 1943 in the matter of a *Reference by the Governor General* regarding the powers of the Corporation of the City of Ottawa and the Corpo-

[1] A.A.L.C.C., Final Report on Diplomatic Immunity, para 12, Third Session Report, p. 37.
[2] Hall, International Law, p. 235.

ration of the village of Rockeliffe Park to levy rates on foreign legations and High Commissioners' residences.[1] The court held that the imposition of taxes, in the strict sense, presupposes a person or a thing from whom it is exacted or collected in virtue of superior political authority, and as such the taxes could not be collected from a foreign sovereign or from his representatives. The court rejected the argument that a tax enforceable on real property was not directly imposed on foreign sovereigns. The matter was also examined by the International Law Commission, and in its Draft Articles the Commission recommended that the sending state and the head of the mission shall be exempt from all taxes and dues, whether they are levied by the central government or any of its regional sub-divisions, or component units of a federation, or by the municipal or local authorities.[2] The exemption applies irrespective of whether the premises are owned by the sending state, or are leased by it. The Commission also maintained the distinction between taxes and dues in the strict sense and those taxes or dues that represent payment for specific services rendered and recommended that the latter category of taxes or dues could be levied. This position has also been embodied in the Vienna Convention 1961.

It is to be observed that most of the municipalities or local authorities levy their rates both on the owner of a premises on the basis of his ownership as also on the occupier of the property. The rate levied on the owner is in the nature of ground rent or house tax whereas the rate levied on the occupier would largely represent the beneficial portion of the dues. It must not be supposed that the owner of a building can escape his liability from payment of the rate by giving it on a lease to a foreign envoy for its being used as the premises of his mission. The liability of the owner to pay all rates and taxes by reason of his ownership of the premises would remain even though he may contract with the envoy that the latter shall pay the taxes. If such a provision is incorporated in the lease, the liability of the mission to defray the taxes becomes part of the consideration given for the use of the premises and usually involves, in effect, not the payment of taxes as such, but an increase in the rental payable.[3]

[1] Canada Law Reports (1943) S.C.R. 208.

[2] Article 21 of the Draft Articles adopted at its Tenth Session provides: "The sending state and the head of the mission shall be exempt from all national, regional or municipal dues or taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered." Article 23(1) of the Vienna Convention is in identical terms.

[3] Article 23(2) of the Vienna Convention specifically provides that "the exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the

Apart from the question of taxation on the premises of the mission, the question may arise as to whether the fees and charges levied by a mission for various services such as granting of visas, authentication of documents and other notarial acts, could be subject to taxes as the income arises within the territory of the receiving state. The rule that is universally accepted is that all fees and charges levied by a mission are exempt from local taxation since they belong to the sending state itself, and on the principle that *par in parem non habet imperium.*[1]

Practically all countries in the world to-day allow exemption to diplomatic agents from certain dues and taxes although the degree of exemption varies from country to country. Fauchille regarded this exemption as a privilege extended merely out of courtesy,[2] but this is so widely recognised now that it may be regarded as a rule of international law that such exemption exists. According to prevalent practice, which can be said to be almost universal,[3] 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 to their personal possessions, furniture, motor cars etc. Many states have provided for these exemptions in their municipal laws either by legislation or by executive orders. In the United Kindgom, all diplomatic emoluments, salaries, or wages paid to any member of the official or domestic staff, are exempt from United Kingdom income-tax.[4] But no exemption is granted in respect of other earnings, such as income derived from investments in the United Kingdom, except in the case of the head of a mission, if the interest or dividends arise out of any British Government security. The United States and other American countries, which are parties to the Havana Convention, exempt diplomatic officers from all personal taxes both national and local, and from all land taxes on the building of the mission.[5] In the Soviet Union, the diplomatic representatives and all persons belonging to official diplomatic staff, who are citizens of foreign countries, are exempt from all direct taxes whether they be general, state, or local as also from personal obligation either in kind or in

law of the receiving state by persons contracting with the sending state or the head of the mission."

[1] The position is recognised in Article 28 of the Vienna Convention 1961.

[2] Fauchille, op. cit., p. 97.

[3] Satow, op. cit., p. 241.

[4] See Satow, op. cit., p. 213.

[5] Article 18 of the Pan American Convention lays down that "Diplomatic officers shall be exempt in the state to which they are accredited: (1) from all personal taxes, either national or local; (2) from all land taxes on the building of the mission, when it belongs to the government . . ."

money on a basis of reciprocity.[1] In India, all diplomatic salaries and emoluments are specifically exempt from payment of income-tax, and the general policy with regard to exemption from taxation is the same as in the United Kingdom.

Exceptions to the rule of fiscal exemption. So numerous are the taxes that are levied by a modern state to-day, and so vast is the net of taxation ranging from the fee payable on registration of births to death duties and embracing the entire gamut of human activity that it is difficult to say with precision as to the class of taxes or dues from which a diplomat will or will not be exempt particularly having regard to the divergence of state practice. The International Law Commission has tried to solve this difficulty by laying down the cases where a diplomat will not be exempt from taxation whilst providing that in all other respects the exemption shall apply.[2] The position is the same irrespective of the authority which levies the tax whether it is the central, regional or a local authority. The first exception to which, according to the Commission, the exemption will not apply are indirect taxes normally incorporated in the price of goods or services. Such indirect taxes would probably include excise duties, which are levied on production or manufacture of goods, as well as taxes on sale or purchase. It is difficult from the administrative point of view to allow exemption in respect of such indirect taxes. Though some states may even allow such tax exemptions, the Commission felt that it was not obligatory to do so, as the imposition of such taxation had no direct bearing on the diplomatic status of the person who purchased the goods. The second exception is in regard to dues and taxes on private immovable property situated in the territory of the receiving state unless they are held on behalf of the sending state for the purposes of the mission. A diplomat would also not be exempt from duties payable on inheritance or succession to the estate of a deceased person if he succeeds to or inherits such estate except in the case where the estate belongs to a member of the mission or a member of his family who dies during the tenure of his office in the receiving state. The principle behind these exceptions to the general rule of fiscal exemption is that the receiving state has territorial jurisdiction over all immovable properties situated within its boundaries except those premises which are used for

[1] Satow, op. cit., p. 237.

[2] Article 32 of the Draft Articles adopted at the Tenth Session. See also Article 34 of the Vienna Convention 1961.

the purposes of the mission, as also over all matters of succession or inheritance to estates within its territories.

The envoy is also liable to pay dues and taxes such as income tax or super tax on private income which he may derive from sources in the receiving state, and capital taxes on investments made in the commercial undertakings in the receiving state including his holding of stocks and shares.[1] The reason is obvious. The envoy does not derive such income by reason of his diplomatic status, nor does he make the gain in the course of his official functions. If he were to engage in business on his own for his own purposes or practise some profession, his income from such sources would also be liable to tax in the receiving state. However, in computing his income for determination of the rate at which tax will have to be paid the salaries and emoluments which he may receive from his government as remuneration for his official post cannot be taken into consideration. An envoy is also required to pay charges levied for specific services rendered such as water rates or electricity charges in the same manner and on the same principle as they are levied on the premises of the mission. He must also pay registration, court, or record fees, mortgage dues, and stamp duties, with respect to his immovable property unless it is held on behalf of the sending state for the purposes of the mission.

Exemption from payment of customs duties

The views held by the various authorities on international law had been that the privilege of free entry for articles intended for the official use of the mission, or for the personal use of one of the members of the mission rests on international courtesy and not upon any mandatory rule of the law of nations. According to Fauchille [2] this is "purely an ex gratia concession". Oppenheim [3] states that in practice and as a matter of courtesy many states allow diplomatic envoys to receive goods intended for their own use free of duty. Hackworth [4] notes that in the United States this exemption is granted on a reciprocal basis. The International Law Commission in its commentary on the subject, however, states that in so far as importation of articles for the use of the mission is concerned the exemption is generally regarded as a rule

[1] In *Van der Elst* v. *Commission of Internal Revenue*, 223 F. 2d. 771, the U.S. Court of Appeals 2nd Circuit held that a diplomat was liable to be taxed on the income from business or capital gains.

[2] Fauchille, op. cit., p. 100.

[3] Oppenheim, op. cit., p. 803.

[4] Hackworth, op. cit., p. 586.

of international law. The Commission also considers that having regard to the almost universal practice of according exemption from payment of customs duty in respect of articles intended for the personal use of the members of diplomatic missions, this should be accepted as a part of international law. It is on this basis that the Commission formulated the principles on this subject, and these have been adopted in the Vienna Convention on Diplomatic Relations. The Commission in formulating the principles took note of the prevalent practice in some states of regulating the exercise of this privilege in order to prevent abuses. Such regulations generally take the form of restrictions on the quantity of goods that may be imported, or the period during which the importation of the articles must take place, and stipulation of conditions under which goods imported duty free are to be resold. The necessity for imposing some restrictions cannot be overemphasised particularly with regard to re-sale of goods imported free of duty considering the number of diplomatic personnel in the capitals of the various countries, and having regard to the effect of re-sale of such goods on the economy of the country. It is to be observed that a number of countries in the world to-day are facing serious shortage of foreign exchange which necessitates imposition of stringent restrictions on expenditure of foreign exchange with the resultant restrictions in imports. Restrictions on imports may also become necessary in the interest of the development of national industries. Now, if a large number of diplomatic personnel were to be allowed to bring in goods duty free without any restriction and to sell them freely in the receiving state, the result may be quite serious in some cases. It is the general practice that when a diplomat leaves the territories of the receiving state upon termination of his mission, he is to be allowed to take with him all his personal belongings including his moneys in the bank, and this means that the receiving state has to provide foreign exchange for the amount. Normally, a diplomat is supposed to be bringing in foreign exchange into the country in the shape of his salaries and allowances, and if he were to save a part of such salaries or allowances, it would seem to be just and proper that the receiving state should provide foreign exchange for the purpose of these moneys being remitted to a country where the diplomat may have his next posting. But if the diplomat is allowed to bring in goods without restriction and he sells them at an exorbitant profit, which has been known to be the case in many instances, especially in respect of sale of motor cars, rare objects of art, pianos, radiogrammes etc., is the receiving state bound to provide him with

foreign exchange for the purpose of transmitting his profits abroad? It is generally agreed that goods imported by a diplomat for the purpose of any business to be carried on by him are not exempt from payment of customs duty. This restriction, however, applies only when the diplomat is actually carrying on a business, which would be a case of very rare occurrence indeed. The problem, however, which is created today is not by his carrying on of a business directly but by the abuse of privilege on the part of some diplomats in selling in the market goods which are supposed to be brought in for their own consumption. The International Law Commission was of the opinion that imposition of some regulations in the matter of importation of goods free of customs duty was not inconsistent with international law. It is submitted that the matter which needs to be seriously considered is whether it is necessary to allow free importation of goods for the use of all categories of diplomatic officers especially when there is so large a body of such persons. It really tends to create a privileged class with the resultant dissatisfaction among persons of equivalent status employed in the government of the receiving state. It may be said that the diplomats have to be paid considerably less by their governments on account of the various fiscal privileges allowed to them, and if these are reciprocally accorded by all states, no government would tend to lose. This argument is only true to a point because smaller nations who have fewer diplomatic posts abroad with small number of personnel are placed at a disadvantage as compared to larger countries with heavy resources at their disposal. Again, it is not in the interest of any country to allow diplomatic personnel to make undue profits by sale of their personal effects. It is, therefore, submitted that the rule of international law with regard to exemption from customs duties ought to be so interpreted as to impose an obligation on the receiving state to allow entry free from customs only to such bona fide personal effects that accompany a diplomat and within a reasonable time after his arrival for the purpose of taking up his post, as also a reasonable amount of goods for his personal consumption having regard to the size of the mission and members of the family of the diplomat. If any state wishes to take a more liberal attitude, it should be free to do so on the basis of reciprocity or otherwise. It is further submitted that states should be free to regulate the conditions for resale of the goods imported by the diplomats by prescribing that the goods should not be resold within a certain period of time or that they should be sold through a governmental agency in order to ensure that the privilege is not abused. It

would appear that imposition of reasonable restrictions either in the matter of importation of goods or their resale does in no way interfere with the effective functioning of a mission in the receiving state.

The personal luggage of a diplomatic agent is generally regarded as exempt from customs inspection. But there may be exceptional cases where the receiving state would be justified in opening the baggage and examining the same. This must only be on very serious grounds, such as when there are cogent reasons for presuming that the baggage contains articles other than those intended for the personal use of the diplomatic agent or members of his household or those intended for his establishment.[1] The baggage may also be inspected if there are very good reasons for suspecting that it contains articles the import of which is prohibited by law of the receiving state. The Vienna Convention has recognised this exceptional right of the receiving state.[2] It is, however, necessary in order to prevent any abuse of this right by the receiving state that the baggage must be opened only in the presence of the diplomat himself or his authorised agent.

It would be useful to take note of the existing practice with regard to customs exemption in Britain, United States and the Soviet Union. In Great Britain, diplomatic agents are exempted from customs duties as a matter of international courtesy. On first arrival, their baggage or that of their wives and families is exempted from customs examination, and any packages arriving for them or for their families are delivered duty free. These privileges are extended to counsellors, secretaries, and attachés but only on condition of reciprocity. There is no restriction as to the amount of goods that can be brought in; official furniture, stationery, office supplies etc. for use by the mission are at present admitted without examination. The goods and baggage of a diplomatic agent are exempt from customs examination on production of a baggage pass which may be obtained by the head of the mission on application

[1] Article 36 of the Vienna Convention 1961 provides: "The receiving state shall, in accordance with such laws it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on

(a) articles for the official use of the mission;

(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment."

Article 34 of the International Law Commission's Draft is in similar terms.

[2] Article 36(2) of the Vienna Convention provides: "The personal baggage of a diplomatic agent shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this Article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving state. Such inspection shall be conducted only in the presence of the diplomatic agent or of his authorised representative."

to the Foreign Office. Foreign Ministers of state or members of special diplomatic missions visiting or passing through Great Britain are accorded every consideration and facility.

Motor cars for personal use of the heads of missions, their families, counsellors, secretaries and attachés are admitted duty free either as a result of reciprocal arrangements or on an undertaking that duty payable on import will be paid if they are sold in the United Kingdom or retained there after termination of their appointment. Cars belonging to the foreign governments are admitted free of duty, and if sold in United Kingdom duty is to be paid on sale value.

In the United States of America, the privilege of free entry is extended to the baggage and other effects of all diplomatic officials accredited to the United States, or *en route* and of their families and servants. Applications for free entry of baggage are to be made to the Department of State, but in the absence of special authorisation from the State Department prior to the arrival of diplomatic officers, the Collector of Customs may accord them the privileges. Members of foreign missions can also receive articles imported for their personal or family use free of duty upon the State Department's instructions in each instance.

In the Soviet Union, all luggage belonging to diplomatic and consular representatives at the time of their passage, on arrival, or departure is exempt as a general rule from customs inspection. In special cases the inspection of baggage of such persons may be allowed as an extraordinary measure by the order of the Chief Directorate of Customs. All packages addressed to a diplomatic officer but not accompanied by him are subject to examination but exempt from payment of duty.

Other immunities and privileges

In addition to the immunities and privileges discussed above, there are certain other matters to which diplomatic immunities and privileges extend. These include, (i) the right to use the flag and emblem of the sending state on the premises of the mission including the residence of the head of the mission, and on his means of transport, (ii) exemption from rendering all personal service under the laws of the receiving state such as militia or fire protection duties, (iii) exemption from holding inquest on the death of a member of the mission, and (iv) exemption from the operation of the social security legislations of the receiving state.

Right to use the flag and emblem of the sending state. The privilege of the sending state to fly its national flag over the premises of its mission, and the right to have its national emblem or coat of arms displayed on such premises has long been recognised in the practice of states. Same is the position with regard to the right of the head of the mission to use his national flag or coat of arms on his residence, his motor car and other means of transport. This right, which arose out of practice of nations and presumably due to the long prevalent doctrine of exterritoriality of mission premises and carriages used by the head of the mission, has now been expressly recognised by the International Law Commission [1] and incorporated in the Vienna Convention on Diplomatic Relations[2]. In certain countries there had been in existence some restrictions concerning the use of flags and emblems of foreign states and doubts could well arise as to the applicability of such regulations in respect of mission premises and the means of transport on the ground that display of flags and coats of arms was not necessary for effective functioning of the mission. The matter has, however, been placed beyond controversy by being incorporated in the Vienna Convention.

Exemption from personal services and compulsory contributions. In many countries the national legislations require persons resident therein, whether citizens or aliens, to render certain personal service as a part of their civic duty such as the duty of fire protection. In times of national emergency, they may be required to take part in compulsory militia duties, or enlist in air raid precautions corps, or work as civic guards. Some states also prescribe compulsory personal contributions for meeting national calamities such as floods, earth-quakes, famines etc. It is quite clear that a diplomat cannot be compelled either to render such personal service or to make contributions. Such exemption would appear to be based on the principle that whilst an ordinary alien who lives in the country does so for his own purpose and as such should be subjected to the local laws and regulations in the same manner as the nationals of that state, the residence of a diplomat in the state is purely on account of his being posted there in the service

[1] Article 18 of the Draft Articles adopted by the International Law Commission at its 10th Session.

[2] Article 20 of the Vienna Convention 1961 provides: "The mission and its head shall have the right to use the flag and emblem of the sending state on the premises of the mission, including the residence of the head of the mission and on his means of transport."

of his home state. The matter is now governed by the express provisions of the Vienna Convention.[1]

Inquests. In the event of the death of a member of the diplomatic corps in the receiving state, irrespective of whether the death has taken place inside the mission premises or not, it appears to have been the practice at least in England not to hold an inquest if immunity had been claimed, even though the death had taken place in circumstances which would normally necessitate holding of such inquest by the Coroner.[2] Holding of an inquest is a jurisdictional act of the receiving state, and it is clear that if the death takes place within the premises of the mission immunity can be claimed. However, it is difficult to see the ground for any immunity if a member of the mission meets his end by reason of an accident or through the criminal act of someone outside the premises of the mission. Surely, the receiving state has jurisdiction to investigate into the cause of such a fatal accident or the crime. Moreover, the holding of an inquest often becomes essential to proper investigation of the matter. It can, therefore, be reasonably expected that if the death of a member of the mission takes place outside its premises, the sending state or the head of the mission would waive the immunity, even if there be any, and allow an inquest to be held by the appropriate authorities of the receiving state. In the event of a death taking place within the mission premises, it would not be unreasonable for the head of the mission to give his consent only on certain conditions if he decides to waive the immunity which he would undoubtedly have in such cases.

Social security legislations. The authorities on international law do not appear to have dealt with the question of social security legislations since the problem is new. In several countries national legislations provide for old age pensions, industrial accident and sickness insurance and unemployment benefits in consideration of certain compulsory payments. In many cases the obligation for such compulsory payments, or at least a substantial portion thereof, is cast on the employer. It seems to be clear that a diplomat, who is not a national of the receiving state, cannot be compelled to participate in such schemes of social security,

[1] Article 35 of the Vienna Convention provides: "The receiving state shall exempt diplomatic agents from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting."

[2] See Satow, op. cit., p. 203.

nor can he be compelled to pay such contributions under the law. But at the same time it would appear that there could be no objection to a diplomat taking advantage of the social security legislations, especially those like the National Health Insurance Scheme in Britain. This should, however, be done with the consent of the receiving state since under the general principle of international law no law of the receiving state can be enforced against a diplomatic agent.[1] The question also arises as to whether a diplomatic agent can be required to pay the contributions which an employer is obliged to pay under such social security legislations in respect of persons whom a diplomat or the mission may employ. On the one hand, it is clear that it is not permissible for a state to enforce its laws on the diplomatic representatives of foreign states, but on the other hand, it seems that application of this principle would lead to an anomalous situation since all persons in the receiving state except those who can claim immunity from such laws are subject to social security legislations. Indeed it would cause great hardship to the persons who are employed in the diplomatic missions of foreign states if they could not take advantage of the social security which the state provides. But who is to pay the contributions which are payable by employers in respect of such employees? The diplomatic missions in these days employ a larger number of persons in subordinate or non-diplomatic categories, many of whom are nationals of the receiving state. The problem therefore is not simple. The International Law Commission recommended that if the employees themselves are subject to the legislation, then the diplomatic agent in the capacity of an employer should be obliged to make the contributions.[2] This surely is a departure from the general principles of law regarding non-enforcement of local laws against a diplomatic agent, but it appears that the departure is justified out of practical consideration. The Vienna Convention provides that a diplomatic agent who employs persons that are not exempt from the social security legislations shall observe the obligations that are imposed upon employers under the laws of the receiving state. The only categories of employees who are exempt from social security legislation under the Vienna Convention are private servants in the sole employ of a diplomatic

[1] Article 33 of the Vienna Convention provides that a diplomatic agent shall be exempt from social security provisions which may be in force in the receiving state, but that this view would not preclude his voluntary participation in such social security system provided that such participation is permitted by the receiving state.

[2] Article 31 of the Draft Articles prepared by the International Law Commission at its Tenth Session.

agent provided such servants are neither nationals nor permanent residents of the receiving state and if they are covered by social security provisions in force in the sending state or in a third state.[1]

Closely connected with the question of social security legislation is the problem of labour welfare legislations which are in force in a number of countries. The laws generally impose obligation on the employer to contribute to employees' provident fund scheme, or to provide for payment of gratuity and retrenchment compensation on termination of service. The question is – can such obligations be imposed on a diplomatic agent in respect of the employees who are locally employed in the mission? In so far as contributions to a provident fund are concerned, it would appear to be on the same footing as contributions to social security schemes. But payment of gratuity or retrenchment compensation on termination of employment seems to be based on a different principle. The obligation is purely on the employer though it is meant to benefit the employee. It would therefore be reasonable to say that such conditions ought not to be enforced on a diplomatic agent as the general principle of international law regarding non-enforceability of local legislation on diplomats ought not to be lightly departed from unless there are exceptional reasons.

Persons entitled to immunities and privileges

The extent of the immunities and privileges enjoyed by the personnel of a diplomatic mission varies according to the category to which a person belongs. A distinction is also made between those who are nationals of the receiving state or permanently resident therein on the one hand, and the home based staff who are nationals of the sending state or of a third state on the other. The personnel of a mission generally consists of (i) diplomatic officers, (ii) home based non-diplomatic staff, (iii) locally recruited staff and (iv) private servants. The non-diplomatic staff, whether home-based or locally recruited, consist of those who are employed in the administrative and technical service of the mission as also those who perform menial or domestic service in the mission. A certain differentiation has now been made in the Vienna Convention between these two classes of non-diplomatic staff for the purpose of immunities and privileges on the basis of their functions. To the former category of non-diplomatic staff belong the administrative assistants or registrars, private secretaries, stenographers, typists, cypher clerks, proof-readers, archivists and clerical

[1] Article 33 of the Vienna Convention 1961.

assistants, whilst the later category would include messengers, chauffers and servants employed in the mission as cleaners or sweepers. The private servants are those who are employed in the domestic service of the members of the mission and employed by them personally.

Diplomatic staff. The members of the diplomatic staff of the mission, who may be called diplomatic officers, uniformly enjoy in all states the same immunities and privileges as the head of the mission if they are not nationals of and not permanently resident in the receiving state, that is to say, they are entitled to be accorded all the immunities and privileges as have been mentioned in this chapter. The reason for treating them on a par with the head of the mission with regard to their immunities and privileges is that they are all regarded as "public ministers" who are appointed to assist the head of the mission in fulfilment of his functions, and as such they have to be accorded the like immunities out of functional necessity. The diplomatic staff today include not only the counsellors, the secretaries, and attachés who are employed on the political work of the mission but also specialists such as Armed Forces Attachés, Commercial, Press, Scientific and Labour Attachés, provided the sending state has accorded them a diplomatic rank and their names have been included in the diplomatic list by the receiving state. At one time, states like Great Britain and France used to insist on being satisfied that the person who was sought to be included in the diplomatic staff of the foreign mission actually performed diplomatic functions so as to be entitled to immunities and privileges.[1] To-day, however, having regard to the all embracing functions of a diplomatic mission even persons who admittedly perform specialist functions are accepted as members of the diplomatic staff as long as they are given a diplomatic rank by the home state. The Armed Forces Attachés, Commercial and Press Attachés, who are sometimes designated as counsellors or secretaries, have become a regular feature in most of the diplomatic missions. In addition one even comes across Labour, Scientific and Agricultural Attachés as members of the diplomatic staff of the mission who are to enjoy the like immunities and privileges as the head of the mission. The right of the members of the diplomatic staff to be entitled to diplomatic immunities on the

[1] In *Barbuit's case* decided by Talbot L.C. in 1737 it was held that a Commercial Agent for the King of Prussia against whom a bill in equity had been filed for non-payment of debts was not entitled to immunity since he was appointed only for the purpose of assisting Prussian subjects in their commerce. According to present trend such a person would surely have been entitled to immunity.

same footing as the head of the mission has never been in any doubt.[1] It has been recognised in international law, and the expression "diplomatic agent" has been used to denote not only the head of the mission but every member of the diplomatic staff of the mission both in the text books on international law and in the Vienna Convention of 1961. It is of interest to note that as early as in 1878 the Tribunal de la Seine declared in the case of *Dientz v. de la Jara* [2] that military attachés were entitled to immunity. A counsellor of the embassy acting periodically as charge d'affaires was held by the English courts in 1854 to be entitled to diplomatic privileges.[3] The same view was taken by the United States courts in respect of the first secretary of the French legation.[4] In England, the Queen's Bench Division held in 1895 that attachés fell within the category of persons entitled to immunity.[5] The United States courts have recently held that Press Counsellors are entitled to immunity.[6]

Wives and families of diplomatic officers. The immunities and privileges of diplomatic officers extend to their wives and members of their families.[7] Immunities have sometimes been extended even to the wives living separately from their husbands.[8] It has been held that separation between the parties to a marriage, being merely a provisional and preliminary measure, did not dissolve the conjugal ties and the diplomatic immunities of the wife therefore subsisted. There is general agreement that the members of the family of a person entitled to diplomatic immunities are entitled to the benefit of these immunities.[9] It is, however, clear that the privileges should be limited to the members of the family who are living with the diplomatic officer. The spouse and minor children are universally regarded as members of the family if they are part of the household of the diplomat. The Vienna Convention also provides that wives and members of the family of diplomatic officers, if they are not nationals of the receiving state and are not permanently

[1] See *Assurantie Compagnie Excelsior* v. *Smith*, (1923) T.L.R. 105.

[2] (1898) J.D.I.P. 500. See also *Hemeleers–Shenley* v. *The Amazone*, (1940) 1 All.E.R 269; *Appuhamy* v. *Gregory*, (1956)I.L.R. 543.

[3] *Taylor* v. *Best*, (1854) 14 C.B. 407.

[4] *Res Publica* v. *de Longchamps*, 1 Dallas. 111.

[5] *Parkinson* v. *Potter*, (1885) 16 Q.B.D. 152.

[6] *Mongillo* v. *Vogel*; *Coll* v. *Vogel*, 84 F. Sup. 1007.

[7] In *Exp. Cheng–Gar–Lim*, 285 Fed. 396 (1921), the son of an official in the Chinese Legation in U.S.A. was held not to be subject to the Immigration Act.

[8] *Cottenet* v. *Raffalovitch*, (1908) J.D.I.P. 153.

[9] *Engelke* v. *Musmann*, (1928) A.C. 432; *In re C (an infant)*,(1959) Ch. 363; *Soc. Centrale de Constructions* v. *De Ayala*, (1951) I.L.R. 348; *Epoux Y* v. *Soc. Centrale de Constructions*, 26 I.L.R. 542.

resident therein, will be entitled to diplomatic immunities and privileges to the same extent as diplomatic officers.[1] It is difficult to define precisely the expression "members of the family" because circumstances may vary in each case. A dependent parent or a relation who keeps house for the diplomat may well be regarded as a member of the family.

Nationals of the receiving state. Though it may be possible for a state at times to appoint a national of the receiving state or of a third state as one of its diplomatic officers with the express consent of the receiving state, the occasion for such an appointment would be very rare in the present day when states have become so conscious of their national prestige. However, if a national of the receiving state is appointed, which must be with its consent, it is now settled that the receiving state must accord him certain immunities and privileges. Hitherto the practice in this regard had not been uniform and the opinions of writers had also been divided. Some authors had held the view that a diplomatic agent, who is a national of the receiving state, should enjoy full immunities and privileges subject to any reservations which the receiving state may make at the time of giving its concurrence. Others were of the opinion that the diplomatic agent should enjoy only such privileges and immunities as have been expressly granted to him by the receiving state. In Britain, it appears to have been the settled practice at least since 1786 that a British subject attached to a foreign embassy or legation other than a servant was not entitled to claim immunity from civil jurisdiction under the Statute of Queen Anne. Since 1952 even the servants have been excluded from this privilege. In every case where Britain had given permission to a British subject being employed to the post of a secretary in a foreign mission, it had always been on condition that the person in question was not to be entitled to diplomatic privileges and immunities.[2] Some authorities took the view that a national of the receiving state appointed to the diplomatic staff of a foreign mission is entitled to immunities unless the receiving state stipulates that he shall not be entitled to them.[3] This view was upheld by the English courts in the case of Sir H. Macartney, a British subject and English Secretary to the Chinese Legation in London.[4]

[1] Article 37, Clause (1) of the Vienna Convention 1961.
[2] Satow, op. cit., pp. 138–39.
[3] Phillimore, Commentaries on International Law, Vol. II, pp. 179–81; De Martens, Geffa Ken, Vol. I, p. 89.
[4] *Macartney* v. *Garbutt and Others*, (1890) 24 Q.B.D. 368.

The International Law Commission considered it essential that a diplomatic agent, even though he is a national of the receiving state, should enjoy at least a certain minimum of immunity to enable him to perform his duties satisfactorily, such as inviolability and immunity from jurisdiction in respect of official acts performed in the exercise of his functions. The basis for enjoyment of such immunity would appear to be that, though a national of a country cannot claim immunity from its jurisdiction, the receiving state by consenting to one of its nationals being appointed to a diplomatic post of a foreign state is deemed to waive its jurisdiction over such national in respect of certain matters which are considered to be essential for effective functioning of his mission. The Vienna Convention appears to have accepted the recommendations of the Commission, for it is provided in Article 38 of the Convention that a diplomatic agent, who is a national or permanent resident of the receiving state, shall enjoy immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions. In so far as granting of additional privileges and immunities is concerned, they have been left to the discretion of each state.

The members of the families of such persons have not been specifically dealt with by the International Law Commission, nor is there any mention about their position in the Vienna Convention. It would, therefore, be reasonable to state that the members of the families are not entitled to any immunity or privileges. It is, of course, open to the receiving state to allow such immunities and privileges as it may like in its absolute discretion.

Non-diplomatic staff

In so far as members of the subordinate or non-diplomatic staff of a mission are concerned, irrespective of whether they are employed in the administrative, technical, or menial services, there is no specific rule of international law which can be said to govern the question of their immunities and privileges. There has been no uniformity in the practice of the states either on the question as to which of the categories of non-diplomatic staff should enjoy privileges and immunities or on the question of the extent of their immunities and privileges.

British practice. In Great Britain, for instance, the members of a diplomatic mission down to the clerical and menial staff were held by the courts to be entitled to diplomatic immunity, and not subject to

the jurisdiction of the courts, civil or criminal, provided they we British nationals.[1] The view taken is that all persons who are asso in the performance of the duties of a foreign mission are privileg the case of *Assurantie Compagnie Excelsior v. Tom Smith* [2] the E Court of Appeal upheld the claim to immunity of one Mr. Smith, a in the U.S. Embassy on the ground of his being on the official s the mission. The court held that as it is of the first importance to a matic agent that he should be able to communicate freely with hi government, the immunities extend to and are enjoyed by all thos are concerned with the maintenance of such communicatio *Parkinson v. Potter*, the High Court of Justice in England hel under international law protection extends not only to an amba but also to all those associated with the exercise of his function Britain, the practice is to furnish the Foreign Office with a list of persons on whose behalf immunity may be claimed. Attempts to immunity where there is no bona fide employment have, however rejected.[4] The courts have also held that the transactions in resp which immunity is claimed must be connected with employmen

United States practice. The practice in the United States is s to that prevailing in Great Britain, and the position is governed Act of Congress 1790, which closely follows the wording of the Stat Queen Anne 1708. The Pan American Convention of 1928 by Arti provides that the immunity extends to the entire official person the diplomatic missions. This principle has been accepted by the Department [6] and was recognised by the courts as early as in 1 *U. S. v. Lafontaine* which concerned the case of a cook at an em

Practice in the U.S.S.R. In the U.S.S.R., minor officials and ser are altogether excluded from jurisdictional immunity. Article 1 Penal Code provides that all persons are subject to penal laws country with the exception of those who enjoy exterritoriality. persons are described in the regulations concerning diplomati consular missions as including counsellors, secretaries and attaché

[1] Satow, op. cit., pp. 192–93; Section 3 of the Diplomatic Privileges Act, 1708.
[2] C.A. (1923) Times, November 21.
[3] Per Matthew J. in (1885) 16 Q.B.D. 152. See also *Toms* v. *Hammond*, (1733) 370; *Triquet* v. *Bath*, (1764) 3 Burr. 1478; *Hopkins* v. *Roebuck*, (1788) 3 T.R. 79.
[4] Moore, Digest, Vol. IV, p. 655.
[5] *Novello* v. *Toogood*, (1823) 1 B.C. 554.
[6] See the statement of Mr. Secretary Hull dated 6 December 1935; Hyde, Inter Law, Vol. II, p. 435.

regulations specifically state that the immunity is to be granted to no other person.

Continental practice. In France, according to a decision of the Court of Cassation, Civil Chamber, delivered on January 10, 1891, the immunity was held to extend to all persons officially members of an embassy or legation.[1] The Commission on the Reform of the Civil Code set up by the Decree of 7 June 1945, however, recommended that the diplomatic immunities should be applied in a less liberal manner. In Article 101 of the Draft Code drawn up by the Commission, it was provided that the immunities should be enjoyed only by the head of the mission, and by the counsellors and secretaries,[2] which means that the members of the non-diplomatic staff were not considered as being entitled to immunity. In Italy, immunity from jurisdiction was extended to the members of the missions, their families and to the administrative personnel,[3] provided they were not of Italian nationality. In Switzerland, subordinate chancery personnel of a mission other than the head of the secretarial staff are not, according to Swiss law, exempt from the jurisdiction of the local courts. In Denmark, immunity from jurisdiction is accorded to all members of foreign missions.

Asia: In Japan, subordinate members of diplomatic missions could not be sued whilst their employment continued.[4] India accords immunities and privileges to non-diplomatic staff of foreign missions on a basis of reciprocity. Thus, a member of the subordinate staff of the U.S. Embassy in India was given immunity from prosecution on a criminal charge on the basis that in the United States the home based non-diplomatic staff of foreign missions are entitled to like immunity.

Latin-American practice. In the Latin American countries, there is some divergence in practice, and there is a tendency to restrict the privileges. In Colombia, under its Judicial Code, diplomatic agents, their families and the official suite, as well as personal servants are exempt from the jurisdiction of the state. In Argentina, whilst the personal servant of the British ambassador was held to be exempt [5] the

[1] (1891) J.D.I.P. 144.

[2] Recueil Sirey, Travaux de la Commission de Réforme du Code Civil, 1949–50.

[3] *In re Reinhardt*, A.D. 1938–40, p. 171. However, in *Società Arethusa Film* v. *Reist*, (1955) I.L.R. 544, immunity was disallowed because the transaction in question was held to be of a private character.

[4] *The Empire* v. *Chang and Others*, A.D. 1919–22, Case No. 205, p. 288.

[5] *Re Kosakiwick*, A.D. 1941–42, p. 114.

Supreme Court refused to grant immunity to the commercial attaché to the Paraguayan legation.[1] The Chilean court refused to allow immunity to a secretary in a foreign mission in respect of a prosecution for fraud.[2] In Brazil, the Supreme Court refused to grant immunity to a Lithuanian national employed as a driver of the Austrian embassy in Rio de Janeiro.[3]

The divergence of state practice in this field was noticed by the International Law Commission in its report on the subject. The Commission observed,

> It is the general practice to accord to members of the diplomatic staff of a mission the same privileges and immunities as are enjoyed by heads of mission, and it is not disputed that this is a rule of international law. But beyond this there is no uniformity in the practice of states in deciding which members of the staff of a mission shall enjoy privileges and immunities. There are also differences in the privileges and immunities granted to different groups. In these circumstances it cannot be claimed that there is a rule of international law on the subject.[4]

Since no definite rule of international law can be said to be applicable in the case of non-diplomatic staff, and having regard to the divergence of state practice, the matter has to be approached on the first principles. It is well recognised that the primary object of granting immunities to diplomatic agents is on account of functional necessity, that is to say, to ensure the effective functioning of the diplomatic missions without any interference from the local authorities. The immunity of a diplomat will be too imperfect if the non-diplomatic staff, who are engaged on the work of the mission and some of whom are engaged in as confidential a task as the diplomatic officers themselves, were not entitled to immunity. If the cypher clerk, or the archivist, or the stenographer of the ambassador could be arrested on some pretext and made to give out information under compulsion, the secrecy of the mission's work could hardly be safe. As already stated, this principle has long been recognised in Britain and the United States of America. The reluctance on the part of the U.S.S.R. to grant immunities to non-diplomatic officers appears to be based on the consideration that such extension of diplomatic immunities is not supported by any rule of international law.

The International Law Commission considered that there should be uniformity in state practice with regard to granting of immunities to

[1] *Re Gullon*, A.D. 1929–30, p. 194.
[2] *Pacey* v. *Barroso*, A.D. 1927–28, p. 200.
[3] *Re Jursitis*, (1956) I.L.R. 429.
[4] International Law Commission, Report of the Tenth Session, Doc. No. A/CN.4/117, p. 64.

members of the non-diplomatic staff since the divergence of practice leads to much confusion and misunderstanding.[1] The Commission drew a distinction between members of the administrative and technical staff on the one hand and members of the service staff on the other. As already stated, the members of administrative and technical staff are those who are concerned in the official functions of the mission such as registrars, personal secretaries, stenographers, typists, archivists and cypher clerks. The members of the service staff include messengers, chauffers, cleaners etc. The Commission recommended by a majority that the former category of the non-diplomatic staff who are not nationals of the receiving state should be granted the same privileges and immunities as members of the diplomatic staff. The Commission rejected the proposal that these categories of staff should qualify for immunity from jurisdiction solely in respect of acts performed in the course of their duties and that in all other respects the privileges and immunities to be accorded to them should be determined by the receiving state. With regard to the members of the service staff, the Commission took the view that it should be sufficient if they were to enjoy immunity only in respect of acts performed in the course of their duties and exemption from dues and taxes on the emoluments they receive by reason of their employment. The Commission further recommended that the members of the families of the administrative and technical staff should enjoy full privileges and immunities provided they form part of their respective households and are not nationals of the receiving state. With regard to the members of the non-diplomatic staff who are nationals of the receiving state, the Commission recommended that such persons should enjoy privileges and immunities only to the extent admitted by the receiving state. The Commission, however, felt that the receiving state must exercise its jurisdiction over these persons in such manner as not to interfere unduly with the conduct of business of the mission. It would be noticed that unlike the case of diplomatic officers the Commission did not consider it fit to recommend granting of immunity to the members of the non-diplomatic staff, who are nationals of the receiving state, nor has the Commission drawn any distinction between the members of the technical and administrative staff on the one hand and service staff on the other in their case. The Commission left the question of immunities and privileges of the entire category of non-diplomatic staff, who are nationals of the receiving state, solely at the discretion of the state expressing the hope

[1] Articles 36 and 37 of the Draft Articles drawn up by the International Law Commission.

at the same time that the receiving state should exercise its jurisdiction over such persons in a manner so as not to interfere unduly with the conduct of the business of the mission. The reasons behind the Commission's recommendation would appear to be based on the principle that every state has sovereignty over its own nationals, and no citizen can claim immunity from jurisdiction of his home state. The partial departure from this principle in cases of diplomatic officers who are nationals of the receiving state was based on the consideration that a state by agreeing to receive one of its nationals as a diplomatic representative of a foreign state may well be said to have agreed to grant him immunity in respect of his official acts in the fulfilment of his mission. No such consideration would appear to apply in the case of non-diplomatic staff of a foreign mission. Nevertheless, it is recognised that such persons, being connected with a foreign mission, ought to have some immunities and privileges in order to safeguard the functioning of the mission. It is difficult to lay down the extent of such privileges and immunities particularly having regard to the needs of different situations and keeping in view the divergence of practice in various countries. It may, however, be expected that the states would be prepared to grant such privileges and immunities as may be found necessary in their mutual interest. Almost all countries are obliged to employ in their missions locally recruited persons in subordinate capacities due to reasons of economy, language difficulties etc. and receiving states are generally known to accord to such persons a certain measure of immunities and privileges in the hope that their employees in other countries would be accorded the same on a reciprocal basis.

The recommendations of the International Law Commission were not fully accepted by the Vienna Convention on Diplomatic Relations with regard to the privileges and immunities of the non-diplomatic staff. In Articles 37 and 38 of the Convention adopted at the Conference, the nationals of the receiving state and those who are permanently resident therein have been treated on the same footing.[1] This basis would appear

[1] The relevant provisions of the Vienna Convention are as follows:

Article 37(2): Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households shall, if they are not nationals of or permanently resident in the receiving state, enjoy the privileges and immunities specified in Articles 29 to 35 except that the immunity from civil and administrative jurisdiction of the receiving state specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

Article 37(3): Members of the service staff of the mission who are not nationals of or permanently resident in the receiving state shall enjoy immunity in respect of acts per-

to be sound because persons who are permanently resident in the receiving state cannot be said to be residing there by reason of their employment in the foreign mission. They are in the same position as the nationals of the receiving state, and by making their permanent home in that country they are to be regarded as having voluntarily agreed to be under the jurisdiction of the receiving state. The Vienna Convention 1961 provides for the grant of immunities and privileges to members of the administrative and technical staff of the mission, who are not nationals of and not permanently resident in the receiving state, together with their families in like manner as members of the diplomatic staff and their families subject to two exceptions. Whilst according them complete immunity from the criminal jurisdiction of the receiving state, the immunity from the jurisdiction of civil and administrative tribunals is confined to acts performed in the course of their official duties. The other exception is that the privilege of importing goods exempt from customs duties, taxes, and related charges are applicable only in respect of goods brought by them at the time of their arrival for taking up the post in the diplomatic mission and things necessary for their being established at that place. The provisions of Article 37 of the Convention may be said to contain an ideal solution of the problem concerning the immunities of administrative and technical personnel. On the one hand, by granting complete immunity to members of this category of staff and their families from criminal jurisdiction of the receiving state and by according them inviolability in respect of their persons, adequate safeguards have been taken to see that the functioning of the mission is not jeopardised by possible leakage of secrets through pressure exerted on such members of the staff by the officials of the receiving state. On the other hand, by retaining the jurisdiction of the courts over such persons in respect of purely civil matters unconnected with their employment, such as actions relating to defamation, breach of promise and liabilities arising out of debts, any undue extension of diplomatic immunity has been avoided. The restrictions placed on the importation of goods free of customs duty by such a large group of persons are in the interest of and for the protection of the receiving state. This helps to keep a distinction

formed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and exemption contained in Article 33.

Article 38(2): Other members of the staff of the mission and private servants who are nationals of or permanently resident in the receiving state shall enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

between members of the diplomatic staff and those employed in subordinate categories as also to keep a check on the ever increasing number of privileged persons.

As regards the members of the service staff who are non-nationals of the receiving state and not permanently resident therein, the provisions of the Vienna Convention are on the same lines as the recommendations of the International Law Commission, that is to say, that the staff of this category are to enjoy immunity in respect of acts performed in the course of their duties as also to receive exemption from dues and taxes on the emoluments they receive by reason of their employment, and to enjoy exemption from social security legislations. Since the members of the service staff are generally not concerned with the confidential work of the mission, and exercise of jurisdiction over them would not in the normal circumstances affect the functioning of the mission in a serious manner, it would not appear to be necessary to accord them complete immunity from criminal jurisdiction or to guarantee their inviolability.

In regard to the cases of non-diplomatic officers, who are nationals of the receiving state or are permanently resident therein, the Vienna Convention proceeds on the same lines as that of the International Law Commission, that is, their immunities and privileges are left to the discretion of the receiving state.

The provisions of Article 37 of the Convention, if adopted by states, would certainly bring about uniformity in the treatment of non-diplomatic personnel which has so far been lacking. The hope of such uniformity is, however, not altogether bright because the Vienna Convention itself by Article 47 contemplates a differentiation in practice by reason of custom or treaty. In Britain or the United States, where the members of the non-diplomatic staff enjoy wider privileges and immunities, it is very unlikely that those privileges and immunities would be restricted except in such cases where the sending state of the diplomatic mission accord lesser privileges. The Vienna Convention would, however, have served a very useful purpose if states agree to regard the provisions of Article 37 as a basis for grant of immunities and privileges to the non-diplomatic staff even though some states may agree to accord immunities and privileges on a higher scale.

Private servants

Private servants stand on a somewhat different footing from the members of the service staff in as much as private servants are in the

personal employment of persons who are entitled to immunity. They are not in the employ of the sending state. The immunities and privileges of private servants are, therefore, not derived from the sending state but from the persons who employ them. To this category of private servants belong the tutors or governesses employed by a diplomat to look after his children, the steward or the butler, and the cook or the chauffeur who work in the household of a diplomatic agent. According to Sir Cecil Hurst, the immunities enjoyed by those in the service of a person entitled to diplomatic immunities are purely derivative. The privilege is the privilege of the employer, not the privilege of the servant himself. Being only derivative it ceases the moment the service ceases.[1]

The private servants of a diplomatic agent are in most cases nationals of the receiving state, and in the past differing views had been expressed as regards their immunity.

British practice. The old English rule was that the privilege of a diplomat also extended to his servants and this was held to include not only the servants of foreign nationality whom he chose to bring with him but also those who were nationals of the receiving state employed locally.[2] Domestic servants of heads of missions, whatever their nationality, were exempted from the jurisdiction of the courts in Britain. This practice has, however, been discontinued since 1952, and domestic servants of British nationality no longer appear to enjoy diplomatic immunity. It has been regarded as essential for a servant to prove bona fide and actual employment in order to be entitled to immunity. Attempts to claim immunity where there was no bona fide employment have always been rejected in England.[3] In the celebrated case of *Novello v. Toogood*, Chief Justice Abbott observed:

> I am of the opinion that whatever is necessary to the convenience of an ambassador, as connected with his rank, his duties and his religion, ought to be protected; but an exemption from the burdens borne by other British subjects ought not be granted in a case where the reason for the exemption does not exist.

In the United Kingdom, it is necessary to furnish a list of domestic servants to the Foreign Office before immunity can be claimed and immunity cannot under any circumstances be claimed if the servant engages in trade.[4]

[1] Hurst, Collected Papers, p. 256.
[2] Per Lord Mansfield in *Lockwood* v. *Coysgarne*, 3 Burr. 1675.
[3] Moore, Digest., Vol. IV, p. 655; *Novello* v. *Toogood*,(1823) 1B.C. 554.
[4] Satow, op. cit., p. 196.

Practice in the United States. In the United States of America, immunity can only be claimed where the name of the servant has been registered in the Department of State and transmitted to the Marshall of the District of Columbia.[1] It is not very clear as to whether the immunity is admissible in the case of a servant who is a citizen of the United States, but it is certain that no citizen or inhabitant of the country has immunity in respect of debts contracted before entering service.

Continental practice. In the Soviet Union, it would appear that servants do not enjoy any immunity since private servants are not mentioned in the Decree of the Supreme Soviet among the classes of persons who are entitled to immunity. In Germany, before World War II under the law then in force the servants who were not German nationals were entitled to immunity as being servants of a diplomatic agent. Thus the French servant in the service of the Spanish ambassador was granted immunity from criminal jurisdiction. In Switzerland, household servants are as a matter of practice exempted from the jurisdiction of the local courts provided they are not Swiss nationals. The position is exactly the same in Italy. In Denmark, under the enactment of 1708 even servants could not be called before the court or arrested for debt. Later, however, the practice grew up under which the servants could temporarily be arrested and the matter reported to the head of the mission.

The Pan American Convention makes no mention of domestic servants. A reported decision, however, shows that in Argentina, the servant of a British ambassador was held to be exempt from jurisdiction.[2]

The International Law Commission took the view that private servants, who are not nationals of the receiving state, should be exempt from the dues and taxes on the emoluments they receive by reason of their employment. In all other respects, the Commission was of the opinion that the immunities and privileges of private servants, whether they be of the nationality of the receiving state or not, should be only

[1] Statute Law of the United States, 22 U.S.C.A., Sec. 254; In *Haley* v. *State*, (1952)I.L.R. 387, Case No. 90, immunity was denied to the personal servant of the Air Attaché of the Swedish embassy in respect of conviction of a crime on the ground that the name of the servant, an American citizen, had not been communicated to the State Department. In *Carrera* v. *Carrera*, A.D, 1949, Case No. 99, immunity was granted to a domestic servant of the Czechoslovak embassy who was permanently resident in the United States because his name had been notified.

[2] *Re Kosakicwick*, A.D. 1941–42, p. 114.

to such extent as may be admitted by the receiving state. The Commission at the same time took the view that the receiving state in exercising jurisdiction over such persons must do so in such a way as not to interfere with the effective functioning of a diplomatic mission. The Vienna Convention has incorporated the recommendations of the Commission.[1] The position, therefore, is that today it is for each state to determine by its own laws or practice the extent of the immunities that would be admissible in respect of private servants, and no uniform rule can be formulated in this regard.

There has always been two trends of thought as regards the desirability of admitting private servants to immunity. From one point of view, it would appear that submission of domestic servants to the local jurisdiction would be advantageous, as unlike the staff employed in the diplomatic mission they cannot be recalled by the sending state for their misdemeanours since such servants are not employed by the state. Moreover, no serious prejudice is caused to the effective functioning of the mission by reason of the exercise of jurisdiction over such persons. On the other hand, it is said that a person entitled to diplomatic immunity must have servants if he is to carry out duties allotted to his post, and the immunity of the household servants is a matter of importance to him for the well being of his mission. In the case of a domestic servant it may be difficult to draw a distinction between a person who is a national of the receiving state and a person who is a national of some other state whom the envoy has brought with him to his post because in both cases the servant derives his immunity from his master. Even if such a distinction were to be drawn, it could only lead to difficulties because diplomats would then be obliged to bring their servants with them rather than employ them locally. It has been recognised in most countries that the immunity of a servant ceases upon the termination of his employment, and he can thereupon be sued even in respect of his past acts. It would seem that the best course to adopt would be to request the diplomatic officer to terminate the employment of his servant if an occasion arises for proceeding against the servant. There is no particular reason for extending diplomatic immunity to domestic servants provided the agents of the receiving

[1] See Article 37(4) of the Vienna Convention which provides: "Private servants of members of the mission shall, if they are not nationals of or permanently resident in the receiving state, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects they may enjoy privileges and immunities only to the extent admitted by the receiving state. However, the receiving state must exercise its jurisdiction over these persons in such a manner as not to interfere unduly with the performance of the functions of the mission."

state pay due regard to the convenience of the diplomatic agent in whose employ the servant is. For example, the diplomat concerned may first be given notice or intimation about any action, be it civil, criminal or administrative, that is sought to be taken against the servant; in the case of arrest of a servant it may be caused in such a way so as not to violate the immunities of residence of the diplomat. It is, however, important that in the course of interrogation of a servant, the authorities must refrain from asking any questions regarding his employment, and shall not attempt to gather information with regard to matters which might have come to his knowledge in the course of employment. If safeguards of this nature are taken, there can be little objection to the exercise of jurisdiction in respect of private servants.

Duration of immunity

Sir Cecil Hurst in the course of his lectures at the Hague Academy on the subject of diplomatic immunities said that the role of the diplomatic agent being to maintain relations between his own government and that of the country in which he is stationed, and the basis of all diplomatic immunities being that the agent comes to the country in which he is stationed on the footing that he is not subject to the local law, it follows as a necessary consequence that he enjoys these immunities throughout the period when he is in that country for the purpose of accomplishing his task.[1] There can be no doubt about this proposition, and it is universally accepted that the immunity of a diplomatic agent and the members of his family continue throughout his mission and also for a reasonable time after the termination of his mission, that is, the period between his recall and departure. The position would be the same with regard to the members of the non-diplomatic staff who are entitled to immunity.

It has long been recognised that from the moment the diplomatic character of an individual is ascertained, he will be entitled, while in the country where he is posted, to enjoy the recognised privileges and immunities. For the head of a mission this has to be from the moment when the government to which he is accredited has given the *agrément*, i.e. has intimated its willingness to receive him as the representative of his country; and for the other members of the mission from the date when their appointments are notified to the Ministry of Foreign

[1] Hurst, Collected Papers, p. 292; Dalloz, Répertoire, Agent Diplomatique, Sec. I, Art. IV; *Dupont* v. *Pichon*, (1805) 4 Dalloz. 321.

Affairs.[1] The Vienna Convention 1961 has also adopted this position, for in Article 39 of the Convention it is provided that every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving state on proceeding to take up his post, or if already in its territory from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed.

The Vienna Convention further provides that when the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The Convention clarifies the position that with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist. It should be mentioned in this connection that the normal rule as regards the duration of immunity in respect of private servants, wherever applicable, is different. In the case of such persons the immunity ceases with the termination of their employment, and they can be subjected to jurisdiction even in respect of acts performed during the period of their service.

The provisions of the Vienna Convention are in conformity with the accepted practice in this regard as amply borne out by the opinions of text writers,[2] judicial decisions, and policy statements issued by Foreign Offices. In *Musurus Bey v. Gadban* [3] the contention that the Turkish ambassador could have been sued during the two months between his recall and departure was rejected by the English Court of Appeal. In *Magdalena Steam Navigation Co. v. Martin*, it was held that no execution could be levied on the ambassador if he leaves within a reasonable time.[4] Mr. Root, the U.S. Secretary of State, on the occasion of the arrest of the French Chargé d'Affaires by Venezuelan authorities four days after the termination of his mission, declared that under international law diplomatic immunities attach to a diplomatic agent even though his powers may be suspended or terminated so long as he may be within the jurisdiction of the state to which he had been accredited for a reasonable time for his withdrawal therefrom.[5]

[1] Fodéré Pradier, Cours de droit Diplomatique, Vol. II, p. 19; Vattel, op. cit., Book IV, Ch. 7, para 83.

[2] Répertoire, Ministre Public, Sec. V, para 4, Article 8; Vattel, op. cit., Book IV, Chap. 9, para 125.

[3] (1894) 2 Q.B. 352.

[4] (1859) 2 E. & E. 94; 121 E.R. 36.

[5] Hackworth, Digest, Vol. IV, p. 457.

Since circumstances vary with every case, it is impossible to set precise limits upon the time necessary for a person who has ceased to exercise diplomatic functions to complete his preparations for departure. Difficulties have occasionally arisen in determining whether a person, who has held a diplomatic post and lingers on in the receiving state, is engaged in settling upon the business relating to his tenure of the post, or whether he is staying there for his own pleasure. Thus *In re Suarez* [1] it was held that a person is not protected from action indefinitely after he ceases to be a diplomat. In *Dupont v. Pichon*[2], the American courts held that in the circumstances of the case a period of five months was not too long for winding up the affairs of a diplomat. Normally the period necessary for the purpose, during which the immunity is to subsist, can be arranged by consultation with the official concerned, but it would appear that ultimately the government of the receiving state must be the judge as to how long the period of immunity is to continue. It is, however, clear that if the diplomat on the termination of his mission decides to reside in the country as a private individual instead of leaving the country, he is to be divested of his privileges.

There was some doubt about the position of the members of the family of a diplomat who dies at his post. The matter, however, has been put at rest by the Vienna Convention which provides that in the case of death of a member of the mission, who is entitled to immunities and privileges, the members of his family shall continue to enjoy the privileges and immunities to which they were entitled until the expiry of a reasonable period in which to leave the country. The Convention further provides that in the event of the death of a member of the mission, who is not a national of or permanently resident in the receiving state, or a member of his family forming part of his household, the receiving state shall permit the withdrawal of the moveable property of the deceased with the exception of any property acquired in the country the export of which was prohibited at the time of his death. It is also stated that estate, succession and inheritance duties shall not be levied by the receiving state on the moveable properties of the deceased, the presence of which in the receiving state was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission. This provision is in keeping with the general principles concerning diplomatic immunities, for it is clear that had the diplomat or a member of the family, as the case may be,

[1] *Re Suarez*, (1917) 2 Ch. 131; (1918) 1 Ch. 176.
[2] *Dupont* v. *Pichon*, (1805) 4 Dalloz 321.

been alive he or she would have been able to take away the moveable properties upon the termination of his mission. It is, therefore, but right that the personal representatives of the deceased diplomat or a member of his family should be free to take away the moveable properties. The restriction placed with regard to exportation of the articles of the prohibited category is presumably due to the fact that the diplomat was aware or ought to have been aware of the prohibition of the export of the particular article or articles and he was expected to observe the laws of the country though these could not be enforced against him. The exemption from estate or succession duty appears to be based on the footing that the person concerned was immune from the jurisdiction of the receiving state including the taxing power of the state, and as such, tax ought not to be levied on his moveable property which becomes payable by reason of his death.

CHAPTER VI

POSITION IN THIRD STATES

Diplomatic Agents

A diplomatic agent may at times find himself sojourning in the territories of a state other than the state or states to which he is accredited. This usually happens when he is travelling through the territory of a state in proceeding to his post or whilst returning home on leave or upon termination of his mission. A diplomatic agent, who is accredited to more than one state, may have to traverse the territories of third states in travelling between one post and another. The question arises as to whether in such circumstances a diplomatic agent is entitled to be accorded any immunities and privileges by the third states in whose territory he may be sojourning. In the state to which he is accredited, international law guarantees to a diplomat the inviolability of his person as well as immunity from the civil, criminal, and administrative jurisdiction of the state in addition to various fiscal immunities and privileges for the reason that such immunities and privileges are essential for the effective functioning of his mission and to ensure against the risk of local interference. But in a third state, a diplomat has not to fulfil any functions pertaining to his mission; consequently it could not be said that immunities and privileges are necessary in third states on the basis of functional necessity. Nevertheless, it seems to be clear that a diplomat in proceeding to his post through the territories of other states, or in travelling through such territories whilst proceeding from one post to another is doing so in the course of his official functions as a diplomatic agent with a view to enable him to exercise the right of legation on behalf of his home state. There has been some divergence of opinion among text writers on the question of immunities and privileges of a diplomat in third states particularly with regard to the extent of such immunities. State practice and the trend of judicial decisions have been in favour of allowance of certain immunities especially those which

are necessary for the purpose of securing an unhindered passage when the diplomat is passing through the territory of a third state on his way to or in returning from his post. The immunity is extended in some cases even where the diplomat chooses to make a short stay in the course of his journey.

It may be said that in recent years with the vast increase in air travel the occasions for diplomats undertaking long rail and road journeys through the territories of other states have become somewhat less common. Consequently, the chances of a diplomat being stopped or molested whilst passing through the territory of an unfriendly country, or his being served with a writ or summons at the instance of an adversary have been greatly minimised. Even a few years ago, a diplomatic agent posted to St. Petersberg or Moscow would have had no option other than to travel by rail through half a dozen capitals of Europe. Today, in all probability he would prefer to travel by air especially in cases where a train journey may mean travelling through the territory of an unfriendly country. Nevertheless, in many cases, the sea and the rail remain the most common form of transport, particularly when the diplomat is first proceeding to his post or returning therefrom on the termination of his tour of duty. It is also not uncommon for a diplomat to make brief halts in third states on his way to his post or to pay visits for purely personal reasons. There are still some places with which there is no direct air communication; and even aircrafts have to halt in the territories of third states. The question concerning the position of a diplomat in third states, therefore, remains an important issue.

"At the present day," said Sir Ernest Satow, "it is so much to the interest of all nations that their diplomatic representatives should be allowed to pass freely and without hindrance through such countries as they may have to traverse in order to reach, or to return from their posts, that it is usual to afford all reasonable facilities and courtesies for the purpose. The only precautions to be recommended are that the agent should provide himself with a passport duly visaed where necessary, in which his official character is fully detailed, and obtain from the diplomatic agent of the third state in his own country a *Laisser Passer* to enable his baggage to pass through the customs of that state with the usual respect." [1]

The right of a diplomat to pass freely and without hindrance would appear to be clearly established in international law and practice in

[1] Satow, op. cit., p. 243.

the present day, and it may be reasonable to assume that such right would include within it the right to inviolability and immunity from the jurisdiction of the state whilst the diplomat is passing through that state. But the point which does not appear to be so clear is whether the diplomat is entitled to full diplomatic immunities and privileges in the third state during his journey and especially where he decides to break journey and make a short stay.

Even in the early days of modern diplomacy it appears that the attitude of the governments in the matter had been that some privileged position ought to be given to the ambassadors of third states while on their way to or from their posts. In 1679, the States General of Holland enacted a law recognising the exemption from the jurisdiction of diplomatic agents who were passing through the country.[1] The controversy raised over the murder of Rincon and Fregose, French ambassadors to the Porte and Venice respectively in 1541 whilst on transit, under the orders of the Governor of Milan,[2] and the arrest of Du Croc, the French ambassador to Scotland in 1572, by Queen Elizabeth [3] also shows that the governments had come to recognise the position of an ambassador even in third states.

Views of writers. It is relevant to notice in this connection the views of well known writers on international law. Rivier [4] considers that a diplomatic agent whilst passing through a third state in proceeding to or returning from his post exercises his own state's right of legation, and if he is hindered or molested, the rights of both the receiving state and the sending state are violated. According to the learned author, as soon as his character is revealed, the diplomatic agent becomes entitled to claim inviolability in respect of all matters involving the rights of those two states though there is no need to regard him as entitled to exterritoriality. It therefore seems to be clear that the immunities of a diplomatic agent in a third state is confined to such of his activities as are necessary for the fulfilment of his mission, that is to say, matters relating to his transit across the territory of the third state. Rivier is further of the view that if the diplomat stays in a third state, certain favours such as exemption from the payment of import duties and other taxes may be accorded to him as an act of courtesy, without his having any right to demand it, and that the passage or

[1] Hurst, Collected Papers, pp. 277–78; (1901) J.D.I.P. 281.
[2] Ward, Law of Nations, Vol. II, p. 557.
[3] Ibid., p. 560.
[4] Principes du Droit des Gens, Vol. I, p. 508.

stay of the diplomat will be allowed only if it is harmless. Halleck [1] takes the view that a diplomatic agent has the right of innocent passage through the territories of all states friendly to his own country, and that he is entitled to the honours and protection which nations reciprocally owe to each other's diplomatic agents. He also considers that a state is at liberty to refuse the right of innocent passage if it has just reason to suspect that the diplomatic agent will abuse his right of passage by indulging in activities prejudicial to the state, but if an innocent passage is granted the diplomat is entitled to respect and protection, and any insult or injury to him is regarded as an insult or injury to both the states. Schmelzing, however, appears to hold a contrary view, as according to him diplomatic agents cannot claim the privilege of inviolability in a third state which they touch on their journey as the diplomat is only a private person when he traverses the territories of third states. He observes that the custom of allowing a free and innocent passage to a diplomat in times of peace and conferment of certain privileges and marks of courtesy on such persons rest upon no legal obligation. Deak,[2] in an article published in *Revue de droit International*, states that it is customary to accord special protection to diplomats in transit, but adds that there is no definite rule and certainly no unanimous opinion on the subject. Sir Cecil Hurst says

> Whether the full measure of diplomatic privileges and immunities should be allowed is not clear; no general rule can yet be said to be recognised. Without exemption from the jurisdiction of the courts, however, a diplomatic agent passing through a third state might never be able to reach or return from his post.[3]

Sir Cecil Hurst is of the view that the duty on the part of a third state to accord special protection to a diplomatic agent can only arise in cases where the third state is notified of the presence of the diplomat, and that it is open to a state to refuse transit across its territory. It would seem that this last condition is hardly of any practical application in the present day because in most cases the diplomatic agent would require a visa on his passport to be given by the state which he wishes to pass through on his journey.

The French Ministry of Foreign Affairs in a published document in the year 1900 in connection with the case of *Duc de Veragua*, whose personal effects were seized in execution of a judgment during his

[1] Halleck, International Law, Vol. I, p. 389.
[2] Revue de droit International, 1928, p. 558.
[3] Hurst, op. cit., p. 279.

temporary stay in Paris, 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 diplomatic agent and accordingly exempt from the local jurisdiction.[1] Though this announcement was made in respect of a special envoy engaged on a temporary mission, it follows that diplomatic envoys accredited to other states should be exempt from jurisdiction in France whilst passing on their way to or returning from their posts.

In the Pan American Convention 1928, it is laid down that persons belonging to the mission shall also enjoy the same immunities and prerogatives in the states which they cross to arrive at their post or to return to their own country, or in a state where they may casually be during the exercise of their functions and to whose government they have made known their position.[2] Article 15 of the Harvard Draft Convention,[3] however, provides that the third state is obliged to accord only such immunities as are necessary to facilitate the agent's transit, and that the third state is only bound by this rule if it has recognised the government of the agent, and is notified of his journey. The International Law Commission in its draft articles on the subject recommended that the duties of the third states in the matter of diplomatic immunities were confined to ensuring the transit of a diplomatic agent through its territory.[4] The same view was taken by the Asian–African Legal Consultative Committee.[5]

Decisions of national courts. The decisions of some of the national courts may also be noticed with regard to exercise of jurisdiction over diplomatic agents accredited to other states whilst on transit. The Superior Court of New York in dealing with the case of the Minister of the Republic of Texas to France and England, who was arrested in the United States for debt while returning to his country, held in 1839 that the privilege of an ambassador extended to immunity against all civil suits sought to be instituted against him in the courts of the country to which he was accredited as well as in those of a friendly country through which he was passing on the way to his

[1] (1901) J.D.I.P. 342.
[2] Article 23 of the Pan American Convention 1928.
[3] Harvard Research in International Law, p. 85.
[4] Article 39 of the Draft Articles on Diplomatic Relations adopted at the 10th Session of the Commission.
[5] A.A.L.C.C., Report of the Third Session, 1960.

post.[1] In 1924, however, this very court held in respect of an action for divorce brought against an attaché of the Legation of Panama in Italy that there was a marked difference between the immunity from civil proceedings and immunity from arrest, and that the country which a diplomatic agent crosses in going to or coming from the state to which he is accredited owes to him only that it shall not hinder the fulfilment of his mission by restraining his personal liberty.[2]

The Civil Tribunal of the Seine in a decision given in 1840 held that the French Decree of *13 Ventôse an II* in consecrating the inviolability of diplomatic agents made no distinction between those accredited to France and those traversing France in order to reach their posts elsewhere.[3] The correctness of this decision as to whether the French Decree confers such immunity has been questioned later.

It can reasonably be deduced from the opinions of authors and the decisions of the national courts that a diplomatic agent is entitled to expect an unhindered passage through the territories of third states whilst proceeding to or returning from his post. The right of innocent passage would appear to include the right to inviolability, as also immunity from jurisdiction for such period as may be necessary for the diplomat to spend on transit. As to whether he is entitled to immunities and privileges other than those connected with his transit facilities, the opinions appear to differ. The authorities on international law also consider it to be important that the diplomatic status of the person concerned should be made known to the governments of the third states through which he may be passing with a view to ensure that he is accorded the immunities and privileges he is entitled to.

It is needless to say that a diplomat should be in possession of a passport issued by his home state which would clearly indicate his status. Most states have a special category of passports which are issued to their diplomatic officers. He would also require visas on his passport from the countries which he wishes to traverse as indicative of the consent of those states to allow him to travel or sojourn in their territory. It is the practice of most states to grant diplomatic visas to those who have a diplomatic status as may be indicated in the passport. The granting of a diplomatic visa would appear to indicate that the state giving such a visa agrees to allow the person concerned the status of a diplomat whilst on its territory and for the duration of the

[1] *Holbrook* v. *Henderson*, 4 N.Y. S. Ct. 619; *Wilson* v. *Blanco*, 56 N.Y. S .Ct. 582.
[2] *Carbone* v. *Carbone*, 206 N.Y. S. Ct. 40 (1924).
[3] Hurst, op. cit., p. 278; (1910) J.D.I.P. 341.

time for which the visa is given. The question that has to be examined is whether granting of a *diplomatic visa* would enable the holder to claim full diplomatic immunities and privileges which he is entitled to in the country to which he is accredited. It has already been stated that a diplomatic agent has no function to fulfil pertaining to his mission in the territories of a third state other than transit across its territory, and therefore the question of granting him the usual privileges and immunities on the basis of functional necessity cannot arise. What then is his right in the third state? On principle this would appear to be no more than a right of transit, since the purposes of his mission would be fulfilled if he is allowed a free and unhindered right of transit through the territory of a third state. It would, therefore, be reasonable to suggest that in the territories of third states a diplomatic agent is entitled to such of the diplomatic immunities and privileges as may be necessary to ensure him a free and unhindered right of passage. This view has been adopted in the Vienna Convention 1961 for it is provided in Article 40 of the Convention that

> If a diplomatic agent passes through or is in the territory of a third state, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third state shall accord him inviolability and such other immunities as may be required to ensure his transit or return.[1]

The Vienna Convention appears to cast an obligation to allow free and unhindered passage to a diplomatic agent in a third state only if that state had given him a visa. This would indicate that a state is not bound to allow such free transit in every case, and that only if it agrees to do so by giving a visa, its obligation is created. This, it may be said, is the correct position from the point of view of international law since a state cannot be obliged to receive a person on its territory or allow him transit, and the obligation of a state is created only if it accepts that person on its territory. The third state must, therefore, in principle have the right to refuse any particular individual or the representative of a particular state to enter its territory even though it may merely be for the purpose of transit across its territory. In practice, however, as observed by Sir Ernest Satow, states in their own interest and in the mutual interest of the international community do not raise objection to an envoy travelling through their territory on his way to his post unless there are good reasons for doing so.[2]

[1] Article 40 of the Vienna Convention.
[2] Hurst, op. cit., p. 280.

Since the claim of an envoy to immunity is confined to the purposes of his transit across the territory of a third state, it would appear to follow that a diplomatic agent who is sojourning in the territory of a third state for his private purposes would not be entitled to claim diplomatic immunity even though he might have been given a diplomatic visa. Sir Ernest Satow relying upon certain authorities also appears to take the same view.[1] It is, however, customary for the governments to show consideration and treat such persons in a manner befitting their position as a matter of courtesy. A short stay which may be necessitated by reason of illness in the course of his journey, or for the purpose of taking a rest, or due to dislocation of transport system would appear to be covered within the period of transit to which the diplomatic privileges and immunities would extend provided the stay is of a reasonable duration. The opinions expressed by learned authors as also the decisions of national tribunals appear to conform to this view. Rivier observes that if a diplomatic agent is sojourning in a third state solely for his own pleasure or in pursuit of some private object, he is merely a distinguished personage, neither more nor less.[2] Sir Cecil Hurst took the view that the diplomatic agents were not entitled to any special privileges or immunities in third states if they were merely sojourning there for their own purposes though this rule would not apply in the case of a man making a short stay or taking short rest in the course of an official journey. Where it is clear that he is not merely resting in the course of an official journey but is stopping in the country for his own purposes it is generally agreed that a diplomatic agent can claim no immunities.[3]

The position as stated above applies to all diplomatic officers from ambassadors and ministers down to the secretaries and attachés of the missions. Since the immunities and privileges of a diplomat extend to members of his family, it would necessarily follow that the immunities and privileges which a diplomat is entitled to in the territories of third states would extend to the members of the family as well. This position has now been expressly stated in the Vienna Convention which provides that the privileges and immunities would be admissible to members of families irrespective of whether they accompany the diplomatic agent or travel separately.[4]

[1] Satow, op. cit., p. 244.
[2] Op. cit., Vol. I, p. 508.
[3] Hurst, op. cit,. p. 283.
[4] Article 40(1) of the Vienna Convention 1961.

Non-diplomatic staff

The treatises on international law do not appear to deal with the position of the members of non-diplomatic staff in the territories of third states, nor are there any judicial decisions on the point. It would be recalled that there has been a good deal of divergence in the views of learned authors and in state practice with regard to the immunities and privileges of non-diplomatic staff even in the territories of the receiving state. Attempt at some uniformity was made for the first time by the International Law Commission, and as already stated the Vienna Convention has now laid down a rule concerning the immunities and privileges of subordinate or non-diplomatic staff. In considering the position of the members of non-diplomatic staff in third states it has to be borne in mind that in the present day it is equally important for a state to ensure free movement for its non-diplomatic staff because without the assistance of such persons it would be impossible for the diplomatic officers to fulfil their right of legation. It is also clear that the members of such staff are to enjoy in the receiving state almost the same immunities as diplomatic agents with regard to inviolability and exemption from criminal jurisdiction. The difference is only with regard to immunity from civil and administrative jurisdiction and certain fiscal privileges which are confined in the case of non-diplomatic personnel to acts connected with their official functions. On this basis it may well be argued that the obligation of the third states with regard to the right of innocent passage in respect of non-diplomatic staff should be the same as their obligation towards diplomatic agents. On the other hand, there is the traditional difference in status between a diplomatic agent and a non-diplomatic officer. A diplomatic agent in so far as international law is concerned is a public minister, who is exercising the right of legation on behalf of his home state. He has, therefore, a public status which is recognised in all states, and consequently he is accorded the immunities and privileges of a diplomatic agent even in third states whilst he is engaged on the purpose of his mission by passing through the territory of the third state in order to reach his post. In the case of a non-diplomatic officer also, it is certain that he ought to be allowed transit across the territory of third states because the sending state is concerned in the exercise of that right. The Vienna Convention, therefore, provides that a third state shall not hinder such innocent passage,[1] which would imply that the third state shall not normally refuse transit,

[1] Article 40(2) of the Vienna Convention 1961.

nor shall it place any obstacles in his way by asking such personnel to comply with the immigration laws. But the question is, should the third state extend the immunities concerning jurisdiction and inviolability to members of non–diplomatic staff as well? The Vienna Convention appears to have left the point open. By using a neutral expression "shall not hinder," it has been left to each state to interpret the expression in a manner acceptable to itself. The performance of a journey across the third state is no doubt a part of the official duties of a member of non–diplomatic staff, but at the same time it would seem that extension of diplomatic immunities in such cases is not essential in the interest of the work of the mission, which alone is the basis for grant of immunities to the subordinate staff in the receiving state.

Diplomatic couriers

The position of diplomatic couriers, who are bearers of official despatches from the foreign office of a state to their diplomatic missions in various states, is different from the position of diplomatic agents. The diplomatic agents are accredited to a particular country or countries and every other state they traverse is regarded as a third state. The couriers are not accredited to any particular state – they are engaged in carrying official despatches from the Foreign Office to one or more of the diplomatic posts and vice–versa. In the state or states to which the courier is ultimately to deliver his mail, his own position and that of the mail comes under the protection of international law as being connected with the right to freedom of communication of the diplomatic envoy. The courier must, however, necessarily pass through the territories of other states in the course of his journey before he can ultimately deliver his mail, and these may be regarded as third states in relation to the rights and immunities of couriers. Sir Cecil Hurst observes:

> It is to the interest of all states to recognise the special position of such couriers and to give them every facility while passing across a third state in the course of their official journeys. Freedom of communication with its own diplomatic agents abroad is so important to every government that it would hesitate to take any action which would restrict or hamper the freedom of communication between another government and its representatives abroad.[1]

It is, therefore, generally recognised by states that couriers who bear official despatches and carry passports clearly defining their status are exempt from the jurisdiction of all states through which they pass.

[1] Hurst, op. cit., p. 282.

Schemelzing [1] observes that couriers enjoy in time of peace complete inviolability for their person and the despatches they carry even in the territory of a third state. Oppenheim is of the view that to ensure the safety and secrecy of the diplomatic despatches they bear, couriers must be granted exemption from civil and criminal jurisdiction, and afforded special protection during the exercise of their office. The learned author states:

> It is particularly important to observe that they must have the right of innocent passage through third states and that according to general usage those parts of their luggage which contain diplomatic despatches and are sealed with the official seal must not be opened or searched.[2]

There appears to be complete agreement among the authorities on international law as regards the position of a courier whilst in the territories of third states. Couriers are entitled to complete diplomatic immunity and this position is now recognised in the Vienna Convention.[3] The couriers at one time did constitute the largest category of persons with diplomatic immunities to be found in third states, as courier services used to be a regular feature with all foreign offices. Today the speed at which instructions have to be obtained by diplomatic agents from their own governments has led to the more frequent use of faster means of communication. Nevertheless, the courier services are still run particularly in Europe and even in the East.

On the same principle which governs the position of couriers and the diplomatic bags which they carry with regard to immunity from search or seizure, third states are also enjoined to accord the same freedom and protection to official communications in transit, including messages in code or cypher.[4] Freedom of communication between a state and its envoys is considered so important that protection to official mail is required to be granted not only in the receiving state but also in all third states through which the mail or messages may pass. In fact without such protection in third states the secrecy of communication is bound to be impaired.

[1] Op. cit., Vol. II, p. 224.

[2] Op. cit., p. 405.

[3] Article 40 of the Vienna Convention provides: "They (third states) shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving state is bound to accord."

[4] Article 40(3) of the Vienna Convention provides: "Third states shall accord to official correspondence and other official communication in transit, including messages in code or cypher the same freedom and protection as is accorded by the receiving state."

CHAPTER VII

TERMINATION OF A MISSION

The mission of a diplomatic agent comes to an end in many ways and under varying circumstances. In the normal course of diplomatic service an envoy is posted in a particular capital for a certain length of time after which he is transferred to another post or to his own Foreign Office, he is promoted to a higher position, and he retires upon superannuation or on termination of his contract of service. Each of such changes brings to an end the particular mission which the diplomat had been fulfilling at that time.

In the case of a diplomatic agent other than the head of a mission, the termination takes place simply upon his relinquishment of his post on transfer or retirement and upon notification thereof to the Foreign Office of the receiving state. Where it concerns the head of a mission, the method is much more formal. Just as his mission commences with the presentation of his Letters of Credence, it is terminated only when the formal Letters of Recall are received from the sending state; and until such Letters are presented to the government of the receiving state the new head of the mission cannot take up his functions. The formality of presenting a Letter of Recall is, however, not necessary in the case of an interim head of mission, as his term of office automatically comes to an end when the permanent incumbent returns or a new head of mission is appointed. It is customary for the head of a mission to seek a farewell audience with the head of the receiving state before he leaves his post on the relinquishment of his mission. The audience is generally in private. It is possible to present the Letters of Recall at the audience but it is not obligatory to do so; in fact it is quite common for the Letters of Recall to be received after the envoy had departed from his post. It is generally known in advance as to when a head of mission is likely to relinquish his post either by the official announcement of his next appointment or the announcement of the name of his successor. It

is customary for the retiring head of mission to pay farewell calls on his colleagues and the officials of the Foreign Office. He is usually entertained at a formal banquet or dinner by the head of the Foreign Ministry or an appropriate official of the receiving state. On such occasions it is customary for the host to make a short speech, and the retiring diplomat is expected to respond to the toast. Normal courtesy requires that the retiring diplomat should adopt a cordial attitude on such an occasion irrespective of the success or failure of his mission. It is to be expected that in the complexities of international relations of modern times a diplomat may come across many difficulties in the fulfilment of his mission. It is, however, wise not to allude to such matters in the course of a farewell speech. By doing so he does not in any way advance his cause, but on the other hand he may create impediments for his successor. This does not mean that "plain speaking" should not be resorted to by a diplomat. Undoubtedly he has a right and it may be his duty to do so on occasions; but the farewell banquet given in his honour is neither the time nor the occasion for it.

It is not, however, in every case that the fact of the termination of his mission is officially known at the time of or prior to his departure. In certain instances his transfer may not be officially notified, and in others the diplomat may not know of it himself since he may be proceeding on leave and his transfer may take effect whilst he is on leave. In such cases it is not advisable for a diplomat to give out that he will not be returning, though there is nothing wrong for him to ask for an audience with the head of the receiving state before he proceeds on leave.

Presentation of fresh credentials. The mission of a diplomat is deemed to be terminated where circumstances necessitate presentation of fresh Letters of Credence, such as where death takes place of the reigning sovereign of the receiving or the sending state. Since Letters of Credence are given by and addressed to the sovereign in countries where there is a monarchical form of government, the death of the sovereign brings to an end the mission of a diplomat which he was charged with under the Letters of Credence, because the credentials are deemed to lapse with the demise of the sovereign of either the sending or the receiving state. The fresh credentials which the diplomatic agent presents are deemed to constitute a new mission, though in the modern diplomatic practice presentation of new credentials in such circumstances does not affect the seniority of the head of the mission or his ordinary relations with the

authorities of the receiving state. It may be mentioned that the death of the President of a republic or his retirement does not necessitate presentation of fresh credentials. Another case where the mission is terminated is where the status of the mission is upgraded from that of a legation to an embassy. In such a case the head of the legation, who is designated as minister, must present new credentials before he can take over as the head of the embassy of his country. The moment the upgrading of the status of the mission comes into effect, the term of office of the minister is deemed to be terminated. He takes up a new mission when he presents his credentials as the ambassador.

Revolutionary changes in government. In the case of revolutionary changes in the government of the sending or the receiving state, presentation of new credentials becomes necessary, and the existing mission of the diplomat is said to come to an end. The same would be the position when the form of government is changed, such as when a monarchy becomes a republic or a republic becomes a kingdom by restoration of the monarchy. It has now been the practice not to issue fresh credentials in every case of a revolutionary change in government. A practice had developed in relation to Latin American states, where changes in government were fairly frequent, to regard diplomatic relations as having remained unchanged inspite of changes in government even though by revolutionary means. This practice now seems to have been adopted in cases of changes by means of *coup d'état* where no serious question of recognition with regard to the new government arises. In all these cases though the mission of the diplomat concerned comes to an end, the diplomatic relations between his state and the receiving state continue.

Extinguishment of sending or the receiving state. The mission of a diplomat may come to an end also by extinguishment of the sending or the receiving state. In such cases the diplomatic relations between the two countries cease to exist and the mission of the diplomatic agent is terminated therewith. The maintenance of diplomatic relations presupposes the existence of two independent sovereign states. If one of the sovereign states loses its identity by being conquered or being merged with a larger state, or by forming itself into an union with another state, the diplomatic relations with that state must automatically be terminated and together with it the mission of the diplomats of that state in other countries as also the mission of the

diplomats accredited to that state would be brought to an end. Exceptions to this rule have, however, been made when states have regarded the extinction of another state as being merely of a temporary nature. For example, during World War II when the advancing German armies had practically conquered the whole of Western Europe, Britain and the United States continued to maintain relations with the governments of those states in exile, whom they regarded as the *de jure* governments of the European states under Nazi domination. In these cases the mission of the diplomatic agents accredited to those countries were not considered to be at an end. These instances are, however, more in the nature of exceptions made in the interests of the political exigencies of the day. When Ethiopia came under Italian domination in 1936, the diplomatic relations with that country were brought to an end and again in 1958 when Syria merged with Egypt to form the United Arab Republic, diplomatic relations with both the countries came to an end and fresh relations had to be established with the new state formed by the merger.

Termination of diplomatic relations by agreement. The diplomatic relations between two states may also be terminated in a friendly way by agreement. It has been observed that though every sovereign independent state enjoys the right of legation, that is, to establish diplomatic relations with all other sovereign states, the establishment of such relations in fact takes place by agreement; and having regard to the large number of independent countries in the world today countries may not find it easy or practicable to have missions in all capitals. A state after opening a diplomatic mission in a particular state may subsequently find it unnecessary or uneconomical to maintain it having regard to the smallness of the interest which may require to be protected. In those circumstances the states concerned may agree to discontinue their diplomatic missions and in such cases the missions of diplomatic agents of the countries concerned would automatically come to an end.

Declaration of a diplomat as a persona non-grata. Apart from these cases the mission of a diplomat comes to an end if he is declared *persona non-grata*, or if he is recalled by his home state as also in the case of rupture of diplomatic relations between the two states and upon outbreak of war between them.

It has already been noticed that before a diplomat can enter upon

his functions he must be found acceptable to the government of the receiving state, and for this reason it has become the accepted practice that before a person is appointed as the head of a mission the concurrence of that government has to be obtained. Similarly, in the case of other diplomatic officers it has become customary to furnish to the receiving state the *curriculum vitae* of those officers who are sought to be posted at a diplomatic mission in that state. If the government of the receiving state concurs in the appointment of the head of the mission, and if it raises no objection on the appointment of the other members of the mission, it is to be understood that the receiving state has agreed to receive the diplomatic agent concerned on its territory and to clothe him with the immunities and privileges necessary for the fulfilment of his functions. At the same time international courtesy and morality require that a diplomatic agent should not abuse his privilege during his tenure of office. If he does so or acts in a manner unbecoming a diplomatic officer, the receiving state is not bound to tolerate such conduct passively, and it may well ask for his recall by his home state, or declare him *persona non-grata* and deliver to him his passports. In the past there have been many such instances, some of which are recorded in textbooks of international law, but in the vast majority of cases the recall of the individual diplomat has been asked for in a confidential manner. In most cases the request for recall has readily been granted by the sending state, but in some the sending state refused to comply with the request whereupon the receiving state had asked the offending diplomat to leave by sending him his passport.

It is the right of every sovereign state to ask for the recall of a diplomatic agent who has given it cause for offence by his conduct. If the home state of the diplomat does not accede to this request for recall, it would follow that the receiving state is not bound to tolerate his presence. In case of flagrant breaches of privilege it is not obligatory on the receiving state to wait for the recall of the offending diplomat and it may take action itself by asking him to leave forthwith. It is clear that if a diplomatic agent renders himself so unacceptable as to produce a request for his recall from the government to which he is accredited, the instances would be very rare where such a request would not be granted. To refuse it would be to defeat the very purpose for which he is sent abroad, that of cultivating friendly relations between independent nations. Perhaps no circumstances would justify such a refusal unless the national honour was involved.[1] Eminent authorities on inter-

[1] See Moore's Digest of International Law, Vol. IV, p. 485; Satow, op. cit., p. 281.

national law like Halleck [1] and Calvo, [2] consider that a state is in duty bound to recall an envoy who has become unacceptable to the government to which he is accredited simply upon its statement that he is so. In fact, state practice recognises that it is for the receiving state to determine as to whether a particular envoy has become objectionable or not, a matter of which the government of the receiving state is the sole judge.[3] Mr. Secretary Fish of the United States explaining the standpoint of his government said as early as in 1871 that

> the official or authorised statement that a Minister has made himself unacceptable, or even that he has ceased to be *persona grata* to the government to which he is accredited is sufficient to invoke the deference of a friendly power and the observance of the courtesy and the practice regulating the diplomatic intercourse of the powers of Christendom for the recall of an objectionable Minister.[4]

Hall, however, considers that

> courtesy to a friendly state exacts that the representative of its sovereignty shall not be lightly or capriciously sent away; if no cause is assigned, or the cause given is inadequate, deficient regard is shown to the personal dignity of his state; if the cause is grossly inadequate or false, there may be ground for believing that a covert insult to it is intended. A country, therefore, need not recall its agent, or acquiesce in his dismissal, unless it is satisfied that the reasons alleged are of sufficient gravity in themselves.[5]

Though Hall may be right strictly from the point of view of law, it would appear that from a practical aspect no useful purpose is served in refusing a request for recall because in such an event the receiving state is likely to take action itself by sending the diplomat his passport. The matter is, however, different when the national honour is at stake; for instance, when the receiving state in the garb of a request for recall of an envoy questions the policies of the sending state itself. In such cases a state should be ready to go to the extent of severance of diplomatic relations in the event of its minister being dismissed by the receiving state. It may be stated that the Pan American Convention on Diplomatic Officers lays down that a state having already accepted a diplomatic officer may request his recall without being obliged to state the reasons for such a decision.[6] The draft articles prepared on the subject of diplomatic relations by the Asian-African Legal Consultative Committee provide:

[1] Halleck, op. cit., Vol. I, p. 393.
[2] Calvo, op. cit. para 1365.
[3] See the statement of Lord Clarendon in Moore's Digest, Vol. IV, p. 534.
[4] Statement of Mr. Fish dated November 16, 1871 in the *Catacazy case*.
[5] Hall, op. cit., p. 359.
[6] Article 8 of the Pan American Convention.

The receiving state may at any time notify the sending state that the head of the mission or any member of the staff of the mission is *persona non-grata* or not acceptable. In such a case, the sending state shall recall him or terminate his functions with the mission. If the sending state refuses or fails within a reasonable time to comply with its obligations, the receiving state may refuse to recognise the person concerned as a member of the mission.[1]

The same provisions have been made in the Vienna Convention on Diplomatic Relations 1961.[2] It is, therefore, now settled that the sending state is under an obligation to recall an envoy if a request for it is received from the receiving state.

Request for recall of a diplomat. The reported cases in which a diplomatic agent has been asked to leave by the receiving state or his recall has been requested are of a varied type. It is difficult at times to differentiate the basis on which requests for recall had been granted and refused in the past. It seems that cases where requests for recall had been readily acceded to are those where the diplomatic agent had acted contrary to the policies of the receiving state, or had made derogatory remarks concerning the policies or personalities of the government of the receiving state, or had expressed views unfriendly to that government. The cases where requests for recall appear to have been refused are those where the government of the sending state had been of the opinion that the request was unjust or uncalled for. Though the Vienna Convention recognises the right of a receiving state to ask for recall of a diplomat without assigning reasons, it is clear that the request for recall of a diplomat does create some kind of a tension between the states concerned; and unless there are justifiable grounds for making such a request it is bound to lead to misunderstanding, and the diplomatic body in the capital is not likely to react to it favourably. States, therefore, generally give reasons when it asks for a particular diplomat to be recalled to show that its action is bona fide. This is particularly so when the relations between the two countries are cordial.

It may not be out of place to mention here briefly some of the instances of recall or dismissal which have taken place in the past as these may throw some light on the question as to when request for recall is

[1] See Article 8 of the Draft Articles - A.A.L.C.C., Third Session Report, 1960, p. 41.

[2] Article 9 of the Vienna Convention 1961 is in the following terms: "The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is not acceptable. In any such case the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission ...

If the sending state refuses or fails within a reasonable period to carry out its obligations ... the receiving state may refuse to recognise the person concerned ..."

justified. It would, however, not be correct to lay too much stress on these cases since circumstances of each case are different, and hardly any principle can be said to be deduced from them.

In 1792, the United States Government asked for the recall of Mons. Genest, the French Minister designate, for his activities in violation of neutrality laws of the country, that is, in fitting out privateers to prey on British commerce, and his subsequent expression of contempt for the opinions of the President of the United States.[1] In 1863, the government of the United States requested that M. H. Segur, the Minister of Salvador at Washington, be recalled for attempted violation of neutrality of the United States during a conflict between Salvador and two other central American republics.[2] These are the two reported instances of request for recall for violation of neutrality laws, and in both cases the requests were readily acceded to.

A request for recall appears to have been made and granted in a recent case when the Soviet Union declared Ambassador George F. Kennan of the United States as *persona non-grata* for making a speech in Berlin in 1952 in which he said that an American's life in Moscow was not much different from that of American diplomats interned in Germany after Pearl Harbour. This would seem to be an unusual case because recall was made even though the United States Government was of the opinion that the ambassador's statement described accurately and in moderate language the position of foreign diplomats accredited to the Soviet Government.

In 1898, Senor Depuy de Lome, the Spanish Minister at Washington, appears to have been recalled on request for expressing certain offensive remarks about President McKinley in a private letter to a journalist friend which somehow found its way in a New York paper.[3] In 1846, the United States Chargé d'Affaires at Lima was recalled for his objectionable remarks about a Peruvian Decree and for his omission to address the Minister of Foreign Affairs as "Excellency" or "Honourable" in his written communication.[4]

The cases of recall on the ground of an envoy indulging in subversive activities against the receiving state or his interference in its internal affairs may now be considered. In 1915, the United States Government requested the recall of Mr. Dumba, the Austro-Hungarian Ambassador

[1] Moore, op. cit., Vol. IV, p. 489; Satow, op. cit., p. 280.
[2] Moore, op. cit., Vol. IV, p. 500; Satow, op. cit., p. 281.
[3] Moore, op. cit., Vol. IV, p. 507; Satow, op. cit., p. 283.
[4] Moore, op. cit., Vol. IV, p. 492; Satow, op. cit., p. 281.

at Washington, who admitted that he had proposed to his government plans for instigating strikes in American munitions factories and improperly using an American citizen as a secret bearer of his official despatches through countries which were at war with Austria-Hungary.[1] On December 14, 1915, the United States Government asked for the recall of Captain Boyed and Captain Von Papen, Services Attachés at the German Embassy, for organising subversive activities. In 1927, the French Government sent a note of protest and later asked for the recall of the Soviet Ambassador in Paris, M. Rakovsky, for signing a public declaration, which incited the workers of capitalist countries to work for the defeat of their governments and the soldiers to join the ranks of the Red Army [2] in the event of any future war against the Soviet Union. In all these cases requests for recall were granted.

Refusal to recall the envoy had been quite frequent in this type of cases whereupon the receiving state had acted on its own by refusing to hold any communication with the offending diplomat and by sending him his passports. For example, in 1804 the Spanish Government refused to recall its Minister in the United States, Marques de Casa Yrujo, who was charged with an attempt to tamper with the Press by proposing to the editor of an American newspaper to oppose certain views of the United States Government and advocate those of Spain.[3] The refusal was presumably due to the fact that he was acting in the interest of his government. In 1848, the British Government is reported to have refused a request to recall its Minister in Spain, Mr. Bulwer, who was declared *persona non-grata* for recommending to the Spanish Government the adoption of a legal and constitutional course of government.[4] It has not been uncommon in the past for the envoys, particularly those who represented powerful states, to tender such advice and it is not often that such advice has been so formally resented. In 1888, Lord Sackville, the British Minister in Washington, was sent his papers on the British Government refusing to recall him. The charge against him was that he had given advice and counsel in regard to exercise of suffrage by American citizens in the pending election of the President of the United States.[5] In 1921, the Guatemalan Government dismissed the British Minister, Mr. H. Gaisford, on the allegation that he had

[1] Satow, op. cit., 283.
[2] Ibid., pp. 283–84.
[3] Ibid.
[4] Moore, op. cit., Vol. IV, p. 508; Satow, op. cit., p. 285.
[5] Moore, op. cit., Vol. IV, p. 536; Satow, op. cit., p. 291.

intervened in favour of Guatemalan citizens accused of conspiracy and afforded them asylum in the diplomatic premises.[1]

Dismissal of an envoy. There have been some cases where states have asked a particular envoy to leave without waiting for his recall by the home state of the envoy. Such a step can only be taken when an envoy acts in serious and flagrant disregard of his obligations. It is not necessary to refer to the instances of the 16th and 17th centuries, as in modern times it is unthinkable that any envoy would be found plotting against the life of the sovereign or taking part in a conspiracy to overthrow the government. But even in recent years states are known to have asked diplomats to leave forthwith in certain serious cases. For instance, in 1916 the German and the Austro-Hungarian Ministers in Athens were ordered to quit Greece with members of their staffs for alleged illicit acts of espionage carried on from Greek territory. In 1917, Count Luxburg, the German Minister in Buenos Aires, aroused intense indignation in the Argentine Republic by his alleged machinations against Argentine interests. The Government of Argentine sent him his passports informing him at the same time that he had ceased to be *persona grata*. Rustem Bey, the Turkish Ambassador to the United States, was sent home early in the 1914–1918 war for publishing indiscreet newspaper and magazine articles. In 1941, various facts and circumstances connecting the Italian naval attaché with the commission of acts in violation of the laws of the United States came to the attention of the U.S. Government whereupon the attaché was asked to leave fortwith.[2]

The reported instances thus show that in the past requests for recall were made generally when the diplomat concerned interfered in the internal affairs of the state. At present occasions for recall appear to arise more frequently in two classes of cases, namely where the diplomat is found to indulge in organising or financing subversive acts in the state of his residence, or in obtaining information about the official secrets of the state by organising illicit intelligence. There are also other forms of breaches of privilege which have in recent years led to the recall of offending diplomats. Since action in such cases are usually taken in secrecy so as not to jeopardise diplomatic relations between the states concerned, especially in the public eye, it is not desirable to

[1] Satow, op. cit., p. 292.
[2] Ibid., pp. 299–300.

mention specific instances. However, the types of cases where recall has been requested may generally be discussed. The most common case is where the diplomat imports a large quantity of duty free articles such as motor cars and liquors, and trades in them. The heavy customs duties which are levied on such goods and the complete ban on imports which are imposed by some states make it easy for a diplomat to find ready customers. Such conduct constitutes gross abuse of his privilege since a diplomat is allowed to import such goods duty free as are required for his personal consumption. It is also harmful to the receiving state in causing loss of revenue and as being detrimental to the general policy of the state. The receiving state is certainly justified in asking for the recall of a diplomat who is found to indulge in such activities. There are also cases where diplomats have been recalled on request for indulging in transactions in foreign exchange in breach of local currency regulations.

There have been numerous instances in recent years of diplomats of certain states organising and financing subversive activities by a group of local people against the government of the receiving state. Similarly, cases have been reported where diplomatic missions have been known to have obtained or attempted to have obtained information regarding official secrets of the state. In such cases it is often difficult to detect the offending hand of the particular diplomat since in the cold war of today it is the state or states which directly or indirectly are known to encourage such activities. All states regard such conduct to be wrongful and are ready to condemn it when it is detected. Normally, the detection of such activities should result in cessation of diplomatic relations with the state whose diplomatic agent is found to indulge in this type of activities, since no diplomat would venture to do so without the connivance of his own government. But in the interest of maintenance of diplomatic relations it has become customary, if not the rule, to merely ask for the recall of the particular diplomat who has been caught in the act. Cases have also occurred where diplomats have held as prisoners some of their nationals within the precincts of the diplomatic mission with a view to deporting them home. This is also clearly a breach of privilege and abuse of his immunities, and such conduct would also justify a request for the recall of the offending diplomat. If a diplomat commits a crime or acts in disregard of the local laws and regulations, the receiving state is also justified in asking for his recall.

In recent years requests for recall of envoys have been made even on

purely retaliatory basis. For example, when a country asks for the recall of a diplomat of another country on the ground of objectionable activity on his part it has been found that the country concerned has, whilst recalling its own diplomat, asked for the recall of a diplomat belonging to the other state. This has been a result of the cold war and can be said to be nothing but an abuse of a state's right to ask for recall of a diplomatic representative at its will. It is also unfair to the diplomat whose recall is requested under such circumstances because normally such a step casts a reflection on the diplomat himself.

Recall of an envoy. A diplomatic agent may also be recalled by his own government without a request being received from the government of the receiving state. This is done when the government has from the reports received reason to be dissatisfied with his conduct, or when he is recalled to avoid a possible embarrassment. When it is found that a diplomat has become unpopular in the receiving state and that his presence there is detrimental to the maintenance of relations between the two states, it is generally felt that it would be wise to ask him to come home on leave or for consultations. The same step is also taken when a diplomat has been unfortunate enough to incur the displeasure of his official chief. When a diplomat gets involved in a situation where it may be embarrassing for him to continue in that place, it is usual to recall him. Such situations may be said to arise if he has run over a person in a motor car accident resulting in death or serious bodily injury to the person, or if he has been sued for debt or breach of promise of marriage, or if he is found to have formed embarrassing associations.

Whatever may be the reason for his recall, it is clear that his mission comes to an end when he is recalled. The same is the position when he is dismissed from his post by his own government. This has often happened when a new government, which has come into power through constitutional or revolutionary means, has a policy to pursue different from the one followed by its predecessor government. In such a situation, the government may find the services of its existing diplomatic representatives unsuitable.

Rupture of diplomatic relations. A diplomatic mission is also terminated by rupture of diplomatic relations between the two states. This happens when a country decides to break off relations and withdraws its diplomatic representatives as a protest against the policies of the

other government. There have been innumerable instances of such practice. Among recent cases the example of India breaking off diplomatic relations with Portugal may be quoted. In 1954, India broke off diplomatic relations with Portugal as a protest against the policies of the Portuguese Government in Goa and asked the Portuguese Minister in Delhi to withdraw. Similarly, Indonesia broke off diplomatic relations with the Netherlands Government over West Irian. Egypt broke off relations with Britain, France and certain other countries in consequence of the Suez action in 1956. The United Arab Republic also broke off relations with Iran and Jordan. States have been known to have severed diplomatic relations with a state which has been interfering in or acting in a hostile manner towards it. But diplomatic relations have been broken even as a gesture of protest against the policies pursued by a particular state, though the pursuance of such a policy may not directly affect the interests of the state which is breaking off the relations. Thus a number of African states decided to break off relations with Belgium as a mark of protest over its alleged role in the Congo. Diplomatic relations have been known to have been broken over particular incidents also such as declaration of *persona non-grata* of an envoy. Australia and the Soviet Union broke off relations when Australia resisted the attempt of certain Soviet officials to forcibly take one of their embassy officials to the Soviet Union.

Outbreak of war. Diplomatic relations certainly come to an end upon outbreak of war, and more often prior to the commencement of actual hostilities because relations by then must reach such a state that no useful purpose is served by maintenance of such relations. It may be mentioned that diplomatic relations cease when there is a formal state of war, which commences with a declaration of war and ceases with the conclusion of a peace treaty. Apart from a state of war, there may be conflicts between the states concerned but such conflicts do not necessarily bring diplomatic relations to an end. For example, between the years 1932 and 1941 China and Japan were engaged in armed conflicts but there was no state of war. Diplomatic relations were continued until 1938 and war was declared only in 1941. Again in the case of China and India, though China has committed aggression on Indian soil, there has been no declaration of war and diplomatic relations are still maintained.

It is to be noted that in the interest of world peace and international relations, it is of utmost importance that diplomatic ties should be

continued because in the absence of such relations it is difficult to maintain any points of contact. This is increasingly realised in the present day as it is obvious that cases of severance of relations over particular incidents and even over general policies pursued by governments have been greatly reduced. It may be mentioned that even after the U-2 incident the Soviet Union did not sever relations with the United States, nor have other states discontinued relations with the Soviet Union inspite of several spy incidents.

Facilities for departure. It is an established principle of international law that the receiving state in the case of severance of diplomatic relations between the two states must grant the necessary facilities to the diplomatic agents, their families, and even the subordinate staff of the mission other than the nationals of the receiving state to leave the country at the earliest possible opportunity. The effect of outbreak of war between two countries is to sever all relations between them, and diplomatic representatives who are appointed for the express purpose of maintaining such relations must withdraw from the capital in which they are stationed. No government, says Sir Cecil Hurst, would contest the view that sufficient time must be allowed to the diplomatic representative of the enemy country to withdraw, and that during that period the diplomatic immunities and privileges must be respected.[1] According to Vattel, the diplomatic agent must be allowed to withdraw in safety and with every mark of dignity and courtesy.[2] It is the duty of the government to see that any special police protection required to protect the retiring envoy and his official residence is provided. Pradier Fodere considered that a safe conduct must be provided as well as special facilities such as special trains, if the normal travelling arrangements are disorganised.[3]

In the case of cessation of diplomatic relations other than on outbreak of war no special difficulties would normally be experienced, since an envoy is entitled to his immunity until he leaves the country and there would be no particular impediment in the way of his travel as normal means of communication will be available to him. But in times of war the situation is often completely changed with the whole nation geared to fighting a war. The retiring envoy may become subject to public criticism, an excited populace may well show the disapproval of the

[1] Hurst, op. cit., p. 285.
[2] Vattel, op. cit., Book IV, Ch. 9.
[3] Pradier-Fodéré, op. cit., Vol. II, p. 20.

other state which is at war by making demonstrations against the ambassador. The military comes in control of key positions and even the means of communications are disrupted. It is in those circumstances that the need for special protection and provision of special means of transport becomes necessary. The International Law Commission and now the Vienna Convention in 1961 have categorically endorsed the view held by the jurists that the receiving state must provide proper facilities for the departure of an envoy including transport in case of need in all cases where diplomatic relations are broken off and even in case of armed conflict.[1]

When relations are broken off the diplomatic representative, no doubt, leaves with all the members of his staff, who are not nationals of the receiving state, together with their families. But the mission premises cannot be taken away, nor is it possible to take away all the archives of the mission or to destroy them especially when the diplomatic officers have to leave in a hurry upon the sudden outbreak of a war. Both the world wars of the present century began with such suddenness that there was hardly any time for the envoys to wind up their affairs. The other problem is that of protection of the nationals of the home state in the receiving state. No doubt, in case of war they may all be interned as enemy aliens, but the problem squarely arises when the diplomatic relations are terminated for other reasons. It has been a long recognised practice, which has now found expression in Article 45 of the Vienna Convention, that the receiving state must, in all cases when diplomatic relations are broken off between the two states, or if a mission is permanently or temporarily recalled and even in case of an armed conflict, respect and protect the premises of the mission together with its property and archives. This provision would no doubt be acceptable to all the states in their mutual interest. The Vienna Convention also recognises the right of the sending state to entrust the custody of the premises of the mission together with its property and archives to a third state acceptable to the receiving state. It has been generally the practice for a state to entrust the protection of its interests and those of its nationals to a third state when diplomatic relations are broken off between two states. When a third state takes up these responsibilities, it is authorised to look after the interests of that state in the same manner as its own diplomatic representatives. It is now accepted that before a third state can represent the interests of a state with which diplomatic

[1] Article 44 of the Vienna Convention 1961.

relations are broken off, the consent of the receiving state must be obtained. This provision is also incorporated in the Vienna Convention.

Termination by death of the envoy. The mission of a diplomat may come to an end by his own death. If he dies at his post when he is possessed of his immunities and privileges, it is incumbent on the receiving state to arrange for his funeral with full ceremonies and to allow his body to be flown to his home state if the members of his family or his government request for it. The receiving state must also allow full facilities for removal of his personal effects and facilitate the departure of the members of his family. It is to be mentioned that the family members would continue to enjoy their immunities and privileges for a reasonable period of time pending their departure although the diplomatic agent, through whom they got their immunity, had died at his post.

If the mission terminates by the death of an envoy who was the head of the mission, it was customary in the past to offer a public funeral in his honour. At the present day all ceremonial marks of respect befitting the representative character of the deceased would be shown and it is usual for members of the diplomatic corps in the capital as well as senior officials of the Foreign Office to attend the funeral. An exceptional mark of respect has sometimes been paid by conveying the body of the deceased to his own country in a warship or special plane, or by ordering a state procession on a gun carriage starting from the premises of the mission of which the deceased was the head.

PART TWO

CONSULAR FUNCTIONS, IMMUNITIES AND PRIVILEGES

CHAPTER VIII

CONSULAR RELATIONS IN GENERAL

Introductory

Although many of the important and traditional consular functions have been taken over in recent years by diplomatic agents including those of protection of the nationals of the sending state and looking after their trading and other interests, the institution of consul remains an important link in the relations between nations. This is especially so in view of the reluctance on the part of states to permit diplomatic missions to have more than one office in the territories of the receiving state with the consequence that a good deal of work, particularly in connection with the trading and commercial interests of the sending state and its nationals in the various territorial sub-divisions of the receiving state has to be undertaken by the consul. Moreover, in cases where no diplomatic relations exist between the states concerned, the interests of the nations are entrusted to the care of the consul.

Historical background to consular relations. The institution of the consul is of a much more ancient origin than that of permanent diplomatic missions. It may be said to be a product of international trade and commerce. Even in ancient times the merchants found it necessary to travel far and wide into foreign lands which had systems of law and custom much different from their own, and they felt the need for their disputes being settled by judges of their own choice administering their national laws. Indeed, after the fall of the western Roman Empire in 476 A.D. many foreigners attracted by the trade and commerce took up residence in Constantinople and other cities of the Byzantine Empire. Merchants from the same town or the same country began to live in the same district, setting up independent communities, building their warehouses, administrative offices and churches while remaining subject to their own national laws. On the basis of the principle of personality

of laws, which was widely recognised in feudal times, these communities soon acquired a degree of autonomy, and in particular the right to have special magistrates who came to be known as *consuls* in the twelfth century. This institution of special magistrates soon gained ground in the Moslem states especially after the Arab conquest of the Roman Empire. Some writers regard the *prostates* and *proxeni* of ancient Greece and the *Praetor Peregrinus* of the Roman Republic as the forerunners of modern consuls; but the consular institutions as understood today may be said to be derived from the institution of *Consules Mercatorum* which prevailed in the cities of medieval Europe.[1] Some institutions, like that of consul, appear to have existed in China in the eighth century, whereas in India and in some of the Arab countries similar institutions appeared in the ninth century. With the growth of international trade and commerce the consular system developed rapidly in the thirteenth and fourteenth centuries not only in the towns of the Mediterranean but also in the trading cities bordering on the Atlantic, the North Sea and Baltic coasts. History shows that wherever international trade flourished during these middle ages, the special magistrates known as consuls began to appear. The Italian Republics, for example, not only exchanged consuls with one another, but also set up consulates in Spain. In the year 1060, Venice received the right to send magistrates to Constantinople to try Venetians involved in civil and criminal cases. In 1251, the City of Genoa obtained permission from King Ferdinand III of Castille to have consuls at Seville empowered to settle disputes not only between the Genoese residents but also between Genoese and local citizens. In 1485, England sent its first consul to Italy and before the close of the fifteenth century there were English consuls in Netherlands, Sweden, Norway and Denmark. During this period the consuls, who were usually elected out of the local community of merchants, functioned mainly as judges or arbitrators in disputes between sailors and merchants as also between merchants and merchants. In some countries, however, consuls exercised complete civil and criminal jurisdiction over their own citizens by reason of special treaties. For example, Genoa, Venice and France enjoyed such treaty rights in Turkey during the fifteenth and the sixteenth centuries.

During the sixteenth century the functions of a consul underwent a rapid and radical change. The states took over the right to send consuls who thereupon ceased to be the elected representatives of the local merchants and became the official representatives of states performing

[1] Oppenheim, International Law. Vol. I, 8th ed., p. 829.

certain diplomatic functions with regard to protection of international trade. They were also clothed with certain immunities and privileges. During the seventeenth century it was felt that the consul's judicial functions with regard to civil and penal laws were incompatible with the territorial sovereignty of the receiving states. This factor coupled with the growing practice of states in opening diplomatic missions resulted in the eclipse of the consular institution at least so far as European countries were concerned. However, with the steady growth of international trade, commerce and shipping in the later part of the eighteenth century western nations felt the need for revival of the consular system, though with some modifications in the functions of consuls. Britain, France, the Netherlands and the United States of America undertook special legislations defining the powers and functions of their consular officers; [1] provision was also made in treaties for exchange of consuls. It became clear that consuls were to be regarded as governmental representatives whose functions were related to protection of trade and commerce. They were no longer to exercise any extraterritorial rights in respect of civil or criminal actions concerning their citizens. There were certain exceptions to this position for in some countries of the East foreign consuls continued to enjoy extraterritorial rights by reason of specific provisions in treaties. Thus China, Japan, Siam, Serbia, Bulgaria, Roumania, Iran, Egypt, Syria, Lebanon, Morocco and the Persian Gulf Sultanates accorded extraterritorial rights to the consuls of western powers during the nineteenth century under bipartite treaties. There can be no doubt that exercise of such powers could not be said to be compatible with modern concepts of state sovereignty and this outmoded practice has practically disappeared now.

Career consular service. France was the first country to begin a career consular service though other states in Europe soon followed suit. In Britain the consular service was organised in 1825 as a branch of the civil service, and the management of this service was placed under the control of a special department of the Foreign Office. The United States of America used to send consuls to various posts from the very beginning but it was not until 1906 that a career consular service was established. Persons who were appointed to the regular consular services of the various states began to be known as career consular

[1] See French Ordinances of 1781 and 1833; Netherlands Consular Regulations of 1786; United States Consular Service Acts, 1792 and 1856; British Consular Act, 1825.

officers, and were recruited in the same manner as members of the civil services. For example, in Britain entrants to the consular service had to pass through the combined civil services examination. In addition to their career consular officers several countries have a number of honorary consuls who are appointed out of the local residents of the place. Honorary consuls need not even be citizens of the state which they are to represent.

Recent trends. In recent years the tendency has been to abolish separate consular services and to have a combined foreign service for both diplomatic and consular officers. It had been customary to regard the consular officers as belonging to the junior service, but with the amalgamation of the diplomatic and consular services all such distinction has disappeared. In France, the diplomatic and consular services were amalgamated by the Decrees of July 10, 1880 and April 27, 1883. In the United States the unification of the two services was done by the Rogers Act of 1924. Britain, however, maintained the distinction until 1943. Today, practically all the major countries of the world maintain a unified service with the result that the officers of the foreign service may be posted to diplomatic missions as well as to the consular posts of the country. It has been suggested in several quarters that having regard to this unification the privileges and immunities of consular officers should be accorded on a more liberal scale than has been admissible under the customary and conventional rules and practice. It is said that an officer on being transferred from a diplomatic appointment to a consular post may find it difficult to adjust to lesser immunities and privileges. It is asserted that the distinction between diplomatic and consular privileges was based on historical reason for which distinction there is no warrant at present. It may be pointed out in this connection that the privileges and immunities are accorded not to a person as such, nor are they given on the basis of the service to which a particular officer may belong. The privileges and immunities of diplomatic agents as well as consular officers are admissible on the basis of functional necessity, and they must vary according to the post an officer may hold. It is also to be borne in mind that notwithstanding the amalgamation of consular and diplomatic services, there is a good deal of difference between the functions of a diplomatic agent and that of a consul though in some respects their duties and functions may overlap. An officer can expect to receive only such immunities and privileges as his post or functions may justify. The

diplomatic representative is the political agent of his government whilst the consular officer normally has no such political functions. It is much more necessary for the diplomatic agent to be assured of the secrecy of his work and to have greater freedom in the matter of communication with the sending state. It is, therefore, clear in principle that some distinction must be maintained between the immunities and privileges of a diplomat and those of a consular agent.

Attempts to codify consular law. Consular relations between states are governed partly by municipal law and partly by international law, perhaps more often by provisions of treaties and conventions between the states concerned. For this reason there is good deal of divergence in practice with regard to functions, immunities and privileges of consuls. It is possible that consular officers of two different countries at a particular post may not enjoy the same degree of immunities and privileges because these may form the subject matter of different bipartite treaties. Such a situation could not be regarded altogether as satisfactory and attempts have been made to codify the consular law with a view to arrive at some uniformity. The subject has been considered on various occasions by learned societies and international organisations. The Institute of International Law in 1896 adopted a Draft Code dealing with immunities of consuls.[1] The American Institute of International Law discussed the subject at its 1925 session and adopted a draft which was submitted to the governments of the American Republics. The International Law Association as well as the Harvard Law School also prepared studies on the subject containing drafts of multilateral conventions. The Sixth International Conference of American States, which met in Havana in 1928, adopted a convention consisting of twenty-five articles[2] dealing with consular intercourse and immunities at the same time as its Convention on Diplomatic Officers. The Havana Convention on Consular Intercourse indeed brought about a certain measure of uniformity in practice as regards consular relations and immunities as between the states parties to the Convention. An attempt was made to codify the law on the subject under the auspices of the League of Nations, but no substantial progress could be made. The International Law Commission took up the study of this subject at its seventh session in 1955, and was able to finalise its recommendations at its thirteenth session in 1961. The recommendations

[1] Annuaire of the Institute of International Law, Brussels–Paris, 1928, p. 1075 et seq.
[2] Final Act of the Sixth International Conference of American States, 1928.

made by the Commission in the form of Draft Articles constitute the most comprehensive work on the subject by an expert body. The United Nations had recently convoked a conference of plenipotentiaries for the purpose of drawing up of a convention on consular relations, which has now been done. The convention, however, does not affect the international agreements now in force as between states parties to them, nor does it preclude the right of states to enter into bipartite or multipartite treaties in the future. It, therefore, seems that consular relations would continue to be governed by such arrangements even in the future though the Vienna Convention might well be regarded as a pattern.[1]

Establishment of consular relations

The establishment of consular relations between states takes place by mutual consent and to this extent it has some similarity with establishment of diplomatic relations. Consular relations, however, do not have any political consequences, and consular posts can be maintained even in the territories of non-sovereign states, as also in territories under the control of unrecognised regimes. Indeed, in the territories of non-recognised states or the territories occupied by belligerents the consular posts constitute the only link or medium of communication with the authorities in control both for the purpose of protection of the citizens of the sending state and maintenance of existing treaty rights. States often maintain consular posts in dependencies and protectorates with the consent of the metropolitan or the protecting power for the purpose of looking after their trading interests and for the protection of their nationals. For example, in several Asian African countries European states as well as the United States of America used to maintain consular posts even in the days prior to their independence. Today, almost all the major countries of the world have consular posts in Hong Kong, which is a British colony. Where difficulties arise in the way of establishment of diplomatic relations by reason of non-recognition of a regime, which has come to power through a revolution or civil war, states have been prompt to establish consular relations to look after their interests. In the case of Communist China, or in the case of Soviet Russia, consular posts were established by various powers prior to the establishment of diplomatic relations. Again, some of the states which recognise the People's Republic of China also find it necessary to maintain consulates in Formosa.

[1] Article 73 of the Vienna Convention on Consular Relations. 1963.

In the case of Latin American Republics, Britain and the United States established consular posts in their territories long before their recognition as sovereign states. It is, however, clear that whenever a state desires to establish consular relations with another, whether it is a sovereign state or not, the consent of the receiving state or the authorities in control of the territories must be obtained. The consent is necessary both from the point of view of principle and practice because the representative of a foreign government is permitted through the establishment of consular relations to perform certain functions in its territory. The consent to exchange and receive consular representatives is generally given by means of specific provisions in treaties of friendship and commerce or in special consular treaties and conventions. The Vienna Convention on Consular Relations 1963 provides that the consent given to the establishment of diplomatic relations between two states would imply consent to the establishment of consular relations as well unless those later relations were excluded by the wish of one of the states concerned at the time of establishment of diplomatic relations.[1] This would appear to be correct in principle because the diplomatic missions in the present day do perform several consular functions. A state which consents to another state establishing diplomatic relations with it can, therefore, be said to consent to its diplomatic mission performing consular functions also. In such circumstances it would be right to say that consular relations exist between the two states. Nevertheless, the practice seems to be for states to enter into separate treaties or conventions regarding consular relations. For example, the Pan American States drew up a separate consular convention at the same time as their Convention on Diplomatic Officers. The numerous consular treaties and conventions which have been entered into in recent years between states which maintain diplomatic relations are also illustrative of this fact.[2]

[1] See Article 2 of the Convention.

[2] For examples of some of the recent consular treaties and conventions see the following:

(a) United States–Mexico Consular Convention dated August 12, 1942; United States–Philippines Consular Convention dated March 14, 1947; United States–Costa Rica Consular Convention dated January 12, 1948; United States–Ireland Consular Convention dated May 1, 1950; United States-United Kingdom Consular Convection dated June 6, 1951; United States–Iran Treaty of Amity, Economic Relations and Consular Rights, August 15, 1955; United States–Muscat Oman Treaty of Amity, Economic Relations and Consular Rights, December 20, 1958.

(b) United Kingdom–Norway Consular Convention dated February 22, 1952; United Kingdom–France Consular Convention, December 31, 1951; United Kingdom–Sweden Consular Convention dated March 14, 1952; United Kingdom–Greece Consular Convention, dated April 17, 1953; United Kingdom–Mexico Consular Convention, dated March 20, 1954; United Kingdom–Italy Consular Convention, dated June 1, 1954; United Kingdom–Federal

Establishment of a consulate

Although consular relations may exist between two states either by reason of express provision of a treaty or convention or by the existence of such relations being implied from the maintenance of diplomatic relations, it is clear that the consent of the receiving state is required for the establishment of consular offices or consulates in the receiving state. It will be observed that unlike the case of a diplomatic mission, consulates may be established in different regions of the country and consequently the extent of the area over which each consulate is to exercise its functions has to be determined by agreement with the government of the receiving state. The very nature of the functions of a consulate, that is, the promotion of trade and commerce and protection of the interests of the nationals of the sending state, necessitates establishment of consular offices in areas where trade and industry are concentrated. It is possible that consular treaties, which provide for establishment of consular relations, may themselves contain provisions regarding the places where consulates are to be located and the areas over which a consulate is to function. But in cases where no such provision exists in the treaty, as also in cases where the existence of consular relations is presumed from the fact of establishment of diplomatic relations, fresh agreement is necessary with regard to the establishment of consulates in the various parts of the receiving state. States do not sometimes permit establishment of consulates or exercise of consular functions in some regions of the country for reasons of national security,[1] and in some cases the receiving state may ask for closure of consulates in particular places

Republic of Germany Consular Convention dated July 30, 1956; United Kingdom–Austria Consular Convention dated June 24, 1960.

(c) Soviet Union–German Democratic Republic Consular Treaty dated May 10, 1957; Soviet Union–Hungary Consular Convention dated August 24, 1957; Soviet Union–Roumania Consular Convention dated September 4, 1957; Soviet Union–Albania Consular Convention dated September 18, 1957; Soviet Union–Czechoslovakia Consular Convention dated October 5, 1957; Soviet Union–Bulgaria Consular Convention dated December 12, 1957; Soviet Union–Poland Consular Convention dated January 21, 1958; Soviet Union–North Korea Consular Convention dated December 16, 1957; Soviet Union–Mongolia Consular Convention dated August 25, 1958; Soviet Union–North Vietnam Consular Convention dated June 5, 1959; Soviet Union–Peoples Republic of China Consular Convention dated June 23, 1959; Soviet Union–Federal Republic of Germany Consular Convention dated April 25, 1958.

(d) France–Italy Consular Convention dated January 12, 1955; France–Sweden Consular Convention dated March 5, 1955; Austria–Yugoslavia Consular Convention dated March 18, 1960; Austria–Soviet Union Consular Convention dated February 28, 1959.

[1] The principle that the receiving state may object to the opening of a consular office in a particular zone or town is recognised in many consular treaties, e.g. the Agreement between the United States and Nepal (1947) (Art. 2), the Agreement between United States and Yemen (1946) (Art. 2), the treaty between Greece and Lebanon (1948) (Art. 14), and the Agreement between the United States and Saudi Arabia (1933) (Art. 1).

without terminating consular relations between the states concerned. The essence of the matter is that both with regard to establishment of consular relations and in the matter of opening of consulates, agreement between the states is necessary. The recent Vienna Convention on Consular Relations clearly recognises this position.[1]

All authorities on international law are agreed that a state is not obliged to admit consuls in its territory, and that consular functions can be performed in the territory of a state only with the permission of that state granted by means of an *exequatur*. As Hackworth observes, the performance of functions within the jurisdiction of a state by consular officers of another state is dependent upon arrangements, express or implied, between the two states for the sending and receiving of such officials.[2] Although some authorities seem to contend that in practice every state must admit consuls of foreign powers, it would appear that the true position today, as succinctly put by Hyde, is as follows:

> It may be greatly doubted, however, whether the law of nations as yet imposes upon a state a legal duty to permit the functioning of a consular service, although in behalf of a foreign state with which diplomatic relations are maintained at any particular place, even embracing one where other states are permitted to enjoy such a privilege.[3]

The Pan American Convention on Consular Agents adopted in Havana in 1928 provides: "States may appoint in the territory of others, with the express or tacit consent of the latter, consuls who shall there represent and defend their commercial and industrial interests——."

There are numerous cases in which states for political or other con-

[1] The relevant provisions of the Convention are as follows:

Article 2: (1) The establishment of consular relations between states takes place by mutual consent.

(2) The consent given to the establishment of diplomatic relations between two states implies, unless otherwise stated, consent to the establishment of consular relations.

Article 4 (1) A consular post may be established in the territory of the receiving state only with that state's consent.

(2) The seat of the consular post, its classification and the consular district shall be established by the sending state and shall be subject to the approval of the receiving state.

(3) Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending state only with the consent of the receiving state.

(4) The consent of the receiving state shall also be required if a Consulate-General or a Consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.

(5) The prior express consent of the receiving state shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

[2] Hackworth, Digest of International Law, Vol. IV, p. 666.

[3] Hyde, International Law, Vol. II, p. 1317.

siderations have refused to grant *exequaturs* to consuls of other states or have revoked permission even after the admission of consuls. For instance, Russia refused for a long time for political reasons to admit consuls in Warsaw. Another instance of this may be found in the request made by the Italian Government in February 1941 to the effect that the American consulates then established at Palermo and Naples be moved to a place as far north as Rome or further north, and to a place which was not near the sea coast. In June 1941, the United States Government in a note to the German ambassador requested the closure of all German consulates in the United States. In 1956, India refused permission to the Brazillian Government to open a consulate in Bombay after the latter had dismissed its honorary consul and had extended the jurisdiction of its consulate in Calcutta to cover the whole of the territory of India.

Appointments to consular posts

When agreement is reached between two states regarding the establishment of consular relations and opening of consular offices it falls on the sending state to decide upon the status of each of its consular offices, i.e. whether it should be a consulate general, a consulate, vice consulate or a consular agency.[1] It is of course open to a state to change that status when it considers necessary provided that notice of such change is given to the government of the receiving state, and its consent obtained. A consular office must necessarily have a head of the consular post whose rank would vary according to the status of the post. For example, a consulate–general must be headed by a consul general whereas a consulate will only have a consul as the head of the post. A vice-consulate or a consular agency would be headed respectively by a vice-consul or a consular agent. In addition to the head of the post there would normally be in each consular office a certain number of officials who would also be entrusted with the exercise of consular functions, as also the consular employees who may be engaged for the performance of technical, administrative, or menial services in the consulate. The number of consular officers and employees in each consular establishment would naturally vary with the size and importance of each post.

[1] Many of the consular conventions provide that it is for the sending state to determine the status of its consular offices. See Article 3(1) of the U.S.A.–U.K. Consular Convention 1961, Article 2 of the Havana Convention 1928 regarding Consular Agents. See also clauses (2) and (3) of Article 4 of the Vienna Convention 1963.

Appointment of the head of the consular post. The head of a consular post, whether he be a consul-general, a consul, a vice-consul or a consular agent, is appointed by the sending state and is admitted to the exercise of his functions by the receiving state.[1] As a general rule the head of a consular post is furnished with an official document known as a consular commission, or *lettre de provision, lettre patente,* or *commission consulaire.* The form of such letters of commission is governed by the domestic laws and consular regulations of each state. It is, however, clear that whatever be the form, the commission of appointment should contain certain particulars in order that the receiving state may be able to determine clearly the powers and legal status of the consul.[2] The consular commission differs from the letters of credence given to a diplomatic agent in that the consular commission is not addressed to the head of the receiving state. The commission either bears no address at all,[3] or is addressed "to all who shall see these presents" [4] or "to all whom it may concern," [5] or "to those to whom these presents shall come" [6] or "to all and singular to whom these presents shall come."[7]

A consular commission has to be issued in respect of each appointment. Accordingly, if a consul is appointed to another post a fresh consular commission must be given for that appointment even if the post is in the territory of the same state. Similarly, a new consular commission is necessary if the head of the post is promoted and the rank of the consular post is raised simultaneously, for example, when a consulate is raised to a consulate-general and the head of the post is promoted to the rank of consul-general. In the practice of some states the head of a post may be given a new letter of commission if the consular district is altered or the location of the consulate is moved.

The commission of appointment of a consular representative is sent

[1] See Article 10 of the Vienna Convention on Consular Relations 1963.

[2] Article 11 of the Vienna Convention on Consular Relations provides: " The head of a consular post shall be provided by the sending state with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule his full name, his category and class, the consular district and the seat of the consular post."

[3] This is the practice in Austria, Bolivia, Brazil, People's Republic of China, Costa Rica, Czechoslovakia, Denmark, Finland, Greece, Guatemala, Iran, Netherlands, Paraguay, Poland Portugal, Sweden, Switzerland and Turkey.

[4] See the practice of Belgium, Colombia, France, Nicaragua, Panama and the United States.

[5] This form is used in Iraq.

[6] Japan, Thailand and Venuzuela use this form.

[7] See the practice of the United Kingdom and other Commonwealth countries.

by the sending state to the government of the receiving state. Where diplomatic relations exist between the two countries the commission of appointment may be transmitted through the diplomatic channel. In other cases the letter of commission may be sent through the consular representatives, or through the diplomatic representative of a third state, or through post.[1] If the receiving state raises no objection to the appointment it would issue an *exequatur* admitting the person concerned to the exercise of his functions as the head of a consular post in the territory of the receiving state. *Exequatur* is the act whereby the receiving state grants the foreign consul final admission thereby conferring upon him the right to exercise his consular functions. The document which is issued to the head of the consular post by the receiving state is, therefore, known as the *exequatur*.

There is no rule of international law specifying the mode of appointing heads of consular posts, nor is there any uniformity in the practice of states regarding the authority which should make appointments of the heads of consular posts. The whole matter is governed by the domestic legislation of each state and sometimes by provisions of bipartite treaties and conventions.[2] The opinion has sometimes been expressed that only heads of states are competent to appoint consular representatives. This, however, is not correct because appointments are often made by the Minister for Foreign Affairs or by the government according to the practice of the sending state. Likewise, international law does not prescribe any rule regarding the manner in which consuls are to be admitted to the exercise of consular functions. Such questions are to be determined by the law and usage of the receiving state. It may be said to be universally accepted that the formalities for the appointment and for the admission of the head of a consular post are to be determined by the law and usage respectively of the sending and of the receiving state;[3] and it is impossible to evolve a uniform rule in this regard. This position is also recognised in treaties and conventions.[4]

Informal methods of making appointments .Although the appointment of the head of a post through issue of a consular commission may be

[1] See Article 11(2) of the Vienna Convention 1963.

[2] See, for example, Article IV of the Convention of 20 May 1948 between Philippines and Spain which stipulates that regular letters of appointment shall be duly signed and sealed by the head of state.

[3] See Article 12 of the International Law Commission's Draft on Consular Relations.

[4] See Article 2 of Havana Convention on Consular Agents 1928.

regarded as the regular mode of making the appointment, the recent practice of states shows an ever increasing tendency to resort to less formal methods such as by issue of a notification of the consul's posting. If the receiving state accepts such informal method of appointment, the commission or similar instrument may be replaced by a notice to the same effect addressed by the sending state to the receiving state.[1] Some of the recent consular conventions, namely those entered into by the United Kingdom with France, United States, Norway and Sweden have adopted this method. Resort to such informal method of appointment sometimes helps in cases where one of the governments is unrecognised.

Exequatur. It has already been stated that it is the municipal law of each state which determines the organ competent to grant the *exequatur*. In many states the *exequatur* is granted by the head of the state if the consular commission is signed by the head of the sending state, and by the Minister for Foreign Affairs in other cases. In some countries the *exequatur* is always granted by the Minister for Foreign Affairs, and in certain cases power to grant *exequaturs* vests in the government itself. *Exequaturs* are granted in different forms according to the practice of each state and these include (a) a decree of the head of the receiving state signed by him and countersigned by the Minister for Foreign Affairs, the original or a certified copy being issued to the head of consular post as is the practice in the United States; (b) a transcription endorsed on the consular commission, and (c) a notification to the sending state through the diplomatic channel.[2]

Reasons for refusal of exequatur. It is well recognised that the receiving state may refuse at its discretion the *exequatur* to a consul[3] because it is the right of each state in the exercise of its territorial sovereignty to decide as to who should be permitted to exercise consular functions in its territory. It is, however, open to doubt as to whether a state which refuses the *exequatur* ought to communicate the reasons for the refusal to the government concerned. The Harvard Research Draft contains a provision that a state may refuse to admit a person to exercise consular functions within its territory without assigning reasons for such refusal.[4] This view is shared by other learned

[1] See Article 11(3) of the Vienna Convention on Consular Relations 1963.

[2] See Commentaries to Article 11 of the International Law Commission's Draft Articles.

[3] See Article 5 of the Havana Convention 1928; Article 7 of the Harvard Research Draft on the Legal Position and Functions of Consuls 1932.

[4] Article 2 of the Harvard Research Draft 1932.

bodies.[1] Nevertheless, refusal to grant *exequatur* to a consul, unless satisfactory reasons are given, may lead to rupture of relations, and many states in the interest of comity do assign reasons whenever it is decided to refuse an *exequatur*. Several consular treaties provide that *exequaturs* shall not be refused unless there is a good cause for doing so,[2] but the provisions of these treaties are silent on the question as to whether the reasons should be communicated to the sending state. There are, however, treaties, though very few in number, which do specifically so provide.[3] The International Law Commission after a review of the whole position has stated that in view of the varying and contradicting practice of states it is not possible to say that there is a rule requiring states to give the reasons for their decision in the case of refusal of an *exequatur*.[4] This position has been adopted in the Vienna Convention on Consular Relations.[5]

Provisional exercise of consular functions. The head of a consular post enters upon his functions only after the receiving state has granted him the *exequatur*, as it is that act whereby the receiving state confers upon him the right to exercise his consular functions. Mere possession of a commission of appointment issued by the sending state, therefore, does not confer upon the bearer of the commission the consular status in so far as the receiving state is concerned.[6] This position, which can be regarded as well accepted, is also incorporated in the municipal laws of several states and in the provisions of treaties and conventions.[7] Nevertheless, it is now generally accepted that pending delivery of the *exequatur*, the head of a consular post may be admitted by the receiving state on a provisional basis to the exercise of his functions. It is to be observed that unlike the case of the head of a diplomatic mission prior consent of the receiving

[1] See the Report of the League of Nations Committee of Experts, Publication of the League of Nations V Legal. 1927 V. 7, p. 4.

[2] See, for example, Article 4(3) of U.S.–U.K. Consular Convention 1951; U.K.–Norway Consular Convention 1951, Article 4(3); U.S.A.–Mexico Consular Treaty 1942, Article 1(3); U.S.A.–Ireland Consular Convention 1950, Article 4(3); France–Italy Consular Convention 1955, Article 4(4); and France–Sweden Consular Convention 1955, Article 4(4).

[3] See, for example, U.K.–France Consular Convention 1951, Article 4(5); France–Italy Consular Convention 1955, Article 4.

[4] Commentaries on Article 11 of the International Law Commission's Draft.

[5] See Article 12(2) of the Convention.

[6] *Re Bedo's Estate*, 136 N.Y.S. 2d. 407; Article 11(2) of the International Law Commission's Draft.

[7] See, for example, U.S.–U.K. Consular Convention 1952, Article 4(4). See also U.S.–Ireland (1950), U.K.–Mexico (1954), U.K.–Italy (1954), U.K.–Germany (1956), Poland–Soviet Union (1958), China–Soviet Union (1959), Consular Conventions. The Vienna Convention 1963 also contains a provision to this effect. See Article 12(1) of the Convention.

state is not obtained before making the appointment of the head of a consular post. This is because the appointment of a consul does not have any political significance. The head of a consular post can proceed to his post on receipt of his commission of appointment, but he cannot enter upon his functions until the receiving state consents to his doing so by issue of an *exequatur*. As formalities connected with the issue of an *exequatur* may take some time and consular functions may have to be performed immediately, especially in places where the local conditions are disturbed, provisional recognition serves a very useful purpose. A number of consular treaties and conventions contain provisions to this effect.[1] Article 13 of the Vienna Convention 1963 also provides for provisional admission of consuls pending delivery of the *exequatur*. A similar provision is contained in Article 13 of the Harvard Research Draft and Article 6 of the Havana Convention 1928. The practice of giving provisional recognition is usually resorted to when a consular office already exists and its new head is awaiting his *exequatur*. There is no special form for granting of provisional admission, which may be done either by written or verbal communication to the head of the post himself, or to the diplomatic representative or any other authority of the sending state. It is, however, understood that if the *exequatur* is refused the consul must relinquish his functions notwithstanding his provisional admission. It may be mentioned that in the Soviet practice there would probably be no case for a provisional admission as in the recent consular treaties entered into by the Soviet Union it is stipulated that prior concurrence of the receiving state must be obtained before making of an appointment to a consular post,[2] and that the *exequatur* shall be issued upon presentation of the commission. Such a provision would appear to be a departure from the normal consular practice and is similar to the diplomatic practice of obtaining *agrément* for the appointment of the head of a mission.

Notification of appointment. As soon as the head of a consular post is admitted by the receiving state to the exercise of his functions either by issue of *exequatur*, or even provisionally, it becomes the duty of the government of the receiving state to notify of the appointment

[1] See for example, U.K.–Norway Consular Convention (1951), Article 4(2) and the Conventions between U.S.A.–Ireland (1950), U.S.–U.K. (1951), U.K.–Sweden (1952), U.K.–Greece (1953), Poland–Yugoslovakia (1958), and Poland–Hungary (1959).

[2] See Sino–Soviet Consular Agreement 1959, Article 2; Soviet Regulations concerning Diplomatic Missions and Consular Institutions 1927, Art. 9.

of the consular representative to the competent authorities in the consular district. Since consular functions are local in character and are confined to the particular district within the jurisdiction of his post it is only on rare occasions that a consul will have to deal directly with the central government. He has, however, frequently to approach the officials within the consular district and it is, therefore, necessary that the local officials should be notified of the appointment.[1]

As already observed earlier, a consulate must have a number of consular officials and employees in addition to the head of the post whose qualifications, rank, and number will depend on the importance of the consulate. In most cases it would be impossible for the head of the post to discharge the various tasks involved in the performance of consular functions without the help of assistants. The International Law Commission took the view that the receiving state's obligation to accept consular officials and employees appointed to a consulate flows from the agreement by which that state gave its consent to the establishment of consular relations and in particular from its consent to the establishment of the consulate.[2] The right of the sending state to appoint the staff of a consulate is, however, specifically provided for in certain recent consular conventions.[3] The grant of the *exequatur* to a consul appointed as the head of a consular post covers *ipso jure* the members of consular staff working in his consulate. It is, therefore, not necessary for consular officials, who are not heads of post, to present consular commissions and obtain *exequaturs*. Notification of their appointment to the appropriate authorities of the receiving state by the head of the post is sufficient to enable them to take up their functions. However, if the sending state wishes to obtain *exequatur* for the consular officers who are not heads of post, there is nothing to prevent it from making a request accordingly.[4] Similarly, the receiving state may, if required by its laws and regulations, grant an *exequatur* to a consular officer other than the head of a consular post.[5]

Limitation on the size of consular staff. The staff of a consulate may be divided broadly into two categories, namely consular officials, that is, persons who exercise a consular function, and consular employees,

[1] See Article 14 of the Vienna Convention on Consular Relations 1963.
[2] See Commentary (1) to Article 19 of the International Law Commission's Draft.
[3] See Article 6 of U.K.–Norway Consular Convention 1951; Article 3(b) of U.K.–France Consular Convention 1951; Article 4(1) of U.K.–Germany Consular Convention 1956.
[4] See Commentaries to Article 19 of the International Law Commission's Draft.
[5] See Article 19 of the Vienna Convention 1963.

that is, persons who perform administrative or technical work, or belong to the service staff. The latter category would include, as in the case of subordinate diplomatic staff, registrars, private secretaries, stenographers, clerical assistants, archivists, messengers and chauffeurs. It is clearly the function of the sending state to determine the number and rank of the members of the consulate staff and to choose them. The International Law Commission had, however, recommended on the lines of its Draft Articles on Diplomatic Relations, that the receiving state may in the absence of an express agreement require that the size of the staff of a consulate be kept within reasonable and normal limits, having regard to circumstances and conditions in the consular district and to the needs of the particular consulate.[1] Though a provision regarding limitation of staff is both necessary and acceptable in the case of diplomatic missions, it is difficult to appreciate the necessity of such a provision in the case of the staff of a consulate. The consular officials and employees do not enjoy immunities and privileges to the same extent as the staff of the diplomatic missions, and, as such, the reasons which prompted states to accept the condition on limitation of diplomatic staff would appear to be absent in the case of consular staff. Under the existing principles of international law a consular official enjoys privileges and immunities only in respect of his official acts. If he were to indulge in activities outside the scope of his consular functions it would not be difficult to check such activities. The International Law Commission was not unaware of the distinction in principle between the staff of a diplomatic mission and that of a consulate and has tried to meet the objection by providing that the receiving state is obliged to take into account not only the conditions prevailing in the consular district but also the needs of the consulate concerned whilst maintaining the right of the receiving state to question the size of the staff.[2] The recommendations of the Commission have now been accepted in the Vienna Convention on Consular Relations.[3]

Career consular officers and honorary consuls. Consular officials can be said to fall broadly into two classes, namely career consular officers and honorary consuls. The career officers belong to a regular service of the sending state; they receive their salaries and other emoluments from the government and are not normally permitted to enter into any

[1] Article 20 of the International Law Commission's Draft Articles.
[2] See Commentaries to Article 20 of the International Law Commission's Draft.
[3] Article 20 of the Convention.

other gainful occupation or vocation. Most states today have a combined foreign service from whose ranks the diplomatic and consular posts are filled though a few countries still maintain a separate consular service. The honorary consuls on the other hand are permitted to engage in gainful employment in addition to their consular duties and they are selected locally from persons resident in the receiving state. It is immaterial whether they are nationals of the receiving state or the sending state, or of a third state. They are not, unlike career officers, liable to be transferred from one post to another, and they do not as a rule draw a fixed salary.

It has often been said that the institution of honorary consuls does not serve any useful purpose, and the League of Nations Committee of Experts suggested the abolition of honorary consuls. The countries in Eastern Europe with the exception of Yogoslavia do not have any honorary consuls. The United States of America, Australia and New Zealand, though they accept honorary consuls from other countries, do not hemselves send honorary consuls. On the other hand Britain, Netherlands, Finland, Switzerland and Brazil support the institution of honorary consuls primarily on financial grounds. Britain has incorporated provisions regarding honorary consuls in her consular treaties with a number of countries, and it appears that Netherlands has over 500 honorary consuls as against 20 career consuls. According to Luke T. Lee, despite some doubts raised recently about the entire system of honorary consuls and the decision of certain countries not to send and or to receive honorary consuls, the honorary consuls are here to stay. The system embraces many attractive features such as economy, flexibility, and the establishment of consulates in places where they would not otherwise be justified. These advantages could not be glossed over lightly by small nations with world wide commercial maritime interests.[1]

Classes and ranks of consular officers. Although the classification among diplomatic agents was determined and recognised as early as in 1815, the same has not been the position with regard to consuls. Since the institution of consuls first appeared in international relations a large variety of titles has been used. The practice of states, as reflected in domestic laws and consular conventions, shows that practically all states recognise three classes of consular officers, namely consul-

[1] Lee, Consular Law And Practice, London, 1961, p. 305.

general, consul and vice-consul. The titles of consul and vice-consul are used not only for the heads of consular posts but also for other consular officers who may be posted at a consulate. Some states have also a class of consular officers known as consular agents who may also be designated as the head of a consular agency. It is, however, to be noted that even where consular agents are included within the category of consular officers, they in effect form a class of their own and are more akin to honorary consuls than career consuls in respect of profession, training, function, remuneration, jurisdiction, nationality and mode of appointment. The consular agents are sometimes permitted to engage in other occupations for gain in the receiving state and to perform only certain types of consular duties.[1] There are various other titles used for consular officers who are not heads of consular posts, such as *consul élève*, alternate consul, deputy consul, proconsul, consular attaché etc.

Dual diplomatic and consular status. A growing practice of states is the investing of both diplomatic and consular character upon an individual assigned to a diplomatic mission. It may be mentioned that a diplomatic officer even without being invested with consular character is entitled under international law to perform most of the work which were traditionally regarded as consular functions because the same are regarded today as part of diplomatic functions. Nevertheless, diplomatic officers are in some cases required to be vested with a consular status as well if the domestic laws of the sending or the receiving state provide that certain functions are to be performed only by a consular officer. Thus, it is usual to designate a diplomatic officer as *First Secretary and Consul-General* or as *Second Secretary and Consul* or as a *Third Secretary and Vice-Consul.* The dual diplomatic-consular status also enables the particular official to work in the embassy as well as in a consulate. Some of the consular treaties provide specifically for assignment of members of diplomatic missions to the work of a consulate.[2] In fact since the amalgamation of diplomatic and consular services both the United Kingdom and the United States have resorted fairly often to this practice of appointing an officer in the dual capacity. According to Lee, this present trend is due to the following factors: (1) the boundary separating the diplomatic from the consular functions

[1] Lee, op. cit., pp. 12–13.

[2] U.S.–U.K. Consular Convention 1951 provides in Article 6(3) that the sending state may, with the permission of the receiving state, assign to work of a consulate one or more members of its diplomatic mission accredited to the receiving state.

has become less apparent in the course of time, (ii) the amalgamation of diplomatic and consular services obtained in almost all countries has mitigated the significance of the distinction between the two services, (iii) a dual status would entitle a person performing essential consular functions to diplomatic privileges and immunities, and (iv) the interchangeability of diplomatic and consular duties by foreign service officers is desirable from the administrative point of view.[1]

Appointment of acting head of post. Whenever the office of the head of a consular post is vacant, that is, when the head of the post has proceeded on leave or has relinquished his assignment on transfer and the vacancy has not been filled, it is the current general practice to appoint an acting head of post. This is provided for in most of the national regulations and consular conventions. The same procedure is also followed when the head of post is unable to carry out his functions due to illness or otherwise. The acting head is usually appointed from among the consular officers or members of the diplomatic staff of the sending state who may at that time be posted in the diplomatic mission or any of the consular posts in the receiving state. Since the acting head is to perform his functions only temporarily, it is not necessary to go through the formality of appointing him by means of letters of commission and to obtain *exequatur* from the receiving state. It is sufficient if the Ministry of Foreign Affairs or the appropriate government department of the receiving state is informed of such appointment by the head of the post or the head of the diplomatic mission or by any competent authority of the sending state. It may be noted that some states do issue letters of commission and obtain *exequatur* for their consular officers other than the heads of post. But even in the case of such consular officers being appointed acting head of post, a notification of such appointment is necessary. In cases where a consular officer or a member of the diplomatic mission of the sending state is not available to fill the office of the head of a consular post, it is permissible for the sending state to appoint a consular employee engaged in administrative or technical duties as the acting head of post. Such an occasion would be very rare indeed unless the sending state desires at the same time to promote the particular employee to the rank of a consular officer. The International Law Commission recognising the practice of appointing acting heads of posts had incorporated a specific

[1] Lee, op. cit., p. 21.

provision in its Draft Articles on Consular Relations.[1] The Vienna Convention 1963 also contains a provision in this respect.[2]

Appointment of nationals of the receiving state. In the case of career consuls, namely, consuls-general, consuls and vice-consuls, who belong to the regular service of the sending state, the occasions for appointment of a national of the receiving state would be very rare indeed since the rules of entrance to the regular foreign service of each state prescribe that the candidates must be nationals of the state concerned. The problem of appointment of the nationals of the receiving state does, however, frequently arise in the case of consular agents and honorary consuls. As already observed, the honorary consuls are appointed from persons resident in the receiving state and they may be of the nationality of the sending state, the receiving state, or of a third state. It is sometimes difficult to find a suitable person of the nationality of the sending state in all the ports or cities of the world where a small state may wish to have a consulate, and it becomes necessary to appoint a national either of the receiving state or of a third state. Unlike the case of a diplomatic agent, a consul has hardly any political functions to fulfil; his functions are local in character and connected mainly with trade or shipping. It would, therefore, seem reasonable to say that there should be much less objection to receiving a consul of the nationality of the receiving state or that of a third state. Nevertheless, it is asserted that a consul has to perform certain tasks on behalf of another state; even an honorary consul is entitled to some measure of immunities and privileges in connection with his functions, and therefore prior consent of the receiving state must be obtained before appointing a national of the receiving state or of a third state. Many of the recent treaties contain requirements to this effect.[3] The Vienna Convention on Consular Relations contains a provision to the effect that consular officials should in principle have the nationality of the sending state, that consular officials may not be appointed from among persons having the nationality of the receiving state except with the consent of that state which may be withdrawn at any time, and that the receiving

[1] Article 15 of the Draft Articles prepared by the International Law Commission. See also Article 9 of the Havana Convention on Consular Agents.

[2] Article 15 of the Convention.

[3] See, for example, U.K.–Federal Republic of Germany Consular Convention 1956, Art. 3(1); U.K.–Italy Consular Convention 1954, Art. 4(1); U.K.–Mexico Consular Convention 1954, Art. 4(1); India-Muscat Oman Consular Treaty 1953, Art. 2(1); Italy–Jordan Consular Treaty 1952, Art. 3; U.K.–Norway Consular Convention 1951, Art. 4 (1); Greece–Lebanon Consular Convention 1948, Art. 14.

state may reserve the same right with regard to nationals of a third state who are not also nationals of the sending state.[1] This puts exactly the same restriction on the appointment of consular officers as in the case of diplomatic agents.

Notification of appointment of members of consulate. It is now customary for practically all governments to maintain a consular list which contains the names of all officers admitted to exercise consular functions in the receiving state. This list which is usually prepared by the Ministry of Foreign Affairs is treated as *prima facie*, if not conclusive, evidence of the consular status of the person whose name is included therein. It is, therefore, of importance from the point of view of a consular officer to ensure that his name is duly entered in this list so that he can establish his status before the courts of the country or the local authorities if an occasion arises for his doing so. The government of the receiving state has consequently to be notified of the appointment of members of the consulate, their arrival at the post, as well as their final departure from the country upon termination of their functions with the consulate. Such intimation should be sent invariably to the Ministry of Foreign Affairs and to such other authority of the state as the Foreign Ministry may determine. In the case of a federal country, like the United States of America, India, Canada, or Australia, it is obvious that intimation of appointment, arrival or departure must be sent to the appropriate department of the local government within whose jurisdiction the consulate is situated. It is customary also to notify the arrival and departure of the members of the families of the consular officers and employees. The International Law Commission has recommended that it should be the obligation of the sending state to send such intimation to the receiving state and that, where possible, prior notification of arrival and final departure shall also be given. The Commission further recommends that intimation regarding appointment, arrival, discharge and departure of persons employed as private servants by members of the consulate should also be given. In the case of persons resident in the receiving state, the fact of their engagement or discharge whether as members of the consulate staff or as private servants is required to be given.[2] The recommendations of the Commission in this regard have now been incorporated in the Vienna Convention on Consular Relations 1963.[3]

[1] See Article 22 of the Vienna Convention 1963.
[2] See Article 24 of the International Law Commission's Draft.
[3] Article 24 of the Convention.

Precedence

In many cities today, especially those which have an importance from the point of international trade and commerce, it is usual to find a fairly sizeable consular corps. The presence of consular representatives of different states gives rise to the question of precedence in connection with official functions and on ceremonial occasions. Though the matter had not until recently been settled either by international law or by a convention, it is seen that the practice followed by most states is fairly uniform.

Precedence of heads of posts. It may be regarded as established that heads of posts, irrespective of the class they may belong to, would take precedence over consular officers who are not heads of posts, and that honorary consuls who are heads of posts would come after the career consular officers of the same rank. Thus an honorary consul general, who is head of a post would rank after all heads of posts who are consuls general but above all consuls who may be heads of posts. The consular officers who are heads of posts rank in the order of consul-general, consul, vice-consul and consular agent. They rank in each class according to the date of the grant of the *exequatur*. The Vienna Convention 1963 provides that if the head of the consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission, which precedence shall be maintained after the granting of the *exequatur*. The order of precedence as between two or more heads of consular posts, who obtained the *exequatur* or provisional admission on the same date, shall be determined according to the dates on which their commissions or similar instruments were presented or notice of their appointment was given to the receiving state. Acting heads of posts would rank after all heads of posts.[1]

Consular officers other than heads of posts. The question of precedence as between the members of consulates other than heads of posts also arises on many occasions, but it is extremely difficult to lay down the order or the rules of precedence among them with any precision. It would, however, be correct to say that officers with the rank of consul take precedence over officers with the rank of vice-consul, deputy consul, proconsul and consul *élève*. It can also be assumed that as between persons holding the same rank the precedence would depend

[1] See Article 16 of the Vienna Convention 1963.

on the dates of notification of their arrival in the receiving state. The order of precedence as between the officials of a particular consulate is determined by the government of the sending state, and this has to be notified to the appropriate authorities of the receiving state by the head of the diplomatic mission of the sending state or by the head of the consular post, if there is no diplomatic mission.[1]

Precedence as between diplomatic agents and consular officers. Another question which has to be considered in this connection is the order of precedence between the members of the diplomatic corps and that of the consular officials. Normally, a country does not have diplomatic missions and consular posts in the same city because the diplomatic missions themselves also perform consular functions. The officers who perform consular functions in the diplomatic missions have a diplomatic rank, and for all purposes of protocol, immunities and privileges, they are regarded as diplomatic officers. The question of precedence as between diplomatic and consular officers is, therefore, of little practical consequence. In some countries, however, consular posts are allowed to be maintained in the capital, particularly in cases where the sending state has no diplomatic mission. For example, in Delhi the Republic of Vietnam, the Democratic Republic of Vietnam, the Republic of Korea, the Democratic Republic of Korea and Monaco are allowed to have consulates though no other country is permitted to do so. In such cases the question of precedence becomes important. It is fairly obvious that the heads of consular posts must rank after the heads of diplomatic missions, but the question is with regard to their precedence as against the Charge d'Affaires and members of diplomatic corps who are not heads of missions. There are several persons in the consular corps who have fairly senior positions in the combined foreign service of the sending state and that has to be taken into account in determining their precedence, particularly having regard to the fact that most states in the world today do not have a separate consular service. So far as privileges and immunities are concerned, there is a reason for making a distinction between all members of the diplomatic missions on the one hand and the officials of consulates on the other because the immunities and privileges are based on functional necessity of the particular office. But as regards precedence the position of a person in the combined foreign service of the state becomes a relevant consideration. It is difficult to lay down a uniform rule in this regard and the question

[1] See Article 21 of the Vienna Convention 1963.

must be settled *ad hoc* by the government of the receiving state. In Delhi, the heads of consular posts who have the rank of consul general are given the status of "Minister" for the purpose of their precedence.

Exercise of consular functions in a third state

In some cases the sending state may entrust a consulate established in a particular state to exercise consular functions in another state. The International Law Commission took the view that such practice could be permitted provided no objection was received from either of the states concerned in whose territory the consular functions were to be exercised. The objection should, however, be express. The Vienna Convention on Consular Relations 1963 provides that unless there is express objection by one of the states concerned, the sending state may entrust a consular post established in a particular state with the exercise of consular functions in another state.[1]

Exercise of consular functions on behalf of a third state

It is possible for a consulate to be called upon to exercise consular functions not only on behalf of the sending state but also on behalf of a third state. Such a situation may arise if the third state does not maintain consular relations with the receiving state but wishes to ensure consular protection for its nationals in that state. It may also arise in cases where diplomatic and consular relations are broken off between the third state and the receiving state, and the sending state is requested to take up consular protection of the nationals of the third state. It is, however, obvious that prior consent of the receiving state must be obtained before a consul can exercise such functions on behalf of the third state.[2] The laws and regulations of several countries make provision for the exercise of consular functions on behalf of a third state subject to authorization of the government of the receiving state. Some of the treaties and consular conventions contain express provisions in this regard. For example, the Agreement of Caracas signed in July 1911 provided that the consuls of each contracting republic residing in any of them could exercise their powers on behalf of individuals of the contracting republics which did not have a consul at the place in question.[3] A similar understanding prevails among the member nations

[1] See Article 7 of the Vienna Convention.

[2] See Article 8 of the Vienna Convention.

[3] This Convention was entered into between Bolivia, Colombia, Ecuador, Peru and Venezuela concerning the powers of consuls in each of the contracting republics.

of the British Commonwealth, though there is no express treaty between them in regard to this.

Appointment of the same person by two or more states

The Vienna Convention on Consular Relations 1963 provides that two or more states may appoint the same person as the head of a consular post in another state unless that state objects.[1] This is in line with the provisions of the Vienna Convention on Diplomatic Relations 1961 and represents rather an innovation in the field of consular law. It is doubtful whether in practice this recommendation will have any practical utility because it is hardly likely that states would agree to invest the head of a consular post with the character of an organ of two or more states at the same time instead of his being the official organ of only one state which he normally is. There are other practical difficulties as well because the scope of consular functions on behalf of two states may vary according to the provisions of consular conventions and in consequence of the operation of the most-favoured nation clause. Moreover, two states might have different interests in certain matters falling within the scope of consular functions.

[1] Article 18 of the Convention.

CHAPTER IX

CONSULAR FUNCTIONS

It is difficult to define the exact scope of consular duties and functions since consular functions are not regulated solely by international law but are based on custom, treaties, national laws and consular instructions.[1] The functions of a consul may vary from case to case having regard to the needs of times and the circumstances of each case. For example, a consular official is likely to exercise much wider powers and have more extensive functions in a place where his government maintains no diplomatic mission. Again, the extent of a consul's functions would depend largely on the provisions of the treaty or consular convention which regulate the consular relations between his home state and the receiving state. The extraterritorial powers which consuls enjoyed in some of the countries in the East until recent years were derived solely from the provisions of respective treaties and not from any rule of international law. It may be mentioned that some conventions, such as the Havana Convention 1928, leave the definition of consular functions to municipal law whilst others, like the Caracas Convention 1911, contain an exhaustive definition of consular functions. National consular regulations have employed different classifications of consular functions suited to the purpose of the state in question. Text writers have also suggested various forms of consular functions. The Vienna Convention on Consular Relations has attempted a comprehensive definition of consular functions by enumerating some of the major duties and functions of a consul, but even so the definition cannot be regarded either as exhaustive or as being universally applicable. In fact, the last clause of the relevant article of the Convention makes it clear that in addition to the various consular functions enumerated in the Article a consul can perform any other functions entrusted to the

[1] See Oppenheim, International Law, 8th ed., p. 837; Hyde, International Law, Vol. II, p. 828: Fauchille, Le droit International, Vol. I, p. 132.

consular post by the sending state which are not prohibited by the receiving state.[1]

Diplomatic missions performing consular functions. The consular functions, whether they be derived from custom, treaty, or provisions of municipal laws, are exercised in modern times by consulates as well as by diplomatic missions. The Vienna Convention on Diplomatic Relations recognising this practice has provided that nothing in that convention shall be construed as preventing the performance of consular functions by a diplomatic mission.[2] If the sending state has no consulate in the receiving state the competence of the diplomatic mission in consular affairs covers automatically the entire territory of the receiving state.[3] But if the sending state has consulates in the receiving state the exercise of consular functions by the diplomatic mission is limited as a general rule to that part of the territory of the receiving state which is outside the consular district or districts allotted to the consulates.

Performance of diplomatic functions by consular officers. There are occasions when a consular officer may be empowered by the sending state with the consent of the receiving state to perform diplomatic acts in addition to his own consular functions. This would be so when the sending state has no diplomatic mission but only one or more consular posts in the receiving state. The consent of the latter state is most important in this regard because there may be many reasons for not establishing diplomatic relations, and the purpose may be defeated if the consuls were allowed to perform all the diplomatic functions. It is, however, to be noted that even if a consul is authorised to exercise diplomatic functions he remains a consular officer and is not entitled to diplomatic privileges and immunities.[4]

Nature of consular functions. Although it is asserted that a consul has no political functions to fulfil, in the practice of states today there would appear to be little difference in the functions of a consulate and that of a diplomatic mission except that the functions of a consulate are essentially local in nature. The relationship between a consul and the local authorities is not altogether unlike that between

[1] See Article 5 of the Vienna Convention 1963.

[2] Article 3(2) of the Vienna Convention on Diplomatic Relations 1961.

[3] For example, there is no exchange of consulates between the Soviet Union on the one hand and the United States and Great Britain on the other.

[4] See Article 17 of the Vienna Convention on Consular Relations 1963.

a diplomat and the central government. The consul has, however, no contact with the central government where the sending state maintains a diplomatic mission, and as such he would have little to do with matters which have to be dealt with at the international level. The modern view is that a consul is as much concerned with defending the rights of the sending state as a diplomatic agent in the sphere with which the consul is concerned, such as (a) defending the interests of co-nationals, (b) protecting the economic interests of his state, and (c) performing such generally accepted consular duties as appertain to government-owned ships, war cemeteries, passports and visas, and ships' papers.[1]

Promotion and protection of trade and commerce. The promotion and protection of trade and commerce between the sending and the receiving states is undoubtedly one of the principal functions of the consul – indeed it is this aspect of consular functions which has been the governing factor in establishment of consular relations between nations. As de Martens observed, the purpose of consular institution is to protect the commerce and navigation of nationals before the foreign authorities and to furnish their government information in the interest of trade and commerce.[2] The national consular regulations of most countries require consular officials to promote and protect trade.[3] In recent years the importance of foreign trade has compelled governments to entrust the protection of trade and development of commercial relations to their diplomatic missions also, and the commercial attachés posted in the diplomatic missions have taken over a considerable portion of the consular work in this regard. There is no duobt a certain overlapping of functions between the diplomatic missions and the consulates in this respect; nevertheless, protection of trade and commerce remains the most important task of consular officials. As the offices of diplomatic missions including those of the commercial attachés are located in the capital of the receiving state, which need not necessarily be the centre of commercial activity, the consulates have a leading role to play within their consular districts with regard to promotion of trade on behalf of the sending state. For example, in the United States of America, Australia, or India, the diplomatic

[1] International Law Commission, Year Book 1959, Part I, pp. 172 and 174.

[2] De Martens, Droit des Gens, 1858, Vol. IV, Ch. III, pp. 386–87.

[3] For example, see the United States Foreign Service Regulations 1941; General Instructions to Her Majesty's Consular Officers 1949; Instructions for the Danish Foreign Service 1932.

missions are located in places where there is very little of international trade, and consequently the consulates in New York, or San Francisco, Sydney, Calcutta or Bombay have to play an important part. It would perhaps be reasonable to assume that whilst the diplomatic mission would be more concerned with questions of policy and with negotiations with the central government in regard to such matters including the question of tariffs, customs barriers, import or export control, it would be the function of the consular officers to negotiate with local traders within the consular district or to represent to the local authorities or the government of the province where the receiving state has a federal form of government. Under the current practice and regulations of several states the diplomatic mission exercises supervisory functions over the work of the consulates of the sending state, and it is reasonable to assume that the consulates would act within their districts in pursuance of the general policy indicated by the diplomatic mission. Protection of trade and commerce would include watching over trade, actual exports and imports, finding markets for home produced goods, and ensuring adequate supplies of food stuffs and raw materials for the sending state. The consular regulations usually contain some indications regarding methods to be employed by consular officers in this respect. For example, British consuls are instructed to deal with all commercial questions referred to them by the head of the diplomatic mission or his principal adviser in commercial matters, by the Foriegn Office, or the Board of Trade, and by individual British traders. They must report on their own initiative about the local economic, financial, and commercial developments within their consular districts. The work in this connection would consist primarily in furnishing of trade reports periodically to the government of the sending state, lending assistance to the citizens and business firms established in the sending state, and protecting the rights and interests of the sending state by guarding against infringement of the provisions of any treaty of commerce which may exist, or of any rights which the sending state or its citizens may have in the receiving state. Another function which the consuls are frequently required to do is to issue consular invoices and certificates of origin in respect of merchandise to be shipped to the sending state as the laws of certain states do not permit entry of goods without a consular invoice. In recent years, however, having regard to the recommendations of the G.A.T.T. the requirement of consular invoices is gradually disappearing in many countries.

Protection of the interests of the sending state and its nationals. Another important function of a consul consists in protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate. This again is a function which also falls within the sphere of activities of the diplomatic agent. Protection of the interests of the sending state and particularly of its citizens has many phases some of which are essentially local in character. For example, when a citizen of the home state is arrested by the local police and is lodged in custody, or where the citizen suffers harm or injury to his person or property in the hands of the local officials, or when he is the victim of mob violence, it becomes necessary to take action immediately which would take the form of a representation to the local authorities. It would really be a matter for the consul in whose consular district the incident may take place to do the needful. If, however, the place of occurrence is not included within any consular district the matter would be taken up by the diplomatic mission. In a federal state the duty of protection of citizens falls perhaps more often on the consul because the representation has to be made usually to the local government rather than to the government at the centre. The consular officers would, no doubt, keep the diplomatic mission informed of all cases of intervention on behalf of any aggrieved national because in case redress is not obtained through the local authorities the central government has to be approached, as ultimately it is the central government which becomes responsible under international law if a foreign national is treated in a manner contrary to established canons of justice. Diplomatic interposition must in all cases be made by the diplomatic agent with the central government, but it is usually the consular authorities whose duty it is to render aid and assistance to the nationals of the home state. There is some difference in principle between the protection afforded by diplomatic agents to the nationals of their home states and the protective acts of consular officials. In the case of diplomatic agents it is an exercise of the right which the sending state possesses in international law to afford protection to its citizens whilst they are abroad, whereas in the case of consular protection the matter is governed by the provisions of consular treaties and the municipal laws of the states concerned. In the practical analysis, however, there is little difference because most of the consular conventions provide for protective functions of the consul, and protection is afforded on the same basis and subject to the same conditions as that of diplomatic protection.

There are two schools of thought with regard to the question whether a national of the sending state may demand the necessary protection from his consul. A majority of states including Britain, the United States and the Netherlands,[1] hold that a consul is duty bound to afford protection to his co-nationals when such protection is requested. Some states like Canada,[2] however, adhere to the view that consular protection cannot be demanded as a matter of right. There is also no unanimity on the question as to whether consular protection may be imposed on a citizen who may refuse to have any dealings with his consul.[3] Such cases would doubtless be very rare and the better view seems to be that where the person himself does not request for any protection, the consul ought not to intervene.

The right of a consul to protect his co-nationals is found almost in every treaty including the conventions entered into by the Soviet Union with communist and non-communist countries. The extent and degree of protection may, however, vary according to the provisions of a particular treaty or convention. The broad pattern of such protective functions may be found in Article 15(1) of the United States-United Kingdom Consular Convention of 1951 which provides:

"A consular officer shall be entitled within his district to:
(a) interview, communicate with and advise any national of the sending state,
(b) enquire into any incidents which have occurred affecting the interests of any such national,
(c) assist any such national in proceeding before or in relations with the authorities of the territory, and where necessary, arrange for legal assistance for him."

Consuls are generally authorised to approach the competent authorities for information concerning their co-nationals. Essential to the fulfilment of a consul's protective functions are his rights to learn immediately of detention of his compatriots, to visit them in prison and to assist them in legal and other matters.[4] Specific provisions in this regard are sometimes made in consular conventions. The view of the United States Government, as expressed in a note to the Italian Charge d'Affaires in 1936, is that while it is not the general practice to notify the consular representatives of a foreigner who is placed under arrest, such notification would promptly be made upon request therefor by the arrested person[5]. In the absence of a treaty, not all

[1] See the Foreign Service Manual of the United States, 1949; General Instructions to Her Majesty's Consular Officers, 1949; Netherlands Consular Manual, 1951.
[2] Instructions for the Guidance of Officers Performing Consular Duties, 1951.
[3] Lee, op. cit., p. 119.
[4] Ibid., p. 120.
[5] Ibid., p. 124.

states are willing to permit foreign consuls to visit or intervene on behalf of their nationals in prison. Japan, for example, while conceding that a consul should be allowed to visit his co-nationals in prison by virtue of international courtesy, questions that he can claim it as of right. A frequent exception to the consular rights to protect nationals and visit them in prison is the case of persons who are held on charge of espionage as evidenced by the practice of states. The Vienna Convention on Consular Relations has, however, categorically provided that with a view to facilitating the exercise of consular functions, the nationals of the sending state resident within a consular district shall be free to communicate with and to have access to their consul, and that similarly a consular official shall have the right to communicate with the nationals of the sending state resident within his district and to visit them if the exercise of his consular functions so requires. The Convention further provides that where a foreign national is arrested or committed to prison or to custody pending trial, or is detained in any other manner, the competent authorities of the receiving state shall without delay inform the consul of the district if he so requests, and any communication addressed to the consulate by the person in custody shall also be forwarded by the authorities without undue delay. In such a case the consular officials shall have the right to visit their co-national in prison for the purpose of conversing with him and arranging for his legal representation, defence or appeal against judicial sentence.[1] These rights have, however, to be exercised in conformity with the laws and regulations of the receiving state. Thus permission must be obtained, wherever required, from the competent authorities before the consul can visit an imprisoned national in prison.

The Vienna Convention on the subject has provided that the right of consular protection will be within the limits permitted by international law.[2] It is, therefore, necessary to ascertain the true position with regard to protection of nationals as permissible under customary international law and in the practice of the states and particularly the conditions under which the right of protection may be exercised. These questions will be discussed in the chapter "Diplomatic Protection of Citizens Abroad."

[1] See Article 36 of the Vienna Convention on Consular Relations 1963.

[2] The relevant provision of the Vienna Convention on the subject is as follows:
"Consular functions consist in
(a) Protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law."

Rendering of aid and assistance to nationals. Apart from his duty of protection *vis-à-vis* the authorities of the receiving state, a consul's function also includes rendering of help and assistance to his co-nationals in every shape or form. This would include introduction of commercial agents to business concerns, assistance in cases of distress, assistance to nationals working in the receiving state, repatriation, and the like.[1] Such functions would also be performed by consular sections in diplomatic missions. It is not uncommon for diplomatic or consular representatives to be approached for financial assistance by their nationals in case of distress, and the regulations or instructions issued to consular officers generally prescribe the limit of such assistance, the circumstances in which assistance may be given, and the methods by which the moneys advanced may be recovered.

Consular officers sometimes have to arrange for repatriation of their nationals who may be stranded. Here again the consular instructions prescribe the conditions which must be followed. The instructions issued for guidance of officers performing consular duties by various countries invariably provide that the person concerned in order to qualify for assistance must have the nationality of the sending state. Precautions have also to be taken against imposters and professional beggars. The other considerations which are usually taken into account in the matter of rendering financial assistance are whether the person concerned has found himself in distress on account of his own misbehaviour or imprudence, and the possibility of his obtaining assistance from other sources including assistance from local authorities. The local laws of some countries provide for rendering assistance to alien destitutes in the same manner as their own nationals,[2] and in such cases the person concerned must be sent to the "Poor Law" authorities of the receiving state.

Repatriation of nationals. Under the United Kingdom Instructions, consuls are allowed to repatriate British subjects at the lowest possible cost without prior application to the Foreign Office. Giving of aid in cash is discouraged except in very special cases. American consuls are instructed to extend to distressed American citizens all possible aid

[1] See Article 5(e) of the Vienna Convention which includes as one of the functions "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

[2] For example, in the Netherlands no distinction is made between citizens and aliens with regard to poor law relief and social welfare benefits including medical care. By a convention concluded between Sweden, Denmark, Finland and Norway in 1928, the national standard of treatment is guaranteed to aliens in respect of poor law benefits.

and assistance within their power, but cash payment directly to the applicant is not authorised without prior permission of the State Department. Japanese consuls are authorised to assist in the relief and repatriation of Japanese nationals who are poverty stricken and who want to return home. In so far as India is concerned, heads of missions are given discretion in the matter of giving of assistance which may even include cash payments in the shape of advances or loans to the applicant. In cases of repatriation, prior permission of the Ministry of External Affairs is generally taken. Any money spent on repatriation is usually recovered from the guarantor who gave the financial guarantee at the time when the passport was issued to the applicant.

The regulations of many states require consuls to give special assistance to the aged, infirm, incurable, minors and the insane, because it is these persons who stand in special need of protection and assistance from the consulate.[1] The Vienna Convention 1963 specifically mentions as one of consular duties "safeguarding the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons." The Convention accordingly provides that the receiving state shall have the duty to inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interest of a minor or other person lacking full capacity who is a national of the sending state.[2] The Sino-Soviet Consular Agreement of 1959 provides that consuls may appoint guardians and curators for nationals of the sending state as well as supervise the activities of such guardians and curators.[3]

"Representation and estate" functions. Another important function which a consul has to undertake in safeguarding the interests of the nationals of his home state may be termed as "representation and estate" functions. This would include representation of a national by his consul before the local tribunals and other authorities of the receiving state and safeguarding his interests in the case of any succession in which the national may be interested. A consul's right to represent his co-nationals, who are unable to defend their own rights and interests, is universally recognised. This applies to all cases where the nationals of the sending state, whether individuals or bodies corpo-

[1] See the French Law of July 14, 1905 as modified upto-date; Mexican Law (Ley del Servicio Exterior, 1943); Lee, op. cit., p. 131.

[2] See Article 37 (b) of the Vienna Convention.

[3] See Article 21 of the Agreement.

rate, are in need of representation owing to their absence from the country. This equally applies where the person concerned is prevented from looking after his interests by serious illness or by being detained or imprisoned in the receiving state. The consul's right of representation is, however, limited in character. Whilst he may arrange for representation of his co-nationals in a pending proceeding before the judicial authorities or administrative tribunals, the consul has no authority to dispose of the rights of the person he is representing. Moreover, his right of representation ceases as soon as the person concerned himself assumes the defence of his rights or appoints a lawyer. A substantial portion of the representation functions relates to succession or administration of estates of deceased nationals. Until recently, the basis of consular intervention in such matters was the nationality of the deceased, that is to say, if the deceased was a national of the sending state, the consular officer could intervene in the matter of administration of his estate in the receiving state. The modern trend, as evidenced by provisions of recent treaties is, however, to provide for consular representation on the basis of the nationality of the beneficiary.[1] This means that irrespective of the nationality of the deceased if the person beneficially interested is a national of the home state, the consular officer is entitled to represent him if the beneficiary by reason of his absence or otherwise is unable to arrange for his representation. If, however, the beneficiary is subsequently represented through his own lawyers and the consular officer is informed of the same, the representation function of the consul automatically ceases. There are two schools of thought on the question as to whether a consul can exercise representation functions in the absence of a treaty provision authorising him to do so. One view is that consuls by virtue of their office have the right to represent their co-nationals if the latter have not taken steps to be represented otherwise. In a recent case in the United States [2] it was held that the rights, powers and duties of consuls rest on international law as well as on statute, regulation and treaty stipulations, and that the courts have given recognition to the power of consular officers to assert or defend the property rights of

[1] See the provisions of U.S.A.–Ireland Consular Treaty 1950, Art. 18(2); U.K.–Norway Consular Treaty 1951, Art. 22(2); U.S.A.–U.K. Consular Treaty 1951, Art. 18; U.K.–France Consular Treaty 1951, Art. 29(2); U.K.–Sweden Consular Treaty 1951, Art. 22(2); U.K.–Greece Consular Treaty 1953, Art. 22(2); U.K.–Mexico Consular Treaty 1954, Art. 23(2); U.K.–Germany Consular Convention 1956, Art. 21(3).

[2] *Re Bedo's Estate*, 136 N.Y.S. 2d. 407 (Decision of the New York Surrogate Court, Bronx County, dated January 7, 1955). See also *Re Ostrowski's Estate*,290 N.Y.S. 174 (1936), A.D. 1935–37, Case No. 198.

their nationals. This is irrespective of whether or not he has been accorded the right to represent them in court by provisions of treaty or otherwise. The other view is that consular estate and representation functions, as are performed, owe their existence entirely to treaty provisions. Thus, the Argentine Supreme Court held in a case decided in 1941 that in the absence of a treaty or permissive legislation by the receiving state consuls do not have the power to represent their co-nationals before the courts of the receiving state.[1]

Conservation of the estate of deceased national. The consul has also the undoubted right to take all measures necessary to ensure the conservation of the estate for the purpose of safeguarding the interests of the nationals of the sending state in matters of succession *mortis causa*. He may accordingly represent without producing a power of attorney the heirs and legatees or their successors in title until such time as the person concerned undertakes the defence of his own interests. Consuls can for this purpose appear before the courts or approach the appropriate authorities of the receiving state with a view to collecting, safeguarding or arranging for an inventory of the assests, and to suggest to the authorities all measures necessary to discover the whereabouts of the assets constituting the estate. The consul may, when the inventory of the assets is being drawn up, take steps to have the assets assessed, to ask for appointment of an administrator, and to take all legal steps necessary for the preservation, administration and disposal of the assets by the authorities of the receiving state. The consular conventions often contain provisions conferring upon consuls in matters of succession rights that are much more extensive, and in particular the right to administer the estate.[2] Consular treaties may be divided into six categories [3] in so far as this aspect is concerned, namely, (a) those authorising a consul to immediately recover and take charge of a deceased's estate irrespective of the wishes of absent heirs,[4] (b) those distinguishing movable from immovable property, with the former to be handed over to consuls and the latter disposed

[1] *Re Maria Beatriz Del Valle Inclan*, A.D. 1941–42, Case No. 124.

[2] See Commentaries to Article 5 of the Draft Articles prepared by the International Law Commission.

[3] See Lee, op. cit., p. 141.

[4] For example, see the Soviet Union–Germany Consular Convention 1925, and the Soviet Union–Czechoslovakia Consular Convention 1935, Sino–British Treaty of Tientsin 1858, United States–Muscat Treaty 1833.

of according to the local laws,[1] (c) those requiring the delivery of only the escheated movables to consuls, all other property being subject to the local laws, (d) those enabling a consul to administer such estate if the heirs have not taken steps to be represented otherwise in the receiving state,[2] (e) those conferring estate functions upon consuls in so far as the local laws permit,[3] and (f) those empowering a consul merely to watch, supervise, and guard the estate, while the administration itself remains with the local authorities.[4]

It is obvious that a consul must perform his estate and representation functions in conformity with local laws, regulations and administrative orders. In regard to protection or administration of estates of deceased persons the extent of a consul's functions would depend upon the provisions of the treaty which govern the matter. The consular regulations or instructions contain specific directions regarding the type of cases where estate and representation functions should be exercised and the manner of discharging such duties. For example, the *United Kingdom Consular Instructions* provide that British consuls must be guided by two important considerations, namely that the law of the receiving state or the treaty permits consuls to render their services to British nationals beneficially interested in the estate and that consular actions are reasonably necessary for the protection and assistance of British interests.[5] Consuls are required to maintain and render accounts whenever they take charge of estates, and it is permissible for consulates to make certain charges for administration of estates.

Notarial functions. Like a diplomatic officer a consul has also to perform a variety of notarial services, such as administering oaths, legalising and authenticating documents and examining witnesses. As already explained in the chapter concering diplomatic functions, the notarial services are performed in the interest of persons who are either nationals of the sending state or who have some business to transact in that state. Treaties often empower consuls to perform notarial acts in accordance with the laws and regulations of the sending state in which their acts may have legal force without, however, obligating the

[1] For example, see the Sino–Soviet Consular Convention 1959 and other consular conventions recently entered into by the Soviet Union.
[2] See the U.S.–Costa Rican Consular Convention 1948.
[3] See U.S.–German Treaty of 1923.
[4] Anglo–U.S. Consular Convention 1951.
[5] Lee, op. cit., p. 151.

receiving state to recognise the validity of such acts.[1] Since notarial functions are regulated by the law of the place where such functions are performed, in the absence of the provision of a treaty many countries require their consular officers to observe the laws of both the sending and the receiving states in the performance of notarial acts.[2] The notarial functions are of a varied type and relate to a variety of subjects. These may include attesting or certifying signatures, stamping, certifying, or translating documents for use in any proceeding in the sending state in pursuance of the laws of that state. Thus for example, when a person resident in the receiving state wishes to make use of some document in any proceeding before the courts or administrative authorities of the sending state, the laws of that state may require that before such document can be used it must be authenticated by its diplomatic or consular representative. Similarly, the law of the sending state may require that the signatures in the document or the translation should be attested or certified. If the law of the sending state requires an oath, or a declaration in lieu of oath, by the executant of the document before its attestation or authentication, such an oath or declaration may be sworn or made before the consular official.[3] The other notarial functions include (a) recording statements of nationals of the sending state in the consulate, and on board vessels, ships and aircraft having the nationality of the sending state, and (b) drawing up, attesting, and receiving for safe custody wills and other instruments executed by the nationals of the sending state.

The consuls are also empowered to grant passports to their nationals and to issue visas to persons who desire to visit the territories of the sending state.

A consul is usually required under the laws of the sending state to perform the work of the registrar, and in such capacity to keep the registers of births, deaths, marriages and legitimations and to make the relevant entries therein in accordance with the laws and regulations of the sending state. The registration of citizens serves a very useful purpose in ensuring that such citizens may promptly be rendered diplomatic and consular protection in case of need. A certificate of consular registration has often been considered as sufficient proof of

[1] U.S.-U.K. Consular Convention 1951.

[2] See the Instructions for the Guidance of Officers Performing Consular Duties, 1950, Canada.

[3] See Harvard Research Draft on Consular Officers, Article 11(a). See also the Commentaries to Article 5 of the International Law Commission's Draft Articles.

nationality for its holder.[1] Almost all consular treaties as well as national regulations do contain provisions regarding performance of such services by consular officers. Some countries provide for compulsory registration of births in consulates, whilst registration of marriages and deaths are considered optional. British consuls are instructed to encourage all British residents in their district to register with them in the interest of prompt consular assistance, protection, and communication.[2] The British passports also draw the attention of the holder to the desirability of registration in consulates.

Solemnisation of marriages. Consular officials may also, if authorised for that purpose by the law of the sending state, act as registrar of marriages between their nationals or between nationals of the sending state and those of another state provided that this is not prohibited by the law of the receiving state. Consular functions in matters of marriages are performed only with the tacit or express permission of the receiving state, as many countries regard marriage as a civil contract under the exclusive jurisdiction of the local authorities in whose territory the marriage takes place.[3] The consular treaties usually require consuls to adhere rigidly to certain conditions. They are required to act in conformity with the local law, to notify the local authorities and to observe the requirement that both parties or in some cases one of the parties to the marriage must be a national of the sending state. The consular regulations usually contain detailed instructions in this regard. In Britain, the practice is to authorise British diplomatic and consular officers to solemnize marriages by appointing them as marriage officers under special warrants. In India, under the Special Marriages Act the diplomatic and consular representatives are empowered to solemnize marriages if they are appointed as marriage officers. A consular officer whilst solemnising a marriage has to make certain that the parties have complied with the requirements of law of the sending state. It is also necessary to ensure that the local laws relating to the ceremony of marriage have not been violated. The questions concerning validity of a marriage are determined by the rules of private international law as there is scope for conflict between the municipal laws of different states. The consul has, therefore, to ensure that the parties can contract the marriage according to the laws of the country where they are domi-

[1] *Great Britain (R.J. Lynch Claim)* v. *Mexico*, U.N.R.I.A.A., Vol. V, pp. 15–27.
[2] U.K. Consular Instructions.
[3] Dicey, Conflict of Laws, 7th ed., p. 232.

ciled, and to see that the marriage ceremony is performed in a manner consistent with the law of the place where the marriage is solemnised.

Service of summons, decrees etc. Consular officers have also to effect service of judicial documents such as summons, decrees etc. sent to them by the appropriate authorities of the sending state for service on persons resident in the receiving state. This may be done directly or through local officials in accordance with the provisions of treaties or conventions that may be in force between the two countries. In the absence of a convention service may be effected in a manner compatible with the laws of the receiving state. In most cases the service of documents is effected through the local courts or administrative authorities since the consulates are not properly equipped to undertake the task of effecting personal service of documents. In some cases, where treaties or agreements so provide, the courts of a country may directly request the courts of another to effect service of judicial documents and in such cases the consular officers have merely to receive such documents from the home state and to transmit them to the appropriate authorities of the receiving state. In other cases the consular officer sends a letter of request to the local government to effect service and it is for the government to decide the manner of service in accordance with local laws, regulations and executive orders.

Shipping. From time immemorial consuls have exercised manifold functions in respect of shipping by virtue of customary international law.[1] In fact, it was the protection of shipping and commerce that had originally led to establishment of the institution of consuls. The scope of consular functions in connection with shipping has, however, been modified in the course of centuries and the consular conventions usually contain detailed provisions with regard to this matter. It is generally recognised that consuls must exercise certain rights of inspection and supervision in respect of vessels having the nationality of the sending state. The extent of such rights is provided for in the laws and regulations of each state which are based on the sending state's right of supervision and protection over vessels having its nationality. The exercise of these rights is one of the pre-requisites for the discharge of consular functions in connection with navigation. The consul's functions in this

[1] Oppenheim and Hackworth both recognise this function of the consul as a part of customary international law. See Openheim, International Law, 8th ed., p. 838; Hackworth, Digest, Vol. IV, pp. 877–947.

regard also extend to rendering assistance to vessels and to their crew. Assisting seamen in distress is indeed one of the traditional functions of a consul. In the exercise of his duties in connection with navigation a consul may go personally on board a vessel, examine the ship's papers, take statements concerning the voyage, and in general facilitate the ship's or the boat's entry into port and its departure. It has been customary for consular officers of maritime powers to exercise supervision over vessels flying their flags, and it has been the invariable practice for local authorities to keep the consul informed in all matters connected with clearance of vessels. A consul is frequently called upon to assist in the enforcement of the customs, quarantine, immigration and seamen's regulations of the local port authorities and of the sending state. The consul or a member of the consulate may appear before the local authorities on behalf of the master or members of the crew and afford them such assistance as they may need including legal assistance. Today, a consular officer also exercises identical functions with regard to the aircraft registered in the sending state and their crew. Under the *United States Consular Regulations* an American consul is required to familiarise himself with all details concerning entry and clearance of civil vessels and aircraft. To the masters of vessels he is to render such information, assistance and service as will enable them to comply with their obligations under the laws of the United States and the local laws.[1] The *Netherlands Manual* regards consular service relative to shipping as "one of the consul's most important functions." [2] The relevant shipping regulations of several countries require masters of vessels to report to the consular officers at ports of call or to deposit with the consul the ship's papers such as the official certificate of registry of the vessel wherever there is a consular officer at the port.[3]

The right of a consul to take proper measures to protect a wrecked or stranded vessel or aircraft flying the flag of the sending state is often provided for in national regulations and treaties.[4] States are required to inform the consular officers of flag states of the occurrence of shipwrecks and accidents to aircraft so that the consul may provide proper assistance to the passengers and crew members, undertake appropriate measures for the protection of the cargo and the repair of the ship or aircraft. The consular instructions issued by various states

[1] Lee, op. cit., p. 81.

[2] Ibid.

[3] See the shipping regulations of United States, Finland, Brazil, Mexico and the Netherlands as summarised in Lee, op. cit., pp. 83–85.

[4] See Lee, op. cit., p. 87; Article 24(4) of the U.S.–U.K. Consular Convention, 1951.

contain detailed instructions in this regard. The International Law Commission's Draft provides that if a vessel used for maritime or inland navigation, which has the nationality of the sending state, is wrecked or runs aground in the territorial sea or internal waters of the receiving state or if an aircraft registered in the sending state suffers an accident on the territory of the receiving state, the consulate of the sending state which is nearest to the place of occurrence must be informed without delay.[1]

Relief and repatriation of seamen. A consular function which has gained widespread acceptance is the relief and repatriation of seamen. For example, the United States consuls are instructed to provide for seamen of U.S. nationality, who may be found destitute within their respective districts, sufficient subsistence and passage to some port in the United States. Most of the consular regulations provide for consular officers to give aid to and repatriate distressed seamen. This function can be performed even in the absence of a treaty though consular treaties also specifically contain provisions regarding relief to distressed seamen.

Promotion of friendly relations. Like diplomatic agents the consular officers are also expected to promote friendly relations between the peoples of the sending and the receiving states. They are also expected to take part in cultural activities and to interpret their country's point of view for the benefit of the people of the receiving state. As already stated, the cultural functions of diplomatic agents and consular officers are of recent practice which took roots only after World War II. The importance of this function cannot be overemphasised in the changed structure of world society and having regard to the context of the United Nations Charter. The International Law Commission regarded promotion of friendly relations as one of the important functions of consuls and the same has also been incorporated in the Vienna Convention on Consular Relations.

Extraterritorial functions. A consular function which existed during the nineteenth century in certain parts of the world was concerned with extraterritorial rights which some of the western countries enjoyed in several Asian African countries by virtue of treaties entered into with the rulers of those states. The consular officers in such cases exercised

[1] See Article 37 (c) of the Vienna Convention on Consular Relations, 1963.

full civil and criminal jurisdiction over their co-nationals, and in accordance with the laws of their home states. For example, Great Britain, France and the United States acquired such rights in Siam by virtue of treaties concluded in 1855 and 1856. In Japan, extraterritorial rights were enjoyed by Holland, Russia, Great Britain, France and the United States under respective treaties concluded in 1858. The classic example of extraterritoriality was in the case of China where the United States, Great Britain and France maintained regular consular courts. Several other European states also enjoyed similar rights by reason of treaties entered into with these powers. Great Britain, France, Spain and the United States also enjoyed extraterritorial rights from time to time in Turkey, Egypt and Morocco. In course of time it was realised that exercise of extraterritorial functions by consular officers was incompatible with national sovereignty. The extraterritorial regime in Japan was terminated in 1899, but the exercise of such rights persisted in other countries and it was not until after the Second World War that the system really began to disappear. United States and Britain renounced such rights in China in 1943 but it was only in 1947 that China restored her full jurisdiction over foreign nationals. The disappearance of the system in north Africa also took place at about the same time. The reasons advanced for exercise of extraterritorial rights were the inadequacy of local laws and the anxiety of western nations to secure for their citizens justice according to their own standards even when sojourning abroad.

CHAPTER X

CONSULAR PRIVILEGES AND IMMUNITIES

The fundamental distinction that exists between diplomatic representatives and consular officers is reflected most in the matter of their privileges and immunities. Whilst international law guarantees the observance of diplomatic immunities by all nations, consular privileges and immunities are based on provisions of treaties and practice of states. There has been a general reluctance on the part of states to accord diplomatic privileges to consular officers, and the extent of consular immunities and privileges has varied considerably depending on the terms of respective treaties and municipal legislation. In fact, of all the immunities and privileges a consul may claim, only two have been universally recognised, that is, the inviolability of consular archives and non-liability for acts performed in official capacity.[1] It has, however, been maintained by several authorities that consuls, as being agents of the appointing state and as recipients of *exequaturs* from the receiving state, must be given those immunities and privileges as are essential to the discharge of a consul's functions, as otherwise the admission of these representatives would serve no useful purpose.[2] Some of the recent writers have questioned the wisdom and logic of retaining the age old distinction between diplomatic agents and consuls in the matter of immunities and privileges, and it is asserted that consular officers at important posts have to assume greater responsibilities than the chief of a mission in smaller countries.[3] The further argument for removing the distinction is the amalgamation of diplomatic and consular services in most of the countries of the world. The International Law Commission in its Draft Articles on the subject had proceeded on the basis that in some respects consular officers should be given

[1] Beckett, "Consular Immunities", XXI B.Y.I.L. (1944), pp. 34 and 37.

[2] Oppenheim, International Law, 8th ed., Vol. I, p. 841; Hyde, International Law, Vol. II, p. 1322; Hackworth, Digest of International Law, Vol. IV, p. 699.

[3] Lee, Consular Law and Practice, p. 223.

almost the same immunities and privileges as diplomatic agents. For example, the Commission had provided for the consular premises the same immunities as are admissible to diplomatic premises under international law. Again, in the matter of fiscal privileges as also with regard to the right of movement and communication a consular officer had been placed on the same footing as a diplomatic agent. The Vienna Conference on Consular Relations 1963 has not fully accepted the recommendations of the Commission. Nevertheless, the provisions of the Vienna Convention with regard to the fiscal privileges of consular officers and employees go much beyond the present position. It is open to question whether conferment of such extensive privileges on consular officers and employees would be in the interest of the international community. Whilst there has been a general feeling against indiscriminate conferment of diplomatic immunities and privileges on the members of diplomatic missions, it has not been possible, owing to the reluctance on the part of some of the major states, to curtail the extent of diplomatic immunity with the result that the number of absolutely privileged persons in the various capitals has been gradually on the increase. If the consular personnel were also to enjoy extensive immunities and privileges, it would result in swelling the ranks of such privileged persons. Immunities and privileges, it is to be remembered, are given purely on the basis of functional necessity of the post that an officer may hold. It is therefore but proper that a consular officer should only be given such immunities and privileges as may be necessary for due discharge of his duties.

Consular premises and archives

The principle of inviolability of consular premises is recognised in numerous consular conventions, although some of these conventions provide for certain specific exceptions to the rule of inviolability. For example, they allow the police or other executive authorities to enter the consular premises in pursuance of an order of court under certain conditions even without the consent of the head of the consular post. Similarly, entry is permitted in cases where the consent is said to be presumed, namely, in the case of fire or other disasters or where a crime is committed in the consular premises.[1] Some conventions on the other hand provide for absolute immunity of consular premises and

[1] See, for example, U.K.–Norway Consular Convention 1951, U.K.–France Consular Convention 1951, U.K.–Sweden Consular Convention 1952, U.K.–Mexico Consular Convention 1954, U.K.–Germany Consular Convention 1956, U.S.-Ireland Consular Convention 1950.

admit of no exception whatsoever.[1] In some countries, however, no immunity is given to foreign consular offices. The Harvard Research Draft provides, "A receiving state shall prevent the invasion of a consular office by its agents of any character provided such office is used solely for consular purposes." This may be said to mean that if the receiving state has reason to be satisfied that the premises are not being used solely for consular purposes, the inviolability will not operate. A number of consular conventions to which the United States is a party contain provisions identical with the Harvard Research Draft. The International Law Commission by a majority decided to recommend that the consular premises should have the same status as the premises of a diplomatic mission. The Draft Article provides that the consular premises shall be inviolable. The agents of the receiving state may not enter them save with the consent of the head of post. It is further provided in the Commission's draft that the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage, and to prevent any disturbance of the peace of the consulate or impairment of its dignity. The consular premises, their furnishings, the property of the consulate and its means of transport are also, according to the International Law Commission, immune from any search, requisition, attachment or execution.[2] The Commission in treating the consular premises on the same footing as the premises of a diplomatic mission with regard to inviolability had gone much further than what the present international practice recognises. On the one hand it is necessary to ensure that consular premises are protected from wanton entry by the authorities of the receiving state, but on the other hand it is demonstrated by instances like the *Kasenkina case* in New York that it is equally necessary to prevent violation of local laws within foreign consulates. It is therefore necessary to reserve the right of entry into consular premises in certain exceptional cases whilst conceding the general inviolability of such premises. That is the position which has been adopted in the recent treaty pattern of the United States, Great Britain and France. The Vienna Conference on Consular Relations did not fully accept the recommendations of the Commission in this regard. The relevant provisions of the Convention adopted at that Conference are in the following terms:

[1] See U.S.–Costa Rican Consular Convention 1948 (Art. 18). Argentina and Honduras regard consular premises as inviolable. The same position is adhered to in all recent treaties concluded by communist states.

[2] Article 30 of the International Law Commission's Draft.

"2. The authorities of the receiving state shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending state. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this article, the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post, its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending state."[1]

Consular archives. One of the essential rules relating to consular privileges and immunities as recognised by customary international law is the inviolability of consular archives and documents of the consulate. Inviolability of archives which includes papers, documents, correspondence, books, and registers of the consulate together with cyphers and codes is one of the few consular immunities which is universally recognised. Inviolability means that such papers are not only immune from search and seizure whilst they are in the premises of the consulate but the immunity extends even when such papers are being carried in the person of a consular officer or employee. Many recent treaties, national regulations and writings of jurists support the immunity of consular archives and none denies it.[2] Even in Italy where the immunity of consular premises is not recognised, the inviolability of consular archives is accepted as a part of customary international law. Recent judicial decisions have also confirmed this principle.[3] It is inconceivable that consular archives would be violated by any official agency. If they are violated by a mob, the receiving state is bound to make suitable amends by punishing the wrongdoers and by tendering apologies to the sending state. In the case of consulates headed by honorary consular officers, inviolability would apply if the archives are kept separate from the private correspondence of the honorary consul and persons working with him, and from the materials, books or documents relating to their profession or trade.[4]

[1] Article 31 of the Vienna Convention 1963.
[2] See Article 32 of the Vienna Convention.
[3] *Telkes* v. *Hungarian National Museum*, 38 N.Y.S. 2d. 429; A.D. 1941–42, Case No. 169.
[4] Article 61 of the Vienna Convention 1963.

Personal immunities of consular officials

It is now almost universally accepted that the receiving state must accord special protection to consular officials and treat them with due respect befitting their official position.[1] This obligation, which extends also in respect of honorary consular officers,[2] is regarded as forming part of customary international law, and its basis lies in the fact that the consul is an official representative of his government in the receiving state and is charged with official functions on behalf of his home state within the consular district. This duty of protection is regarded as indispensable for the proper discharge of his official duties and failure to afford that degree of extra care may render the receiving state answerable in international law. In the case of career consular officers, the state is obliged to take appropriate steps to prevent any attack on their persons, freedom or dignity, whereas in the case of honorary consuls the receiving state is under a duty to accord such protection as may be required by reason of their official position.[3] Several international incidents which have taken place from time to time show that in cases where a consul has been subjected to insults or bodily harm and injury the presumption has always been that the receiving state has failed in its duty to take care.[4] Should any incident happen involving a consul, it is the duty of the receiving state to bring the wrongdoer to justice and to tender apologies to the sending state. In executing the laws of the country, especially those concerning police and penal laws, a government has to keep in mind that foreign governments are sensitive regarding the treatment accorded to their representatives, and the receiving state has therefore to exercise greater vigilance in respect of their safety and security.[5]

Consular officials, unlike diplomatic agents, are not immune from the jurisdiction of local courts, civil or criminal. Whatever privileges and immunities they do enjoy with regard to exemption from local jurisdiction rest upon provisions of treaties, reciprocity, courtesy, national

[1] See Article 40 of the International Law Commission's Draft Articles; See also the provisions of recent treaties entered into by Great Britain and the Soviet Union, such as U.K.–Norway Consular Convention 1951, (Art. 5), U.K.–Greece 1952,(Art. 5), U.K.–Mexico 1954, (Art. 5), U.K.–Italy 1954, (Art. 5), U.S.S.R.–Federal Republic of Germany 1958, (Art. 7), and U.S.S.R.–China 1959, (Art. 5). According to French official view, no state is obliged to admit foreign consuls into its territory. However, once admitted the consuls must be accorded personal protection against any outrage or violence, and their dignity and proper discharge of functions be ensured.

[2] See Article 61 of the International Law Commission's Draft Articles.

[3] See Articles 40 and 64 of the Vienna Convention.

[4] Lee, op. cit., pp. 287–88.

[5] See *Mexico* v. *U.S.*, Opinions of Commissioners – Hackworth, op. cit., Vol. IV, p. 708; U.N.R.I.A.A., Vol. IV, p. 173.

laws and regulations, and the policy of the receiving state.[1] Nevertheless, it seems to be recognised in the practice of states as well as in the writings of jurists that if an act is performed by a consul in the course of his official functions, he should be exempt from local jurisdiction in respect thereof,[2] the reason being that a consul in discharging his official duties is acting on behalf of his home state which cannot be sued without its consent. The International Law Commission appears to be in accord with this view as it provides that "Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions." [3] The Vienna Convention on Consular Relations also provides that consular officers and employees shall not be amenable to jurisdiction in respect of their official acts.[4] It follows that for every act outside his official functions a consul is amenable to local jurisdiction like any private person. This would be especially so when a consul is engaged in private gainful activity as is usually the case with an honorary consul. The decisions of various national courts also maintain the distinction between acts performed in the course of official duties and those outside it. For example, jurisdictional immunity was upheld in actions arising out of a lease of consular premises,[5] as also with regard to contracts of employment,[6] and in suits for damages for acts done by a consul in his official capacity.[7] If, however, the consul enters into a contract without disclosing that he is doing so on behalf of his government and the other party looks to him personally for performance, he may be sued for breach of such contract.[8] The Vienna Convention expressly provides that immunity from jurisdiction shall not be available in civil actions arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending state.[9]

There can be no doubt that a consul is liable for his acts which are wholly unconnected with his official duties and he can be dealt with

[1] Oppenheim, op. cit., 8th ed., p. 753; Hyde, op. cit., p. 1323; See also *Savic* v. *City of New York*, A.D. 1919–42, Suppl., p. 205; See also Article 13 of the U.K.–Norway Consular Convention 1951.

[2] See Article 21 of the Harvard Research Draft; Oppenheim, op. cit., Vol. I, p. 841.

[3] Article 43 of the International Law Commission's Draft Articles.

[4] See Article 43(1) of the Convention.

[5] See *Faucompre* v. *Polish Consul-General*, A.D. 1931–32, Case No. 183.

[6] *Landley* v. *Republic of Panama*, A.D. 1938–40, Case No. 175.

[7] *X* v. *Consul-General of the United States*, A.D. 1935–37, Case No. 187.

[8] See Article 13(2) of the U.K.–Norway Consular Convention 1951.

[9] See Article 43(2) of the Convention.

under the laws of the receiving state in respect of such acts. In a recent case the U.S. Criminal Court of Appeal held the Chinese Consul-General in New York subject to. jurisdiction on a charge relating to misappropriation of certain funds.[1] The Egyptian courts strictly apply the rule that under customary international law consular immunity from local jurisdiction hinges upon whether the consul has acted in his official capacity.[2] Reported decisions also show that local courts have assumed jurisdiction in cases of forgery [3] and defamation,[4] which had no connection with the exercise of consular functions. The question may sometimes arise as to whether a particular act can be considered as falling within the official functions of the consul. According to the Harvard Research Draft, such questions are to be decided by the receiving state subject to diplomatic recourse by the sending state. Even in cases where the consul is subject to local jurisdiction, some of the treaties and national regulations provide that no action should be taken against the consul until the home state of the consul has been informed and opportunities have been afforded to it to make diplomatic representation.[5] Some consular treaties make a distinction between civil and criminal acts in the matter of local jurisdiction. For example, if an act of a civil character is done by a consul within the scope of his official duties, he is not liable. However, if an act of a criminal nature is committed by him, his amenability to local jurisdiction depends upon the seriousness of the crime.[6] This approach has, however, not been followed in the consular conventions entered into since 1950, and in later treaties provision is made for complete immunity from local jurisdiction in respect of official acts of consuls.

Espionage activities. Doubts may sometimes arise as to whether a consul is amenable to local jurisdiction if he indulges in espionage activities. When a consul does such acts, he undoubtedly acts in the interest of his government. It would, however, seem that acts of espionage would in no case fall within the functions of a consul since consular functions are well understood in international law, and any activity of a consul which is outside his consular functions will not

[1] *Carl Byoir and Associates Inc.* v. *Tsune-Chi Yu*, A.D. 1941–43, Case No. 121.

[2] *Ahmed Bey El Saadani* v. *El Syed Mohamed Dessouki*, A.D. 1935–37, Case No. 189.

[3] See the case of *Chilean Consul in Argentina* who was charged with defrauding by forgery. A.D. 1943–45, Case No. 85.

[4] *Murphy* v. *Lee Fortin*, A.D. 1949, pp. 303–305.

[5] See Argentine Consular Regulations (Art. 8); Polish-Soviet Consular Convention 1958 (Art. 11).

[6] See Article 2 of the U.S.-Costa Rican Consular Convention.

come within the jurisdictional immunity enjoyed by a consul by virtue of international law or provisions of treaties. A consular official can be prosecuted in the receiving state if he indulges in subversive activities or engages in espionage in contravention of the laws of the receiving state.

Traffic cases. An exception which is generally made to the rule of immunity from jurisdiction in respect of official acts is in the case of actions arising out of traffic accidents. Many recent treaties and municipal legislations require consular motor vehicles to be adequately insured against third party risks, and they provide that any action by a third party with respect to property damage or injury shall be deemed to be one from which a consul cannot disclaim his liability.[1] The Vienna Convention 1963 also provides that immunity from jurisdiction is not admissible in respect of a civil action by a third party for damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft.[2] Even in the absence of such provisions in treaties, municipal courts have entertained actions arising out of traffic cases taking the view that traffic accidents cannot be said to arise out of official functions of consuls.[3]

Personal inviolability of consular officials. Closely connected with the question of the jurisdiction of courts is the question of personal inviolability of consuls. Since the local courts of the receiving state have complete jurisdiction over consular officers in respect of criminal acts committed outside the scope of consular functions, the question that arises for consideration is whether consular officers can be arrested or detained and if so, under what circumstances. The matter cannot be regarded as settled since the municipal courts generally refuse to recognise the principle of personal inviolability of consuls as part of international law. At the same time states have often provided for such personal inviolability by means of treaties and conventions. The trend of the recent consular conventions is that states, while asserting the subjection of consular officials to the jurisdiction of the receiving state, recognise that consular officials shall be exempt from arrest and de-

[1] For example, see U.S.A.–Ireland Consular Convention 1950, Art. 11(5); see also the consular conventions entered into by the United Kingdom with Norway (1951), United States (1951), France (1951), Sweden (1952), Greece (1953), Mexico (1954), Italy (1954) and Germany (1956).

[2] See Article 43(2) of the Convention.

[3] See *Laterrade* v. *Sangro y Torres*, A.D. 1951, Case No. 116. (Decision of fhe Court of Appeal in Paris).

tention and all other restrictions on their personal freedom except in cases where they have committed a serious offence. The conventions contain conditions, which are not uniform, for determining as to whether the crime committed by a consul is to be regarded as one of a serious character for this purpose. Some conventions adopt the nature of the crime as the test, whilst others regard the sentence prescribed for the offence in the municipal laws of the contracting states as the determining factor. On the one hand it is clear that in so far as acts committed outside the scope of his consular functions are concerned, a consul is in no better position than private individuals, but on the other hand it is realised that the arrest of a consular official would hamper considerably the functioning of the consulate, particularly as many of the matters calling for consular action will not admit of delay.

Arrest or detention. The Vienna Convention on Consular Relations now provides that consular officials may not be liable to arrest or detention pending trial except in the case of a grave crime and pursuant to a decision by a competent judicial authority, and that consular officials shall not be committed to prison or liable to any other form of restriction on their personal freedom except in execution of a judicial decision of final effect.[1] This means that a consular officer cannot be arrested or kept in custody except in execution of a sentence pronounced by a court of law and only when that sentence has become final after exhaustion of all appellate processes. In cases of crimes of a serious character a consul can be arrested and detained provided a judicial warrant is issued for such arrest or detention. As to what should be regarded as a grave crime, it is difficult to lay down any specific test which will be applicable in all cases. The consular treaties, however, generally contain some indication in this respect. This restriction on the arrest and detention of consular officers do not, however, apply in the case of honorary consuls [2] or consular employees.[3]

The relevant provision of the Vienna Convention further provides that if criminal proceedings are instituted against a consular official, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position, and except in the case of commission of a grave crime, in a manner which will hamper the exercise of consular functions

[1] Article 41, paragraphs 1 and 2 of the Vienna Convention 1963.
[2] Article 58 of the Vienna Convention 1963.
[3] See Commentary (12) to Article 41 of the International Law Commission's Draft.

as little as possible.[1] These considerations apply equally to the case of honorary consuls.[2] Moreover, in the event of the arrest or detention of a member of consular staff including consular officers and employees, or in the case of institution of criminal proceedings against any such person, it is incumbent upon the authorities of the receiving state to notify the head of the consular post forthwith. In the case where such measures are taken against the head of the post himself, the sending state should be informed of such arrest, detention or institution of criminal proceedings through diplomatic channels.[3] The object of such notification is really twofold. In the first place, the arrest, detention, or institution of proceedings against a member of the consular post dislocates its work and the sending state must be satisfied that the action of the receiving state is *bona fide* and justified. Secondly, it gives the sending state an opportunity to represent in the matter. For example, in some cases the arrest or prosecution may be due to some misunderstanding. Again, the receiving state may on occasions agree to withdraw the prosecution on the assurance that the guilty official will be punished by his home state. Some of the consular treaties even go on to provide that no prosecution should be launched without prior consultations with the sending state.[4]

Giving of testimony. Unlike the members of a diplomatic mission, consular officials and other members of a consulate are not exempted from liability to attend as witnesses in courts of law or in the course of administrative proceedings. Nevertheless, the practice of the states as evidenced by consular conventions [5] and municipal regulations [6] shows that the court or other authority requiring the evidence must avoid interference with the performance of official duties by the consular officers. It is also fairly well established that evidence should be recorded, wherever possible, at the consulate or at the consul's official residence. In some countries the law even permits acceptance of a written declaration by the consul as admissible evidence. There is also general agreement among the text writers that consular privileges

[1] Article 41, paragraph 3, of the Vienna Convention 1963.
[2] See Article 63 of the Vienna Convention.
[3] Article 42 of the Vienna Convention.
[4] See Polish–Soviet Consular Convention of 1958.
[5] See the provisions of treaties entered into by the United Kingdom with U.S.A. (1951), Norway (1951), France (1951), Sweden (1952), Greece (1953), Mexico (1954), Italy (1954), and Germany (1956). See also the provisions of U.S.A.–Ireland Consular Convention (1950); Hungary–German Democratic Republic Consular Convention, Poland–Soviet Union Consular Convention (1958); Austria–Soviet Union Consular Convention (1959); and China–Soviet Union Consular Convention (1959).
[6] See, for example, the Argentine Consular Regulations.

include giving of oral or written testimony on consular premises instead of in court, except perhaps in criminal cases.[1] The Harvard Research Draft succinctly puts the present practice as

"A receiving state shall exempt a consul from attendance as a witness at the trial of a civil case; it may require a consul to give testimony orally or in writing at his residence or office or to attend as a witness at the trial of a criminal case, but such requirements shall be enforced with due regard for the dignity of the consul and his convenience in the exercise of his functions."

The Vienna Convention 1963 provides that if a consular official should decline to give evidence, no coercive measures or penalty may be applied to him,[2] that is to say, no warrant can be issued for his arrest and compulsion to give evidence, nor can he be convicted for contempt of court for his failure to obey the directions of the court to give evidence. These conditions with regard to giving of testimony, namely recording of evidence at the consulate and exemption from coercive measures for refusal to give evidence do not apply in the case of honorary consuls or to consular employees.

Evidence concerning official matters. It is, however, clear that though members of a consulate may be called upon to attend as witnesses, they are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. The right to decline to produce official correspondence and papers in court or before administrative tribunals logically follows from the principle of inviolability of consular archives and documents. This applies both to career consular officers and to honorary consuls as well as to consular employees. The principle that consuls are not required to disclose information or evidence relating to their functions or to produce consular documents is stipulated in practically all the treaties entered into in recent years. Thus any conversation that a consular officer or employee may have with any individual in the course of his official acts, such as an interview before granting a visa, is privileged. Even in the absence of treaties, municipal courts are inclined to exempt consuls from giving testimony on matters relating to their official functions and from producing official documents.[3] The Vienna Convention on Consular Relations has also recognised this position.[4]

[1] Oppenheim, op. cit., p. 843; Hyde, op. cit., p. 1344.
[2] Article 44, paragraph 1, of the Convention.
[3] See *American League for a Free Palestine* v. *Tyre Shipping Co.*, 119 N.Y.S. 2d. 860.
[4] Article 44, paragraph 3, of the Convention.

Freedom of movement. According to the provisions of the Vienna Convention 1963 the members of a consulate would be entitled to the same degree of freedom of movement as members of a diplomatic mission.[1] This position would certainly be correct in so far as the district covered by the consular post is concerned because a consular officer or employee must be afforded a sufficient degree of freedom in the interest of his official duties. A consul is expected to keep in touch with his co-nationals, to look after their interests as well as the interests of the sending state. This entails free movement throughout his consular district and as a matter of functional necessity he must be afforded all facilities of travel in his consular district in the same manner as a member of the diplomatic mission. It is, however, open to doubt whether this right of a consular officer and employee should extend to the entire territories of the receiving state. The right, however, as provided for in the Vienna Convention is subject to the laws and regulations concerning zones entry into which is prohibited or regulated for reasons of security.

Freedom of communication

Consular officers have in the course of their official duties frequently to communicate with the government of the sending state and its diplomatic mission in the receiving state for the purpose of making reports and receiving instructions. It is, therefore, of utmost importance that they should be able to freely communicate with such authorities in all secrecy. According to text writers, a state may well assert the right to claim for its consular officer the privilege of free communication with his own government and with its diplomatic or consular representatives within the domain of the state where he exercises his functions. Practically all consular treaties and conventions specifically contain provisions for the consular right to communicate in plain or secret language directly with the officials of the sending state irrespective of their locations or the means of communication. The Vienna Convention 1963 puts the right of freedom of consular communication practically on the same footing as the freedom of communication of diplomatic agents.[2] This is possibly so because consular archives are as inviolable as the archives and documents of diplo-

[1] Article 34 of the Convention provides, "Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure freedom of movement and travel in its territory to all members of the consular post."

[2] See Article 35 of the Vienna Convention on Consular Relations.

matic missions, and consular officers in their communication with the home governments act as much in the interest of the sending state as a diplomatic agent. The Convention provides that the receiving state shall permit and protect free communication on the part of the consular post for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending state, wherever situated, the consular post may employ all appropriate means, including diplomatic or consular couriers and the diplomatic or consular bag. The normal practice is for consulates to make use of diplomatic courier service and the consular bag at times forms part of the diplomatic bag. Sometimes by reason of its geographical position a consular post may have to send a courier to the seat of the diplomatic mission or even to the sending state, particularly if the latter has no diplomatic mission in the receiving state. It is obvious that the consular bag, like the diplomatic bag, shall not be opened or detained by the receiving state, and all official correspondence of the consulate, that is, all correspondence relating to the consular post and its functions, shall be inviolable. However, if the competent authorities of the receiving state have serious reason to believe that the bag contains something other than the correspondence, documents or articles intended exclusively for official use, they may request that the bag be opened.[1] Freedom of communication also covers messages in cypher or code, but this would not include the right of a consulate to install and use a wireless transmitter without the consent of the receiving state. In times of war or national emergency, however, it is permissible for states for reasons of security to restrict the freedom of diplomatic or consular nommunication, such as by prohibiting use of code messages.

Communication with co-nationals in the receiving state. Another aspect of freedom of communication of consuls is with regard to their right to communicate freely with their co-nationals. This is regarded as so essential to the exercise of consular functions that its absence would greatly minimise the utility of establishing consular relations. Some treaties do, no doubt, contain specific provisions to this effect,[2] but this right is generally recognised even in the absence of treaties. The Vienna Convention 1963 has provided that nationals of the sending state shall be free to communicate with and to have access to their

[1] See Article 35(3) of the Vienna Convention 1963.
[2] See French–Italian Consular Convention of 1955 (Art. 23).

consular officers, and that the consular officials of the sending state shall be free to communicate with and to have access to their nationals.[1] The freedom of communication in respect of all official matters is enjoyed equally by career consular officers and honorary consuls.

Fiscal privileges and immunities

It is now universally recognised that premises used for consular purposes are exempt from both national and local taxation in the receiving state on the same principle on which premises of diplomatic missions are exempt, that is to say, on the ground that these premises are used for the public purposes of a foreign sovereign state. The Vienna Convention on Consular Relations has put the position of consular premises on precisely the same footing as the premises of diplomatic missions with regard to exemption from taxation. The Convention provides that the premises of a consular post as well as the residence of the head of the consular post shall be exempt from all national, regional or municipal dues and taxes if such premises are owned or leased by the sending state or by any person acting on its behalf. The exemption does not, however, extend to payment of charges for specific services rendered, such as water and electricity rates.[2] The exemption also does not extend to such of the taxes as are payable by the owner of the premises under the laws of the receiving state in the case of leased premises.[3] In the case of posts headed by honorary consular officers, the premises used for the offices of the consulate would be exempt from such taxation only if the premises are owned or leased by the sending state.[4] The Harvard Research Draft [5] as also the recent consular treaties [6] contain provisions regarding exemption from taxation in respect of consular premises. Even in the absence of treaty provisions, consular offices and properties have been held exempt from taxation, as in the case of *Yin-Tso Hsuing v. Toronto Corporation* the High Court of Ontario (Canada) held that the property of a foreign government occupied by its consul-general and his staff and used for the public purposes of the foreign state is covered by the principles of immunity from local taxation recognised by international law.[7]

[1] Article 36(1) (a) of the Vienna Convention 1963.
[2] Article 32(1) of the Vienna Convention.
[3] Article 32(2) of the Vienna Convention.
[4] Article 60 of the Vienna Convention.
[5] See Article 19 of the Harvard Research Draft.
[6] See, for example, U.S.A.–Ireland Consular Convention 1950; U.K.–Norway Consular Convention 1951.
[7] A.D. 1950, Case No. 40.

Tax exemption on fees collected by a consulate. The heads of consular posts are also exempt from payment of all dues and taxes on moneys collected or fees received by a consulate for performance of consular functions on the basis that such moneys belong to the sending state and are, as such, public revenues of a sovereign state. It is the universal practice for consular offices to charge fees for various services performed by them, especially in connection with their notarial functions as well as for administration of estates. The national consular regulations lay down the scale of fees that consular officers may charge for each of the specific services, such as authentication of documents, service of summons, issue of passports, or granting of visas. When they are called upon to administer the estate of a deceased person, it is customary for consulates to charge a percentage of the valuation of the estate as administration charges. It is obvious that all moneys collected by a consulate as fees or charges belong to the government of the sending state. Consequently, under the general principles of international law such fees are exempt from all dues and taxes levied either by the receiving state or by any of its territorial or local authorities. The Vienna Convention has clearly recognised this position.[1]

Exemption from payment of personal taxes. Exemption from taxation is usually accorded to career consular officers under consular conventions and other bilateral arrangements between the sending and the receiving states. In the absence of treaties the matter is governed by the relevant laws and regulations of the receiving state. Exemption is generally granted in such cases on the basis of reciprocity. The International Law Commission considered that members of a consulate should ordinarily enjoy the same tax exemption as members of a diplomatic mission.[2] The Commission, however, recognised the principle of reciprocity with regard to this matter. The exemption is usually granted from payment of direct taxes on their income derived from salaries and other emoluments received from their governments and all other income received or accrued outside the receiving state.

Consular officers are also exempt from payment of all direct taxes whether levied by the government of the receiving state or a local authority, such as corporation tax on the use of the property occupied

[1] See Article 39 of the Vienna Convention.
[2] See Article 48 of the International Law Commission's Draft Articles.

by a consul as his residence, taxes or licence fees on motor vehicles, wireless sets etc. The reason for this exemption is that such taxes which are payable by the nationals or resident aliens should not be levied on persons who happen to be in the receiving state purely for the purposes of their government. According to the International Law Commission, the exemption is to be extended not only to consular officers but also to other members of the consulate except those who are employed in the performance of menial works such as chauffers, messengers, cleaners etc., the latter being entitled to exemption from dues and taxes only on the wages which they receive for their services. Exemption from taxation in the case of consular employees is a new development because in the Harvard Research Draft, which was based on state practice, exemption is accorded only to consular officers, and many of the consular treaties follow the pattern of the Harvard Draft. The Vienna Convention 1963, however, provides for exemption from all direct taxes in respect of consular officers, consular employees and members of their families. With regard to the members of the service staff, the Vienna Convention follows the recommendations of the International Law Commission.[1]

Indirect taxes. It appears to be clear that the tax exemption does not include indirect taxes which are normally incorporated in the price of goods or services, such as excise duties and possibly purchase or sales tax. Such taxes are regarded as part of the price of the goods and it is difficult to give exemption from their payment particularly having regard to administrative inconvenience. Similarly, charges levied for specific services rendered such as electricity or water rates have to be paid by consular officers and employees. If a consul holds real property in the receiving state or has a private income with its source in the receiving state, all taxes on such immovable property including estate, succession or inheritance tax and all dues and taxes on the private income including capital gains taxes must be paid in the same manner as an ordinary resident in the country. The principle is obvious. A consul holds real property or derives a private income from sources in the receiving state purely in his personal capacity, and these have no relation to his official duties as a consul.

Honorary consuls. The national regulations and provisions of treaty do not generally exempt an honorary consul from payment of taxes.

[1] Article 49 of the Vienna Convention 1963.

The International Law Commission had, however, recommended that honorary consuls, who are not nationals of the receiving state, should be exempt from payment of duties and taxes on the remuneration and emoluments which they receive from the sending state in respect of the exercise of consular functions.[1] The position is the same under the relevant provision of the Vienna Convention on Consular Relations.[2]

Exemption from payment of customs duties. It is almost the universal practice, as evidenced from national regulations and provisions of treaties, to exempt consular posts from payment of customs duties in respect of all articles imported for the official purpose of the consulate. Such articles include furniture, office equipment, typewriters, stationery and motor cars intended for use as staff cars. The basis of such exemption is that the goods belong to the government of the sending state and being dedicated to public use of the state are immune from the jurisdiction of the receiving state. There is, however, some divergence of view as to the extent of customs exemption which consular officers and employees are entitled to enjoy. The recent treaties reveal the existence of two schools of thought. According to one view, consuls are entitled to customs exemption only in respect of such goods as arrive within a reasonable time of the first arrival of the consular officer to take up his post [3] The other view, which is rapidly gaining ground, is that articles for the personal use of a consular official or members of his family forming part of his household should be exempt from payment of customs duties irrespective of the time of their arrival.[4] The International Law Commission in its Draft Articles on the subject has adopted the latter view.[5] It is, however, obvious that in the matter of customs exemption the principle of reciprocity must play a prominent part. The Commission has further provided that employees of consulates except those who are employed to perform menial services should be allowed customs exemption in respect of goods for their personal use which are imported at the time of their

[1] Article 63 of the International Law Commission's Draft.

[2] See Article 66 of the Convention.

[3] See, for example, Greece–Lebanon Consular Convention 1948; U.K.–France Consular Convention 1951; France–Italy Consular Convention 1955; and France–Sweden Consular Convention 1955.

[4] See, for example, consular conventions between United States–Mexico 1942, United States–Philippines 1947, United States–Ireland 1950; United Kingdom–Norway 1951, United Kingdom–Sweden 1952, and United Kingdom–United States 1951.

[5] Article 49 of the International Law Commission's Draft.

first arrival in the receiving state. The provisions in the Vienna Convention 1963 are in accord with the recommendations of the Commission.[1]

Since states determine by domestic regulations the conditions and procedures under which exemption from customs duties is granted, and in particular the period within which such goods should be imported, it is open to the states to determine the period during which the goods imported duty free must not be resold. The largeness in the number of privileged persons necessitates such restrictions both in the interest of the receiving state and in order to minimise cases of abuse of privilege. The International Law Commission considered that such regulations are not incompatible with the obligation to grant exemption from customs duties provided they are general in character.[2] It may be stated that honorary consuls do not enjoy any exemption from payment of customs duty in respect of articles imported for their personal use or the use of the members of their families. Customs exemption is, however, granted in respect of certain goods imported for the official use of the consulate headed by a honorary consul provided they are solely used for such purpose and remain in the property of the government of the sending state. It is to be noted that the exemption does not extend to importation of motor cars even for official use.

Other privileges and immunities

The right of a consul to display the national flag and the state coat of arms on the building in which the consulate is housed and at the entrance door of that building is recognised under the general principles of international law and is confirmed in treaties and conventions. The right in reality is the right of the sending state. The Harvard Research Draft regards this as being necessary to designate the consulate and thus to assure the immunities of the office and its archives. It is generally admitted that the inscription appearing on the coat of arms of the sending state may be in the official language of that state. While a great majority of treaties confer upon a consul the unlimited right to fly his country's flag over his office, a few treaties restrict such right to the extent that it may be exercised only on days of public ceremonies, public solemnities or on other customary occasions.[3] Dis-

[1] Article 50 of the Convention.

[2] Commentaries to Article 49 of the International Law Commission's Draft.

[3] Lee, op. cit., p. 287. See also the consular conventions between France–Italy 1955, and France–Sweden 1955.

agreement exists with respect to a consul's right to fly his country's flag at his residence. Whilst some treaties specifically allow this right to a consul, others are either silent on the matter or permit this only on suitable occasions.[1] The heads of consular posts are permitted in most countries to fly the flag of the sending state on their motor cars and other means of transport used by them. The national regulations of several countries, such as France, the Netherlands, and the United States, contain provisions regarding the display of flags and coat of arms in the premises of the consulate, the residence of the head of the consular post and his means of transport. This is regarded as a matter of international courtesy and comity. Honorary consular officers can also exercise these rights both as regards the consular premises and their means of transport if the consular treaty or the regulations of the receiving state provide for it. In so far as display of coat of arms is concerned, it is clear that honorary consuls can do so in the premises of the consulate as "it is necessary and customary to designate the office of a consul by means of a plate in order to facilitate the identification of the consulate by interested persons." [2] The Vienna Convention now provides that the consulate and its head shall have the right to use the national flag and coat of arms of the sending state on the building occupied by the consulate, and at the entrance door thereof, and on the residence of the head of the consular post and on his means of transport when used on official business.[3]

Exemption from registration, residence and work permits. Consular officers and other members of a consulate who are permanent employees of the sending state together with their families forming part of their households are exempt from all obligations regarding registration or residence under the laws of the receiving state relating to aliens or foreigners, provided they do not carry on any private gainful occupation in the receiving state. Unlike other aliens, they are not required to register themselves with the police, nor are they required to obtain residence permits for their stay as long as they are employed in the consulate of a foreign state. Several states have enacted laws under which foreign nationals require work permits if they are to take up employment in the receiving state. The persons employed in a consulate are, however, exempt from taking out such work permits

[1] Lee, op. cit., p. 277.
[2] See the *Consular Premises (Austria) case*, I.L.R. 1955, p. 557.
[3] Article 29 of the Vienna Convention.

in respect of their employment in a consulate.[1] Honorary consular officers who do not carry on other gainful private occupation, such as trade, profession, or calling, are entitled to similar exemption. This, however, does not apply to members of their families or to honorary consuls who carry on other activities for gain outside the consulate.[2]

Social security legislation. The members of a consulate including consular officers and all categories of consular employees together with their families are exempt from the operation of the social security legislations of the receiving state provided they are not nationals of the receiving state nor permanently resident therein.[3] In many states provision has been made in recent years for compulsory social security schemes, such as old age pensions, national health scheme, provident fund, disability insurance etc., by means of legislation. All persons resident within the state are required to participate in such schemes and to contribute towards them. It is, however, in the interest of all states that members of consulates should be subject to the national social security laws of their own states rather than that of the receiving state, as otherwise by reason of their frequent transfers from post to post they would not obtain full benefits under the social security system in any state. The same principle holds good equally in the case of private servants who are in the sole employ of the members of a consulate. The exemption applies if such private servants are not nationals of the receiving state and if they are covered by the social security legislations of the sending state or third states.[4] If the consulate or its members employ persons who are nationals of the receiving state or persons permanently resident therein, they cannot claim exemption from payment of contributions which are payable by the employer under the laws of the receiving state.[5] Honorary consular officers are, however, not exempt from payment of contributions under the social security laws both for themselves and in regard to persons they employ.

Exemption from rendering personal service. The members of a consulate together with the members of their families forming part of their households are exempt under international law from rendering all

[1] Articles 46 and 47 of the Vienna Convention.
[2] Article 65 of the Vienna Convention.
[3] See Article 48, paragraph 1, of the Vienna Convention.
[4] See Article 48, paragraph 2, of the Vienna Convention.
[5] See Article 48, paragraph 3, of the Vienna Convention.

personal services to the receiving state, such as military or fire protection service, jury duty, and all other kinds of compulsory service, which a state may call upon its nationals or persons permanently resident to perform. They are also exempt from payment of any kind of forced contributions. The exemption, however, does not extend to persons who are nationals of the receiving state. The Vienna Convention now provides that the receiving state shall exempt honorary consular officials from all personal services and from all public services of any kind and also from military obligations, such as those connected with requisitioning, military contributions, and billeting.[1] It is obvious that such exemption would not apply in the case of honorary consuls who are nationals of the receiving state or in the case of members of families of honorary consuls. It is doubtful whether such exemptions ought to be granted where the honorary consul engages in trade or other occupation or calling in addition to his consular functions and occupies premises for such purposes. There would appear to be no principle of law to preclude the authorities of the receiving state from requisitioning the premises occupied by an honorary consul for the purposes of his private avocation, nor is there anything to prevent his being called upon to make military contributions like other resident aliens, as an honorary consul derives benefit from his private gainful activities in the receiving state like all other persons resident therein.

Reciprocity. Consular privileges and immunities being based more upon the discretion of states rather than on any positive rule of international law, the question of reciprocity is of paramount importance. A state, which is not prepared to accord to consuls in its territories the privileges and immunities which are generally recognised in the practice of states, cannot expect that such privileges and immunities would be accorded to its own consular officers. In fact, the bilateral consular conventions ensure reciprocal treatment for each others consular officers and employees.

Career consular officers carrying on private gainful occupations. It appears from a study of the consular regulations of various countries that some states, though it is only a few, permit their career consular officers to carry on private gainful occupation in addition to their work with the consulate. It would also appear from state practice that this

[1] See Article 67 of the Vienna Convention.

class of consular officers is not accorded the same immunities and privileges as are admissible to career consular officers who are engaged full time in the discharge of consular functions. These officers, although belonging to a career consular service are, in fact, in a position analogous to that of honorary consuls who generally carry on a private gainful occupation in the receiving state, whether it be commercial, professional or other activity. Having regard to this position, the International Law Commission recommended that career consular officers who carry on private gainful occupation should be entitled only to such privileges and immunities as are admissible to honorary consuls.[1] The Vienna Convention on Consular Relations, however, categorically provides that career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving state. The Convention further provides that privileges and immunities shall not be accorded to consular employees who carry on private gainful occupation.[2]

Nationals of the receiving state. It has already been stated that a sending state may appoint a national of the receiving state to one of its consular posts in that state provided the consent of the receiving state has been obtained in the case of a consular officer. It is obvious that a national of the receiving state cannot be entitled to jurisdictional immunity to the same extent as a national of the sending state or that of a third state. The practice of the states shows that consular officers falling within this category are allowed immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their functions and the privilege to decline to give evidence concerning matters connected with the exercise of their functions and from producing official correspondence and documents relating thereto. Apart from these privileges, a national of the receiving state does not become entitled to any other immunities and privileges which are accorded to consular officers. The position is the same with regard to persons who are permanently resident in the receiving state even though they are not nationals of that state. It is, however, open to the government of the receiving state to grant such other privileges and immunities as it may consider necessary even in respect of its own nationals who are employed as consular officers of foreign states. Although the accepted position in law is that no person can claim

[1] See Article 56 of the International Law Commission's Draft.
[2] Article 57 of the Vienna Convention 1963.

immunity from the jurisdiction of the state of his nationality, the immunity granted to consular officers in respect of their official acts is justified on two grounds. Firstly, the official acts in respect of which the immunity is granted are in reality the acts of the sending state, though performed through the officers, and consequently immunity must attach to such acts in the same way as any other act of the sending state. Secondly, it may be said that the receiving state having given its consent to the appointment of one of its nationals as the consular officer of a foreign state, that consent implies that the officer would receive the immunity which is necessary for the performance of his official acts. Members of a consulate other than consular officers and private servants, who are nationals of the receiving state, are entitled only to such privileges and immunities as may be accorded to them by the receiving state at its discretion. The Vienna Convention whilst adopting this position has provided that the receiving state should, however, exercise its jurisdiction over these persons in such a way as not to hinder unduly with the performance of the functions of the consulate.[1]

Diplomatic officers performing consular functions. It has already been stated that consular functions are exercised not only by members of a consulate but also by diplomatic missions. Some of the diplomatic officers may specially be assigned to the consular section of the mission, but in small missions the same officers perform both diplomatic and consular functions. It is customary to inform the receiving state the names of diplomatic officers who are also performing consular functions. Diplomatic officers, whether they are specially assigned to consular sections or not, continue to enjoy full diplomatic privileges and immunities by reason of their position as members of diplomatic missions.

Waiver of immunity. The principle behind the waiver of consular immunity is exactly the same as in the case of diplomatic immunities, that is to say, the immunity being vested in the sending state it is the state which alone has the capacity to waive the immunity. It follows that if the immunity in respect of a consul is waived by the sending state the consul can no longer claim it. The waiver must in all cases be express, which should be communicated to the government of the receiving state either through the diplomatic channel or by the head of the consular post when he himself is not the object of the waiver of

[1] See Article 71 of the Vienna Convention 1963.

immunity. The initiation of proceedings by a member of consulate in a matter where he enjoys immunity from jurisdiction would automatically preclude him from invoking immunity from jurisdiction in respect of any counter claim directly connected with his suit. It may be stated that just like the case of a waiver of diplomatic immunity, a separate and specific waiver would be necessary where the sending state wishes to waive immunity with regard to measures of execution resulting from a judicial decision.[1]

Duration of immunity. The question of duration of immunity of a consul has to be decided on the same principle as in the case of diplomatic agents. The Vienna Convention provides that every member of a consulate shall enjoy his privileges and immunities from the moment he enters the territory of the receiving state on proceeding to take up his post, and if already in its territory from the moment he enters on his duties with the consular post. When the functions of a consular officer or employee come to an end, his privileges and immunities shall normally cease at the moment when he leaves the country or on the expiry of a reasonable period after the termination of his functions, but shall subsist until that time even in the case of an armed conflict. The Convention further prescribes that with respect to acts performed by a member of a consulate in the exercise of his functions, his personal inviolability and immunity from jurisdiction shall continue to subsist without limitation of time. Members of the families of consular officers and consular employees likewise enjoy immunity from the time of their entry into the receiving state or from the moment their names are furnished to the receiving state. Even in the event of the death of a consular officer or employee, members of the family continue to enjoy immunity until their departure from the receiving state or at the expiry of a reasonable time enabling them to do so.[2]

Duties of consuls

Just as the receiving state is expected to allow consular officers and other members of the consulate full freedom in the exercise of their functions without any interference, and to afford them such immunities and privileges as are necessary for the purpose, members of consulates are also expected to observe a certain code of conduct whilst they are in the territories of the receiving state. This implies that consular

[1] Article 45 of the Vienna Convention 1963.
[2] See Article 53 of the Vienna Convention 1963.

officers and employees should conduct themselves in such a way so as not to abuse their privileges and immunities granted to them by the receiving state. Their first and foremost duty is to respect the laws and regulations of the receiving state, particularly those enacted for the purposes of ensuring the health and safety of the local population, such as sanitary or traffic regulations. They are also forbidden to interfere in the internal affairs of the receiving state or to act to the prejudice of that state such as by organisation of subversive activities. If they were to indulge in such acts, the receiving state would be justified in asking for their recall or to withdraw the *exequatur*. Although consular officers are expected not to take part in internal politics, they are entitled to interpret their country's viewpoint in various matters and to take such steps as are permissible under international law for the purpose of protecting or defending the interests of their country and its nationals. It is also important to bear in mind that consular premises must not be used in any manner which would be incompatible with consular functions. The premises should be used solely for consular purpose, and in cases where the same premises are used for housing of the other offices, institutions, and agencies, the part of the premises used for consular purposes should be kept separate. Since consular premises come under the protection of international law, it is important to ensure that they are not used for a purpose which is contrary to the local laws or a purpose which would defeat the provisions of such laws. Thus the premises should not be used for the purpose of gambling, or for giving asylum to fugitives from justice, or to keep persons in forceful confinement. Such use of consular premises amounts to gross abuse of privilege. Consular officers are also expected to ensure that the fiscal privileges given to them are not abused, that is to say, they shall import only such articles as are required for their *bona fide* personal use. Honorary consular officers are required to observe the same code of conduct as career officers.[1] Moreover, it is expected they they should not use their official position in furtherance of their trade or any other gainful activity in which they may be engaged.

[1] See Articles 55 and 58 of the Vienna Convention 1963.

CHAPTER XI

TERMINATION OF CONSULAR FUNCTIONS AND POSITION IN THIRD STATES

In normal circumstances the functions of a consular officer comes to an end on his retirement, on transfer to another post, and upon notification by the sending state to the receiving state that the functions of the officer have come to an end. The functions of a consul are also terminated on the withdrawal of the *exequatur* or upon notification by the receiving state to the sending state that the receiving state refuses to consider him as a member of the consulate.[1] The functions may also be terminated by other events, such as the death of the consular officer, the closure of the consulate or severance of consular relations, the extinction of the sending or the receiving state, incorporation of the consular post within another consular district, or in the event of war.

Relinquishment of the consular post. The most common form of termination, that is, by relinquishment of his office as the consular officer in a particular post, hardly needs any explanation as career consular officers in the course of their service are transferred from one post to another, they proceed on leave, or retire upon attaining superannuation. They may also be removed by the sending state for other reasons and in all these cases the functions of the officer come to an end as soon as the government of the receiving state is informed of such transfer or retirement by the sending state. In the case of heads of consular posts, the receiving state is usually notified through the diplomatic channel with a request at the same time for grant of *exequatur* for his successor. In cases of other consular officers, the notification is sent by the head of the consular post.

Withdrawal of exequatur. It is well recognised that a receiving state has the right at any time to withdraw its consent to a person's exercise

[1] See Article 25 of the Vienna Convention on Consular Relations 1963.

of consular functions within its territory, the right being consistent with the principle of territorial sovereignty. But at the same time it is admitted that in the interest of international comity the consent should not be withdrawn without cause, and that save in urgent cases a receiving state should not withdraw its consent without giving the sending state the opportunity to provide against the interruption of consular activities. In fact, some of the recent consular conventions provide that reasons for the revocation of a consul's *exequatur* must be furnished to the sending state if the latter requests for it,[1] and in some treaties it is provided that the receiving state shall give reasons for withdrawal of *exequatur* wherever possible.[2]

The recent instances of expulsion of foreign consuls and revocation of *exequaturs* show that such action against a consul is usually resorted to for meddling in internal political affairs or indulging in espionage activities. For example, Syria ordered the expulsion of an American vice-consul from Damascus in 1957 on charges of plotting to overthrow the government. Yugoslavia expelled a Czechoslovak deputy consul in Zagreb in 1949 for having urged hostile elements to commit offences against the state. Similarly, a British vice-consul was expelled by Czechoslovakia on charges of subversion.[3] In some cases recall of consular officers and closure of consular offices have, however, been asked for purely as a measure of retaliation. Thus the arrest of French consuls in Poland in 1949 touched off a series of retaliatory measures by France. Again, the United States asked the Czechoslovak government to close its consulates in Chicago, New York, Cleveland, and Pittsburgh as a measure of retaliation against the action of the Czechoslovak government in closing American consulates in its territory. The instances of removal of the Egyptian consul-general at Jerusalem in 1957, the closure of six Dutch consulates by the Indonesian government, the closure of four French consulates by the Tunisian Police in 1958, the expulsion of two Cuban consuls from the United States in 1960 may also be regarded as falling within this category.[4] The Soviet Union in retaliation for the *Kasenkina-Samarin* case ordered the closure of the United States consulate at Vladivostak.

The International Law Commmission in taking note of the current

[1] See the consular conventions entered into by the United Kingdom with Norway (1951), France (1951), Greece (1953), Mexico (1954), Italy (1954) and Germany (1956). See also the United States consular treaties with Costa Rica and Ireland as well as the treaty between France and Italy (1955).

[2] Swiss–Indian Treaty of 1948 (Art. 2).

[3] See Lee, op. cit., p. 39 (footnote).

[4] Ibid., pp. 314–315.

practice of the states has provided that if the conduct of the head of a consular post or of a member of the consular staff gives serious grounds for complaint, the receiving state may notify the sending state that the person concerned is no longer acceptable. In that event, the Commission recommended, the sending state shall either recall the person concerned or terminate his functions with the consulate. If the sending state refuses or fails to carry out this obligation, the receiving state may withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.[1] The provisions in the Vienna Convention 1963 are substantially to the same effect.[2] It may be stated that formerly states sometimes refused to recall their consuls inspite of the request by the receiving state though in majority of cases such request was heeded to.

Termination by death of consul. It is obvious that the death of a consular officer brings about the termination of his consular status. It has already been stated that notwithstanding the death of the consul the members of his family are allowed enjoyment of privileges and immunities until their departure from the territories of the receiving state or until the expiration of a reasonable period after the death of the consular officer. It may also be mentioned that in the event of the death of a member of consulate or a member of his family, the receiving state is under an obligation to permit the export of the movable property of the deceased with the exception of any such property acquired in the country the export of which was prohibited at the time of his death. The receiving state also cannot levy estate, succession, or inheritance duties on movable property the presence of which in the receiving state was due solely to the presence in that state of the deceased as a member of the consulate or as a member of the family of a consular officer or employee.[3]

Extinction of state. It would appear that consular status is automatically dissolved by the extinction of either the sending state or the receiving state since the consular status is created by means of the consular commission of appointment and the grant of *exequatur*. Thus the loss of sovereignty on the part of the receiving state terminates the consular status unless a new *exequatur* or provisional authorisation is

[1] See Article 23 of the International Law Commission's Draft.
[2] See Article 23 of the Vienna Convention 1963.
[3] See Article 51 of the Vienna Convention.

obtained from the state which has absorbed the receiving state. The loss of sovereignty of the sending state, however, does not in every case terminate the consular status, especially in cases where the absorption of the sending state by another is not recognised by the receiving state. For example, the United States continued to recognise the consular status of the Estonian, Latvian, and Lithuanian consuls since the integration of these states in the Soviet Union was not recognised by the United States. This, however, is in the nature of an exception. In cases where as a result of a war or *coup d'état* the receiving state passes into the hands of a government which is not recognised by the sending state, the question arises as to whether consular status of the consuls of the sending state can be said to continue. It is clear that the unrecognised government can by its action terminate such status, but on the other hand the consul may continue to discharge his functions if he is permitted to do so by the unrecognised regime. The matter depends entirely on the attitude of the new government which may be gathered from the manner in which it addresses the consul of the sending state.

Departure of members of consulates. The members of a consulate, if they are not nationals of the receiving state, are entitled to leave the territories of that state together with the members of their families on the termination of their functions. This is a universally recognised rule and may be regarded as part of customary international law. The receiving state is under an obligation to grant facilities to all members of a consulate who are not nationals of that state and members of their families irrespective of their nationality in order to enable them to leave at the earliest possible time. This obligation exists even if the consulate is ordered to be closed and in cases of armed conflicts on the outbreak of hostilities. As in the case of members of a diplomatic mission, the receiving state must also in the case of consuls and consular employees place at their disposal the necessary means of transport if the ordinary transport system is disrupted.[1]

Premises, properties and archives of closed consulates. In the event of severance of consular relations between two states, the receiving state shall, even in the case of armed conflict, respect and protect the consular premises together with the property of the consulate and its archives. The sending state may entrust the custody of the consular premises together with the property and archives of the consulate to a third

[1] See Article 26 of the Vienna Convention 1963.

state acceptable to the receiving state. In the event of temporary or permanent closure of a consulate without severence in consular relations, it is the diplomatic mission of the sending state which ordinarily takes charge of the papers and archives of the closed consulate and performs consular functions in respect of the district covered by the closed consulate. If, however, the sending state has no diplomatic mission in the receiving state but has another consulate, that consulate may be entrusted with such functions with the concurrence of the receiving state. In cases where the sending state does not maintain its diplomatic mission or any other consulate, the sending state may entrust a third state with the custody of the archives of the closed consulate as well as the protection of its interests and those of its nationals. The third state must, however, be acceptable to the receiving state.[1]

Duties of third states

Like diplomatic envoys, consular officers have also to pass through the territories of third states whilst proceeding to their posts or returning therefrom. There is, however, very little material available on the question of status, privileges and immunities of consular officers in third states because their position is based not so much on principles of international law but on the provisions of bipartite treaties. The question as to whether a third state is obliged to grant passage to consular officers proceeding to their posts is not settled by any rule of international law. International comity, however, demands that a third state should not hinder such passage for the same reasons as international law casts an obligation on third states in regard to diplomatic agents, namely by hindering such passage a third state would be hampering consular relations between two states. The Vienna Convention 1963 provides for granting of certain privileges to consular officers whilst they are in the territory of third states in proceeding to their posts or returning to their own country. It is obvious that a consular officer who is on a private visit to a third state can claim no immunity. If the third state has permitted the consular officer to pass through its territory by granting him a visa, it is required, according to the provisions of the Convention, to grant him such immunities as may be necessary to ensure his transit. He cannot, however, claim any higher immunity than those he is entitled to in the receiving state. Members of the families of consular officers travelling with him or

[1] See Article 27 of the Vienna Convention.

separately are entitled to the same privileges and immunities. Other members of a consulate and their families are, however, not entitled to any immunity or privilege in the third state except that their passage through such states which have given them visas should be unhindered.[1] As honorary consular officers are appointed from persons ordinarily resident in the receiving state, they are not entitled to any privileges in third states. Even if they are nationals of the sending state, they would not be entitled to the treatment accorded to career consuls in third states which they may have to pass through whilst going home on leave or returning therefrom.

Correspondence and communications in transit. The duty of third states is perhaps of more practical importance with regard to correspondence and other official communications in transit. Since such correspondence and communications emanate from the governments, they are entitled to the same protection and respect as the correspondence of diplomatic missions. The Convention, therefore, provides that third states shall accord to such correspondence and official communications in transit including messages in code or cypher the same freedom and protection as are accorded by the receiving state. Consular couriers and consular bags in transit are also entitled to same inviolability and protection.[2] The same principle applies to the correspondence and official communication of consulates headed by honorary consular officers.[3]

The Convention further provides that if consular officers, members of their families and other members of a consulate happen to be in the territories of third states for reasons beyond their control, such as dislocation in transportation system or illness, they would be regarded as if they were on transit on their way to or returning from their posts for the purpose of their privileges and immunities in third states. Similarly, if the official mail of a consulate including consular bags are found in a third state due to *force majeure*, they would be entitled to like inviolability as in the receiving state.[4]

[1] Article 54, paragraphs 1 and 2, of the Vienna Convention.
[2] Article 54, paragraph 3, of the Vienna Convention.
[3] Article 58 of the Vienna Convention.
[4] Article 54, paragraph 4, of the Vienna Convention.

PART THREE

INTERNATIONAL LAW
SELECTED TOPICS

CHAPTER XII

DIPLOMATIC PROTECTION OF CITIZENS ABROAD

Introductory

As already stated, one of the primary duties and functions of a diplomat is to protect the interests of the nationals of his home state who may be resident or sojourning in the territories of the receiving state. The right of a state to afford protection to its citizens whilst they are abroad is a universally accepted canon of international law, and it is this right of his home state that a diplomatic agent exercises whilst looking after the interests of his co-nationals and making representations on their behalf to the government of the receiving state if they suffer harm or injury in the territories of that state. Consular officers are also authorised to exercise the right of protection in respect of their nationals by virtue of express provisions of treaties, customary rules of international law or the assurances of "most-favoured-nation" treatment.[1]

It has been well recognised that whilst a state has absolute discretion in the matter of admission and entry of aliens into its territory, and whilst all aliens resident or sojourning in the territory of a state are expected and required to obey the municipal laws of the receiving state, the home government of the alien is entitled to expect that its nationals abroad are treated in accordance with a certain minimum standard under international law. It follows that the home state of an aggrieved alien has the right to espouse his cause if there is a failure on the part of the state of residence to carry out certain acknowledged international obligations of a state which cause damage to the person or property of the alien on its territory. The Permanent Court of International Justice has observed that

[1] Article 5(a) of the Vienna Convention on Consular Relations 1963 mentions "protection of the interests of the nationals of the sending state" as a consular function.

"the right of every sovereign state to protect its subjects, who have been injured by acts contrary to international law on the part of other states, and who have been unable to obtain satisfaction by remedies under municipal law, is an undoubted right. A state by taking up the case of one of its own nationals, by resorting to diplomatic action is in reality asserting its own right, the right to ensure in the person of its national respect for the rules of international law.[1]

This principle has also been embodied in several drafts of international conventions on state responsibility and diplomatic protection.[2]

The municipal laws and regulations of various states, such as Argentina, Belgium, Denmark, Great Britain, the Netherlands and the United States of America, specifically enjoin their diplomatic and consular representatives to afford diplomatic protection to their nationals and their interests abroad.[3] The Vienna Convention on Diplomatic Relations 1961, which also includes the right of diplomatic protection of their nationals as one of the functions of diplomatic agents, provides that the right shall be exercised within the limits permitted by international law.[4] The same is the position with regard to consular protection.[5]

In determining the extent and manner of affording protection to the citizens of his home state, the diplomatic agent or the consular officer has to be guided by the customary and conventional rules on the subject as well as the principles contained in the decisions of various international courts and arbitral tribunals, provisions of treaties and conventions, and state practice. It is important for him to know the type of case where he would be justified in making interpositions on behalf of the nationals of his home state and the occasions for such intervention. This necessarily would depend on the substantive rights which an alien is entitled to enjoy in the receiving state according to the principles of international law. He would also have to ascertain the classes or categories of persons on whose behalf he can intervene. It should be mentioned that though the primary purpose of diplomatic

[1] *Panevezys–Saldutiskis Railway case*, (1939) P.C.I.J. Series A/B, No. 76, pp. 16–17.

[2] See Project No. 16 entitled "Diplomatic Protection" prepared in 1925 by the American Institute of International Law; Article 1 of the Harvard Law School's Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners prepared in 1929; Article 1 of the Draft Articles on the same subject adopted in 1930 in the first reading of the Third Committee of the Conference for the Codification of International Law under the auspices of the League of Nations; Paragraph 3 of the Resolution on International Responsibility of the State adopted at the Seventh International Conference of American States in 1933; Chapter I of the Draft Convention on the subject of State Responsibility prepared by the Rapporteur of the International Law Commission.

[3] Feller and Hudson, A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries, 1933, 2 Vols.

[4] See Article 3(1) (b) of the Vienna Convention on Diplomatic Relations 1961.

[5] See Article 5(a) of the Vienna Convention on Consular Relations 1963.

protection of citizens is aimed at seeking redress for harm or injury suffered by them in the hands of the receiving state or its offiicals, the scope of a diplomat's or a consul's function in looking after the interest of his nationals is in fact much wider and includes advancement of their interests in the receiving state.

Diplomatic intervention permissible only in case of nationals. One of the important principles concerning the right of protection of citizens abroad is that this right of a state and its diplomatic or consular agents is necessarily limited to intervention on behalf of its own nationals, because in the absence of any special agreement it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection.[1] It is the bond of nationality which constitutes a genuine link between an individual and the state,[2] and it is therefore of importance to ensure that an individual who approaches the diplomatic envoy or the consul for protection has the nationality of the sending state. The nationality of a person has, however, to be determined not by any rule of international law but by the municipal law of each state, as it is for the state to decide by its municipal laws as to who is or who is not to be regarded as its citizen.[3] The envoy will, therefore, have to satisfy himself that the person who approaches him for help or protection qualifies to be a national of his home state under its nationality laws.

Tests of national status

Although each state is free to decide upon and lay down the tests for its citizenship or nationality, an examination of the nationality laws of various states shows that the main criteria for determination of national status are generally based on two principles, namely (i) *jus soli* and (ii) *jus sanguinis*. According to the principle of *jus soli*, the nationality of an individual is determined by the fact of his birth in the territory of a state. Consequently, the laws based on this principle provide that all persons born within the territory of a state shall have the nationality of that state. The principle of *jus sanguinis* on the other hand is based on the fact of descent, and under this principle the national status of a person is considered to be the same as that of his father at the time of his birth. In the case of an illegitimate child, the status is, however,

[1] *Panevezys-Saldutiskis Railway case*, (1939) P.C.I.J. Series A/B, No.76, pp. 16–17.

[2] *Nottebohm case*, 1955 I.C.J. Reports, 23.

[3] Oppenheim, International Law, 8th ed., Vol. I, pp. 642–43; Hackworth, Digest of International Law, Vol. II, pp. 1–3; Hyde, International Law, Vol. II, pp. 1064–65.

determined by the nationality of the mother at the time of its birth. There are some countries, for example, Argentina where nationality is determined solely by application of the principle of *jus soli*, i.e. birth in the territory of the state, but in most countries application of both *jus soli* and *jus sanguinis* or a combination of both is resorted to. For example, under the law in Great Britain, children of British nationals (United Kingdom citizens), wherever born, acquire British nationality at birth. At the same time children born in the United Kingdom or the colonies, though they may be of foreign parentage, also acquire British nationality at birth.[1] The same position obtains under the laws of the United States of America,[2] India,[3] Pakistan,[4] Australia,[5] Canada,[6] Iraq,[7] and the United Arab Republic.[8] In Ceylon, citizenship is primarily determined by application of the principle of *jus sanguinis* i.e. descent.[9] The same is the position in Japan and the Philippines,[10] though in Japan citizenship by reason of birth subject to certain qualifications is recognised.[11] In Burma and Malaya, a combination of the two principles of *jus soli* and *jus sanguinis* is adopted, that is, in order to acquire the citizenship of these countries it is necessary to have the qualification of both birth and descent or race.[12] In France, the citizenship is principally determined by descent, but birth in the territory in certain categories of cases also qualifies for citizenship.[13] In the U.S.S.R., the law is that every person in the state is deemed to be a citizen unless he proves that he is a foreigner.[14] The provisions regarding acquisition of nationality at birth vary largely from country to country even whilst applying the basic principles of *jus soli* and *jus sanguinis*. It should be mentioned that children born to foreign sovereigns or to ambassadors or any member of the diplomatic staff in the receiving state do not acquire nationality by application of the *jus soli* because of the immunity enjoyed by the parents. The same rule would possibly apply in the case of children born to members of the

[1] British Nationality Act, 1948.
[2] U.S. Nationality Act of 1940 as amended by 54 Stat. 1137.
[3] Indian Citizenship Act, 1955.
[4] Pakistan Citizenship Act, 1951.
[5] Australia, Nationality and Citizenship Act, 1948–55.
[6] Canadian Citizenship Act, 1946 as amended.
[7] Iraqi Nationality Law of October 9, 1924.
[8] Egyptian Law of February 27, 1929.
[9] Ceylon, Citizenship Act, 1948.
[10] Constitution of the Philippines, Art. IV.
[11] Japanese Law No. 147.
[12] Constitutions of Burma and Federation of Malaya.
[13] Code of French Nationality of October 19, 1945.
[14] Soviet Decree of October 29, 1924.

subordinate diplomatic staff and the members of a consulate who are not nationals of the receiving state.

Naturalisation and registration. Apart from the question of acquisition of nationality at birth, the citizenship or nationality of a state can also be acquired subsequently by persons who are not citizens of that state. This includes persons who are nationals of some other state as well as stateless persons. The method by which nationality can be so acquired is known as naturalisation, which procedure is obtainable in practically all the countries of the world. In the Commonwealth countries, nationality can also be acquired by means of a procedure known as registration. The conditions under which registration or naturalisation can be applied for are laid down in the municipal laws of each state. According to the laws of some countries, foreign women married to their nationals automatically acquire the nationality of the state by reason of such marriage, but in most countries marriage to a national is regarded merely as one of the qualifications for acquisition of nationality of the state by registration or naturalisation.[1]

In addition to determining the criteria for acquisition of their nationality in the future, which, above stated as, are based generally on birth, descent, registration, and naturalisation, many of the newly independent countries have found it necessary to lay down by means of law or provisions in the constitution the tests for determining the categories of persons who are to be regarded as the citizens of the state at the commencement of their statehood upon attainment of independence. The criteria adopted for this purpose have sometimes been based on domicile or residence for a requisite period in the territories which have become the territories of the new state in addition to the other usual tests as stated above.[2]

The nationality of a person is thus to be determined by the criteria laid down in the municipal law of each state and upon ascertaining the facts regarding the person's place of birth or parentage. In the case of persons who claim citizenship by registration or naturali-

[1] In France and Iraq, a foreign woman married to a national automatically acquires the nationality of her husband, though in France an option is given to her to retain her original nationality. In Britain, prior to the enactment of the British Nationality Act, 1948, foreign women upon their marriage with British subjects automatically acquired British nationality. But now in Britain, India, Pakistan, U.S.A., and in various other countries marriage to a national is regarded as a qualification for registration or naturalisation.

[2] See, for example, the Iraqi Nationality Law of October 9, 1924, Pakistan Citizenship Act, 1951, Constitution of India, 1950, Constitution of the Federation of Malaya, Constitution of Burma, and Constitution of the Philippines.

sation, the certificate issued by the appropriate authorities of the state affords conclusive proof. It is possible that a person who was originally a citizen of a state at the time of his birth may subsequently lose that status by reason of some voluntary act on his part or by operation of law. For instance, he may himself renounce the nationality of his birth or he may lose that status under the provisions of a law by voluntarily acquiring the citizenship of another state, or by being deprived of the nationality. Again, it is for the municipal law of each state to prescribe the conditions for loss of nationality.

It is to be stated that once it is established that the person concerned possesses the nationality of the home state of the envoy under its municipal laws and that he had not lost that status either by a voluntary act on his part, or by action of the state, or by operation of law, the envoy or the consul will be within his competence to take up his case with the government of the receiving state and to represent on his behalf in the exercise of his right of diplomatic protection.

Proof of nationality. Normally it would not be very difficult for an envoy or consul to ascertain as to whether the person who has sought his protection is a national of his home state or not, since in most cases the person would be in possession of a passport. The passport generally indicates the national status of the holder, and this can at least be regarded as *prima facie* proof of nationality though there may be some doubt as to whether this is a conclusive proof. In cases of persons who are ordinarily resident in the receiving state, it would be found that they are normally registered with the embassy or the consulate, and there would hardly be any difficulty in determining their national status. There may, however, be cases where the problem is not so simple. This happens when the aggrieved person is neither in possession of a passport nor is registered with the diplomatic mission. This is usually so with a person who had left his home a long while ago in search of trade or occupation, and having found it had identified himself so completely with the receiving state that he has no thought of his home state or its envoy until a revolution or a set of circumstances have obliged him to seek the protection of his home state. Several such cases have arisen in recent years, especially in Tibet and China, and the problem has also presented itself in some of the newly independent countries of South East Asia and East Africa. In all these cases it is necessary to determine the nationality of the claimant by applying the tests under the municipal laws of the envoy's home state. A good deal

of caution is also necessary, particularly where there is reason to suppose that the person concerned may be regarded by the government of the receiving state as its national.

Position of a non-national holding a passport of the sending state. Though the normal rule of international law is that diplomatic protection can be afforded by a state only to its nationals, it has been suggested that a state can extend its protection to a person who carries a passport issued by the state even though it may transpire that the person is not a national of the state which issued him the passport. Passports, which serve as documents of identity and national status, usually contain a request in the name of the head of the state issuing the passport to all persons who may be concerned to afford the holder every assistance and protection of which he or she may stand in need. Passports are normally granted by states only to their own nationals, but occasions arise when it may transpire that a person who has been granted a passport is not a citizen, and that the passport was issued either by reason of a genuine mistake about the nationality of the person or by reason of fraud. Again, a state may decide to grant a passport to a stateless person out of humanitarian consideration. The question is whether the diplomatic agent or consular officer can give protection to such a person by reason of his holding a passport issued by his home state. The matter is not free from doubt, but the reasonable view would be that as long as the passport remains valid the holder can legitimately be given protection having regard to the request contained in the passport itself regarding assistance and protection being rendered to him in the name of the head of the state. The House of Lords in England had held in the case of *William Joyce* v. *Director of Public Prosecutions* that Joyce, though not a British subject and who obtained a passport by suppression of that fact, could nonetheless obtain British protection whilst abroad on the basis of his British passport. [1]

Cases of dual nationals

An important point that is to be kept in view is that it is sometimes possible for one and the same person to be claimed as a national by two or more states, since that person may qualify for the citizenship of more than one country under the respective municipal laws. For

[1] See the decision of the House of Lords in *William Joyce* v. *Director of Public Prosecutions*, (1946) A.C. 347.

instance, a person may be a citizen of one state by reason of his birth in the territory of that state whilst he may be regarded as a citizen of another state by reason of his descent i.e. on account of his father being a national of the second state. Such persons are known as dual or multiple nationals. Cases of dual nationality also arise by persons acquiring the nationality of a state by naturalisation.

How dual or multiple nationality arises. Although states have often tried to evolve formulae for avoidance of multiple nationality by making specific provisions in their municipal laws, and some states, such as Pakistan and Burma, do not recognise cases of dual nationality, it has not been possible to eliminate such cases altogether as they arise from the concurrent application of the municipal laws of various states which easily overlap and produce the phenomenon of dual or multiple nationality. So far as the individual is concerned, he may happen to be in possession of more than one nationality knowingly or unknowingly and with or without any intention on his part. For example, during the nineteenth and the early twentieth centuries numerous immigrants from European countries became citizens of the United States and other American countries by naturalisation whilst their countries of origin continued to regard them as their nationals. Again, the children of such immigrants who became citizens of American states were also regarded as citizens of the European countries of origin of their fathers by reason of the doctrine of *jus sanguinis*. The broad application of this doctrine under the Chinese law also tends to create a very large number of dual nationals in the various countries of South, South East, and East Asia. Cases of dual or multiple nationality also arise by reason of legitimation of illegitimate children, and by marriage in the case of women where a married woman under the nationality laws of her state of origin is allowed to retain the nationality even after her marriage to a foreign national.

In cases of persons possessing dual or multiple nationality two questions arise for consideration, namely (i) which is the state that can espouse his cause and afford him diplomatic protection in third states, and (ii) whether one of the states of which he is a national can represent on his behalf to the other state which also claims him as its national.

State which is entitled to give protection to dual or multiple national. As regards the first question, one view is that the state whose passport

the person carries is the only state which can give him protection, whilst the other view is that the state of which he is an "active national" is alone competent to afford him diplomatic protection. Until recently, the position was that in so far as the states other than those whose nationality the dual national possessed were concerned, which may be called third states, claims could be preferred against them by each of the states whose nationality the dual national had. It is very likely that each of them could justifiably claim the right of protection over him in the territories of third states. Conversely, a third state could treat an individual with two or more nationalities as a subject of any of the states to which he owed allegience. So long as a genuine link between a claimant state and an individual existed, the opposite party could not contest the right of the claimant state to grant diplomatic protection to its citizen on the ground that the individual concerned also possessed the nationality of another state. This was the view taken by some of the mixed claims commissions.[1] This, however, was not a very satisfactory position and did lead to complications.

Active or overriding nationality of a dual national. The modern tendency seems to be in favour of allowing the right of diplomatic protection only to the state of which the dual national possesses the active or overriding nationality. This view was first advocated in the *case of James Louis Drummond*[2] in a claim between France and Great Britain. In essence it means that where there is a dispute between two countries regarding the nationality of a claimant, who is a dual or a multiple national, the nationality of the claimant's habitual residence should prevail over his other nationality or nationalities. In other words, if both the claimant and respondent states assert that the person concerned is their national, such person should be considered, for the purpose of the claim, to be a national of the country in which he had his habitual residence at the time when the claim arose. The Permanent Court of Arbitration and several of the mixed arbitral tribunals established under the Peace Treaty of 1919

[1] See the *Mackenzie Claim* (1925) between Germany and the United States of America before the mixed claims commission where Germany had contested the claim of the United States on the ground that Mackenzie was a British national under the English law by reason of his parentage though a citizen of the United States by birth. The objection was, however, overruled by the umpire. U.S.–German Mixed Claims Commission, 1926, Decisions and Opinions of the Commission, p.628; 20 A.J.I.L. (1926), pp. 595–96; A.D. 1925–26, Case No. 200. See also the *Salem case*, (1932), A.D. 1931–32, Case No. 98.

[2] Knapp, P.C. Rep. 295; 12 E.R. 492.

applied the same test.[1] The International Court of Justice in the *Nottebohm case* (1955) also gave effect to this principle of real and effective nationality although this was not a case of dual nationality. In determining the "active or overriding nationality" of a dual national, it is relevant to come to a finding regarding the place where the person concerned has established his regular domicile, where he ordinarily carries on business and where he habitually exercises his public rights. If this place could be found, that would determine the effective nationality of the dual national. The International Court of Justice in the *Nottebohm case* (1955) has held that in determining this question different factors are to be taken into consideration and their importance will vary from one case to the next, the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children. The court held that a person should be deemed to be a national of that state with which he is most closely and genuinely connected as could be gathered from the circumstances.[2] The municipal laws of various countries as well as treaties often contain provisions for determining the active nationality of such persons, and the basis generally adopted is the test of "habitual residence" or "intimate connection".[3]

Protection by one state against another state of the claimant's nationality. On the second question, namely whether one of the states of which the claimant is a national can interpose on his behalf with another state of which the claimant is also a national, the answer appears to have been in the negative. This was primarily based on the doctrine of non-responsibility of states for claims of individuals with

[1] See the decision of the Permanent Court of Arbitration in the *Canevaro case* (1912) between Italy and Peru and the decision of the arbitral tribunal in *Hein* v. *Hildesheimer Bank* decided by British–German Mixed Arbitral Tribunal, A.D. 1919–22,Case No. 148. See also the decision in *Baron Frederick Born* v. *Yugoslavia* (1926) decided by the Yugoslav–Hungarian Mixed Arbitral Tribunal, 6 T.A.M. 499, and in *Barthex de Montfort* v. *Treuhander Hauptverwaltung* (1926) decided by the France–German Mixed Arbitral Tribunal,A.D. 1925–26, Case No. 206. See also *Borchard*, The Diplomatic Protection of Citizens Abroad, (1915); Ralston, The Law and Procedure of International Tribunals, Revised ed., 1926 and Supplement, 1936; Feller, The Mexican Claims Commissions. See also Article 5 of the Hague Convention.

[2] The *Nottebohm case* (1955) between Guatemala and Liechtenstein, (1955) I.C.J. Reports, pp. 12-26.

[3] Article 52 of the Mexican Law of January 19, 1934. See Hudson, Cases and Other Materials on International Law, 3rd ed., 1951, p. 198; Article 12 of the Draft Convention on Nationality, 1929, prepared by the Harvard Research on International Law; Article 5 of the Hague Convention on the Conflict of Nationality Laws, 1930.

double nationality. In the case of the claim of *Executors of R.S.C.A. Alexander*, the claim was denied by the American-British Claims Commission on the ground that in the law of nations a state might not espouse a claim in behalf of one of its nationals who was also a national of the respondent state.[1] A similar view has been taken by various other arbitral tribunals, text writers, and in drafts of international conventions.[2] This view has also been adopted by the International Court of Justice.[3] The trend in modern international law, however, seems to be otherwise. The rule that a state cannot protect its nationals, who happen to be dual nationals even against their will, in respect of injury or harm suffered in other states of their nationality, has in practice led to much hardship in the past and may so lead in the future as well. Professor Schwarzenberger has rightly observed that the doctrine "results merely in a denial of effective justice." It is submitted that in order to give effective protection to a dual national what should be done is to determine his active and overriding nationality. This can be found by reference to his intention, whenever possible, otherwise by application of the tests laid down by the International Court of Justice in the *Nottebohm case*.[4] As in many cases a person becomes a dual national not by choice but by operation of law, he ought to be allowed to elect in favour of one nationality, and such election could well be presumed from his conduct, such as renunciation of one nationality or possession of passport of one country. Once the active nationality is thus determined, the state concerned shall be allowed to afford protection in all other states including those states whose nationality the dual or multiple national may possess.

The policy adopted by the United States had so far been not to afford diplomatic protection to an American citizen against a country whose nationality he also possessed, although it reserved the right to do so in exceptional circumstances. It had recognised the exclusive right of protection of the other state if the dual national had his habitual residence there. According to the practice followed by the United States, if an American citizen retained his domicile in the other state of which he was also a national after attaining majorty, the other state was

[1] Moore, International Arbitrations, Vol. III, p. 2529.

[2] Borchard, op cit., p. 588; Article 6 of the Harvard Draft Convention on Responsibility of States, 1929; Hyde, op. cit., Vol. II, p. 898.

[3] Decision of the International Court of Justice in its Advisory Opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, (1949) I.C.J. Reports, p. 186.

[4] The *Nottebohm case*, (1955) I.C.J. Reports, pp. 12-26. See also the decision of the Italian-United States Conciliation Commission in the *case of Florence Strunsky Merge*, (1955) I.L.R. 443.

held to have the superior claim for the right of protection. The recent trend in the policy of the United States has, however, undergone a complete change, and it is possible that in the future that government may afford protection to its citizens and espouse their personal injury or property damage claims against foreign governments notwithstanding the fact that the claimants may also appear to be nationals of the other state or states.[1] The British view has been that the British Government may or may not afford diplomatic protection to a British subject in or against a country of which he is also a national. As regards international claims for wrongs suffered by British nationals, the general instructions of the British foreign service stipulate that where the person concerned is a dual national Her Majesty's Government will not take up his claim against the other state of his nationality unless in the circumstances which gave rise to the injury the other state treated him as a British national.[2] In the Asian African countries, Burma and Pakistan do not recognise cases of dual nationality at all, so in their cases the problem does not arise. Ceylon, Indonesia and Iraq take the line that the right of diplomatic protection of a dual national belongs to the country which issued him the passport. But in the view of Japan and the United Arab Republic, the principle of active or dominant nationality should determine such questions. In ascertaining the active nationality of a dual national, some countries are of the view that a dual national must have freedom to choose either of the nationalities whereas India is of the opinion that the intention should be gathered from relevant circumstances.[3]

Bodies corporate

The right of diplomatic protection extends also to limited companies which are incorporated or registered in the envoy's home state though operating in a foreign country. As a corporation is an entity possessing a juristic personality in the eye of the municipal law of a state, international law recognises that it possesses, for certain purposes, a nationality. Such nationality is that of the country in whose territory it resides, under whose laws it has been created and by which it is governed.[4] The relationship between the corporation and the state suffices in international relations to justify the home state in treat-

[1] Rode, "Dual Nationals and the Doctrine of Dominant Nationality," 53 A.J.I.L. (1959), pp. 112–43.
[2] Sinclair, "Nationality of Claims – British Practice", 27 B.Y.I.L. (1950), pp. 125–44.
[3] A.A.L.C.C., Report of the Second Session, Cairo, 1958.
[4] Moore, op. cit., Vol. V, pp. 1653–1654.

ing the entity for several purposes as though it were a national just like any of its own natural persons. This view was affirmed also by the Permanent Court of International Justice in the case of the *Peter Pazmany University* (1933). The world court held that as under the Hungarian law the university was a juridical person, its status as a Hungarian national was unquestionable.[1]

Though technically the right of a state to protect its national corporations, regardless of the nationality of its shareholders, bondhonders and directors, is an established principle of international law, state practice shows that the state claiming the right normally will not afford its diplomatic protection to a juristic person whose nationality is more fictitious or nominal than real. If this right is indiscriminately exercised, it may sometimes lead to complicated situations where one state may be trying to exercise such a right in favour of entities in which the controlling interest is being held by nationals of the state against which the right is claimed. According to the special rapporteur of the International Law Commission

> this would make a mockery of the principle of the "nationality of the claim" on which the doctrine of diplomatic protection is based, and produce a situation absurd in law from the point of view both of the respondent state and of the claimant state.[2]

It may be added that certain well recognised tests or criteria have been developed in order to find out the relationship existing between a state and a corporate person which is necessary for determination of the right of diplomatic protection claimable by the state. These tests are the tests of *siege social*, incorporation, control and beneficial ownership of the corporation.[3]

Legal basis for diplomatic protection

Before entering into details concerning the rights which an alien is entitled to enjoy in the territory of the receiving state which would largely determine the scope and extent of diplomatic protection, it would be useful to discuss briefly the doctrine of "minimum standard of treatment" under international law in this context.

[1] Reported in P.C.I.J. (1933) Series A/B, No. 61, p. 232.
[2] International Law Commission, Yearbook 1958.
[3] Schwarzenberger, International Law, Vol. I, 1958, pp. 391–412.

The doctrine of minimum standard of treatment .The concept of minimum standard of treatment, which was developed during the nineteenth and early twentieth centuries, was based on the principle that although a state was not obliged to admit foreign nationals into its territory, as in the matter of entry and reception of foreigners a state had absolute discretion except when there were treaty provisions to the contrary, but once a state agreed to admit an alien it was bound to accord him a certain standard of treatment which would be in keeping with the notions of justice, irrespective of the manner in which it treated its own nationals. It meant principally that in the matter of personal liberty and property rights of aliens the receiving state was required to provide for certain minimum safeguards; and if it failed to do so it would be answerable to the home state of the aggrieved alien which could take up his cause in the exercise of its right of diplomatic protection. It would be no answer to say that the treatment it accorded to the foreign national was the same as it gave to its own nationals. To take an example, the rule of "minimum standard" contemplated that the property of an alien could not be nationalised or expropriated without payment of just compensation, and if a state by legislative or executive action acted contrary to this principle, it could not be heard to say that it did so in accordance with its laws or that it also nationalised properties of its own citizens without payment of full compensation. Again, in the matter of personal liberty it would be expected that a state should not act in a manner which may amount to "denial of justice" to the alien, such as by subjecting him to arbitrary arrest or detention, or by denying him access to the courts of justice. It was also expected that the state should protect the personal and property rights of an alien against mob violence. Thus it came to be recognised that if an alien suffered harm or injury to his person or property by application of laws, or treatment in the hands of state organs which did not accord with this minimum standard of treatment, or when such harm or injury was suffered in the hands of private individuals and the state failed to take action, the home state of the injured or aggrieved alien was entitled to demand reparation from the offending state for the wrong or injury caused to its national. It was considered that the wrong or injury caused to an alien in this manner was a wrong caused to the home state of the alien. The diplomatic correspondence of Britain and the United States reveals that these nations have always insisted on the observance of this standard of treatment in respect of their sub-

jects or citizens whilst demanding redress from several countries, such as China, Japan, Persia, and Turkey as well as Mexico and various other Latin American republics.

Origin of the doctrine of minimum standard of treatment. The doctrine of minimum standard of treatment appears to have had its origin in the necessity of encouraging the nationals of various European states to sojourn and reside in the countries of the East in the interests of trade and commerce. After the industrial revolution the Western nations for the purpose of maintenance of their economy found it necessary to extend their trading activities with the countries in Asia and North Africa and to invest in the development of underdeveloped countries. The standards of justice in many of these countries both as regards personal and property rights were very different from the standards obtaining in Europe. In many an eastern country a person could be deprived of his life or liberty, and his property could be confiscated on the mere word of the ruler or an official without a proper cause or trial. It was, therefore, felt that under such conditions it would be unsafe to make investments in these countries or to assist in building up their economy if there was no guarantee to protect such investments and that the nationals of the western states would be reluctant to sojourn or reside in such places in looking after the interests of trade and commerce of their home states. The doctrine was, therefore, evolved in Europe for demanding for their nationals treatment according to what was laid down as the minimum standard of international law. It is important to note that though this is essentially a European concept of international law, the eastern nations must be held to have accepted this doctrine at least tacitly by admitting foreigners on these terms. It is needless to say that the contacts with the West in the matter of trade and commerce were equally beneficial to them, since it was investments from the West and the technical knowledge of the western experts which helped the Asian states in building up their system of communications, to exploit their natural resources, and to have finished products and marketable goods for the consumer. When the South American republics emerged as free nations on shaking off the Spanish rule there was need for investment of foreign capital for building up of their economy as also the need for technical experts from other countries. Men and capital from the European countries as also the United States of America were, therefore, greatly attracted to those lands, and here again was the need to

ensure against arbitrary confiscation of property and to safeguard the personal freedoms of personnel who were sent to work on the various projects. The rule of minimum standard of treatment was readily applicable, and various arbitrators made awards for damages against states for maltreatment of aliens either in respect of their persons or in respect of expropriation of their properties. In the proceedings before arbitrators the fact that a state treated its own nationals in the same fashion was not accepted as a defence on the part of the defendant state.

The Calvo doctrine. The well known jurist, Calvo, however, evolved a formula for restricting cases of intervention by the home state of the alien by suggesting that such intervention shall not be made until the local remedies have been exhausted, and that a person could waive the diplomatic protection of his home state by providing in a contract with the government of the receiving state that he agreed to be bound by the decision of the authorities in the receiving state.

For some years past the concept of minimum standard of treament has been criticised in various quarters, as according to some writers this doctrine gives the powerful nations scope for intervention in the affairs of smaller states. It has also been asserted that a foreign national who seeks entry into the territory of a state for his own purposes, be it for travel, tourism, or trade, must take things as he finds them in the country of his sojourn or residence, and that it would be sufficient if he is treated on the basis of equality with the citizen of the state in respect of his personal or property rights. Another view is that as long as certain fundamental human rights are observed in the matter of treatment of an alien, the receiving state would not incur responsibility to the home state of the alien.

Doctrine of national standard of treatment. It is argued that in the context of the Charter of the United Nations and the Declaration of Human Rights every state was expected to accord to its own nationals a certain standard of treatment which would be consistent with civilised notions of justice, and that an alien who voluntarily sojourns or resides in a country must be satisfied if he is treated in the same manner as its own nationals. Whilst there is considerable force in this suggestion, it is difficult to shut one's eyes to the fact that even today there are a large number of countries all over the world where the

very basic foundations of personal liberty are denied by the state to its own nationals. It would greatly retard the progress of many an underdeveloped country and also hamper foreign travel and contacts between peoples of various lands unless the alien, who is admitted into the territory of a state, was assured of a certain minimum standard of treatment under international law.

The trend of discussion at the Fourth Session of the Asian-African Legal Consultative Committee illustrates a restrictive view in the matter of treatment of aliens. According to its *Report on the Status of Aliens*, the Committee's view is that subject to certain minimum safeguards as regards personal liberty, the question of treatment of foreign nationals should be left to the discretion of the receiving state to be regulated by laws, regulations and executive orders.[1] The Harvard Law School in its draft No. 12 on the subject prepared in 1961 at the invitation of the United Nations Secretariat, on the other hand, appears to suggest an extension of the doctrine of state responsibility by including cases of cancellation of contracts or promulgation of legislation by which an alien is deprived of his profession or occupation without payment of compensation as wrongful conduct on the part of a state for which reparation would be due.

It is difficult to strike a balance between the rights of an individual who is resident in a country other than his own and the sovereign powers of the state to regulate the lives and conduct of all persons, whether nationals or not, resident in its territory. Perhaps a *via media* could be found by extending the doctrine of minimum standard of treatment in regard to personal liberty of the alien and in the matter of acquisition or expropriation of his property whilst recognising the sovereign powers of the state to regulate all other matters according to its discretion.

Suggestions have been made by the rapporteur of the International Law Commission that criminal responsibility might attach to individuals for maltreatment of aliens, and that the right of an individual to maintain claims for reparation independently of his home state may be recognised. Whatever may be the merits of such suggestions, it would appear that the practical considerations alone will stand in the way of their adoption as part of international law.

[1] A.A.L.C.C., "Report on the Status of Aliens", Report of the Fourth Session, 1961.

Rights of an Alien

The position of an alien in the receiving state as regards his rights which may need to be protected by the diplomatic agent or the consul of his home state, may be classed as (i) rights concerning entry, residence or sojourn, (ii) personal rights including right of free movement, and (iii) property rights.

Rights concerning entry, movement and residence

As already observed, states have an absolute discretion under international law to admit or not to admit an alien into its territory, and consequently there is no legal duty on any state to receive or allow entry to foreign nationals on its territory. It follows that even if a state allows entry to a foreigner it may do so on such conditions as it may deem fit to lay down. This undoubted right of a state, which flows from his territorial sovereignty, has been recognised by jurists and writers as well as in the decisions of municipal courts, state practice, and in the provisions of treaties and conventions.

Opinions of authors. Vattel, the well known continental jurist, observed, "A Sovereign may prohibit entrance into its territory either to all foreigners in general or to certain persons, or in certain cases or for certain purposes as the welfare of the state may require." [1] In the view of Oppenheim

> apart from special treaties of commerce, friendship and the like, no state can claim the right of its subjects to enter into and reside on the territory of a foreign state. The reception of aliens is a matter of discretion and every state is by reason of its territorial supremacy competent to exclude aliens from the whole or any part of its territory.[2]

According to Hackworth "in the absence of treaty obligations a state is under no duty to admit aliens into its territory. If it does admit them, it may do so on such terms and conditions as may be deemed by it to be consonant with its national interest." [3]

[1] Law of Nations, Vol. I, S. 231, S. 125.
[2] Oppenheim, op. cit., Vol. I, pp. 675–78.
[3] Hackworth, op. cit., Vol. III, pp. 717–18.

State practice. In the United Kingdom and the United States of America, as also in several other states, the right to admit, exclude, or deport aliens has been regarded as an incident of territorial sovereignty. The British practice indicates that apart from treaty obligations to the contrary a state has a right to exclude aliens or particular categories of foreigners especially if it considers their presence opposed to its peace, order and good government or to its social and material interests.[1] The view taken in Canada is that the power of prohibiting aliens rests with every country and that it is open to the parliament of each country to prescribe the conditions upon which an alien may enter or be permitted to remain in the country.[2] In the United States of America, these questions are governed by the provisions of its municipal laws. The opinions expressed by the Supreme Court of the United State is that

> It is an accepted maxim of international law, that every sovereign nation has the power as inherent in sovereignty and essential to self preservation to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."[3]

The view taken by the courts in Argentina, Australia,[4] Belgium, Egypt,[5] West Germany,[6] Eire,[7] Mexico,[8] Panama,[9] and South Africa,[10] is to the same effect. The same position also obtains in most of the Asian countries.[11]

The Havana Convention on the Status of Aliens signed in 1928 provides in Article I that "States have the right to establish by means of laws the conditions under which foreigners may enter and reside in

[1] *Musgrove* v. *Chun Teeong Toy*, (1891) A.C. 272; *Rex* v. *Home Secretary ex parte Chateau-Thierry*, (1917) 1 K.B. 578; *Rex* v. *Superintendent of Chiswick Police Station ex parte Sacksteder*, (1918) 1 K.B. 578; *Re Lannoy*, (1942) 1 All. E.R. 574, 2 All. E.R. 232; *Rex* v. *Secretary of State ex parte Greenberg and Others*, (1947) 2 All. E.R. 550.

[2] *Papageorgiou* v. *Turner*, (1906) 37 N.B.R. 149; *Rex* v. *Alamazoff*, (1919) 47 D.L.R. 533–35; *Re Leong Ba Chai*, (1952) 4 D.L.R. 715; *Attorney-General of Canada* v. *Cairn*, (1896) A.C. 542, 546.

[3] *Nishimura Ekiu* v. *United States*, (1892) 142 U.S. 651, 659; *Gong Yue Ting* v. *United States*, 149 U.S. 698, 705–707; *Lew Moon Sing* v. *United States*, 158 U.S. 538; *Turner* v. *Williams*, 194 U.S. 279; Moore, op. cit., Vol. IV, pp. 71–80; Hackworth, op. cit., Vol. III, p. 277; Hyde, op. cit., Vol. I. pp. 216–17; *United States ex rel Voipe* v. *Smith*, 289 U.S. 422, 425; *Shaughnessy* v. *United States ex rel Mezei*, (1953) 345 U.S. 206.

[4] *The King* v. *Carter ex parte Kish*, (1934) 52 C.L.R. 221.

[5] *Erisina* v. *Egyptian Government*, (1931) Gaz. Tribx., XXII (1931–32) p. 353.

[6] *Residence of Alien Trader case*, *Neue Juristische Wochenschrift* (Germany) 7 (1954), p. 1822.

[7] *The State* v. *The Minister of State ex parte Hermann Geortz*, (1948) I.L.T. 34.

[8] *In re Carlos Wunchs*, (1935) 46 Semanario Judicial 5 Epoca 3799; *Matter of Wong*, (1949) Semanario Judicial de la Federación 5 Epoca, Vol. 99, Part 3, p. 2254.

[9] *In Loy* v. *La Nacion*, (1939) 37 Registo Judicial 22.

[10] *Van In Rensbrug* v. *Ballinger*, (1950) 4 S.A.R. 427; *Mohammud* v. *Principal Immigration Officer*, (1951) 3 S.A.R. 887.

[11] A.A.L.C.C., "Final Report of the Committee", (Art. 2) Report of the Fourth Session, 1961.

their territory." Further, the International Conference on Treatment of Foreigners held at Paris in 1929 approved the following provision in this regard:

"Each of the High Contracting Parties remains free to regulate the admission of foreigners to its territory and to make this admission subject to conditions limiting its duration, or the rights of foreigners to travel, sojourn, settle, choose their place of residence, and move from place to place."

The Asian-African Legal Consultative Committee in its Final Report on the Status of Aliens has recommended that "the admission of aliens into a state shall be at the discretion of that state" and "A state may prescribe conditions for entry of aliens into its territory." [1]

This being the position both under international law and in the practice of states, countries which desire to ensure in advance the right of entry for their nationals into the territory of other states have entered into bipartite treaties or multilateral conventions with the states concerned. The most recent example of such a multipartite agreement is found in Article 2 of the Treaty establishing the Benelux Economic Union (February 3, 1958) which provides "The nationals of each High Contracting Party may freely enter and leave the territory of any other Contracting Party."

Conditions regarding entry of aliens. Although states retain an absolute discretion in the matter of reception and entry of foreign nationals, they have often indicated in their laws, regulations, and executive orders the principles which they would adopt in this matter. It is now almost the universal practice to provide that except in special circumstances aliens would be refused admission unless they are in possession of appropriate travel documents. Normally, a person who desires to go abroad would obtain a passport from his home state signifying its consent to the passport holder travelling in the countries for which the passport is endorsed. A visa issued thereon by the government of the receiving state indicates that state's consent to admit him into its territory. In international practice, it is, therefore, required that an alien entering the territory of a state should be in possession of a valid passport duly visaed. It is, however, difficult for stateless persons or political refugees to comply with this requirement, and in such special cases every state has the freedom to decide in its absolute discretion whether or not to admit them even though they may not have valid travel documents in their possession.

[1] Ibid.

Excludable aliens. The immigration laws or regulations of various states, which prescribe the conditions of entry into the particular state, generally provide against admission of certain categories of "excludable aliens." These include persons in a condition of vagabondage, beggary or vagrancy, mental defectives and persons of unsound mind, persons suffering from a loathsome, incurable and contagious disease, stowaways, habitual narcotic users, persons who unlawfully deal in opium or narcotics, prostitutes, procurers, persons who live on immoral earnings of prostitution, indigent persons and those without adequate means of supporting themselves or without sufficient guarantee of support at the place of destination. In addition to these categories which are excluded in the interest of public health and moral well-being of the nation, many states also exclude persons who are reasonably suspected of having committed serious infractions of law abroad, and those who have been expelled or deported from another state. Practically all states refuse to admit aliens whose entry or presence is likely to affect prejudicially its national or public interest. Both Britain and the United States of America do under their immigration laws exclude these classes of undesirable aliens.[1] The Asian African countries also take the view that a state may well exclude, apart from its general power of exclusion of all foreign nationals, the classes of aliens enumerated above in the interest of public health or moral well-being.[2]

Residence or sojourn. As stated above, a state has the undoubted right even whilst admitting an alien into its territory to prescribe conditions for the entry. The conditions may relate to limiting the number of places to be visited or the duration of the visit, or it may be stipulated at the time of entry that the person shall not engage in any trade or calling, or that he shall not make his residence in the territory permanent. In practice, it appears that conditions for entry and residence are invariably made at the time when the entry visas are granted. Most of the states in the world today have different categories of visas for entry into the country. When an alien applies for a visa, he has to state in his application the purpose of his visit, and if he is permitted entry for that purpose the visa issued on his passport would indicate the limits and duration as well as conditions of his sojourn. The various categories of visas include those for transit, tourism, study, temporary visit, and

[1] For American practice see Hyde, op. cit., Vol. I, pp. 221–26.

[2] See A.A.L.C.C., "Final Report on the Status of Aliens," Report of the Fourth Session, Tokyo, 1961.

long residence with or without the right to carry on a specified occupation which is known in some countries as immigrant visas. The practice of the states indicates that though states are prepared to grant entry visas quite readily to those who intend only to travel or to come as students and trainees, they are more stringent as regards admission of aliens who intend to settle down permanently.[1] Some states, such as Mexico, permit the entry of aliens for permanent settlement only if they are specialists and skilled technicians. In Indonesia and in the United Arab Republic, foreigners seeking admission for permanent settlement are granted permission for the purpose only if they are considered to be capable of contributing to the culture or the wealth of the country. Among the other Asian countries, Burma and Iraq permit the entry of foreigners without any distinction between permanent settlers and others while India and Japan maintain a distinction. Ceylon does not allow entry to any foreigner for permanent settlement.[2] In the United States, Canada, and Australia, entry of foreign nationals for permanent settlement is based largely on a quota system, and in the United States also on the basis of the profession or occupation of the particular individual seeking entry into the country.[3]

Though states do possess absolute discretion in the matter of admission of aliens, no state can in normal times keep out all aliens from its territory. Such a practice would be highly detrimental to its own interest and be resented by other states who would refuse admission to nationals of such a state in their territories. But it is well recognised that in times of war or national emergency a state would be well justified in refusing entry to and generally excluding all aliens from its territory. The member states of the Asian-African Legal Consultative Committee, except Japan, take the view that such justification would extend to exclusion of aliens in the national and public interest of the state. This undoubtedly takes into account the special situations which exist in the newly independent countries of Asia and Africa where the exigencies of a case may require exclusion of all foreign nationals from the territories of the state.

The practice adopted by various states in the matter of admission of aliens follows a similar pattern in many respects, but policies of states do differ a good deal. For example, certain states have adopted the policy of excluding aliens on racial grounds such as obtains under the

[1] Oppenheim, op. cit., Vol. I, p. 676.
[2] A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961.
[3] Hyde, op. cit., Vol. I, pp. 225–27.

immigration laws of Australia and South Africa where persons of Asiatic origin are considered to be prohibited immigrants. The quota system together with the barred zone provision in the United States immigration laws is also based on the grounds of race. Although strictly from the legal point of view no objection could be taken to a state excluding aliens from its territory on whatever ground it chooses, but refusal of entry by reason only of race, religion, sex, or colour has been condemned by states as being not consonant with the concept of human dignity. According to Hyde, such practices are "tokens of arrogance that defy explanation and produce resentment on the part of the states whose nationals happen to be singled out for exclusion." [1] The objection is made not on the ground of law but is based on moral obligations of states towards each other. The Asian-African Legal Consultative Committee in its Final Report on the Status of Aliens has recommended that "A state shall not refuse to an alien entry into its territory on the ground only of his race, religion, sex or colour." [2]

Diplomatic representation in case of refusal of entry visa. A state has undoubtedly an unfettered right in the matter of admission or exclusion of aliens unless there are treaties or conventions in existence under which the state may have agreed in advance to receive or refuse entry to certain categories of aliens. Thus in so far as international law is concerned, no state would be able to object to exclusion of its nationals by any other state, and granting or refusal of an entry visa is exclusively within the competence of the receiving state. Thus protests or international claims could not normally be lodged by a state or its envoy in exercise of its right of diplomatic protection on account of refusal of an entry visa to one of its nationals. In practice, however, envoys often represent on behalf of their nationals even in these matters by bringing to the notice of the government of the receiving state the hardship that would be caused to the particular person if he is refused entry. This would be the case where a foreign national, who had been long resident in the receiving state and had associated himself with business or professional activities, suddenly finds after a temporary absence that his entry into the receiving state has been barred with the consequent denial of his means of livelihood. Again, in a case where a person is refused entry on the ground of his nationality, race, or colour, the home

[1] Hyde, op. cit., Vol. I, p. 218.

[2] See A.A.L.C.C., "Final Report on the Status of Aliens (Art. 3)", Report of the Fourth Session, Tokyo, 1961.

state of the person concerned may regard it as an affront to itself and lodge protests against the policy adopted by the receiving state.

Rights concerning residence and movement. As already observed earlier, an alien who seeks entry into the territory of a state may be admitted subject to such conditions as the receiving state may lay down in this regard. An alien is also expected and required to comply with the local laws, regulations and executive orders. But at the same time the receiving state, having once admitted the alien and thereby having given its consent to his entry and residence, is expected to accord him a reasonable standard of treatment consonant with the basic principles of justice. The practice of states indicates that an alien is normally allowed sufficient freedom in the matter of choice of his residence and his movement within the territory of the receiving state unless at the time of his entry stipulations are made to the contrary. For instance, the entry visa may indicate that the alien shall reside only in a particular city or town and that he shall not visit any other place without permission.

Registration with the authorities. The laws and regulations of most states require that a foreign national shall register himself with the appropriate authorities of the receiving state and keep them informed of his changes in address. Whether an alien should register in every town or city he may visit during his sojourn is not very clear since the practice varies in this regard. In times of emergency, practice of the states shows that all countries keep a closer watch on the movement of foreigners, and they may compulsorily be required to register with and report to police authorities with a view to keep track of their movements.[1] The laws and regulations relating to foreigners in each state usually contain provisions in this regard. In Britain, it is permissible for the Secretary of State for Home Affairs to subject an alien or a class of aliens to special restrictions in public interest in addition to or in substitution for the general restrictions which may relate to residence, reporting to the police, registration etc.[2] The practice in the Asian African countries, particularly in Japan, Indonesia, United Arab Republic, Iraq, India, Pakistan, and Ceylon, is that registration is required on entry into the country. The text writers recognise this right

[1] United Kingdom, Order dated September 18, 1939, S.R. and O. 1939, No. 1059; Section 31 of the U.S. Act of Congress approved on June 28, 1940. Several states of America had promulgated state legislations in this regard during the years 1917–18.

[2] See Alien's Order, 1920, Art. 1191.

of receiving states,[1] and international conventions have also recognised that in principle a state is competent to restrict the freedom of movement and residence of foreign nationals.[2]

It would, therefore, appear that if a state were to require registration of a foreign national, or to restrict his movement or his choice regarding place of his residence, no objection could be taken by the home state of the alien or its diplomatic agent. The position would be the same even if the restriction imposed on him is more stringent than those imposed on other aliens or class of aliens. However, if the restrictions were imposed because of his nationality or purely with a view to persecute him, or if the restrictions result in undue hardship, the envoy of the home state of the alien or the consul would be justified in representing to the government of the receiving state or the local authorities as the case may be. It is to be observed that many states proceed on the basis of reciprocity in the matter of treatment of each other's nationals and if this principle is observed there could hardly be any ground for complaint.

Personal freedoms and denial of justice

The more valuable rights of an alien which need to be watched and protected by his home state are the rights concerning his personal freedoms and the means for safeguarding these freedoms. They consist in (i) freedom from arbitrary arrest, (ii) freedom to practise his own religion, (iii) right to have protection of the executive and police authorities of the state, and (iv) the right to have free and ready access to the courts of law. To these may perhaps also be added the right to have legal assistance. Some authors are of the view that freedom of speech and expression should also be protected but opinions expressed on this aspect of the matter are not uniform.

It is generally recognised both under customary international law and in the provisions of treaties and conventions that a foreign national must be fairly treated whether it be on the basis of the traditional concept of the "minimum standard of treatment" or be it on the basis of fundamental human rights as acknowledged and recognised in the United Nations Declaration of Human Rights.

[1] Oppenheim, op. cit., p. 689.

[2] Art. 2 of the Inter-American Convention on Status of Aliens, 1928; Proceedings of the International Conference on the Treatment of Foreigners held in Paris, 1929, League of Nations Document C.I.T.E. 62, 1930, II, 5, pp. 419–21; Art. 7 of the Final Report of the A.A.L.C.C. on the Status of Aliens.

Arbitrary arrest. On whatever basis one may proceed, it would be abundantly clear that to subject a person to arrest or detention without informing him of the grounds of his arrest or to do so on a flimsy charge without giving him an opportunity of defending himself would certainly offend the basic principles of natural justice. Whether such arrests and detention are permissible under the laws of the receiving state or whether the state treats its own nationals in the same manner is quite immaterial.

Police protection and access to courts. Since an alien is subject to the local laws and regulations during his sojourn or residence in the receiving state, it would follow that he should be entitled to seek the protection of such laws. An alien can therefore claim the right to protection of the executive and police authorities of the state and to have free and ready access to the courts of law. If the executive and police authorities refuse to render him assistance when his person or his property is attacked due to mob violence or otherwise, the conduct of the receiving state and of its officials would clearly amount to a denial of justice. Similarly, if he is denied access to the courts of law to safeguard his rights against the actions of the executive or of private persons, such conduct on the part of the state would be regarded as wrongful. Again, the procedure followed in the courts of a country and the opportunities provided for proper legal assistance have considerable bearing on the question whether or not there has been a denial of justice on the part of the receiving state. Grossly unfair discrimination, outright arbitrary arrest, denial of freedom of access to the courts of justice and denial of the liberty to choose and employ legal practitioners in the prosecution and defence of the alien's rights before such courts and tribunals are regarded by most states as instances of denial of human rights and fundamental freedoms, and such conduct would constitute legitimate ground for diplomatic intervention by the home state.[1] The diplomatic correspondence of Britain and the United States clearly brings out the attitude of these states in demanding for their nationals treatment in accordance with these minimum guarantees. In the Asian African countries, aliens are normally permitted to enjoy personal freedoms and essential civil rights on terms of equality with nationals. In Burma, Ceylon, and India, aliens are entitled to challenge the legality of their arrest or detention by means of *habeas corpus* petitions. In Indonesia, Iraq, and United Arab Republic, there are also

[1] Oppenheim, op. cit., p. 687.

similar provisions for challenging the validity of a detention. Aliens are allowed free access to courts in practically all non-communist Asian-African countries. The Asian-African Legal Consultative Committee has recommended that these two essential freedoms, namely freedom from arbitrary arrest and the right to protection of the courts and other authorities should be accorded to an alien. It would appear to be clear that at least in respect of these fundamental concepts of justice in the treatment of an alien the plea of national standard of treatment should be of no avail. Consequently, an envoy or a consul will be well within his rights to represent and if necessary to protest to the government of the receiving state or the local authorities, as the case may be, if a national of his home state is subjected to arbitrary arrest or if he suffers damage or injury by reason of justice being denied to him. In grave cases the diplomatic agent may with the concurrence of his government prefer a claim on behalf of the aggrieved national. The cases where arrests can be regarded as arbitrary and the circumstances in which denial of justice may be said to be caused will be discussed in detail later in this chapter.[1]

Freedom of religion and religious practice. As regards the right of religious freedom, the weight of state practice establishes that a state may exercise control over the religious training and worship of inhabitants within its borders including aliens. Bilateral treaties have often been entered into to enable individuals to practise their own religions in a foreign state.[2] The United States is inclined to the view that its citizens must be allowed the enjoyment of the same privileges of religious freedom as are accorded to the nationals of other states. The United States practice points to the fact that inspite of her deep interest in religious freedom it normally does not intervene on behalf of its nationals in foreign lands except in cases where the religious persecution is considered to be directly injurious to the rights of the nation or of its nationals.[3] Many Asian African countries accord

[1] See pages 322-331.

[2] Moore, op. cit., Vol. II, pp. 171–78.

[3] See the provisions of bilateral treaty between United States and Germany, December 8 1923, which stipulated for freedom of worship provided their teachings and practices were not contrary to public morals. See also the provisions of the Treaty of Friendship, Commerce and Consular Rights between U.S.A. and Norway, 1928; treaty between U.S.A. and Poland, 1931; Art. 4 of the Convention between U.S.A., Great Britain and Iraq of January 1930; the U.S.–Italian Treaty of Friendship, Commerce and Navigation signed in Rome, February 2, 1948; Art. 1 of the Treaty of Friendship, Commerce and Navigation concluded between Japan and United States, April 2, 1953.

freedom of religion and religious practice on a basis of equality with their nationals. This is the case in Burma, Ceylon, India, Indonesia and Japan. In the United Arab Republic, aliens are treated at par with national minorities in this regard and freedom of practice of religion on the part of an alien is subject to the interests of public order or general morality of the state. In Iraq also this right is subject to maintenance of public order. The Asian-African Legal Consultative Committee in its Final Report on the Status of Aliens has recommended that aliens should enjoy freedom to "profess and practise their own religion."

Freedom of speech and expression. There is no uniformity of practice regarding the right of an alien to freedom of speech and expression. Some states give the same rights to an alien in this regard as its own nationals whilst others do not guarantee this right at all in so far as an alien is concerned though their own citizens may enjoy it. It would appear that this is not so fundamental a right as to call for intervention on the part of the home state or its envoy if its nationals are not accorded this freedom.

Political Rights. Closely linked with the right of free speech and expression are the political rights and rights of suffrage. Generally, aliens are prohibited from participating in the political life of the host state and are therefore not entitled to the right of suffrage. Practice of most states indicates that aliens are not entitled to any political rights in the receiving state. Oppenheim observes that even before the First World War when there was a tendency to treat admitted aliens more and more on footing of equality with nationals, the aliens were not permitted to share in the political rights and duties. In one or two countries, like Uruguay, political rights are granted to aliens who have been resident in the country over a long period. The Asian-African Legal Consultative Committee was of the view that an alien shall not be entitled to any political rights, including the right of suffrage, nor shall he be entitled to engage himself in political activities except as otherwise provided by local laws, regulations and orders.[1]

Professional and business activities

It is now well established that a state may and is free to prohibit or regulate the professional or business activities of an alien even after he

[1] A.A.L.C.C., "Final Report on the Status of Aliens," Report of the Fourth Session, Tokyo, 1961.

is allowed entry into the receiving state. It follows that any professional or business activities carried on by an alien in the receiving state must be in conformity with the local laws, regulations and executive orders as also municipal and other bye-laws. It is not in every case nor is it in respect of every type of business or professional activity that a state will intervene, but practice of the states shows that in the economic and other interests of their nationals states do prohibit certain types of professional and business activities on the part of foreigners.[1] In countries where aliens are not as such prohibited from practice of a profession, the state may nevertheless require that aliens must obtain the same qualifications as the nationals of the state are required to have under its laws as a condition precedent to their embarking on practice of the profession.[2] The fact that they may be similarly qualified in their own countries can never be considered sufficient to enable them to carry on their activities in a foreign country. This position obtains particularly in regard to professions of accountancy, medicine, law, engineering, pharmacy and teaching. International law recognises the competence of a state to prescribe such regulations which

[1] For example, in France the Decree of June and November, 1938 empowers the government to fix for each category of industry or commerce the percentage of aliens permitted to be employed therein. Further, an alien is prohibited from carrying on an industrial or commercial profession without obtaining a special permit. The French Decree of February 2, 1939 provides for certain cases where aliens must be refused a permit to undertake a commercial profession. See *Re Galatazkay*, (1951) I.L.R. 291.

In Switzerland, aliens are prohibited from entering into the book publishing business by the Decree of Swiss Federal Council of November 3, 1944. Aliens are normally permitted to enter only as employees of a named employer, and not allowed to engage in any other occupation. See Nussbaum, American Swiss Private International Law, New York, 1960, p. 15.

Under the Federal Law of the United States, aliens who seek to enter the country for performing skilled or unskilled work are not admitted if sufficient number of U.S. nationals are available for performing the same work, or if the employment of such aliens is likely to affect adversely the wages and working conditions of the workers in the United States similarly employed. See 66 Stat. 166-281, 8 U.S.C.A., paras. 1101-1503, 1182.

Further, in the United States, professions which involve the performance of functions in a public capacity or are state licensed in the interest of public health and safety are not open to aliens. In addition, the state laws of various states lay down restrictions in this regard, e.g., admission to legal professions in various states is restricted to U.S. nationals only. There is a tendency to apply the same restrictions to certain other professions as well, e.g. accountancy. In Britain, aliens cannot be admitted normally to practise at the bar. Among Asian African countries, aliens who have been admitted are not excluded from the professions in Ceylon, India and Japan provided they possess the requisite qualifications. In Burma, Indonesia and Iraq, they are excluded from specified professions. In Ceylon, India and Indonesia, foreigners can even enter government service, but in Burma and Iraq this is possible only in respect of temporary posts. Japan admits foreign specialists only on a temporary or short term basis.

[2] These conditions are imposed by all states but some states recognise the qualifications or degree of other states on a reciprocal basis, e.g. the Philippine Statute (S. 12, Act No. 3105, as amended)in the matter of qualifications for accountancy.

may even amount to prohibition.[1] Consequently, many states, in order to secure advantage for their nationals, have entered into bilateral treaties or multipartite conventions in this regard.[2] It can therefore give no cause for complaint if a state, in the absence of treaty provisions to the contrary, excludes aliens altogether or a certain category of aliens from engaging in all or certain classes of business or professional activities. The only exception perhaps to the rule may be where invidious discrimination is practised in the case of a particular alien or a group of aliens merely on account of their origin, nationality, colour or race. There may also be cases where an alien or a group of aliens, who have been engaged in certain professions or callings, suddenly find themselves without their means of livelihood by reason of some new enactment prohibiting aliens from engaging in those professions. Such cases of hardship may need to be represented to the government of the receiving state, and the diplomatic agent of the home state of the aggrieved alien will be the best person to do it. In suitable cases it should be possible to obtain some compensation from the receiving state. The practice of states generally shows that the principle of reciprocity plays a large part in the attitude of states in determining the classes of aliens who should be allowed or excluded from the practice of the professions or carrying on of business activities. The Draft Convention on the International Responsibility of States prepared by the Harvard Law School in 1961 provides in Article 11 of the draft that to deprive an alien of his existing means of livelihood by excluding him from a profession or occupation which he had hitherto pursued in the state without a reasonable period of time in which to adjust his affairs by way of obtaining other employment and disposing of his business or practice at a fair price is wrongful if the alien is not accorded just compensation which must also be promptly paid. Though from the point of view of fairness there is a great deal to be said in favour of this position, it is doubtful whether this could be regarded as a valid doctrine in law having regard to the absolute discretion states possess in the matter of prohibiting or restricting the professional or business activities of foreign nationals within their territories. The envoy of his home state can certainly represent the case of the aggrieved national with the government of the receiving state and request for compen-

[1] Moore, op. cit., Vol. IV, p. 13; Hackworth, op. cit., Vol. III, p. 618; A.A.L.C.C., Art. 9 of the "Report on the Status of Aliens," Report of the Fourth Session, Tokyo, 1961.

[2] Art. 26 of the Franco–German Commercial Agreement of August 17, 1927; Art. 1 of the Treaty of Friendship, Commerce and Navigation between Japan and the United States, April 2, 1953; Art. 2 of the European Convention on Establishment, 1955.

sation, but if the request is rejected it is extremely doubtful whether any further action in the form of an international claim would be competent.

Rights to property

Just as a state has the competence to prohibit or regulate the professional and business activities of foreign nationals in its territory, the state is equally competent by virtue of its territorial sovereignty to lay down by its laws, regulations or executive orders as to whether aliens generally or a class of aliens can or cannot hold property, and the conditions subject to which such rights can be acquired or held.

Acquisition of property rights. Jurists and writers on international law are of the view that every state has the liberty of granting or refusing to foreigners the power of possessing land or other immovable property within its territory and that no one has a right to complain if the state does not permit aliens to have such rights.[1] The general practice of states, however, reveals that aliens are by and large permitted to acquire property in most states, but such property rights of individuals are regulated by the municipal laws of the states concerned.[2] Some states make a distinction between resident and non-resident aliens in the matter of acquisition and holding of property, and in some countries foreigners are not permitted to acquire the mineral or economic resources of the country.[3] In some others aliens are excluded from acquiring a certain class of movables, such as ships and airplanes. Consequently, in order to ascertain the rights of aliens in the matter of acquisition of property, the municipal law of each state becomes the governing factor. The practice of the states not being uniform in this regard, states have often sought to enter into bilateral

[1] Vattel, Law of Nations, Ch. VIII, S. 114.

[2] In Burma, Ceylon and India, aliens are permitted to hold property. Japan permits foreign ownership of real property on the basis of reciprocity. Iraq imposes restrictions on alien ownership of agricultural land. In the U.A.R., under the Land Reforms Law no foreigner can own more than 200 acres of land per head. In Indonesia, aliens are permitted to hold property, but they cannot acquire title to such property. In the United States of America, no alien or a person who is not a citizen of the United States or who has not declared his intention to become a citizen can acquire title to or own any land in any of territories of the United States. See U.S. Statutes, 4 U.S.C.A., paras. 1501–1512.

[3] Article 27 of the Constitution of January 31, 1917, as amended, provides that only Mexicans by birth or naturalisation or Mexican corporations have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for working mines or for the utilisation of waters or mineral fuel in the Republic of Mexico.

arrangements in order to secure the rights of their citizens or subjects.[1] Here again as in all matters where states have a discretion, question of reciprocity plays an important part, and states have been found to grant to the nationals of other countries the right to acquire property provided those countries grant similar rights to their nationals.[2] The Asian-African Legal Consultative Committee has recommended that subject to local laws, regulations, and orders and subject also to the conditions imposed for his admission into the state, an alien shall have the right to acquire, hold and dispose of property.[3]

If a state allows foreign nationals to acquire and hold property within its territory, the question is what are his rights with regard to such properties.

Right to hold property. It is unquestionable that the rights in such properties, whether movable or immovable, must be governed by the municipal laws and regulations of the state in the same manner as those of the nationals of the state, that is to say, the alien must pay such rates and taxes as are payable under the laws in force, and that the property rights of the alien individual or corporation must be subject to the right of the receiving state in respect of eminent domain or police powers.

It is quite clear that a state may acquire, nationalise or expropriate the properties of its nationals in the exercise of its rights of eminent domain. Similarly, it can demolish or destroy such properties in the interest of health or to prevent damage in case of fire. Such action would be in the exercise of the police powers of the state. The constitutions or the municipal laws of the western states provide that the state can nationalise, acquire or expropriate property only for a public purpose or in the national interest and upon payment of just compensation, which means the market value, to the dispossessed owner of the property. But in some of the other states, no such limitation is put on the powers of the government either under their constitutions or municipal laws. Even in India, which generally follows the western pattern in the matter of rights of its citizens, the provision in the Constitution

[1] For example, see Article VII (1) of the Treaty of Friendship, Commerce and Navigation concluded between Italy and the United States of America in 1948. See also the provisions of the European Convention on Establishment, 1955 under the auspices of the Council of Europe.

[2] France, Japan and the United States of America proceed mainly on the basis of reciprocity. See the decision of a French court in *Veuve Proust* v. *Kaing*, A.D. 1949,259–60.

[3] A.A.L.C.C., Article 11 of the "Final Report on the Status of Aliens," Report of the Fourth Session, Tokyo, 1961.

regarding payment of "compensation" has been amended to provide for only such compensation as may be determined by law.[1]

Cases of nationalisation and expropriation. What then is the position if a state acquires, expropriates, or nationalises the property of an alien or a foreign corporation? There are four possible views: one, which may be called the traditional view, is that if a state permits aliens to acquire property rights in its territory, such acquired rights cannot be taken away, nor can the alien be deprived of the use or enjoyment of his property unless such taking or deprivation is for a public purpose clearly recognised as such by a law of general application and the dispossessed owner is paid promptly just compensation in terms of the fair market value of the property. According to this view, it would be immaterial to consider what the municipal law of the state is with regard to nationalisation or expropriation of property since the right is based on the doctrine of minimum standard of treatment under international law. The diplomatic correspondence of Britain and the United States shows that those governments had proceeded on this basis in preferring claims on behalf of their nationals on foreign governments. In recent years, however, both Britain and the United States whilst making claims on this principle have not in actual practice insisted on payment of full compensation in respect of nationalisation of British and American interests in Yugoslavia, Poland, Czechoslovakia and in several Latin American countries.[2] The reason seems to be based on the inability or lack of capacity of the governments concerned to pay. The international tribunals and mixed arbitral commissions have, however, been consistently applying the doctrine of minimum standard in

[1] Constitution of India (Fourth Amendment) Act, 1955.

[2] The post-War 1945 nationalisation agreements concluded between the governments of the United Kingdom and the Latin American countries provide for the payment of just and equitable compensation for the expropriation of British owned properties in that part of the world. But the actual compensation paid as a result of the Anglo-Mexican Agreement concerning expropriation of British owned properties in Mexico appears to have amounted only to about one third of the real value of the oil properties. In the Anglo-Argentine and the Anglo-Uruguayan Purchase Agreements, the compensation agreed upon appears to represent about sixty per cent of the capital involved. In the Agreement between the United Kingdom and Czechoslovakia (1949) and the Agreement between the United Kingdom and Poland, the compensation stipulated is understood to be one third of the value of British investments nationalised by those countries. In the case of Yugoslavia, the claim was settled at fifty per cent of the value of British investments. Under the 1948 Agreement between Yugoslavia and the United States, a sum of seventeen million dollars was accepted in satisfaction of claims of American property owners whose property had been nationalised in Yugoslavia. This *en bloc* settlement was much less than the full market value of the properties. The United States in its recent practice appears to be taking into account the question of ability of the offending nation to pay.

deciding upon the justification of the acts of expropriation and in determining the compensation payable on such occasions.[1] The Harvard Law School in its recent Draft Convention on State Responsibility prepared in 1961 has also relied on this test.[2]

The second view is that aliens, by being given the privilege of acquiring property rights in a state, cannot expect to be treated in a preferential manner as compared to the nationals of the state and that if aliens do acquire properties in the state, their rights in these respects must be subjected to the same standard of treatment as that of the nationals. Consequently, if a state deems it necessary as a measure of agrarian reform, or in pursuance of its policy of nationalisation of certain industries, to acquire, expropriate or nationalise foreign owned properties under the relevant laws applicable to nationals and foreigners alike, no objection could be taken.[3] According to this view, it would not be obligatory to pay full compensation or the market value for the property acquired. It would be sufficient if the alien owner of property is compensated in accordance with the same principles as applicable in the case of nationals of the state.

The third view would permit a discrimination as against the foreign owner of property. According to this view, which is largely held in the newly independent Asian African countries,[4] it should be permissible for a state as a matter of policy to acquire foreign owned property or any interest therein. It is observed that in most of these countries foreign nationals, both individuals and corporations, had acquired vast

[1] *Union Bridge Company Claim* (1924) decided by the arbitral tribunal constituted by Mexico and U.S.A.; The *de Sabla Claim* (1933) decided by Panama–U.S.A. Claims Commission; The *Illinois Central Railroad Company Claim* (1926) by General Claims Commission decided between Mexico and U.S.A.; The *Canevaro case* (1912) between Italy and Peru; *Re Certain German Interests in Polish Upper Silesia* (1926) P.C.I.J. Series A, No. 7, p. 21; *Re Serbian and Brazilian Loans case* (1929), P.C.I.J. Series A, No. 20, p. 18; In the *Norwegian Shipping Claims* (1922), *U.S.A.* v. *Norway*, the Permanent Court of Arbitration held that just compensation is due to the claimants under the U.S. municipal law and international law.

In the *Spanish Zone of Morocco claims* (1924), *Great Britain* v. *Spain*, the special arbitral tribunal held that under international law an alien cannot be deprived of his property without just compensation.

The same view was adopted in *Goldenberg and Sons* v. *Germany* (1928), A.D. 1927–28, Case No. 369; *Roumania* v. *Germany*, A.D. 1923–24, Case No. 85, the *Chorzów Factory case*, P.C.I.J. Series A, No. 17, pp. 25–29.

[2] Article 10 of the Draft Convention on International Responsibility of States for Injuries to Aliens, Draft No. 12, prepared by the Harvard Law School.

[3] Portuguese–German Arbitration, (1919) 2 U.N.R.I.A.A. 1035.

[4] The Asian–African Legal Consultative Committee in Article 12 of its Final Report on Status of Aliens recommends that "The state shall, however, have right to acquire, expropriate or nationalise the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalisation in accordance with local laws, regulations and orders." Japan, however, is in favour of the traditional view that just compensation should be paid for all acquisitions.

interests not only in land and properties but also in the mineral wealth of the country under licences or leases granted by colonial powers prior to the emergence of these states as free nations. It is urged that the new nations upon attainment of independence are free as a matter of policy to decide whether it would be desirable to leave the mineral wealth of the country and the means of their exploitation in the hands of foreigners in the economic interest of the nation. It is pointed out that several states in the West do not permit foreigners to acquire interest in such property. Again, in some of the Asian countries like Burma and Indonesia, vital means of communication between different parts of the country were in the hands of foreign owned corporations like the Irrawady Flotilla Company in Burma and the K.P.M. in Indonesia. In these cases it can certainly be maintained that it is in the vital interest of the state to nationalise such and similar foreign owned interests. The state may decide at the same time not to expropriate or nationalise similar rights held by its nationals as the same may not become necessary in the interest of security or the economic needs of the nation. It is generally conceded by all states that some compensation should be paid to the dispossessed foreign owner, but it is pointed out that if full compensation or market value had to be paid for acquisition of these interests by the state, it would be practically impossible to carry out the schemes of nationalisation as there may not be enough funds in the state coffers to meet the amount of compensation. It is therefore suggested that such compensation should be paid as may be determined by the state. Countries like Indonesia take the view that compensation need not be paid for nationalisation of properties which were acquired by foreign nationals prior to the independence, but adequate compensation should be paid for taking or nationalisation of property rights which are acquired by foreigners after the country's attainment of statehood.

There is a fourth possible view supported by De Visscher and some other authorities according to which nationalisation as such of major resources is lawful, but other forms of expropriation are unlawful.

It is difficult to say as to which of these should be regarded as the correct view of the law in the present day circumstances. The first view under the traditional doctrine of the "minimum standard of treatment" had held the field for a long time and is still regarded as correct by most of the western nations. But at the same time the second and the third alternative views held by Latin American and Asian African countries could not be ignored as they now represent the

majority of world opinion. On the one hand it is necessary to secure the freedom of the state in the matter of expropriation or nationalisation of property within its territorial domains without fettering its discretion, irrespective of whether the property belongs to its own nationals or aliens, since the state must be deemed to be the best judge of what is for public good and in the best interest of the nation. But on the other hand, it is equally expedient to ensure that foreign nationals, who had invested their capital and acquired property rights with the consent of the receiving state, express or implied, should not be left completely at the mercy of that state. The *via media* may seem to be to uphold the receiving state's right and competence to take, expropriate or nationalise foreign owned property in the public interest but to provide at the same time that adequate compensation should be paid to the dispossessed owner. This is the view which has been advocated by the rapporteur of the International Law Commission.[1] Adequate compensation need not be the full value for the property, but it would not certainly be a nominal sum, nor would it be a sum to be fixed by the government of the receiving state in its discretion. What is "public need" or "public interest" is difficult to define and this must be determined by the receiving state itself according to its best judgment.

According to various arbitral awards, international law allows requisition and expropriation for reasons of public utility in time of peace or war,[2] and that if expropriation is carried out by the competent organ of a state in conformity with general national legislation, principles of good faith, juridical equality between aliens and absence of discrimination against aliens as such, and conditional upon payment of compensation, such expropriation would be in keeping with dictates of international law and practice of civilised nations of the present day world.[3] But it is argued that when a state has permitted an alien either to engage in business or otherwise lawfully to acquire property, it must not thereafter arbitrarily or unreasonably adversely affect such property and property rights and confiscate them.[4] According to some of the text writers, the requirement of compensation is considered either as one of the dictates of natural law or as a principle of an

[1] Article 9 of the draft on International Responsibility of the State presented by F.V. García Amador to the Tenth Session of the International Law Commission – I.L.C., Yearbook 1957, Vol. II, p. 130.

[2] Portuguese German Arbitration (1919), Award II (1930), U.N.R.I.A.A. 1035-39

[3] *Standard Oil Company's case* (1926); see also League of Nations, Bases of Discussion 1929, V.3, pp. 33–37.

[4] Moore, op. cit., Vol. VI, pp. 913 and 986. Fenwick, International Law, 1948 ed., p.289.

international equality. They hold that common sense and justice among men and nations demand that if a country wishes to nationalise an industry, it must make payment to foreign owners of the property nationalised.

The doctrine of payment of just compensation has, however, been challenged by a number of modern writers on international law. Some authors not only reject the principle of "full" or "just" compensation but also the theory of "some compensation" or "compensation". Some insist that the requirement of compensation applies only in the case of expropriation which involves discrimination against aliens or against particular aliens. Others lay emphasis upon the freedom of states to expropriate property in the course of a general programme of economic and social reform without payment of compensation or at least without payment of full or prompt compensation.[1]

Expropriation of foreign owned property has given rise to a good many disputes in the past between the home state of the alien and the expropriating state calling for diplomatic intervention, preferment of claims, and even international arbitrations. Today, it is certainly the duty of the diplomatic agent, as it has always been, to afford protection to the nationals of his home state in respect of their property rights whether individuals or corporations. If their property is taken away or nationalised, he can certainly represent on their behalf and demand payment of adequate compensation.

Special treaties guaranteeing property rights. States have often found it necessary to enter into bilateral or multilateral arrangements [2] with other states under which special guarantees for the property rights of the nationals of the contracting parties have been provided for. This has been with a view to secure with certainty certain minimum rights against expropriation and particularly with regard to payment of adequate compensation. In view of the uncertainty of the law on the subject, investing states often require to be assured of their position and of their nationals before employing their capital in the under-developed countries. It is needless to say that if a state after entering

[1] Katz and Brewster, The Law of International Transactions and Relations, (1960) p. 833; Wortley, Expropriation in Public International Law, (1959)p. 35; Kuhn, "Nationalisation of Foreign Owned Property: Its Impact on International Law,"45 A.J.I.L. (1915), pp. 711–12; Schwarzenberger "Property Abroad", Current Legal Problems (1952).

[2] Protocol to the European Convention signed in Paris, March 1952. See also Wilson, "Property Protection Provisions in United States Commercial Treaties," 45 A.J.I.L., p.83

into such bilateral arrangements decided to act contrary to these guarantees, it would be violating the principles of international law.

Rights arising out of contracts and concessions

The question may logically arise as to whether the rights of a national arising out of or under a contract with a foreign state or a concession granted by it would also come for protection of the home state if his interests are affected by a breach of contract or withdrawal of the concession on the part of the foreign state. The rapporteur of the International Law Commission on State Responsibility as also the Harvard Law School in its research Draft No. 12 take the view that it would. The Permanent Court of International Justice had taken the same view at least in one case brought before it.[1]

A state may enter into a contract with an individual or a company of foreign nationality with regard to supply or purchase of commodities, or for construction of dams, bridges and factories. Similarly, the state may grant concessions to such a foreign company or individual giving it the right to prospect for and exploit the mineral resources of the country. Such contracts and concessions were often entered into and granted in the past. For the purpose of economic development of newly independent countries, the necessity for foreign capital investments and the need for securing the services of experts have frequently been arising in recent years. Many such states have entered into contracts with foreign companies and individuals for their construction projects and for the purpose of exploitation of the economic wealth of the nation. In all these cases the contracting party has to make a large initial outlay in men and money, and its programme of work in other fields also requires to be adjusted. Equity therefore demands that adequate safeguards should be provided against unjustified termination or breach of contract on the part of the state concerned. The cases where a state's conduct in terminating the concession or contract is wrongful, the home state of the alien individual or corporation would be entitled to take up the cause. According to the rapporteur of the International Law Commission, the repudiation or breach of the terms of a contract or concession is wrongful if the repudiation or breach is not justified on grounds of public interest or of the economic necessity of the state, if it involves discrimination between nationals and aliens to the detriment

[1] *Mavrommatis Jerusalem Concessions case*, P.C.I.J., Series A, No. 2 (1924), pp. 11 and 12

of the latter and if it involves "denial of justice." [1] The Harvard Law School in its draft on State Responsibility has, however, adopted a wider test. According to it, the state's action would be wrongful if the annulment or non-performance of the contract is inconsistent with the law of the state as it existed at the time of making of the contract or granting the concession, and if it is effected for the purpose of securing to the state or to other persons for its or their economic advantage benefits owed to the alien under the terms of the contract or concession. It would also be wrongful if the annulment or non-performance constitutes an unreasonable departure from the principles of law which are generally recognised by municipal legal systems as applicable to governmental contracts or concessions.[2] The tests suggested by the rapporteur of the International Law Commission would appear to be more appropriate as they take into account the needs of the under-developed and newly independent countries.

Taxation

Closely connected with the property rights of foreign nationals is the problem of taxation. It is well recognised that a state by virtue of its territorial sovereignty is competent to levy tax on incomes, properties and gains, as also on transactions, such as sale or transfer of property which arise or accrue within its territorial limits. No objection could be taken if the burden of such taxes falls on foreign nationals, whether resident in the territory or not, as long as there is real and sufficient *nexus*, that is, territorial connection with income, property or transaction sought to be taxed, and as long as foreign nationals are subjected to the same treatment as the citizens of the state in the matter of levy and realisation of taxes or rates, there could be no ground for complaint. The principle is that if an individual goes to a country and enjoys the protection of the governmental machinery of the state, or if an individual or a corporation acquires property in that state and takes advantage of the governmental machinery for protection of that property, the individual or the corporation should be called upon to pay a similar share of the expenses of running the government as the citizens of the state. The practice of most states confirms the rule.[3]

[1] Article 7 of the draft on International Responsibility of State presented by F.V. García Amador at the Tenth Session of the International Law Commission.

[2] Article 12 of the Draft Convention on State Responsibility prepared by the Harvard Law School in 1961.

[3] The state practice and the decisions of courts in the United States uphold the power of states to tax persons by reason of the closeness of their connection and to tax properties physically

Discriminatory taxes and forced loans. The matter, however, presents some difficulty when a state wishes to levy a higher tax on foreign nationals or subject them to forced loans, or when a state in the guise of levying a tax proceeds to confiscate property. The view is held by some authors that there is no principle of international law which forbids the territorial sovereign from imposing in some instances a heavier burden on foreign nationals, and in order to ensure against such exercise of state power treaties have been entered into between nations containing the guarantee of national standard of treatment in the matter of taxation.[1] Some decisions have, however, taken the view that in charging a tax against non-resident aliens the state must demand no more than it demands of its own citizens. [2] It is beyond doubt that if a state were to confiscate property in the guise of exercising its taxing power, such an act would amount to an abuse of its rights, and an envoy will be well within his competence in protesting against such conduct on the part of the receiving state. It is, however, difficult at times to differentiate between what are taxes and what is confiscation in view of the world trend towards excessive taxation. Perhaps, the determining factor would be to find out whether all persons similarly situated including the citizens of the country have been subjected to the same burden.

Forced loans. In so far as loans are concerned, if all persons in the territory are required to subscribe to a loan to meet some national emergency or to pay for a project in the national interest, no objection could be taken.

The Asian-African Legal Consultative Committee in its recommendations on the status of aliens appears to endorse the view that it is possible to make a differentiation between nationals and aliens in the matter of payment of taxes and duties but that no discrimination should be permissible in the matter of loans.[3] The representative of

within its jurisdiction belonging even to non–resident aliens. See the decisions of the U.S. Supreme Court in *Burnet* v. *Brooks*, (1933) 288 U.S. 378. *Frick* v. *Pennsylvania*, 268 U.S. 473; and *Re de Ganayr*, 250 U.S. 376. The same principle was adopted by the House of Lords in England in *Winans* v. *Attorney General*, (1910) A.C. 31.

[1] Article VII of the Treaty of April 16, 1957 between U.S.A. and Denmark; Article I of the Treaty between U.S.A. and Germany of December 8, 1923.

[2] *Lord Forres* (*Archibald Williamson*) v. *Commissioner of Inland Revenue*, 25 Board of Tax Appeals 154.

[3] Article 13 of the Final Report on the Status of Aliens of the Committee provides:

"An alien shall be liable to payment of taxes and duties in accordance with the laws and regulations of the state.

An alien shall not be subjected to forced loans which are unjust or discretionary."

Japan in the Committee was, however, in favour of the national standard of treatment in the matter of taxation. He was further of the view that no alien could be subjected to forced loans.

Deportation and expulsion

Another matter which needs to be considered in connection with the rights of aliens is the question of deportation and expulsion. Just as a state has absolute discretion under international law in the matter of admission of foreign nationals into its territory, the state has also the right to decide as to whom and under what circumstances it would expel or deport from its territory. It is for each state to decide as to the length of time and the conditions under which it would permit an alien to remain in its territory.

Although this right of a state to expel or deport a foreigner from its territory is unquestioned, it is well accepted at the same time that a state must not abuse its right by proceeding in an arbitrary manner. Humanitarian considerations require that expulsion or deportation must be effected in a reasonable manner and without causing unnecessary injury to the alien affected. It is particularly necessary that a person, who has been residing in the territories of the receiving state for some length of time and who has established business or professional connections there, must be given some reasonable time to wind up his interests. It is also necessary to ensure that an alien under an expulsion order is not exposed to unneccessary indignity prior to expulsion. It is, however, to be pointed out that where an alien has to be expelled or deported for reasons of national security in times of emergency, it may not be possible to allow him the privilege of winding up his affairs prior to departure.

According to some view, a state, although it has the right to expel aliens from its territory, is nonetheless accountable to other states for any hardship or loss inflicted beyond what is inevitable in the fact of expulsion.[1] Article XXX of the Regulations adopted by the Institute of International Law prescribes: "The act of decreeing expulsion shall be notified to the expelled individual; the reasons on which it is based must be stated in fact and in law." Thus it appears that the alien's home government has the right to inquire into the reason for and the manner of expulsion of its national. Where the prodecure applied in the course of expulsion manifests a harsh treatment against the national of a foreign state, his home government would be justi-

[1] McNair, International Law Opinions, 1956, Vol. II, p. 109.

fied in making diplomatic representation and protest against such capricious or unreasonable exercise of the power of expulsion.[1]

The grounds for and the manner in which deportations are to be carried out are generally contained in the municipal laws, regulations or executive orders promulgated by various states. Usually under these laws the executive authorities of the state are vested with wide powers in the matter. Though states enjoy ample discretion regarding the grounds for expulsion,[2] the reasons most commonly given for deportation are the reasons of national interest and security or public order. In some countries aliens who are convicted of serious offences are liable to be deported at the expiry of their terms of imprisonment.[3]

It is undoubtedly true that an order of deportation or expulsion on a person who has been resident in the receiving state for a considerable length of time acts as a very heavy punishment and causes much hardship, especially as by being deported the person concerned is completely uprooted from his hearth and home and is in all probability left with no means of livelihood. For these reasons countries like Great Britain, which greatly value individual liberty, do not readily resort to this step. In fact until December 1919, the government of the United Kingdom had no power to expel even the most dangerous alien without the recommendation of a court of law or without an Act of Parliament making provision for such expulsion except during a war or on occasions of imminent national danger or grave emergency. In Japan, aliens permanently settled cannot be deported unless special permission for the purpose has been obtained from the Ministry of Justice. It may be observed that if an alien commits an act or conducts himself in a manner contrary to the laws of the country he can be punished in the same way as the citizens. It is therefore expedient that except where his activities are so prejudicial to the security of the state that in the national interest the country needs to rid itself of him, the power of expulsion should not be lightly exercised. This

[1] See Lauterpacht, The Function of Law in the International Community, 1933, p.289; Oppenheim, op. cit., Vol. I, p. 691 ; A.D. 1929–30, Case No. 164.

[2] See the case of Ben Tillet, a British subject expelled from Belgium for organising a strike in 1896, and that of Tom Mann expelled from Germany for advocating trade unionism, as also that of Mr. Jaures, the French socialist leader, for advancing the socialist opposition to government's foreign policy. Moore, Digest of International Law, Vol. IV, pp. 69–70.

In 1901, George Kennan, an American citizen, was expelled from Russia for writing a book about penal establishments in Siberia. According to Soviet law, foreigners whose behaviour is suspicious and those who are not desirable as residents within Russia may be expelled by order of the Ministry of Interior.

[3] This is the position under the Malayan laws, as also the laws of the United States. See Hyde, op. cit., Vol. I, p. 235.

would especially be so where the alien has dug his roots deep into the commercial or economic life of the receiving state as a participant therein.

The practice of the states shows that in cases of arbitrary and unreasonable expulsion of resident aliens and in cases of hardship the home states of the aggrieved aliens have not been slow in taking up their cause though recognising at the same time the right of the receiving state to order expulsion of foreign nationals from its territory.[1] In diplomatic representations made on such occasions the reasons for expulsion have been asked for and in several cases, where the answer had been unsatisfactory, indemnity for the arbitrary expulsion of their subjects has been obtained. For example, Great Britain obtained from Nicaragua in 1895 an indemnity for the expulsion of twelve British subjects who had been arrested and expelled for alleged participation in the Mosquito Rebellion. Arbitrators in international arbitrations between states have awarded damages mainly on the ground of arbitrariness in the methods applied by the state concerned.[2]

The Asian-African Legal Consultative Committee in taking the state practice into consideration has recommended that:

(1) A state shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders.

(2) The state shall, unless the circumstances warrant otherwise, allow an alien under orders of expulsion or deportation reasonable time to wind up his personal and other affairs.[3]

Scope and extent of diplomatic protection

The above discussion will help to indicate the proper standard of treatment in international law which aliens may legitimately expect to receive in the territory of a state. If a state acts in derogation of the minimum rights of a foreigner in its territory, whether it be through legislative or executive action, or fails to afford him protection in respect of his person or property, or denies him justice, the conduct of

[1] The U.S. Secretary of State, Mr. Root, in his communication to the American Minister in Caracas in 1907 declared: "The right of a government to protect its citizens in foreign parts against a harsh and unjustfied expulsion must be regarded as a settled and funda mental principle of international law. It is no less settled and fundamental that a governmen may demand satisfaction and indemnity for an expulsion in violation of the requirements of international law."

[2] See Briggs, The Law of Nations; Cases, Documents and Notes, 2nd ed., 1952 pp. 535–37.

[3] See Article 16 of the "Final Report of the Committee on the Status of Aliens," Report of the Fourth Session, Tokyo, 1961.

that state would be regarded as internationally wrongful. In such a case the home state of the aggrieved alien would be within its rights to represent on his behalf, to lodge protests, and even to prefer a claim if it becomes necessary. This, however, is only a part of the functions of the home state in the matter of diplomatic protection of its nationals. In practice, states which are ever vigilant to secure for their nationals their legitimate rights and guarantees do often represent to the government of the receiving state long before any actual harm or injury is caused, particularly if there is any likelihood of their rights being affected by some impending legislation or otherwise. The practice of the states would, however, show that whilst informal approaches can be made on every occasion of such threatened wrong or injury, the more formal approach by means of protests or preferment of claims can only be made when the national has actually suffered harm or injury to his person or property by reason of some act or omission which can be termed as internationally wrongful, if the same is caused by the state itself or by state agencies or officials and in some cases by private persons if such act could be legitimately attributable to the state.

It would now be relevant to discuss the types of cases where intervention by the envoy of the home state of the alien would be called for and the manner in which assistance should be rendered to the aggrieved or injured national of the sending state. State practice shows that intervention or assistance is required mainly in cases of arrest and detention of a national, cases of denial of justice in judicial proceedings, expropriation of property as also in cases where the receiving state fails to afford adequate protection against acts of private persons or mob violence.

Cases of arrest and detention

The most important and familiar type of case where the envoy's or the consul's protection or assistance is sought is in the case of deprivation of personal liberty by means of arrest and detention by the authorities of the state. Since an alien is subject to local laws of the state, it is clear that he may be arrested or kept in detention for violation of a law and in accordance with the procedure established in that state. In such a case there would hardly be any cause for intervention on the part of an envoy or a consul. The position is, however, so only as long as the arrested person has been accorded a certain minimum standard of treatment in the process of his arrest or de-

tention. It has therefore been well recognised in the practice of states that an alien upon his arrest should be given an opportunity to consult the diplomatic or consular representative of his home state; similarly, an envoy or a consul has the right to request for information if one of his nationals is arrested or detained in order to satisfy himself that the treatment meted out to the person is in accord with the required minimum standard and to enable him to afford such assistance to the arrested person as he can legitimately give. Some writers are of the opinion that the receiving state must itself inform the envoy or the consular official of the home state of the arrest or detention of an alien as soon as the arrest takes place.[1] If the government of the receiving state denies this opportunity to the detained person of consulting his envoy or consular representative, it is abundantly clear that such conduct would be in violation of the principles of international law and as such wrongful.[2]

The practice of states shows that the right of a diplomatic agent or a consular officer to interview an imprisoned national is usually conceded even in the absence of treaty. A frequent exception to this is, however, made in the case of secret agents who are sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets.[3] There would appear to be no reason for making any discrimination with regard to such persons because, however heinous their crime may be, they are entitled to a trial and to observance of basic principles of justice. In fact in 1956, the Egyptian authorities permitted the British Consul General to interview James Swinburn and three other Britons who were accused of conducting espionage. It is essential that the envoy or a consul should be allowed to have an interview with the arrested or detained person. The purpose of such an interview is to ascertain whether he has been treated in a proper manner with due regard to minimum standards or civilised notions in the course of his arrest and detention and also with a view to find out as to what assistance the envoy can render him in the shape of legal advice and otherwise. The practice of the states is not clear on the point as to whether the interview should be in private or

[1] The Vienna Convention on Consular Relations 1963 also contains a provision to this effect. (See Article 36 of the Convention).

[2] See Briggs, op. cit., pp. 566–67; Schwarzenberger, International Law, 3rd ed., 1958, p. 194.

[3] The Hungarian authorities refused the U.S. Consul General permission to interview Robert A. Vogeler, Israel Jacobson and Edgar Sanders who were reported to have confessed to espionage activities. The Czechoslovak authorities also refused permission to interview William N. Oatis until he had served twelve months in prison.

whether the receiving state can insist on the interview taking place in the presence of one of its officials. It may well be said that the object of the interview would be frustrated if it were to take place in the presence of an official of the receiving state, as the arrested person may be afraid of telling his envoy or consul of any maltreatment he may have received for fear of reprisals, and he may even be reluctant to discuss his defence. The number of occasions on which such interviews can take place and the questions which an envoy can ask must necessarily vary from case to case, but it seems that the receiving state must have some discretion in the matter having regard to the needs of the case and provisions of its municipal laws. For instance, the laws of some countries require that an order of the court must be obtained for purposes of interview with an undertrial person.[1] Another question which may be raised is how soon should the prisoner be allowed to be interviewed by his diplomatic or consular representative. It would appear that no objection could be taken if the accused is held *incommunicado* for a reasonable time after his arrest and until he has been questioned by the police or other investigating authorities.[2]

It is clear that if the envoy is satisfied after his interview with the detained person that the receiving state has not denied him the normal standard of treatment, the envoy should do nothing apart from offering him advice and arrange for his defence by providing the services of a lawyer if necessary. On the other hand, if the person concerned has been arbitrarily arrested or treated in a manner amounting to denial of justice, or if he has suffered bodily harm or injury in the course of his arrest or whilst in detention, the envoy or the consul must protest to the appropriate authorities of the receiving state and ask for his immediate release, or demand that he be treated in a manner consistent with civilised notions of justice. It may even be necessary for him in very serious cases to claim compensation, after obtaining the instructions of his government, for the wrongful conduct of the state in treating a national of his home state in such arbitrary manner. The United Kingdom *Consular Instructions* require foreign service officers to see that British subjects are given adequate legal advice and facilities as well as satisfactory conditions on detention. They are to make certain that the local authorities bring the accused to trial within a reasonable period, conduct the trial according to the generally

[1] See International Law Commission, Yearbook 1959, Vol. II, p. 92.
[2] Lee, Consular Law and Practice, London, 1960, p. 124.

recognised standards of justice, and permit the arrested person the opportunity of communicating with the outside world.

Justice demands, whether one puts it on the basis of minimum standard of treatment under international law or on the basis of human rights, that a person arrested must be told of the grounds of his arrest and be given a reasonable opportunity of defending himself.[1] The laws of democratic countries generally provide for arrests only on a judicial warrant issued upon accusation of an offence though in certain circumstances police officers are given power to arrest persons, that is, where there is a reasonable suspicion of the commission of an offence of a serious character. But in the latter category of cases it is obligatory to produce the arrested person before a judicial officer within the shortest possible period of time, usually twentyfour hours, and the continued detention is not authorised without a judicial order. The municipal laws of these states also provide for informing the arrested person of the grounds for his arrest and for affording him an opportunity of being defended by a legal practitioner of his choice. These may well be regarded as the minimum guarantees which a state ought to observe in the matter of arrest or detention of aliens. An envoy can, therefore, whilst looking into the case of an arrested national, legitimately enquire as to whether the arrest was made on a judicial warrant, and if not, whether he had been produced subsequently before a judicial officer, whether he had been informed of the grounds for his arrest and whether he had been given the option to consult a lawyer of his choice. If these safeguards are not observed, an envoy could well ask for the immediate release of the arrested person or at any rate insist that he be immediately told of the charge and be produced before a judicial authority and given an opportunity of showing case. If the receiving state still persists in denial of these elementary rights, the envoy would be justified in lodging a formal protest, and if need be, claim reparation for the injury caused to his national provided he is instructed to do so by his government. It is no answer to say that the laws of the state do not require observance of these conditions for

[1] Article 5 of the Harvard Draft Convention on State Responsibility 1961 provides that the arrest or detention of an alien is wrongful if it is effected in a discriminatory manner and in clear violation of the law of the state; if the cause or manner of arrest or detention does not conform to principles generally recognised by municipal legal systems; if the state does not have jurisdiction over the alien; and if the arrest or detention involves a breach of treaty obligation. This Article further provides that the detention of an alien becomes wrongful after the state has failed to inform him promptly of the cause of his arrest and the specific charges against him, to grant him prompt access to a tribunal for determining the legality of his arrest or detention and to grant him a speedy trial.

obviously such a law would violate the basic canons of human rights. It would appear that an arrest or detention can be justified only when it is in accordance with the laws of the receiving state and that law also conforms to certain minimum standards.

Times of war and emergency. In times of war or emergency, however, states may make laws for arrest and detention of persons, and particularly of aliens, without trial; but even such a law in order to conform to standards of justice must provide for communication of the grounds of arrest and detention within the shortest possible time, and give the detained person an opportunity of disproving the charges before some administrative tribunal which may be set up. In case of an arrest under such circumstances and particularly when the arrest is made for reasons of security of the state, it would appear to be sufficient if the envoy is informed by the government of the receiving state of the law under which the arrest has been made and of the fact that the arrested person had been told of the reasons and had been given an opportunity of making a representation before a duly constituted tribunal. Though detention without trial by a court of law is somewhat repugnant to the accepted canons of justice but, in cases of emergency, whether it be in time of war or it be during a period of uncertainty following upon a civil war, revolution, or even the normal process of change consequent upon the attainment of independence of a country, a certain amount of discretion must be vested in the state to meet the situation. As long as some safeguards consonant with the principles of natural justice are provided for in such law, no objection could be taken.[1]

Arrest in connection with expulsion or deportation. Arrest and detention are permissible under the laws of most countries with a view to expulsion or deportation of an alien and in such cases it would be sufficient to inform the envoy that the person concerned was being detained with a view to his expulsion or deportation.

[1] The law of preventive detention in force in India and similar legislations in various countries under which detention is permissible without a judicial trial were considered by an U.N. Seminar on Human Rights in 1958 as not amounting to arbitrary arrest in view of the safeguards provided in these legislations regarding communication of the grounds of detention to the detained person, as also the opportunity afforded to him for representing his case before an impartial tribunal. In many cases in western Europe and even in Britain, legislations have been introduced in times of war to provide for detention without a trial, e.g. the Defence of the Realm Act, 1914, and the Defence Act, 1939.

Illegal acts of state officials. In many instances it may well be that, in spite of the provisions of the local laws containing minimum guarantees, the police or executive officials of the state may choose to subject an alien to arbitrary arrest or detention in violation of his rights under the local laws. In all such cases, apart from his insistence that the detained person be set at liberty forthwith, the envoy will be justified in demanding that the delinquent officials be duly punished. If the authorities of the state fail to take suitable action, the liability for the wrong done by its officials will be imputed to the state. Another class of cases where an envoy's protection may be sought by one of his nationals is where he is manhandled by an official in the course of making the arrest or is beaten up whilst in custody.[1] It is quite certain that no law of a civilised state would authorise such acts, but the state may still be regarded as responsible for the same if it tacitly connives at the acts of its officials. It is clear that if a person resists arrest, a certain amount of force may be employed to effect the arrest, but the force should not exceed the limit which is reasonably necessary to prevent the escape of the person sought to be arrested. If the force used exceeds reasonable limits, or if he is beaten up whilst in custody either for the purpose of extracting a confession or for the sake of impressing upon him the show of authority of the particular official, the conduct would be regarded as internationally wrongful.

Remedies available in local laws. In most countries it is very likely that the law itself would provide some remedy for obtaining the release of a person wrongfully held in custody [2] in violation of the laws in force and for obtaining damages by suit against the state or the responsible officials for injuries suffered by reason of wrongful detention or application of force and maltreatment whilst in custody. The law may also provide for punishment of officials responsible for such acts. If this is so, the envoy should advise the aggrieved national of his home state to seek redress for his grievances by these methods. The envoy may even help him in having recourse to such proceedings by affording him proper legal assistance. It is very likely that the aggrieved national, who seeks the help of the envoy, may not be aware of such provisions

[1] According to clause (3) of Article 5 of the Harvard Draft Convention on State Responsibility, "The mistreatment of an alien during his detention is wrongful."

[2] In the common law countries this can be done by obtaining a writ of *habeas corpus* from a superior court. This procedure is applicable in Britain, United States, India, Pakistan and other Commonwealth countries. In some countries, like Egypt, there is a procedure known as "objection against provisional detainment."

of law, and the envoy or his legal advisers could guide him in this regard. If, however, he fails to get relief by pursuing the remedies under the municipal law, or if no such remedies are available, then diplomatic intervention may be called for depending on the circumstances of the case.

Cases of denial of justice in judicial proceedings

It is the normal rule of international law that an alien cannot complain if he is committed to custody or punished in pursuance of a decree or sentence pronounced by a judicial tribunal upon conviction of an offence under the local laws in force. The principle is, however, subject to two exceptions, namely the cases where the rules of natural justice are not observed in the trial, and cases where the alien is subjected to a sentence which may be regarded as unduly harsh or barbarous according to civilised standards.

So far as the judicial proceedings are concerned, the essentials of a fair trial consist of the following elements: (a) the accused person must be told of the specific charges against him so that he can defend himself, (b) he must be given adequate time to prepare his case and be afforded the opportunity of summoning witnesses in his defence, if necessary, by issue of process by the court, (c) he must be given full opportunity to know the substance and source of any evidence against him and to contest its validity by cross-examination, (d) he must be afforded the right of being defended by a legal practitioner of his choice and the opportunity to instruct him for his defence, (e) the trial should be held before an impartial tribunal, and (f) the court or the public prosecutors must not so conduct themselves as to raise a reasonable apprehension in the mind of the accused person that he was not receiving a fair trial. The diplomatic agent or the consul of the home state of the alien accused is entitled to attend the judicial proceedings or to send one of the members of his staff to observe the proceedings and ensure that the elementary principles of a fair trial or natural justice are not denied to the accused person. According to the Harvard Draft,[1] full opportunity to communicate with a representative of the government of the

[1] See Article 7 of the Harvard Draft Convention on State Responsibility, 1961. According to the Rapporteur of the International Law Commission, fundamental human rights which ought to be guaranteed to an alien, would include the right of public hearing with proper safeguards by the competent organs of the state, the right of an accused to be presumed innocent until disproved, the right to be informed of the charges made against him in a language which he understands, the right to speak in his defence or to be defended by a counsel of his choice, the right not to be convicted for any act which was not an offence at the time it was committed, and the right to be tried without delay or to be released.

home state and full opportunity to have such a representative present during the proceedings is itself one of the attributes of a fair trial of an alien. To this may be added one other condition, i.e. the accused must be put in such a position that he can understand the proceedings and that the services of an interpreter are provided if he does not understand the language of the court. It is obvious that if these conditions are not observed by the receiving state and the alien accused is convicted, it cannot be said that he has been convicted and sentenced as a result of a fair trial so as to stand in the way of diplomatic interposition. Denial of a fair trial is denial of justice for which a state can be held internationally responsible. Denial of justice would also be deemed to have occurred if a judicial decision has been rendered or made by reason of foreign nationality of the individual affected.

In countries where democratic forms of government exist with the necessary concomitant of an impartial judiciary, the practice naturally is to observe both the forms and principles of natural justice, because it is equally important that justice must not only be done but it must also appear to have been done. According to the procedure generally adopted in such countries, the trials are held in open court and the accused person is informed sufficiently in advance of the charges levelled against him in order to enable him to prepare his defence. The charges are formally read over to him at the commencement of the trial when he is asked to plead guilty or not guilty. Such a procedure is essential to a fair trial because not only must the accused know what the charges against him are, but he must have time to prepare his defence by consulting lawyers, by thinking over and deciding upon the persons who can be called in his defence and by selecting documents which he would like to rely upon. He must also have the opportunity of disproving or contradicting the statements made by prosecution witnesses by cross-examination and by summoning persons in his defence for this purpose. The laws of several states provide for issue of process by the court itself for summoning witnesses whom the defence may wish to call, and non-observance of this procedure by a court has often led to quashing of proceedings on appeal to a superior court. The accused must be able to follow the proceedings of the court, particularly as to what the prosecution witnesses are saying and the rulings of the judge. It is, therefore, equally essential that where the alien accused does not follow the language, he should be given facilities to have an interpreter. It cannot, however, be said that the interpreter should be provided at the expense of the state. It would be sufficient if he is

given the facility of having one at his own expense or at the expense of his home state. The judge, however, must make sure that the accused does understand or at least follow the proceedings.

When trials are held in public with the observance of the forms and procedure stated above, the diplomatic representative will have no difficulty in either attending the proceedings or in rendering advice and assistance to his nationals. But unhappily, there are many countries where trials are held as a mere matter of form and *in camera*, the trial consisting only in accusation by the prosecutor followed by the sentence of the judge. Again in some countries, the political system is such that no witnesses would be prepared to come forward in the defence of an accused, especially a foreigner, particularly when he is held on a political charge. What is an envoy to do under such circumstances? If he asks for a trial in accordance with the standards obtaining in other countries he would promptly be told by the government of the receiving state that their system is different and that the alien must be satisfied with the form of trial under its own judicial system which is applicable to its own citizens accused of similar crimes. Perhaps in the circumstances the best thing for him to do would be to attend the proceedings and this request cannot be refused by the government of the receiving state even though the trial may be held *in camera*. He should then ascertain whether the accused had been told of the particulars of the charges against him, whether he had the opportunity of consulting a lawyer of his choice, and whether he or his lawyer is given an opportunity of cross-examining the witnesses who may be called for the prosecution. In most of these cases, however, it would probably be found that there is an alleged confession by the accused himself on which the conviction would be based. According to the laws of democratic countries no confession would be admissible in evidence unless it is voluntary; but how is the envoy to make sure whether the confession is voluntary or not? It can be said that such a trial is no judicial trial at all, and any person who is imprisoned pursuant to a trial of this character is wrongfully detained. But what is the practical consequence – preferment of international claim perhaps by the home state of the alien – but is it an adequate protection to the alien who has been sentenced without the opportunity of a fair trial? The fault lies not in international law, but in the political systems which deny even to their own citizens the most basic human rights.

The right to consult a legal practitioner of one's choice is regarded as one of the very basic concepts of justice, and this would be even

more so in the case of a foreign national, who may be unfamiliar with the laws and procedure of the country of his residence. The lawyer would be in a position to advise him of his rights and prepare his defence both on facts and law. The position would be so as long as the legal profession of the country is independent and free from interference by the authorities of the state. Some writers take the view that the prosecuting state must provide legal assistance to an accused person either free or at a reasonable cost, but in this regard it would be sufficient if the state treats the alien in the same manner as its own nationals similarly situated. It is important that the tribunal which tries the alien is an impartial tribunal. Again, this can be so only in so far as the political system of the country would allow. But what is perhaps more important is that the judge or the public prosecutor must not act in a bullying manner towards the accused, nor should they indulge without cause in refusing his requests for reasonable adjournments to prepare his case or in summoning witnesses in his defence so as not to raise an apprehension in the mind of the accused that he is not receiving a fair trial. As regards sentence that can be passed by a tribunal, it is often said that it would be denial of justice to pass a sentence which is excessive or which is regarded as barbarous by civilised standards. The notions of punishment for various crimes vary from country to country and it is difficult to lay down any norm in this regard. As long as a person receives a fair trial, it would be difficult to take an exception to the sentence that may be passed, provided it is established that a citizen of the country would have been sentenced to a similar term for the same offence and no discrimination has been made on account of the nationality of the accused.

Properties and property rights

As already observed, the scope of diplomatic protection extends to protecting the properties and property rights of the nationals of the home state of an envoy. It has been stated earlier in this chapter that though states are not obliged under rules of international law to allow aliens to acquire and hold property in their territories, states do generally permit foreign nationals to do so, though certain states exclude particular classes of properties, such as holding of agricultural land over the permissible limit, acquisition of mineral rights or industries of national importance. Once a state concedes the right to hold property to an alien, it follows that the property and property rights of foreign nationals would fall to be protected in the usual manner. The cases

where the assistance of the envoy may be sought are those where the properties are damaged or destroyed, or where the properties or property rights are extinguished, acquired, expropriated, or confiscated. It is to be stated that the properties or property rights, that may be sought to be protected, may belong to the nationals of the home state who are resident in the territories of the receiving state, or they may belong to non-resident nationals or companies incorporated in the home state of the envoy.

Demolition or destruction of property. Cases of properties being damaged, demolished, or destroyed may arise in a number of circumstances. For example, the appropriate authorities of the state or even private persons may find it necessary to pull down a building or part of it to prevent a fire from spreading, or for rescue of an individual who may be trapped within the premises. Such cases may be regarded as instances where damage or destruction of property is required by circumstances of urgent necessity, and in such a situation there is really nothing much that an envoy need do except perhaps represent the case of the national before the appropriate officials for payment of compensation if the citizens of the state are paid compensation in similar circumstances under the municipal laws. Again, it may become necessary for the judicial or executive authorities of the state to order destruction of property in the interest of public health, or to pull down unauthorised structures constructed in breach of public health regulations, or to demolish buildings which are in such a condition so as to constitute a public danger. In such cases, it is to be expected that the destruction or demolition will be done under orders of a judicial officer or an executive authority acting under the provisions of some law after giving an opportunity to the owner of the property to show cause. If these conditions are observed and if the action of the authorities in making the order is not in fact an abuse of their powers under the law for the purpose of depriving an alien of his property, no objection could be taken. A foreigner must be expected to obey the laws regarding public order, health and morality, and if he is treated on the basis of equality with the citizens of the country he ought to be satisfied and no ground for diplomatic intervention can be said to exist. But there may be many an occasion when diplomatic or consular intervention will be called for, such as in the case where the business premises of his national are looted, or his properties are wantonly damaged or destroyed, whether it be by private individuals or through mob violence

or in a riot with or without the connivance of the police authorities of the state. It is very unlikely that the state itself will authorise such acts, but it may still be held responsible for them in certain circumstances which will be discussed later.

Extinction of property rights, expropriation and nationalisation. Extinction of property rights and acquisition, expropriation, nationalisation or confiscation take place principally through the actions of the state itself. It has already been observed that a state has jurisdiction over properties situated within its territories whether they belong to its citizens or aliens, resident and non-resident, and the state's right to acquire, expropriate or nationalise such properties in public interest and upon payment of a certain measure of compensation cannot be questioned. Confiscation of property, except when the same is done under a judicial order upon conviction of an offence in a fair trial, is not, however, permissible under international law, practice, or morality. Confiscation means deprivation of property without payment of compensation whether or not such deprivation is authorised by law. Acquisition of property is usually done under the provisions of the municipal laws of each state. If the law provides for such acquisition for a public purpose and prescribes payment of compensation, there can be no ground for complaint. If the executive officials act in derogation of the provisions of such law, there would in all likelihood be some remedy available under the municipal law, and if the envoy is approached by his national in a case where his property has been taken away without payment of compensation, the best course would be to advise him to take recourse to such action as may be available under the municipal laws. The envoy can of course give him all possible help including financial and legal assistance in pursuing such a course; he may even informally bring his case to the notice of the authorities. It may be stated that even if the acquisition is done only under an executive order, there could be no objection provided compensation is paid. It is usual even in democratic countries to acquire property for the purposes of providing parks or recreation spaces, building of schools, housing of refugees or slum dwellers, broadening of roads and slum clearance schemes which are deemed to be public purposes of the state. As acquisition of property for these purposes is made out of genuine necessity, there is not much likelihood of any discrimination against foreigners and the governments are not found averse to paying even the full market value as compensation since the amounts needed for the

purpose are comparatively small. Any difficulties caused to the alien in this type of case would probably be due to the attitude of a particular individual official and consequently an action under the municipal laws, if such remedy is available, or an informal representation by the envoy before a superior official will bear fruit.

Nationalisation of industries and expropriation of properties is generally done by special legislation enacted for the purpose or by executive decrees depending on the form of the government and the constitutional machinery in the receiving state. In such cases the past experience shows that a state may decide to nationalise and expropriate the properties of all foreigners or foreigners of a particular nationality or nationalities, or it may proceed on the basis of nationalisation of all or particular industries or expropriation of particular classes of property as a measure of general industrial or agrarian reform. The latter category would include the properties of foreigners and citizens alike. It has also been seen sometimes that in deciding upon nationalisation of a particular industry or industries, the state may be motivated by the fact that those industries or a controlling interest in them are in the hands of foreigners.

If a state decided to nationalise its public industries, such as mineral development and public utility undertakings like railways, electricity, or gas works, or even banks and insurance corporations, and if the properties of citizens and foreigners alike including foreign corporations are involved in such a scheme of nationalisation, no objection could be taken as such to the nationalisation of the properties by the home state of the alien. But the position is only so as long as compensation is paid for the properties taken over, and here the difficulties often arise. Taking of property without payment of compensation is confiscation and that certainly is not permissible. States often find it difficult, especially those which are newly independent or underdeveloped, to pay the market value or even a fair value of the nationalised properties out of state coffers. Various views have been advanced by text writers, learned societies and in policy statements made by governments from time to time as to the basis on which compensation need be paid and these have already been discussed.[1] The important point to be borne in mind is that as soon as nationalisation policy of the government of the receiving state or the basis of payment of compensation for such nationalised property is made known, the envoy should make repre-

[1] See page 311–16 ante.

sentation to the appropriate authorities if he finds that the interests of the nationals of his home state are likely to be adversely affected. He should lodge protests if the representation bears no fruit and ultimately the question of preferring claims may have to be considered. However, in preferring claims or in asking for compensation for the nationalised or expropriated property in such cases, account should be taken of the genuineness or *bona fides* of the state action in pursuance of its policies for furtherance of the common good of its people and its paying capacity. Thus it might be considered proper to allow some time to the state to pay the compensation, such as by means of bonds bearing adequate interest.

The considerations would, however, be somewhat different when the nationalisation or expropriation measures are likely or are intended to affect only the interests of foreigners or foreigners of certain nationalities. It is true that under international law it is entirely up to each state to decide as to whether it would permit aliens to hold property in its territory and consequently a state may decide at any time to revoke such concession to foreigners; but it is equally true that vested rights, once acquired, must be respected and they cannot be taken away without compensation. A state, which wishes to nationalise or expropriate properties of foreigners only, may have good reason to do so in the interest of the nation, but it is submitted that if it does so, it must pay full compensation, that is, the market value of the property plus the value of the interests which the alien would lose by reason of the expropriation or nationalisation of his property. It is unlikely that any remedies would be available to the alien under the local laws in the matter of compensation since it is the law or the decree relating to nationalisation or expropriation which itself would possibly indicate the measure of compensation payable, and the provisions of such law or decree would be binding upon the courts. Diplomatic intervention would, therefore, be the only remedy. Cases where nationalisation or expropriation measures are taken in respect of the properties of aliens of a particular nationality, as a token of disapproval of the policies of their home state, have been known to have taken place even in most recent years. Though a state retains absolute discretion in such matters, it is difficult to find any principle of international law on the basis of which such discriminatory measures can be taken against aliens of a particular nationality. The practice of many states has been to proceed on the basis of reciprocity in the matter of treatment of foreign nationals and it should, therefore, be clarified that if a state were to discrimi-

nate against aliens of a particular nationality on the ground that their home state has discriminated against the nationals of the receiving state, there could perhaps be some justification for the action. Nevertheless, it is obvious that full compensation of the nature indicated above must be paid for such nationalisation or expropriation. Here again, diplomatic intervention would appear to be the only remedy if the alien is deprived of his property without payment of compensation.

Injury in the hands of private persons

The class of cases where an alien may suffer harm or injury to his person or property in the hands of private individuals will now be considered.

It may happen that a national of the sending state is assaulted, or he may receive severe injuries as a result of mob violence in a riot or during a rebellion. It is not uncommon that the person may become the victim of assault or mob violence by reason of his race or nationality owing to dissatisfaction over the policies or actions of the government of his home state. Similarly, his home or business premises may be looted and his properties damaged or demolished. He may be caught up in a race riot and beaten up because of his race or colour. He may even suffer bodily injury or damage to his business or property in a general riot or insurrection directed against the government of the receiving state. Such instances have occurred in recent years as well as in the past.

Since in international law all aliens resident in the territory of the state are subject to local laws and regulations, it is to be expected that the authorities of the state of residence of the alien shall afford him adequate protection in respect of his life and property, and failure to do so could be considered as evidence of wrongful conduct on the part of the state. It is clear that a state can be held responsible for the wrongs and injuries suffered by foreign nationals only if the same arises out of the acts of the state itself or of its officials, but it is not responsible for the acts of private persons including its officials acting outside the scope of their authority.[1] But at the same time it is equally clear that the state may incur responsibility even in respect of these latter acts if it connives at them, or fails to take adequate precautions to prevent them, or if it fails to punish the wrongdoers and bring them to

[1] Under international law in order that a state may incur responsibility, it is necessary that an unlawful international act be imputed to it; Moore, International Arbitrations, Vol. II, pp. 2050 and 2082.

justice.[1] Equally will it be responsible if it does not allow protection of its police authorities to an alien in time of need, or if it fails to afford him access to its courts for recovering damages from the wrongdoer. If an alien is beaten up or his property is damaged by an individual, the envoy should try to ascertain as to whether such acts were perpetrated with the connivance of the police authorities of the state and, if not, whether the authorities have acted with due diligence and promptness in arresting the wrongdoer with a view to bringing him to justice. It is difficult to make out exactly the role of the authorities in such a situation, but the promptness with which they act on a complaint being lodged by the injured alien with the police will show their attitude.[2] It is very often the case that when there is a certain degree of agitation over the policies or acts of a foreign state engineered by the local press or politicians in the minds of the local people, they might be tempted to attack or damage the property of any foreigner they may come across, who is a national of that foreign state or looks like being one. Whenever there is such a feeling, it is the duty of the state and the police authorities to take adequate measures to prevent harm or injury being done to the alien or aliens of that particular nationality, and the envoy of the home state of the alien may well request for such protection. It means that as soon as information is received regarding an attack or threat of an attack, the police and the fire protection authorities must come to the aid of the alien and give him all necessary assistance. The wrongdoers ought to be apprehended at once and prosecuted in accordance with law. If there is any lack of diligence on the part of the authorities in this regard out of tacit sympathy with the cause of the wrongdoers or otherwise, the alien could ask for the protection of the envoy of his home state. It would be the duty of the envoy in these circumstances to represent with the authorities concerned and demand redress. In case of mob violence or race riots which may break out all of a sudden, the duty of the authorities is to prevent further damage

[1] Borchard, The Diplomatic Protection of Citizens Abroad, 1918, p. 217; Briggs, op.cit., p. 172; Cheng, General Principles of International Law As Applied by International Courts And Tribunals, 1958, p. 209; *The Janes Claim*, (1926) 4 U.N.R.I.A.A., 82–87; *The Neer Claim*, (1926) 4 U.N.R.I.A.A., 60–62; *The Noyes Claim*, (1933) 6 U.N.R.I.A.A., 308–311. See also Schwarzenberger, op. cit., p. 629.

[2] What constitutes "due diligence" is a question of fact. Cheng, op. cit., pp. 208–15; Fenwick, op. cit., p. 283. According to Article 13 of the Harvard Draft Convention 1961:

(1) Failure to exercise due diligence to afford protection to an alien by way of preventive or deterrent measures against any act wrongfully committed by any person acting singly or in concert with others is wrongful ...

(2) Failure to exercise due diligence to apprehend or to hold after apprehension as required by the laws of the state a person who has committed against an alien any act referred to in paragraph 1 of this Article is wrongful ...

being done and to punish all persons responsible for the acts of violence. In such cases compensation can be demanded only if compensation is payable under similar circumstances to the citizens of the state, but the state must provide for an opportunity to the alien to sue the perpetrators of the acts of violence in a civil court and claim damages. If such remedies are not available under the municipal laws, the alien may ask for compensation from the state itself and the envoy may give him advice and assistance in this regard.

Manner of making representation to the government of the receiving state

The right of diplomatic protection which an envoy exercises on behalf of the state he represents consists in protecting the interests of the nationals of his home state including, as already stated, making of representation on their behalf to the government and the government departments of the receiving state. This may be done informally in the course of an interview or by a formal note bringing to the notice of the government the facts of the particular case whilst requesting consideration of the matter in issue. A representation may be made in respect of the interests of nationals of his country generally or in respect of a particular individual. In the former type of case, the occasion for representation may arise when the government of the receiving state has introduced or is contemplating promulgation of legislation by which the interests of all his nationals are likely to be affected, such as nationalisation decrees, taxation laws, or laws relating to business or professions. It may also arise when the envoy has to request for protection of his nationals resident in the country against mob violence or riots. The familiar type of case, however, which arises more often is concerning individual citizens of his country. Such occasions arise in a variety of cases and under varied conditions. They range from a case of refusal of entry visa to cases of arrest or detention, denial of a fair trial, deprivation of property, dispossession from business or profession, mob violence and even expulsion or deportation.

Representations are normally made to the Foreign Office of the receiving state, since the Ministry of Foreign Affairs is regarded as the appropriate channel of communication between the envoy and the government of the receiving state; but in urgent cases the department of the government more directly concerned with the matter may be approached by the envoy. Consular officers, who are perhaps more concerned with individual cases, usually approach the

local officials within their consular districts. If no redress is received through such officials, the matter is brought to the notice of the diplomatic agent who may take it up with the Foreign Office. The purpose of making a representation is simply to bring the relevant facts to the notice of the government of the receiving state pointing out the hardships of the case and to state the views of the government of his home state. It does by no means amount to expression of disapproval of the conduct of the receiving state in the particular matter, and representations can therefore be made even when the government of the receiving state has acted within its rights permissible under international law.

Protests. The more formal manner of approach by means of lodging of protests is resorted to normally where the home state takes the view that the receiving state in the matter of treatment of its nationals generally or of a particular national has acted arbitrarily, or in a manner inconsistent with the principles of law or state practice, for example when the receiving state expropriates property without payment of compensation, or when it is responsible for denial of justice or fails in its duty of affording protection to aliens. Lodging of protest is a definite disapproval of the policies of the government of the receiving state for its failure to do its duty under international law. Protests are generally lodged if previous approaches of representations of the envoy are not heeded to or in cases when the receiving state shows a persistent disregard to international law in its treatment of foreign nationals, or when it acts in a manner so manifestly unjust as to call for an immediate protest, such as arbitrary arrest or confiscating property in wanton disregard to basic human rights of the foreign national.

Preferment of claims. If protests are of no avail, the next step that is open to the home state is to prefer a claim on behalf of its aggrieved national for damages in respect of the wrongs or injuries suffered by him to his person or property rights. The claim is presented directly to the government of the receiving state. It may be stated that in such a claim the reparation that may be demanded is designed to re-establish the situation which would have existed if the wrongful act or omission attributable to the receiving state had not taken place. It means that the home state can claim revocation of the wrongful act by the receiving state or restitution in kind of property wrongfully taken; the

claim may also be for performance of an obligation which the receiving state wrongfully failed to discharge or for abstention from further wrongful conduct. Where restitution is not possible, payment of damages is the only remedy that can be claimed. In some cases, damages are claimed even in addition to restitution. Damages are meant to place the injured alien or his legal representatives in as good a position in financial terms as that in which the person would have been if the wrongful act on the part of the receiving state had not taken place, or to restore to the injured alien any benefit which the state responsible for the injury obtained as a result of its act or omission and to afford appropriate satisfaction to the alien for the wrong or injury suffered by him due to the conduct of the receiving state.

It is very likely that the receiving state may come to terms with the home state of the alien once the claim is preferred, but in cases where the receiving state proves to be adamant, the claim could be pursued through the usual means for settlement of international claims between states, such as by having recourse to the International Court of Justice where it is possible to do so under the statutes of the court, or by resorting to international arbitration. There have been numerous instances of recourse to international arbitrations by the United States of America and Britain against Mexico and other Latin American states in respect of claims of their nationals.

Exhaustion of local remedies

But before a state presents an international claim on behalf of one of its nationals, the envoy has to make sure that the aggrieved person has exhausted all the remedies which may be available to him under the municipal laws of the state.[1] The principle of exhaustion of local remedies is a well accepted doctrine of international law and is based on the hypothesis that diplomatic intervention in the form of presentation of international claims is an extraordinary remedy available in respect of internationally wrongful conduct on the part of a state for breach of its acknowledged duty under international law. If a state itself provides for appropriate remedies under its laws for the harm or injury suffered by an alien, the state cannot be said to have failed in its duty until the local remedies have been exhausted and the alien has failed to get adequate redress for the injury suffered by him. It is recognised that

[1] See the *Tinoco Concessions case*, (1923) 1 U.N.R.I.A.A.; 18 A.J.I.L. (1924), p. 147 *The North American Dredging Company Claim* (*United States* v. *Mexico*),(1926) 4 U.N.R.I. A.A., 26–30. *The Mexican Railway Union Claim* (*Great Britain* v. *Mexico*), (1930) 5 U.N.R. I.A.A., 115–120; Schwarzenberger, op. cit., pp. 602–12.

a state must allow access to aliens within its territory to courts of law for redress of their grievances and failure to do so on the part of a state is itself an international wrong. It should be open to an alien to institute actions both against the state and private individuals, as the case may be, if he suffers harm to his person or property. For instance, it is permissible under the laws of most of the democratic countries to have recourse to *habeas corpus*, to claim damages for wrongful imprisonment in the courts of law, and to bring to book officials or private individuals who may have assaulted or injured him. Similarly, it is possible to claim damages from the state or private persons for damage or destruction of his property. In many countries, it is possible to challenge the actions of the executive branch of the government in a court of law on the ground that the executive action is in violation of the law of the state; again, in countries like the United States and India, where aliens are entitled to some of the fundamental rights under the constitution, even a law can be challenged as being *ultra vires* of the constitution. When such remedies are available, the alien, whether an individual or a body corporate, must have recourse to such procedure, and it is only after all such remedies are exhausted including the appellate proceedings that the question of diplomatic intervention may arise. For instance, in the case of nationalisation of foreign property the law must first be tested in the courts of the country. The question of exhaustion of local remedies can, however, arise if there are such remedies open. Again, if the court or the authority before which the alien is to pursue his remedies denies him justice, that is to say, if his approach to the court is circumscribed by excessive conditions, such as payment of unduly heavy costs as a condition precedent to his approaching the court, or if he is denied a fair hearing in the conduct of proceedings, the case for diplomatic intervention would at once arise. The same principle would apply if it appears that the attempt to have recourse to the local remedies will merely amount to nothing but compliance with a purposeless formality.[1] It should be mentioned that if a claim is to be preferred, it should be done with as little delay as possible after the local remedies have been exhausted.[2]

Waiver of diplomatic protection

In this connection another principle of international law needs to be

[1] *Panevezys Saldutiskis Railway case*, (1939) P.C.I.J. Series A/B, No. 76, pp. 16–17.

[2] According to Article 26 of the Harvard Draft Convention 1961 on State Responsibility, the claim shall be barred by lapse of time if the presentation of a claim is delayed after the exhaustion of local remedies.

considered, namely that the right of diplomatic protection is not a personal right of an alien but it exists in favour of one state as against another. The mere fact that a private individual or corporation declines the protection of his or its government cannot deprive the home state of its legal right to extend diplomatic protection on behalf of such individual or corporation. The well known South American jurist, Calvo, evolved a doctrine under which an individual or a corporation could stipulate in a contract to be governed solely by the decision of the local courts or tribunals [1], and if such a stipulation was made, the jurisdiction of the home state to afford diplomatic protection was considered to be ousted. This is known as the Calvo doctrine. The insertion of a Calvo clause became common among Latin American states due to the fact that on innumerable occasions, *concessionaire* campanies and individuals sought the protection of their home states on flimsy grounds without caring even to exhaust the local remedies that were available. The legality of the Calvo doctrine has been discussed in a number of arbitral decisions, and the correct view appears to be that (i) in so far as such clause attempts to deprive in general the government of his country of its undoubted right of applying international remedies to violations of international law committed to his damage, it is to that extent void; (ii) but there is no rule to prevent the inclusion of a stipulation in a contract that in all matters pertaining to the contract, the jurisdiction of the local tribunals shall be complete and exclusive; (iii) that it would not be proper on the part of a foreigner or foreign company to treat the state against which he seeks the diplomatic pretection of his home government as an inferior and untrustworthy state and to request for his own government's intervention without exhausting all the available local remedies for the purpose, but (iv) where such a stipulation purports to tie in this respect the hand of his government not to intervene in respect of a clear violation of international law, it is void.

Rendering of help and assistance to nationals

The right of diplomatic protection must not be supposed to be confined to making approaches to the government of the receiving state. It necessarily includes rendering of all help and assistance to the nationals of his home state. It means that the envoy or a consular representative can interview him on all occasions and even whilst he is in custody, though this would necessarily have to be with the knowledge of the appropriate authorities of the receiving state. The form of

[1] See page 386 ante.

assistance may include supply of information, provision of an interpreter, legal assistance, and monetary help according to the needs of the situation. On many an occasion the alien will turn to his envoy for guidance and financial help as he may not be in a position to pursue the remedies through lack of funds. The receiving state is under an obligation to grant all facilities to the envoy to discharge his duties in this regard. In cases where a person is imprisoned, the envoy or the consular representative must be informed at once and communications from the prisoner should be forwarded to him. The laws and regulations of the state must not be so framed and the restrictions that may be imposed on the interviews between an alien prisoner and his envoy must not be such so as to frustrate the object of his interview.

Before concluding this aspect of the matter, it ought to be mentioned that the envoy or the consul must judge for himself the facts of each case and satisfy himself that his intervention is called for. It has to be remembered that the envoy has important political functions to fulfil which necessitate maintenance of friendly relations with the government of the receiving state and its officials, and nothing should be done which would unnecessarily annoy them. In cases of gross or persistent disregard of international law or in cases of denial of justice towards his nationals, his duty is, however, clear. The number of cases where informal approaches bear result is indeed surprising, and consequently this method ought to be tried before making a formal protest. If he decides to prefer a claim, he will no doubt do so after obtaining the instructions of his government.

Preferment of claims by individuals

It would not be out of place to mention that there is at present a trend of thinking to the effect that an aggrieved alien should himself be in a position to prefer a claim against the offending state for the injuries suffered by him due to the wrongful conduct of the receiving state. Though there is high authority [1] in favour of such a view, it is difficult to see the basis for it in international law or the efficacy of such a course. Hitherto it has been well established that a person who goes to reside or sojourn in a foreign country goes under the protection of his home state whose passport he carries, and if he suffers harm or injury due to the wrongful conduct of the receiving state in violation of the

[1] Both the rapporteur of the International Law Commission, Mr. F. V. García Amador, and the Harvard Draft Convention 1960 have provided for claims by individuals against states.

principles of international law or state practice, and if he fails to obtain redress under the municipal laws, his home state may espouse his cause and present an international claim against the offending state. In that event, the claim would transform itself from a personal action to that of action by one state against another on the basis that non-observance of principles of international law by a state in the person of a national of another state is an affront to the latter state itself for which it may demand due reparation. By taking up the claim of one of its own nationals and in demanding compensation, the claimant state asserts its own rights and thereby the claim comes to be considered on a state to state basis with all the available machinery for settlement of inter-state disputes and claims. It is of course for each state to decide whether it would espouse the claim of one of its nationals against another state, and it is often the case that the home state of the injured alien may decide not to do so out of political considerations. It is argued that if private individuals could prefer claims themselves, it would provide them a remedy in such situations. But the point for consideration is whether recognition of such a right would advance matters very much and whether it would at all be desirable. An aggrieved individual can today pursue all the remedies that may be available under the municipal laws of the state whenever they are available. In a situation where he fails to get relief under such proceedings or where the political structure of the state is such that no remedies are open to an alien against wrongful acts of the state or even of private persons, is it likely to make any difference by the individual preferring a claim on the government of the receiving state? When the envoy of his home state represents on his behalf, or protests or prefers a claim, the whole might of the state is behind him, and it is in the knowledge of this fact that the offending state may sometimes relent. Apart from the fact that the claiming state may have recourse to an international tribunal or court, there is also the possibility that the refusal of the claim by the offending state may lead to bad relations with the claiming state with the resultant political consequences and the repercussions it may have on the treatment of its own nationals. This often acts as a deterrent. If an individual prefers a claim, such considerations would be absent, and the claim is in all probability likely to be rejected. In order to render such a right on the part of an individual effective, it would therefore be necessary to allow him access to some international tribunal. Even as regards disputes between states, the jurisdiction of the International Court of Justice and of other international tribunals is based solely on

the consent of the states which accept such jurisdiction and in the matter of international arbitrations, the arbitrators can decide only on the basis of a voluntary agreement on the part of the states concerned. It is hardly likely that states would be ready to accept the jurisdiction of an international body to decide over claims of private individuals having regard to the hitherto accepted notion that private individuals are not subject to international law. To vest compulsory jurisdiction in an international tribunal to hear and decide cases of private individuals against states in respect of their conduct in their treatment of foreign nationals would greatly undermine the sovereignty of the states and would appear to violate the fundamental doctrine on which international law is based, namely state sovereignty. Moreover, it may be observed that whilst states can be expected to proceed with caution and act only in genuine cases in preferring claims against other states, the same cannot be expected of individual claims.

CHAPTER XIII

PASSPORTS AND VISAS

One of the many functions which diplomatic and consular officials have to perform is the issuing of passports. Passports are documents of identity which are issued in the name of the head of the state in favour of persons who wish to travel or sojourn in foreign countries. They contain a request to all persons who may be concerned to afford assistance and protection which the holder of the passport may stand in need. In modern times, possession of a passport has become an absolute necessity in foreign travel, though less than a hundred years ago only a few countries, such as Persia, Roumania, Russia and Serbia, required passports from aliens entering their territory and none required passports from departing aliens. The two world wars and the development of modern means of fast travel have, however, led to greater control by many states, which is done by means of passports and visas. In addition to enabling its holder to leave his country and enter a foreign state, a passport implicitly confers upon the traveller the right to return to his own country.

Issue of passports

Passports are generally issued by states in favour of their own nationals according to the laws or regulations of the state concerned. Because of the importance attached to a passport, states invariably require their passport issuing authorities to establish the identity, allegiance and national status of the applicant beyond all reasonable doubt before issuing a passport. It is usually a matter for the executive discretion to determine whether or not to grant a passport to the person who has applied for it. The conditions for issue of passports vary from state to state, but the criteria which are generally followed would appear to suggest that one of the matters to be taken into consideration is whether the person, who has applied for the passport, would be in a position to

support himself while sojourning abroad. Another factor which has assumed prominence in modern times is the political beliefs and affiliation of the person concerned.[1] The further fact which requires consideration is whether the state issuing the passport would be in a position to afford the holder due protection in the country which he wishes to visit. In modern times, passports have come to be regarded as proof of the consent of the state which issues the passport to the holder visiting the countries endorsed on the passport. It also assures the holder of the diplomatic protection of his home state, whose passport he carries, whilst residing or sojourning abroad. The passport also serves as evidence of the nationality of the holder, though according to international practice this is by no means conclusive.

Although passports are normally granted in favour of a state's nationals, they are sometimes given to stateless persons on humanitarian grounds and on occasions to aliens who have been long resident in the country. Great Britain sometimes issues passports to persons who are not citizens of the United Kingdom and the colonies but are Commonwealth nationals whose exact nationality is in doubt. Since each of the countries of the Commonwealth has its own nationality laws, it may happen that a particular individual does not qualify for citizenship under any of the nationality laws though he was undoubtedly a British subject at the time of his birth. In such cases, the government of the United Kingdom may give him a passport. The passport issued to such a person is, however, of a category different from the regular passports issued to the citizens of the United Kingdom and the colonies.

In addition to the ordinary passports, states also issue special or official passports for government officials who may be visiting abroad in the course of their official duties, such as attending international conferences or proceeding on some business of the state. This category of passport is also given to government employees assigned to foreign service establishments. Diplomatic passports are issued in favour of the

[1] Under the United States laws, the Secretary of State is authorised to deny passports on two broad grounds, that the applicant is not a citizen of or does not owe allegiance to the United States, or that he is engaged in a conduct which would violate the laws of the United States. The action of the State Department in refusing to issue passports to applicants suspected of communistic sympathy or affiliation was struck down by the Supreme Court. The court held that freedom to travel is an important aspect of citizens' "liberty" and that the Secretary of State was not authorised by Congress to bar passports on the ground of applicant's beliefs and associations alone . (See *Kent et al* v. *Dulles, Secretary of State*, 357 U.S. 116) This decision is, however, of not general application as most countries do not regard freedom of travel in foreign lands as a part of citizens' liberty. In Britain and most of the Commonwealth countries including India, there is no fetter on the executive discretion in the matter of issuing passports.

members of the foreign service and their families. In some countries these are also given to ministers and senior officials of the government of sufficiently high status who proceed abroad for the purpose of attending international conferences.

When an application is made for issue of a passport the same has to be scrutinised in the Foreign Office, or by the diplomatic agent or the consular official of the state, as the case may be. If it is decided to issue the passport it is made valid for travel in certain countries as are endorsed in the passport itself. If the holder of the passport desires to visit any additional countries, he has to make an application for endorsement.

Endorsements. In considering an application for endorsement for a particular country or countries, the Foreign Office or the diplomatic agent must scrutinise the application keeping in view the same criteria, namely the means of support of the holder in the country for which the endorsement has been requested and the ability of the state to afford him diplomatic protection in that country. The further consideration which is to be kept in view is whether the holder of the passport is likely to prove himself as a source of embarrassment to the government which issues him the passport. It is needless to mention that in the case of a country which the state issuing the passport does not recognise, no endorsement should be made because an endorsement cannot be made in respect of any political entity which is not recognised as a state and secondly, because the passport issuing state would not be in a position to afford any protection to the holder of the passport in such a country.

Visas

A person desirous of visiting a country other than his own would not only require a passport endorsed valid for the country in question from his own government but he would also need an entry visa from the government of the state which he wishes to enter for the purpose of travel or residence. An application for a visa is usually made to the diplomatic agent or the consular official of the country concerned. The issue of a visa, which is given on a valid passport, would signify the consent of the state concerned to receive the alien on its territory and to give him such protection which a state is required to afford in accordance with international law and practice. It has already been observed that it is a matter entirely for the discretion of the receiving state to decide as to whether or not it would receive a particular foreign

national into its territory. It may also make a distinction between persons who wish to enter the territory for a temporary visit and those who wish to come for long residence. It would be usual for a diplomatic mission or a consulate to grant an entry visa in respect of persons who wish to visit the country for a period not exceeding thirty days for the purpose of travel or tourism, but today the general practice is that in case of longer residence the instructions of the home government are sought before the visa is granted. There are various categories of visas which are determined according to laws and regulations of each state. Visas are not normally given on passports issued by a country which the receiving state does not recognise.[1] In such cases the person, whose home state is not recognised by the country he wishes to visit, should obtain a certificate of identity from the diplomatic mission or the consulate of his home state and have his visa endorsed on this certificate.

It may be stated that a visa is only *prima facie* evidence that the holder, according to the available information and examination, is entitled to enter the state. It is no guarantee that he will be able to do so. The final decision still rests with the immigration officials who may refuse him permission to enter the country even though the alien has a valid passport and visa.[2]

There are in general three types of visa, namely the diplomatic visa, the official visa, and the ordinary visa. Diplomatic visas are invariably given on all diplomatic passports. They may be given on other passports in certain cases. For example, British diplomatic visas are given to cabinet ministers and important officials of foreign governments on official missions, representatives and officials of the United Nations and of other international organisations when travelling in their official capacity or official business of their organisation, and diplomatic couriers in addition to members of diplomatic service of foreign states and foreign consular officers *de carriere* proceeding to or returning from their posts. Wives and members of the families of such persons, with the exception of diplomatic couriers, are also given diplomatic visas whilst travelling to and returning from the posts where the latter are stationed. Servants of persons to whom diplomatic visas have been granted also receive diplomatic visas when travelling with their em-

[1] It, however, appears that a Chinese with a nationalist passport had obtained visas to travel to the United Kingdom, the Netherlands, Switzerland, Sweden and Denmark all of which have withdrawn recognition from the issuing regime. See Lee, Consular Law And Practice, London, 1960, p. 184.

[2] Lee, op. cit., p. 184.

ployers. All members of reigning houses and presidential families and members of ex-reigning houses, who are *personae gratae* to Her Majesty's Government, are given diplomatic visas. The official visas are normally granted to foreign government officials travelling on official business for their government and to personnel of delegations and officials of certain international organisations where grant of a diplomatic visa is not justified. In all other cases ordinary visa is given.[1]

In recent years, numerous arrangements have been made between countries to mutually abolish or simplify the visa requirements for their nationals in each other's territories. Canada, for example, concluded in 1949 such reciprocal arrangements with Sweden, Denmark, Belgium, Luxembourg and the Netherlands. In 1952, Sweden, Denmark, Finland and Norway concluded an agreement under which their nationals do not require to have a passport or other travel document when travelling from any one to any other of these countries or for residence therein during such time as a residence permit is not required. The United States has agreements with fifty nations for the reduction or elimination of passport visa fees. Some of these countries, namely France, United Kingdom, Denmark, Norway, Ireland, Morocco, Tunisia and Portugal, waive the visa requirement altogether for American citizens visiting for a temporary period. The United Kingdom has bilateral arrangements for the reciprocal abolition of visas with France, Belgium, Luxembourg, Norway, Denmark, Netherlands, Switzerland and Iceland. There are numerous such arrangements between the various states in Europe. New Zealand has also entered into such arrangements with some of the European states. There is, however, no such arrangements with any Asian country except in cases where visa requirements are waived owing to membership of the Commonwealth of Nations.

[1] United Kingdom, Consular Instructions (XIII – 47).

CHAPTER XIV

ASYLUM AND EXTRADITION

The various matters which the Foreign Office of a state and its diplomatic officials have to be concerned with from time to time include questions relating to granting of asylum to fugitives in the territory of the state or in its diplomatic missions, as also the question of extradition of fugitive offenders.

Territorial asylum

The question of granting territorial asylum arises when a person or persons having fled from another country enter the territory of the state and seek permission to remain there. This may happen when an individual or a group of persons, in order to escape persecution in their own land on account of their race, religion or political beliefs, leave its territory and try to find refuge in some other land where they could live and enjoy some of the fundamental freedoms. In recent years, many such instances have arisen, for example the cases of Jewish refugees who were made to flee from Nazi persecution in Germany on account of their race, the refugees from Hungary and other East European states, and the Tibetan refugees who sought their freedom from domination by leaving their homes and taking refuge in other lands. The occasion may also arise when an individual after having committed a political or a common crime escapes from the territory where the crime has been committed and seeks refuge in a neighbouring country. In all these cases, it is most unlikely that the refugees would have any travel documents in their possession for entry into the state in a normal manner. Cases have also arisen in recent years for diplomatic representatives of certain countries to seek asylum in the territory of the state to which they had been accredited.

Principles concerning territorial asylum. The principle concerning the grant of asylum in the territory of a state under international law is the same in all categories of cases mentioned above, that is, in the absence of any treaty obligation to the contrary, a state is free to admit any one it likes into its territory and to allow him to remain there. There is, however, no corresponding right in the refugee to demand that he should be granted asylum by the state whose territory he has entered. Article 14 of the Declaration of Human Rights approved by the General Assembly of the United Nations in 1948 which provides that "Every one has the right to seek and to enjoy in other countries asylum from persecution," is often quoted in support of the proposition that there is an obligation on a state to grant asylum to political offenders and to receive persecuted aliens into its territory. This, however, would not seem to be the correct view either in principle or in the practice of states. The true position is that whilst it is the right of a refugee to seek asylum in a state other than his own, the decision as to whether or not to grant him that asylum is a matter for determination of the state concerned. The state has, however, unquestionably the right to grant such asylum and it incurs no liability to other states by doing so. Thus a state is under no legal duty to refuse admission to a fugitive alien into its territory, or in cases where he has been admitted, to expel or deliver him up to the persecuting state. On the contrary, states have always upheld their option to grant asylum if they choose to do so. The right of a state to grant asylum has been recognised as an institution of humanitarian character and the constitutions of several states expressly provide for the right of asylum and protection of persons persecuted for political reasons[1] with the result that one can almost maintain that this right of a state has become a part of the general principles of the law of nations as recognised by civilised states. There is, however, one exception to this rule, that is, no asylum should be given to war criminals.

State practice. The practice of the states shows that in the case of refugees from political persecution, the right of asylum is liberally exercised and even the provisions of local immigration laws are not

[1] See the Preamble to the French Constitution; Article 10 of the Italian Constitution; and Article 31 of the Yugoslav Constitution.

Among Asian African countries, the laws of Indonesia, Iraq and the United Arab Republic have specifically provided for the grant of asylum to political refugees. (See A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961,p. 68).

enforced against them in many respects. For example, in Britain and the United States of America, the governments have never been known to close their door to the refugees from Nazi persecution and more recently to those who have fled from European countries where communist regimes had taken over. In India also, the refugees from Tibet have been allowed to enter and remain in its territory and seldom has any one been known to have been turned back. Whilst it is desirable on humanitarian grounds to allow refugees who have fled from political persecution to remain in the territory of the state they have entered, economic considerations of the country have to be taken into account in this respect, particularly in the case of smaller nations, since the influx of a large number of refugees may upset the economy or the economic stability of the state itself. These considerations have sometimes prompted the decision of states in refusing admission to refugees when they have come in large numbers due to a war or political instability in a neighbouring country. In the case of granting asylum to an individual refugee, who comes in singly, either because of political persecution or after having committed a common crime, the overriding consideration that is generally taken into account by states is: what would be the fate of the man if he is pushed back to the territory from which he had crossed the frontier. The practice of states shows that if there is a possibility of the man being sentenced to death or being subjected to a degrading and cruel punishment, then the state would grant him asylum.[1]

Deserters from armed forces. In the case of a deserter from the armed forces of a neighbouring country, the general practice is not to allow refuge except where it can be shown that the man had been subjected to forced conscription and that he would receive inhuman treatment if he is not admitted into the territory of the state.

There is, however, one important factor which is to be borne in mind in this connection, that is, whilst the state has the right and competence to grant asylum to political refugees, that right has to be exercised consistently with the state's obligation to see that its territory is not used for activities detrimental to other states. The principle is that a state is under an obligation as part of its general duties to prevent its territory from being used for acts hostile or detrimental to other states; and from this it follows that a government has to

[1] Hackworth, Digest of International Law, Vol. III, p. 734; Hyde, International Law Chiefly as Interpreted and Applied in the United States, Vol. I, p. 229.

ensure that persons within its territory, whether citizens or foreigners, do not indulge in such activities.[1]

Duty of vigilance over activities of persons granted asylum. In principle there would not appear to be any difference between persons who are granted asylum and others resident in its territory in respect of a government's obligation in this regard, but this duty assumes special importance in respect of persons who are granted asylum because in practice it appears that political refugees, especially those who have been dispossessed of power in their own countries, may attempt from a neighbouring state to organise subversive and other types of hostile acts or activities against the government which has ousted them.

Hostile acts of refugees. Although there is no dispute as regards the principle, there is considerable scope for difference of opinion as to what type of activities would constitute hostile acts. In some cases the position is obvious, such as when the refugees organise an expedition or guerrilla activities. These are clearly hostile acts and cannot be permitted. But there are other types of activities where it is difficult to draw the line between the acts which are hostile and those which can be allowed. To this class falls the propaganda activities by political refugees. The determination of such a question would depend largely on the facts and circumstances of each case and upon the attitude of the government concerned. The Anglo-American school of thought tends to deny that there is any obligation on a state to suppress activities by private persons which do not involve armed hostility or terrorist activity. In other words, the state is not under any obligation to suppress private propaganda. This view is shared by some authorities in international law, for example, Oppenheim is of the view that

> The duty of a state to prevent commission within its territory of acts injurious to foreign states does not imply an obligation to suppress all such conduct on the part of private persons as is inimical or prejudicial of the regime or policy of a foreign state. Thus there is no duty to suppress revolutionary propaganda on the part of private persons directed against a foreign government.[2]

According to Van Dyke, the principle that states must use due diligence to prevent the use of their territory as a base for the spreading of propaganda hostile to foreign governments has never in general

[1] Oppenheim, International Law, 8th ed., Vol. I, p. 678.
[2] Ibid., p. 284.

practice been accepted as law.[1] Jurists, like Fauchille and Calvo, have on the other hand advocated a widening of the duty of restraint so as to include all cases where there exists a threat to the security of a foreign power.

In recent years, there have not been many instances of subversive or propaganda activities organised by political refugees because those who have sought and been granted asylum in various countries have been more concerned with their own safety and to make a fresh beginning in the new land. Very few of them appear to have any thought of going back since the regimes from which they have fled on account of persecution all appear to be well established. In the nineteenth century, however, the position was somewhat different as the changing regimes in various continental countries often gave the refugees the idea of staging a come back. Generally, the attitude of the Anglo-American countries throughout has been to allow a large measure of freedom to all refugees, whereas the practice in the continental countries has been more restrictive. There are two old British precedents which might be worth referring to in this connection. In 1803, France complained to Great Britain of seditious publications in the British press at the instance of Royalist refugees and demanded action, but the British Government maintained that the law of nations did not require it. In a series of correspondence in 1852 between Britain and the continental powers, Britain refused to suppress revolutionary propaganda unless it amounted to waging war against a foreign state. Lord Phillimore in the celebrated case of *King v. Antonelli and Barberi*[2] held that all publications against foreign governments could not be treated as criminal. To hold otherwise, he said, would mean that persons who espouse the cause of Italian liberty would be held guilty of criminal libel. In the South American states, where granting of political asylum is common, the practice varies from state to state. In some countries refugees have been allowed full freedom not only to organise propaganda but also to indulge in subversive activities against the government of the country from which they had fled. On the other hand, in some states a more strict rule is applied and actions which are considered to be treason if committed by nationals of the state are not permitted. Amongst Asian African countries, there does not appear to be unanimity on the

[1] Van Dyke, "The Responsibility of States for International Propaganda," 34 A.J.I.L. (1940), pp. 58–73.

[2] (1905) J.P. 4.

question of surveillance of political refugees by the state of asylum. The laws of Burma and Ceylon are silent in this regard. The law of Japan does not admit of any restriction on such persons. Iraq and Indonesia take the line that restrictions may be placed if it becomes necessary. When a political refugee misuses the hospitality of the host state, Burma, Ceylon and Japan maintain that he may be deported, but according to Indonesia and Iraq he can be tried and punished just like any other criminal offender. The United Arab Republic considers that the state should draw the attention of the refugee to any improper conduct on his part, and if he still persists in such undesirable activities, he could be deported, but the deportation should not amount to extradition in disguise.[1]

Asylum in the premises of a diplomatic mission

The question of granting asylum in the premises of a diplomatic mission, however, arises under different circumstances. It is possible that in times of an uprising or civil war or a *coup d'état* the leaders of the defeated faction or members of the government, who have been dispossessed, may seek shelter in the premises of the diplomatic missions in the capital. It may also happen that a person may seek such shelter after committing a political assassination or even a common crime. Practice shows that such refuge in the premises of a mission is sought only in cases of extreme urgency, and the question that often arises for consideration is whether such persons may be granted asylum within the premises and for what period of time. There is a broad distinction between territorial asylum on the one hand and asylum in the premises of a diplomatic mission on the other, since the competence to grant territorial asylum is derived directly from the supremacy of a state over its territory, whilst in the case of diplomatic asylum the refugee is within the territory of the state from whose jurisdiction he is seeking protection. The International Court of Justice by a majority in the *Asylum case* has laid down that a decision to grant diplomatic asylum involves a derogation from the sovereignty of that state.[2]

For a considerable period of time beginning with the fifteenth century, the practice of granting asylum within the premises of diplomatic missions to political refugees and fugitives from justice was commonly invoked, and it was recognised that once such asylum had been granted

[1] See A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961, p. 68.
[2] The *Asylum Case* between Colombia and Peru, (1950) I.C.J. Reports, p. 187.

the local authority could not exercise jurisdiction over such persons and as such was unable to bring them to justice. The basis on which such right of asylum was exercised was that the premises of a diplomatic mission enjoyed exterritoriality and formed part of the territory of the home state of the diplomatic envoy. There have been numerous instances in which such asylum had been granted and this practice continued in Europe till late in the nineteenth century. In recent times, however, the practice of states has been to discontinue such right of asylum, and many states, including the United States of America, have expressly taken the stand that no such right exists in international law. The modern view regarding inviolability of diplomatic premises, as borne out by state practice and decisions of national courts, tends to show that such premises are regarded as part and parcel of the territory of the state in which they are situated and that these premises are inviolable merely for the purposes which are necessary for effective functioning of the diplomatic mission. The theory of exterritoriality of diplomatic premises does no longer find support. It is, therefore, asserted that the so-called right of diplomatic asylum has no basis in international law and as such cannot be recognised. This view appears to find support from the following observation in the judgment of the International Court of Justice in the *Asylum case:*

> It (diplomatic asylum) withdraws the offender from the jurisdiction of the territorial state and constitutes an intervention in matters which are exclusively within the competence of that state. Such derogation from territorial sovereignty cannot be recognised unless its legal basis is established in each particular case.

Article 6 of the Harvard Research Draft on Diplomatic Privileges and Immunities also provides: "A sending state shall not permit the premises occupied or used by its mission or by a member of its mission to be used as a place of asylum for fugitives from justice."

It may, however, be mentioned that the practice of granting asylum is still recognised in some of the Latin American states, particularly those which are parties to the Convention signed at Havana in 1928 and the Montevideo Convention of 1933 on Political Asylum. The United States of America, which is a party to the Havana Convention, however, expressly stated that it did not recognise the so-called right of asylum as part of international law and did not accept those provisions of the convention which relate to granting of asylum. The view of the American State Department, which appears to set out succinctly the correct position in international law, is as follows:

Immunity from local jurisdiction is granted to foreign embassies and legations to enable the foreign representatives and their suites to enjoy the fullest opportunity to represent the interests of their states. The fundamental principle of legation is that it should yield entire respect to the exclusive jurisdiction of the territorial government in all matters not within the purposes of the mission. The affording of asylum is not within the purposes of a diplomatic mission. The limited practice of legation asylum is in derogation of the local jurisdiction. It is but a permissive local custom practised in a limited number of states where unstable political and social conditions are recurrent. There is no law of asylum of general application in international law. Hence, where asylum is practised, it is not a right of the legate state but rather a custom invoked or consented to by the territorial government in times of political instability.

The present tendency appears to be in favour of the view that if a person takes shelter within the premises of an embassy as a fugitive from justice, he should be handed over to the authorities if he is accused of a criminal charge and a warrant of arrest has been issued by competent authorities of the receiving state. But at the same time there does not appear to be any duty cast in international law upon the head of a mission to refuse entrance to persons who want to take refuge in the embassy.[1] Even the regulations concerning diplomatic missions of foreign states in the territory of U.S.S.R. merely mention that "the inviolability of diplomatic premises gives no right to give asylum to persons against whom orders of arrest have been delivered by the competent organs of the U.S.S.R. or of the federated republics." This would appear to support the view that the head of a mission is not obliged to turn away a refugee who wants to take shelter within the embassy – all that he is required to do is to hand over such a person to the competent authorities, if an order of arrest has been issued against him.

Cases of temporary refuge. The practice of states, however, seems to show that although the right of diplomatic asylum is not recognised in law, a distinction is drawn between asylum and cases of temporary refuge in times of grave political emergency. The latter has often been permitted. In many cases asylum in embassies is permitted and acquiesced in by local authorities. For instance, during the Spanish Revolution in 1936, numerous refugees including Spanish nationals sought shelter in various diplomatic missions in Madrid and such refuge was granted in several cases. After a time, however, Spain changed her attitude towards such asylum in diplomatic missions. The Spanish Minister of State in a communication addressed to the doyen of the

[1] Oppenheim, op. cit., Vol. I, p. 796.

diplomatic corps announced that Spain had respected the right of asylum through a spirit of tolerance and not because it was obliged to do so and he threatened to discontinue the practice of the government in this regard. This resulted in a general protest from the various missions.

The United States of America, which had consistently taken up the attitude of not recognising the right of asylum, have itself permitted granting of temporary shelter by American diplomatic officers in cases of absolute necessity for preservation of innocent human lives. The instances in which U.S. Government have permitted this course of action provide useful guide as to what may be considered proper cases for granting of temporary refuge. From the reported instances in which American diplomatic officers have been permitted to grant shelter to refugees, it appears that the considerations which weighed with the State Department have been either the necessity to save innocent human life, or reasons of humanity in aid of lives obviously and imminently threatened, or provision of shelter for humanitarian reasons to political refugees in imminent peril of their lives, or actual danger of mob violence or hostilities. Thus the American Minister in Haiti in 1911 was permitted to give shelter to the deposed President "in order to save innocent life," and during the Chinese Revolution of 1911, the American Charge d'Affaires at Peking was instructed at his discretion to grant temporary refuge to the Emperor and Empress Dowager. Similarly, ex-President Gonzalez of Costa Rica was afforded shelter in the American embassy. Following the establishment of dictatorship in Honduras in 1919, the American Minister granted asylum to certain refugees to save them from conditions approaching a reign of terror. In his report the Minister stated that he permitted five gentlemen including two Congressmen to remain in the legation after they had rushed there as he believed that the brutalities perpetrated by the government were purely for political reasons and that the parties were in great bodily danger. In a letter to the American Minister in Chile in January 1925, the State Department observed that a diplomatic officer must exercise utmost discretion in determining whether conditions for granting of temporary refuge exist. During the Spanish Revolution in 1936, the American Ambassador in Madrid was instructed to give refuge to those who were in actual danger from mob violence or from hostilities, but not to grant protection for the purpose of enabling the refugees to avoid arrest on charges brought against them by proper officials.

In the light of the practice stated above, it would appear that the right of asylum in the premises of a diplomatic mission does not exist in international law, but at the same time the head of a mission is not obliged to prevent a refugee from entering and taking shelter within the premises of the mission. Temporary refuge or shelter can be granted to refugees if they are in imminent peril of their lives or to save them from mob violence or hostilities. A person who has taken refuge must, however, be handed over to the local authorities if he is wanted on a criminal charge or a warrant of arrest has been issued against him by competent authorities.

Extradition of fugitive offenders

Closely connected with the question of territorial asylum is the matter of extradition of fugitive offenders. It is generally recognised under international law that a state in whose territory a crime has been committed is entitled to try and punish the offender irrespective of whether he is a citizen of the country or an alien. States possess this right by virtue of their territorial supremacy, and several states also exercise criminal jurisdiction over their nationals even in respect of crimes committed abroad. The question of extradition of a fugitive offender arises when a person after committing a crime in a particular country leaves its territory and takes refuge in another state. If the state in whose territory the crime has been committed is anxious to try and punish the offender, it would naturally have to request the other state to hand over to it the person accused of the crime. Such a request would normally be conveyed through its diplomatic agent to the government of the other state. When no diplomatic relations exist, it is, however, open for a government to approach the government of the other state directly or through some other agency. If such a request is received, the government of the state which has been requested for surrender of the criminal would naturally have to consider the question as to whether the person concerned should be extradited, and in coming to a decision in this regard, it must follow certain well known rules under international law.

Extradition treaties. It is generally recognised that unless the states concerned have entered into a treaty for extradition of fugitive offenders, there is no obligation on the part of the state to which the request is addressed to hand over the criminal; and for this reason it is normally the practice for interested states to enter into bilateral treaties

or conventions in this regard. Most states appear to prefer conclusion of bilateral treaties, though some are in favour of having extradition conventions between a group of states.

Extradition in the absence of treaties. There is a trend of opinion that even in the absence of extradition treaties states should voluntarily surrender fugitive criminals to each other in the larger interest of the international community for suppression of crime. This doctrine has, however, never become established as a part of the law of nations.[1] Nevertheless, the municipal laws of certain states contain provisions for voluntary surrender even in the absence of treaties. Such a provision exists in Canada[2] which contemplates extradition in certain circumstances even where no treaties exist. There are also extradition laws in force in France and Germany which were enacted expressly for surrender of fugitive criminals in the absence of treaty arrangements. There does not appear to be any agreement in principle among the various nations on this question. While certain states, such as India and Japan, are of the opinion that there was no objection to the voluntary surrender of criminals even in the absence of a treaty, countries like Indonesia consider such voluntary surrender desirable only in respect of crimes of a serious character. Certain other countries, like Burma and Ceylon, are not in favour of voluntary surrender at all.[3] The position in international law and state practice appears to be that in the absence of a treaty no state is obliged to hand over fugitive criminals to another state for their trial and punishment by that state, but it is a matter of policy for each state and for its municipal legislation to decide whether a state would hand over fugitives from justice to other states even in the absence of a treaty. It may be stated that there could be no objection in principle to a country voluntarily surrendering a person since no state is obliged to give refuge to a criminal in its territory.

Extradition of the citizens of the requested state. Another question, which often arises, is whether a citizen of the requested state should be handed over for trial in respect of commission of an offence in the requesting state. The relevant treaty of extradition may contain provisions in this regard, but generally the provisions of treaties are

[1] See Harvard Research Draft Convention on Extradition; Moore, op. cit., Vol. IV, p. 239; Hyde, op. cit., Vol. II, p. 1012; Hackworth, op. cit., Vol. IV, p. 1.

[2] Revised Statutes, Vol. V.

[3] See the Report of the A.A.L.C.C. on Extradition of Fugitive Offenders (Report of the Fourth Session, Tokyo, 1961).

silent on this question. It therefore becomes necessary for each government to decide whether it would extradite its own nationals even though there may exist a treaty between the requesting and the requested states. It may be argued, on the one hand, that if a state is competent under its own laws to try and punish its nationals for crimes committed abroad, there is no need to surrender them to the requesting state, as they can be dealt with adequately in the requested state. On the other hand, it may be pointed out that the courts of the country where the crime is committed would be in a better position to deal with the matter since witnesses would be available more readily there and it may also be necessary to have local inspection of the place of the offence.

State practice. The majority of states decline to extradite their own nationals and prefer to punish them under their own laws in respect of crimes committed abroad. Great Britain and the United States of America, regarding criminal jurisdiction as essentially territorial, are prepared in principle to surrender their own nationals; actually, however, the treaties entered into by these two states with other countries contain varying provisions in this regard, doubtless on account of the difficulty of securing reciprocity for their policy. Countries which refuse to surrender their own nationals are Denmark, Greece, Guatemala, Haiti, Iceland, Italy, Luxembourg, Nicaragua, Salvador, Spain, Switzerland and Uruguay. The countries which allow the option of surrender of their own nationals at their discretion are Albania, Argentina, Hungary, Iraq, Paraguay, Peru, Belgium, Bolivia, Chile, Columbia, Cuba, Czechoslovakia, Finland, France, Liberia, Mexico, Monaco, Netherlands, Norway, Panama, Poland, Portugal, Roumania, San Marino, Thailand and Yugoslavia. France, however, like several other European countries, prefers to punish its own subjects for grave crimes committed abroad even though this may involve practical difficulty in procuring the necessary oral and documentary evidence. India appears to be of the view that there cannot be sufficient justification for refusing to extradite a country's own nationals, whilst Indonesia favours surrender of one's own nationals in respect of crimes of a serious character only. Burma and Japan are opposed to surrender of their own nationals. Ceylon considers that surrender of a country's own nationals ought to be on a reciprocal basis, but such reciprocity need not be insisted upon in all cases.[1]

[1] See A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961, p. 19.

Extraditable offences. The offences for which extradition may be granted are generally provided for in the extradition treaties themselves. It is difficult to derive any general principle on which such classification may be said to be based. What, however, is insisted upon is that the extraditable offence must be regarded as an offence under the laws of both the requesting and the requested states, although the name by which the crime is described need not necessarily be the same. The treaties generally adopt two different methods for specifying the extraditable offences, namely the enumerative method which specifies each and every offence for which extradition may be granted, and the eliminative method which fixes certain criteria on the basis of punishment for the purpose of determining what are extraditable offences. The enumerative method was largely in vogue in the nineteenth and early twentieth centuries,[1] and the usual types of offences which were generally regarded as extraditable were murder, manslaughter, rape, indecent assault, kidnapping, child stealing, abduction, procuration, bigamy, inflicting grievous bodily harm, threats with intent to extort money, perjury, arson, burglary or house breaking, robbery with violence, embezzlement, fraud, obtaining money by false pretences, counterfeiting, forgery, crimes for offences against bankruptcy law, bribery, malacious injury to property, crimes or offences or attempted crimes or offences in connection with traffic in dangerous drugs. The modern trend, however, is to adopt the eliminative method which defines extraditable offences by reference to the maximum or minimum penalty which may be imposed.[2] The argument in favour of the eliminative method is that there are a number of offences which may not exist at the time of the conclusion of the treaty but may be brought in within the extraditable offences without necessitating a modification in the treaty. Further, it is difficult to define with precision all the offences which the state would regard as extraditable at the time when the treaty is entered into. Nevertheless, some states, e.g. the United Kingdom, prefer the enumerative method and adopt it both in their

[1] This system has also been adopted in municipal legislation by the United Kingdom Extradition Acts of 1870, 1873, 1906 and 1932 and countries which have their laws based on the British pattern.

[2] Modern bilateral treaties, such as the Extradition Treaty of 12th June 1942 between Germany and Italy, the Treaty of 29th November 1951 between France and Federal Republic of Germany, and the recent Treaty between Iraq and Turkey, have adopted the eliminative method. Recent multilateral conventions, such as the Extradition Agreement of 14th September 1952 between the members of the League of Arab States, the Extradition Convention of 5th May 1954 drawn up by the Legal Committee of the Council of Europe, the Harvard Research Draft on Extradition, and the Draft Convention on Extradition drawn up by the Inter-American Council of Jurists in 1956 have all adopted the eliminative method.

treaties and in the municipal legislation regarding extradition. It is entirely a matter for each country to decide as to which method it would prefer, and extradition requests may be made or granted only for those offences which are contemplated in the relevant treaty or convention. It is also to be borne in mind that extradition may be made only if the extraditable crime has been committed in the territories of the requesting state and not otherwise.[1] It may happen that where a person commits a crime in a state other than the state of which he is a national, the state of his nationality may wish to extradite him so that it can try and punish him for the crime committed abroad. It is quite clear that extradition procedure cannot be availed of for this purpose.

Non-extradition of political offenders. In deciding upon the question of extradition, another matter has to be taken into consideration, namely the principle of non-extradition of political offenders, that is to say, if the requested state is satisfied that the crime for which the person is being sought is of a political nature, the extradition ought to be refused. It is almost the universal practice, as manifested in treaties and national legislations in various countries, for the states to decline to extradite persons who are wanted for trial in respect of political offences. The difficulty, however, arises in determining the tests which should be applied in coming to a decision on the question whether an offence is or is not of a political character. Extradition treaties do not usually contain a definition of the term "political offence," nor do the municipal laws of states provide any guide in the matter. The difficulty of defining a political crime is no less reflected in the writings of jurists whose views are conflicting. Some writers consider a crime "political" if committed from a political motive, whereas others call "political" any crime committed for a political purpose. In a case decided in the United Kingdom in 1894, it was held that in order to constitute an offence of political character there must be two or more parties in the state each seeking to impose the government of their own choice on the other, and that if the offence is committed by one side or the other in pursuance of this object, it is a political offence, otherwise not.[2] Numerous instances of crimes of political character are mentioned in text books of inter-

[1] Most extradition treaties contain a provision to this effect. See, for example, the Anglo-American Extradition Treaty of 1931, and Art. 1 of the Extradition Treaty between Japan and the United States.

[2] *Re Menier*, (1894) 2 Q.B. 415.

national law.[1] It, however, appears that the question as to whether or not a particular act is a political offence is usually to be determined in the circumstances of each case. Two instances, however, may specifically be mentioned. In *Re Castioni*, it was held that the extradition must be denied as the offence with which he was charged was of a political character since the charge of wilful murder preferred agianst him was in respect of killing a local official during a revolt.[2] In 1934, the Italian Court of Appeal of Turin declined to extradite to France two persons charged with the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs at Marseilles on October 8, 1934 on the ground that the assassination "having resulted from political motives and having injured the political interest of Yugoslavia, constituted a political offence" under the Italian Penal Code. Though the majority of Asian African countries recognise the principle of non-extradition of political offenders, doubts have been cast on this doctrine at least by two countries, namely Ceylon and Indonesia. Ceylon considers that in the matter of extradition no distinction should be made between ordinary crimes and crimes which amount to political offences or crimes of a political nature. Indonesia is of the view that the difficulty in determining whether a crime is of a political character or not may lead to complications and if the principle of non-extradition of political offenders was accepted, it would be difficult to determine in each case whether a person should be extradited or not, especially in the case of mixed offences which have both political and criminal elements. Indonesia is further of the opinion that in any event persons, who are not nationals of the state where the political crime is committed, should not get the advantage of this doctrine since foreign nationals do not enjoy political rights in a state and as such they cannot be said to have committed a political offence. It is further suggested that an offence shall not be considered as of a political nature if there is a preponderance of the features of a common crime over the political motives or objectives of the offender.[3]

As already stated, it is impossible to have a precise definition of the term "political offence", and it would be for the requested state in each case to decide the question having regard to the facts and circumstances. It would generally be the case that when extradition of a person is requested and the proceedings for such extradition are started

[1] Hyde, op. cit., Vol. II, pp. 1019–1027; Moore, op. cit., Vol. IV, pp. 223–54; Hackworth, op. cit., Vol. IV, pp. 45-52.

[2] (1891) 1 Q.B. 149.

[3] See A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961, pp. 26–28.

by the requested state, the person concerned may plead in his opposition to the application for extradition that the crime for which he is being wanted is of a political nature. The onus of proving that it is in fact so would rest on him, but the requested state may ask for information and clarification from the requesting state regarding the nature of the offence for which extradition had been requested in order to determine whether the offence is of a political character or not. If the person concerned is able to make out a *prima facie* case that his offence is of a political nature, the burden of proving the opposite would lie on the requesting state.[1]

Non-extradition of military offences. It is also the general practice not to grant extradition for offences of a purely military character and most of the extradition treaties contain provisions to this effect. The exemption is no doubt for offences of an exclusively military character and not for those which are also offences under the general criminal code. The expression "purely military offences" may be defined as "acts or omissions which are punishable only under the military laws of the state and do not fall within the scope of ordinary penal laws of the state." [2]

Protection against double jeopardy. It may further be stated that the general practice of states is to refuse extradition if the person sought to be extradited has already been tried and discharged or punished or is still under trial in the requested state for the offence for which extradition is demanded.[3]

The general practice of states requires some kind of proof of the offence having been committed in the territory of the requesting state and also proof of the fact that it is the person sought who had committed the crime. The practice of states with regard to the evidence of the guilt of the person claimed, which is required to support the extradition, varies from state to state. This is due to the difference of emphasis which is placed, on the one hand, upon the importance of international cooperation in the matter of suppression of crime and, on the other, upon the protection of the individual against oppression.

[1] Article 7 of the Articles containing the Principles concerning Extradition of Fugitive Offenders. – A.A.L.C.C., Report of the Fourth Session, Tokyo, 1961, p. 23.

[2] The Franco–German Treaty of 1951 provides that extradition shall not be granted if the offence consists exclusively of a violation of military duties. The Inter–American Draft Convention of 1956 similarly excludes "essentially military crimes".

[3] The laws and/or treaties of most countries contain provisions providing against double jeopardy for the same act.

Procedure for extradition. The practice in the United Kingdom and the countries of the Commonwealth is to require a requesting state to establish a *prima facie* case of an extraditable offence before a magistrate against the person who is wanted on a criminal charge. It is felt that such a procedure provides a safeguard for the individual. But at the same time it may be observed that in a number of bilateral treaties states have expressly done away with the requirement of establishing a *prima facie* case of guilt prior to extradition and persons are surrendered upon production of a formal warrant of arrest upon proof of the identity of person claimed and the extraditable character of the acts alleged to have been committed and upon satisfaction that the offence charged is not of a political character. Article 17 of the Harvard Research Draft on Extradition also recognises that the requirement of a *prima facie* case of guilt ought to be eliminated. But the prevalent practice is to grant extradition only if according to the authorities of the requested state the existing evidence furnished before it would be sufficient to justify committal for trial if the offence had been committed within the jurisdiction of that state. It is customary in practically all the states to hold some kind of a judicial enquiry before the extradition warrant is issued and the person sought is surrendered to the requesting state. In such proceedings, the person concerned can contest the validity of the extradition request and may also take the benefit of all remedies and reliefs available to him according to the laws of the state. Normally this would include appeals to higher courts and tribunals.

The request for extradition is made in writing and submitted normally through diplomatic channels to the constituted authority of the requested state. If diplomatic posts are not maintained in the state from whose territory extradition is necessary, the request could be sent through the consular representatives, and in the absence of a consular post it may be forwarded directly to the Ministry of Foreign Affairs of the requested state. The requisition for extradition should be accompanied by the original or a certified copy of the judgment or the warrant of arrest or other document having the same validity issued by a competent judicial authority. The nature of the offence for which the requisition is made, the time and place of its commission, its local classification or description and the legal provisions applicable to it should be specified as precisely as possible. The request shall also be accompanied by a copy of the provisions of the criminal code that are applicable to the case together with a description of the person claimed and any other particulars which may serve to establish his identity and

nationality. In the case of a person accused of an offence, the request shall be accompanied also by the original or certified copy of the statement made on oath or otherwise before a competent judicial authority. It is for the requested state to inform the requesting state in writing and through the channel by which the request for extradition was made its decision in this regard. The expenses in connection with the execution of the request are borne by the requesting state in accordance with international practice. If two or more states request for extradition of the same person at the same time, the requested state usually has the discretion to decide as to the state to which it would extradite the person concerned taking into consideration all the circumstances of the case, and in particular the nationality of the accused, the gravity of the offence and the penalty to be imposed therefor.

CHAPTER XV

COMMERCIAL ACTIVITIES OF STATES AND IMMUNITIES IN RELATION THERETO

Introductory

There is one branch of the law of state immunity with which a diplomat ought to be familiar. This arises in connection with the trading and commercial activities undertaken by states. There are two aspects from which a diplomat is concerned with this subject. In the first place, he may be called upon to negotiate and enter into contracts on behalf of his government with regard to transactions of a commercial nature involving certain purchases. He may also be required to take up matters concerning the activities of state trading organisations of his government and claims made against such organisations in the state of his residence. In the second place, he may have occasion to advise a national of his home state with regard to his rights in transactions between him and the government of the receiving state or a state agency.

Nature and purposes of commercial contracts by or on behalf of governments. It is to be observed that states today do not confine their activities to what had been regarded as the traditional functions of a state in the nineteenth and the early part of the present century. Some of the states not only own and control all means of production and distribution inside the state, but they also handle all import and export trade through government departments or state agencies. The increasing participation by governments in trade and commerce ever since the first World War has brought them directly into contact with merchants and trading organisations in other countries. Even the governments, which do not enter into trading activities as such, are sometimes obliged to import supplies for their defence forces as well as foodstuff for maintenance of rationing systems or essential supplies; and countries with a programme of industrial expansion often have to import

machinery from abroad. This is particularly so in the case of newly independent countries where development plans necessitate industrial expansion in the public sector by the government itself or through state agencies. States are also known to operate news agencies and international transport, such as steamships and air services. All these activities necessarily lead to contractual relations involving rights and obligations between a government and foreign parties, whether it be a foreign government, an individual or a corporation.

When a contract is entered into by one government with another even with regard to matters of a commercial nature, the rights and obligations created under such a contract stand practically on the same footing and are enforceable in the same manner as any other engagement on a government to government level. But the problem would appear to be different when a government or a state agency enters into contractual relations with a private person or a corporation in another country. Disputes may arise out of such commercial engagements on a variety of matters, such as non-delivery of goods within the stipulated time, disputes as to the quality or short supply as well as non-payment of price, or refusal to take delivery of goods as would normally arise between private parties in a trading contract.

The commercial engagements of governments are entered into through different agencies depending upon the nature of the transaction and the internal constitutional set up in each state. In cases where the government is making purchases of supplies for its defence forces, or foodstuffs for maintenance of essential supplies within the country, or machinery for use in the factories for defence production, the purchase would generally be made through a government department. In such cases, the contract would in all probability be negotiated and signed by a specially authorised official of the government or an official of its diplomatic mission. Purchases of these character and contracts in relation thereto may be said to be directly connected with the governmental functions of a state in the true sense of the term.

The other category of commercial transactions which the governments sometimes enter into may be termed as purely trading transactions. These include transactions for sale abroad of commodities produced in government owned factories or contracts for sale of raw materials or import of consumer goods. Russia and other East European countries, where the entire trade is in the hands of the government, undertake such activities very often. and they maintain special representatives of the department of state trading in various capitals

of the world who are generally attached to their respective embassies. It is these officials who usually negotiate trading contracts though at times other officials of the mission may have to perform such tasks. Russia used to maintain separate trade representatives in the various European capitals, but at present the tendency is to include such officials within the personnel of its diplomatic missions. Some countries, whose economic policies and constitutional set up are different, prefer to do their trading activities through public corporations, which have a separate entity under the law and are not considered as a part of the government though they are managed and controlled by the government. In such cases, the contracts would be negotiated and signed by the officials of the public corporations. The officials of the diplomatic missions in such cases would not be directly concerned with these contracts though they may be expected to use their good offices in securing the contracts and to see to their due performance.

The question often arises as to whether a diplomatic agent who signs a trading contract or a contract of a commercial nature, and his government or the state trading agency which is a party to such a contract, can be sued by a private individual or a corporation for breach of contract with regard to such transactions. The liability of a government to be sued in foreign courts in connection with its operation of news agencies and transport services has also arisen in the past. These questions have assumed very great importance at the present time having regard to the large number of transactions which governments and state trading organisations have to enter into with private individuals or bodies corporate.

The problems regarding the immunities of an envoy have been fully discussed in a previous chapter. It has been observed that the immunities which an envoy enjoys are really attributable to his government, from which it may follow that if his government were not entitled to immunity from jurisdiction in respect of particular types of activity, the envoy representing his government could not claim immunity in respect of such acts. On the other hand, it may be said that an envoy is accorded immunity from jurisdiction out of functional necessity and that in no circumstances can an envoy be sued during his tenure of office unless the immunity was waived in respect of particular transactions. If the latter view were to prevail, it would follow that a diplomatic agent can never be sued even if he enters into a commercial transaction on behalf of his government. Municipal courts may also take the view that even though diplomatic immunity may not extend

to such acts, the diplomat will have no personal liability as the acts complained of are acts of state. The real question of importance which needs to be discussed in this connection is whether a government or a state trading organisation can be sued in the courts of another state for breach of contract or in tort in relation to its activities of a commercial nature. This leads us to a consideration of the doctrine of sovereign immunity.

Doctrine of sovereign immunity and restrictions thereto

Under the classical doctrine of international law no state could be subjected to the jurisdiction of another on the basis of the principle *par in parem non habet imperium;* and the municipal courts of most countries used invariably to apply this doctrine on any given occasion when a state was sued and if immunity was claimed. This meant that no foreign state or an official organ thereof could be sued in the courts of another state in respect of any of its liabilities without its express consent. The foreign state could, however, always bring an action against an individual or private company in respect of their liabilities arising out of the same contract or agreement. As an individual or a company has no status in international law, he could not approach any international forum for redress of his grievance. The only step he could take was to approach his government to prefer a claim on the foreign government on his behalf. It may be observed that it is not always easy for a government to prefer international claims against a foreign government for political and other reasons – indeed, it is impracticable to prefer such a claim for every breach of contract. Even if a claim was to be preferred, the results are often extremely doubtful. From time to time traders entering into contracts with foreign states or governments had insisted on insertion of a clause in the contract itself to the effect that the foreign government would agree to arbitration in the country of the trader or that the foreign government would not raise the plea of immunity in respect of any claims arising out of the contract. In law, however, in so far as common law countries are concerned, even such a clause is of no avail as no execution can be levied by the courts to enforce an arbitration award if the foreign state raises the plea of sovereign immunity; and this plea, it would appear, can be raised at any stage inspite of the express clause in the contract.[1] It should be mentioned that quite a number of states volun-

[1] *See Duff Development Corpn.* v. *Government of Kelantan,* (1924) A.C. 797; *Kahan* v. *Federation of Pakistan,* (1951) 2 K.B. 1003; Mr. Sucharitkul in his book "State Immunity and Trading

tarily submit themselves to arbitration or jurisdiction of courts in foreign states in respect of claims arising out of transactions which are purely of a commercial nature. In fact the reputation of a state in commercial markets abroad depends largely on its own conduct and dealings in such matters, and from the practical point of view it is to the advantage of every state to honour its commitments under the contracts and to submit itself to arbitration or to jurisdiction of a court when genuine disputes arise in the performance of such contracts. Nevertheless, some governments do at times take up a difficult attitude and are ready to shelter behind their sovereign immunity if a claim were to be raised against them. The fact remains that a government can be sued or brought to arbitration only with its own consent and that too can be frustrated by the government raising the plea of immunity at a subsequent stage of the proceedings or even at the stage of execution. This has led various international lawyers to doubt the wisdom of applying the doctrine of sovereign immunity to transactions of a purely commercial character which can be termed as trading transactions.

Suggestions for restricting the doctrine of sovereign immunity in respect of commercial transactions of states. Sir Humphrey Waldock observes

> That immunity (sovereign immunity) harmless enough in days when state transactions abroad were practically confined to the acts of diplomats, consuls, armies and warships, wears a very different look when claimed by the modern state with respect to its commercial transactions.[1]

In fact, ever since the First World War there has been a tendency on the part of several authors to advocate restrictions on the doctrine of sovereign immunity of states,[2] presumably on account of increasing

Activities" at page 206 observes that under the French law immunity may be waived in advance by agreement, and cites some decisions in support. It is doubtful whether this position would be correct from the point of view of international law.

[1] See the Foreword to the book entitled "State Immunity and Trading Activities" by Dr. Sompong Sucharitkul.

[2] See Allen, The Position of Foreign States before National Courts, 1933; Watkins, The State as Party Litigant, 1927, pp. 189–91; Shepherd, Sovereignty and State Owned Commercial Entities, 1951; Brinton, "Suits Against Foreign States", XXV A.J.I.L. (1931), p. 50; Garner, "Immunity of State Owned Ships Employed in Commerce," VI B.Y.I.L. (1925), p. 128; Fensterwald, "Sovereign Immunity and Soviet State Trading," H.L.R. (1949–50), pp. 614–42; Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," XXVIII B.Y.I.L. (1951),pp. 220–24; Carter, "Sovereign Immunity – Substantiation of Claims," IV I.C.L.Q. (1955), Part III; Loewenfeld, "The Doctrine of Sovereign Immunity," 45th Report of I.L.A. (1952), p. 215; Fawcett, "Legal Aspects of State Trading," XXV B.Y.I.L. (1948), pp. 34–38; Hyde, op. cit., Vol. II, p. 849.

activities on the part of states in the sphere of trade and commerce. The arguments advanced by these authorities appear to be based on the consideration that (i) grant of immunity is rather in the nature of an exception to the general rule and should be confined to the rationale underlying the subject of immunity, (ii) old cases of absolute immunity were formulated to meet the needs of mediaeval civilisation which no longer exist, and (iii) it is possible to make differentiation between the acts done in pursuance of public interest or for military purposes on the one hand, and the trading or non-sovereign acts on the other. Some authorities, however, still prefer to adhere to the doctrine of absolute immunity of states and their reason for doing so, as aptly put by Sir Gerald Fitzmaurice, is that the distinction between the sovereign and non-sovereign acts of a state is arbitrary and unreal and one which is not easy to apply in practice, and which might become much more difficult to apply if states cared to take the appropriate measures. In his opinion, the only sound course is to adhere to the strict doctrine of complete immunity, any departures from it in specific cases being regulated by international conventions.[1] Fenwick in his treatise on international law also advocates complete immunity as in his view a state jurisprudentially is one and the acts of a state can have but one end in view, that is the defence of public interest, and as such all the acts of a state are public acts. Several other authors, such as Westlake,[2] Pitt Cobbett,[3] and Anzilotti, [4] appear to take the same view. There is thus a good deal of divergence of opinion among eminent writers on international law on the question whether a state is immune in respect of all its acts including trading activities and acts which are not necessary for its governmental functions. It would, therefore, be useful to refer to the decisions of various national courts and state practice before examining the principles involved.

Judicial decisions: English cases. In England, the government does not appear to have expressed any definite view on the question of immunity of states. The law on the subject, in so far as Britain is concerned, has therefore been developed entirely by the courts. The first case which appears to have come before the English courts con-

[1] Fitzmaurice, "State Immunity from Proceedings in Foreign Courts," XIV B.Y.I.L. (1933), pp. 101–24.

[2] Westlake, International Law, paras. 190–92, p. 319.

[3] Cobbett, Cases on International Law, 1947, pp. 102–104.

[4] Anzilotti, "L'esenzione degli stati stranieri dalla giurisdizione," Rivista 5 (1910), p. 477 et seq.

cerning the immunities of foreign states and their property was decided in 1820.[1] In that case, as also in some of the subsequent cases, the courts declined jurisdiction on the ground that the foreign state as personified by the foreign sovereign was equally sovereign and independent, and to implead him before the local courts would insult his royal dignity. Lord Campbell C.J. in the celebrated case of *De Haber* v. *The Queen of Portugal* [2] held that an action could not be maintained in any English court against a foreign sovereign for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head, and that no English court has jurisdiction to entertain any complaints against him in that capacity. In the *Parlement Belge case*,[3] the Attorney-General appearing in court supported the claim to immunity in respect of a ship which was the public property of the King of the Belgians and used partly as a mail packet and partly for the purpose of trade. The English Court of Appeal upheld the claim on the basis that as a consequence of the absolute independence of every sovereign authority and of international comity, which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one should decline to exercise by means of its courts any of its territorial jurisdiction over the public property of any state which is destined to public use.[4] In a later case the House of Lords approved of this doctrine by laying down that under the principles of international law, which were engrafted in the municipal law of England, the courts of the country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages, and that they will not by their process seize or detain property which is his or of which he is in possession or control.[5] Though these cases related to attachment or seizure of ships, which were either the property of a foreign state or under the jurisdiction and control of such a state, the principles laid down therein have been understood to be of general application in suits against foreign states or sovereigns. The English courts had also held in a number of cases that any claim by a foreign government of a right or title in property must be accepted as conclusive without enquiring

[1] *The Prins Frederik*, (1820) 2 Dods. 451.
[2] (1851) Q.B. 171.
[3] (1880) 5 P.D. 197.
[4] Per Brett L.J. in (1880) 5 P.D. 197 at 214–15.
[5] *The Cristina case*, (1938) A.C. 485. per Lord Atkin at p. 490.

whether or not the claim was well founded with the result that proceedings against the property in which a foreign sovereign had claimed an interest were necessarily dismissed for want of jurisdiction.[1] In the latest decision of the Judicial Committee of the Privy Council,[2] however, it was observed by Earl Jowitt L.C. that a foreign state must furnish sufficient evidence to satisfy the courts that its claim is not illusory. Two of the decisions of the English Court of Appeal appear to have given the impression that the immunity of the sovereign would extend to vessels which are used for purely trading purposes,[3] and on this understanding a number of decisions of the English courts have extended immunity to this type of cases.[4] The House of Lords, the highest judicial tribunal in England, has, however, expressed some doubt on this doctrine in the *Cristina case*.[5] While Lord Atkin took the view that immunity applies to public property of a state used purely for commercial purposes and Lord Wright was inclined to agree with him, three of the learned Law Lords expressed their doubts in the matter. Lord Maugham felt that it was high time that steps were taken to put an end to a state of things which in addition to being anomalous is most unjust to the nationals of the country. He observed that the matter had been considered over and over again in recent years by foreign jurists, by English lawyers and businessmen, and almost unanimously they are of opinion that if governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal remedies and actions as any other ship-owner. The decision of the English courts which went the farthest in favour of allowing immunity in connection with state trading is that of the Court of Appeal in the *Porto Alexandre*,[6] but as already stated, considerable doubts have been cast on the soundness of this decision as well as on the decision in the *Parlement Belge case* [7] by the House of Lords. Some of the recent opinions of the Court of Appeal and the House of Lords appear to be in favour of a restricted immunity in cases of state trading. Thus in *Dollfus Mieg et Cie* v. *Bank of England*,[8] Evershed M.R. thought that the extent of the rule

[1] *Vavasseur* v. *Krupp*, (1878) 9 Ch. D. 351, per James L.J. at 355. *The Jupiter*, (1924) P. 241, 243 (Serutton L.J.).
[2] *Juan Ysmael and Co. Inc.* v. *Indonesian Government*, (1954) 3 W.L.R. 531.
[3] *The Porto Alexandre*, (1920) P. 30; *Re Parlement Belge*, (1880) 5 P.D. 197.
[4] *Compañia Mercantil Argentina*, (1924) 40 T.L.R. 601.
[5] (1938) A.C. 485.
[6] (1920) P. 30.
[7] (1880) 5 P.D. 197.
[8] (1950) 1 Ch. 333.

of immunity should be zealously watched, and in the same case three of the learned Lords constituting the majority in the House of Lords expressed their agreement with the opinion of Lord Maugham in the *Cristina case* that the doctrine of immunity should not be extended.[1] Nevertheless, the Court of Appeal by a majority allowed the claim of the Tass Agency to immunity on the basis of the Soviet Ambassador's certificate that the Tass Agency was an organ of the Soviet Government.[2] Immunity was also accorded to Servicio National del Trigo, a government department of Spain, engaged in ordinary business of production and distribution.[3]

It would appear from the decided cases that in England the distinction made in some of the countries of continental Europe between acts *jure imperii* and acts *jure gestionis* has not found much favour. As Judge Lauterpacht accurately puts it, in the United Kingdom although the principle of absolute immunity has been applied with a consistency bordering on rigidity without distinction between acts *jure gestionis* and acts *jure imperii*, that practice has not been followed without some hesitation.[4] It would perhaps be right to say that there is no decision as yet of the final court of appeal in England regarding the immunities of a foreign state in regard to its commercial dealings or its trading transactions. There has been so far no case in England in which a foreign state has been subjected to the jurisdiction of the courts though individual judges have doubted the correctness of the doctrine of sovereign immunity in its absolute form. The criticism of the earlier decisions on this question has been very marked in later years, and in 1957 an eminent judge, Lord Denning, called for a fresh approach to the problem in the case of *Rahimtoola* v. *Nizam of Hyderrabad*.[5]

Decisions of the courts in the countries of the Commonwealth. It may be of interest to note the development of the law in this sphere in the countries of the British Commonwealth. The courts in Scotland appear to have rigidly followed the doctrine of absolute immunity as laid down by the English Court of Appeal in the *Porto Alexandre case*, which, as already stated, has taken the extreme view in favour of sovereign immunity. For example, immunity was accorded to a public

[1] (1952) 1 All. E.R. 572; (1952) A.C. 582.
[2] *Krajina* v. *Tass Agency*, (1949) 2 All. E.R. 274.
[3] (1957) 1 Q.B. 438.
[4] Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", XXVIII B.Y.I.L. (1951), p. 70.
[5] (1958) A.C. 379 at p. 411 et seq.

vessel engaged in trade in the case of *S.S. Victoria* v. *S.S. Quillwark*[1] and in a number of other recent cases.[2] The decisions of the Canadian and South African courts appear to be on the same lines, and this is so notwithstanding the observations of the House of Lords in the *Cristina case*.[3] In a recent Australian case, the Supreme Court of Queensland upheld the immunity of a trading vessel "Union Star" despite some doubts expressed in the judgment as to whether the principle of sovereign immunity applies to a ship which is merely engaged in commerce.[4] In India, the position is not settled so far. Two cases appear to have arisen before the Calcutta High Court in this connection. One was in respect of attachment and seizure of certain goods destined for the use of Indonesian armed forces carried on board a ship. The charterers of the ship having become bankrupt, the cargo was seized at the instance of the owners to be taken in satisfaction of the hire charges. The Ministry of External Affairs gave a certificate declaring that the goods were immune from attachment and seizure. The court, however, did not give any pronouncement on the subject of sovereign immunity though it referred to a large number of decisions of both the British and the American courts. The other case relates to certain transactions for purchase of tea between the Government of the United Arab Republic and a private merchant at Calcutta. The judge of the first instance disallowed immunity but this was reversed by the court of appeal. The matter is now pending before the Supreme Court of India.

The High Court of Eire has, however, taken a more restrictive view of sovereign immunity. In the case concerning *Ramava*, the High Court following the reasoning of the early case *Re Charkieh* held against allowing immunity to state ships engaged in commercial pursuits.[5]:

Decisions in the United States of America. The position in the United States of America was laid down as early as in 1812 by Chief Justice Marshall of the Supreme Court in the celebrated case of *The Schooner Exchange* v. *Mc Faddon*.[6] To quote the judgment of the learned Chief Justice, the principle behind the doctrine of state immunity is that:

[1] Decision of the Court of Session dated 22 December 1961, A.D. 1919–42, Suppl. Vol., Case No. 80.

[2] See the *El Candado*, A.D., 1938–40, Case No. 90.

[3] (1938) A.C. 485.

[4] *U.S.A.* v. *Republic of China*, (1950) I.L.R. 168. See also *Wright* v. *Cantrell*, A.D. 1943–45, Case No. 37.

[5] A.D. 1941–42, Case No. 20.

[6] *The Schooner Exchange* v. *Mc Faddon*, (1812) 7 Cranch 116.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, 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.

In the *Carlo Poma case*,[1] where an exception to the doctrine of state immunity was pleaded on the ground that the vessel in question was engaged in trading, the U.S. Federal Court held that the English courts go the whole way in refusing process against the property of a foreign sovereign under any circumstances. This is because of the international comity due from one sovereign to another and that the law of the United States was the same. A few years later the Supreme Court held that it had no jurisdiction against *The Pesaro*,[2] an Italian ship employed by the government for trading purposes on the ground that the ship was owned and possessed by the Italian Government, and operated by it in its service and interest although the vessel was described as a general ship engaged in the common carriage of merchandise for hire. The court observed,

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in the time of peace as any less a public purpose than the maintenance and training of a naval force.

If this is the true basis for grant of immunity from jurisdiction, it would follow that a court would decline jurisdiction in respect of any action against a foreign state even though such action may arise out of trading activities of the state. The American courts appear to have thus adopted an absolute view of immunity by holding that it is for the foreign government and not for the courts to decide whether an act of that foreign government is governmental or non-governmental. In the American law, mere ownership of the ship by a foreign government is not enough. It must be devoted to the public use and must be employed in carrying on the operations of the government.[3] Thus in

[1] *The Carlo Poma*, (1919) 259 F. 369.

[2] *Berrizzi Brothers* v. *The S.S. Pesaro*, (1925) 271 U.S. 562. This case has been followed in *The Navemar*, (1937) 303 U.S. 68, *Yokohama Specie Bank Ltd.* v. *Chenting T. Wang*, *The Kuang Yuan*, 113 F. 2d. 329; 311 U.S. 690.

[3] *The Roseric*, (1918) 254 F. 154. In this case it was held that it is not the ownership or exclusive possession of the instrumentality by the sovereign, but its appropriation and devotion to such service that exempts it from judicial process. See also *Oliver American Trading Co.* v. *Mexico*, A.D. 1923–24, Case No. 21 and *Dexter and Carpenter* v. *Kunlig*, 43

Mexico v. *Hoffman* [1] immunity was denied partly because the suit related to the commercial operation of the ship by a third party, and partly because of the attitude of the executive branch of the government of the United States.

It may be observed that in the United States, the attitude of the State Department has been in favour of restriction of immunity in respect of foreign state operated vessels employed in ordinary trade. A "suggestion" by the State Department that immunity should be withheld in such cases was, however, rejected by the Supreme Court in the *Pesaro case* as also by the Department of Justice which took the view that foreign state trading vessels were immune.[2] The present tendency of the courts, however, is to accept the "suggestions" of the State Department as evident from the observation of Stone C.J. in the *Republic of Mexico* v. *Hoffman* (*1945*): "It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognise." In 1952, the State Department through its Acting Legal Adviser restated in clear terms that it was the Department's policy to follow the restrictive theory of sovereign immunity recognising a distinction between *acta imperii* and *acta gestionis* of foreign governments. Whilst immunity was to be accorded in respect of acts falling within *acta imperii*, the same was to be denied in cases within the latter category. This view, however, cannot be said to be established in the practice of the courts as yet.

Decisions of courts in continental Europe. The doctrine of immunity of states from the jurisdiction of local courts was equally applicable in the countries of continental Europe. The French Court of Cassation in the case of *Le Gouvernement espagnol* v. *Cassaux* (1849) [3] reaffirmed the principles laid down earlier by the Tribunal Civil du Havre in the case of *Blanchet* v. *Gouvernement d'Haiti* (1827),[4] and by the Tribunal Civil de la Seine in the case of *Solon* v. *Gouvernement égyptien*.[5] The basis of these decisions is the sovereignty of foreign states. Like the

F. 2d. 705. A foreign government cannot be made a party defendant against his will in respect of property in which it has an interest: ***Gallopin*** v. ***Wnsor***, A.D. 1931–32, Case No. 89, ***Frazier*** v. ***Foreign Bondholders Protective Council***, 125 N.Y.S. 2nd. 900.

[1] *Republic of Mexico* v. *Hoffman*, (1945) 324 U.S. 30.

[2] See Hackworth, op. cit., Vol. II, p. 430 – Letter from Acting Legal Adviser to the Department of State to Acting Attorney-General dated May 19, 1952, *Department of State Bulletin*, Vol. XXVI, p. 984.

[3] J. P., 1849–I–166.

[4] Dalloz, 1849–I–6.

[5] J.P., 1849–I–172.

French courts, the Belgian tribunals also declined jurisdiction whenever the exercise of such jurisdiction was likely to violate the principle of independence of states or of state sovereignty. The general principle of state immunity was accepted by German authorities as early as in the nineteenth century. For example, in 1819 the Minister of Justice of Prussia refused an order of attachment made by the Court of Saarbruken against the property of the Government of Nassau on the ground that the general principles of sovereign immunity formed part of international law. This view of international law was adopted by the Prussian courts in the later cases of the nineteenth century. In Italy, however, though the doctrine of state immunity was recognised, a distinction was sought to be drawn between the different types of activities of a state.

Shipping cases. France. Before the First World War the French courts consistently applied the principle of absolute immunity, but since then there have been conflicting decisions concerning arrest and attachment of foreign public vessels employed exclusively in commerce. Thus in the case of *The Campos*,[1] a vessel employed by the Brazilian government for commercial purposes was held to be immune from attachment and seizure. Similarly, in *S.S. Balosaro* and *The Englewood*, it was held that a ship employed by a foreign state for trading purposes could not be attached or seized.[2] In *Société maritime auxiliare de transports C. Capitaine du Hungerford*,[3] however, the court recognised a distinction between state ships employed for public purposes and vessels engaged in ordinary trading voyages, though it held that the ship engaged in carrying cargo of wheat and wool for British and French governments was employed in public law activities. The distinction made in *The Hungerford* case between public vessels engaged in trade and those employed in governmental activities has been followed in the later decision of the French courts.[4]

Germany. In Germany, the doctrine of sovereign immunity appears to have been followed with regard to public vessels even though used for commercial purposes. For example, in the case of *The Schenectady* (1920), the German Supreme Court dismissed an appeal against the

[1] *The Campos*, (1919) Clunet, Vol. 46, p. 747,.

[2] *The S.S. Balosaro*, (1919), Recueil du Havre, 62 (1918–19) I, 31; *The Englewood*, Clunet 47 (1920), 621.

[3] R.I.D.M. (1920–21)–32–345.

[4] *Evans (Capt.) ex p. Crédit Lyonnais et Etat* v. *South Atlantic Navigation Co. and Gironde Pilotage and Lifeboat Service*, A.D. 1943–45, Case No. 35.

vacation of a writ of attachment and seizure of a vessel which was the property of the United States of America. The court also upheld the immunity of a ship called the *Ice King* operated for commercial purposes by the U.S.S.B., and also in the case of the *West Chatala* [1] on the ground that the American liner was acting merely as agent for the United States Government.

Netherlands. In the Netherlands, before the First World War the principle of state immunity was not recognised by the courts.[2] In 1917, however, the government enacted a law recognising the immunities of foreign states in accordance with international law. In 1921, the courts allowed immunity from jurisdiction but only with regard to the acts which could be described as *jure imperii.*[3] In one of the decided cases, however, the court held that state operated vessels employed in trade were immune from arrest, and that distinction between private and public character of the service of the ship was irrelevant.[4]

Belgium. In Belgium also, since the First World War the immunity of public property of a foreign state from attachment and execution has been regarded as absolute. In the cases concerning the ships the *"Youlan"* [5] (1920), the *"Lima"* and the *"Panquin"* (1921)[6] it was held that a public vessel in use for commercial purposes did not lose its immunity from arrest by way of attachment or execution.

Italy. The Italian courts, on the other hand, have always taken a restrictive view of immunity based on the distinction between *atti d'impero* and *atti di gestione.* With regard to ships, no immunity is admissible with the exception of ships of war.[7]

Portugal. Portugal, it seems, does not allow immunity to trading vessels though it itself claimed immunity from the jurisdiction of the English courts in the case of the *Porto Alexandre.* The Court of Appeal of Lisbon in the *Cathelamet case*[8] assumed jurisdiction against a vessel of commerce owned and employed by U.S.S.B. for trading purposes.

[1] R.I.D.M. (1922–II)–34–668; see Sucharitkul, State Immunities and Trading Activities, 1959, pp. 83–84.
[2] Phillimore, International Law, pp. 466–67.
[3] *South Africa* v. *Herman Grote,* A.D. 1919–22, Case No. 8.
[4] *Advokaat* v. *Schuddinck and the Belgian State,* A.D. 1923–24, Case 69.
[5] A.D. 1919–22, Case No. 103
[6] A.D. 1919–22, Case No. 104.
[7] Sucharitkul, op. cit., p. 86.
[8] A.D. 1925–26, Case No. 133.

Scandinavia. It appears that in the Scandinavian countries the distinction between acts *jure imperii* and acts *jure gestionis* has been accepted by the courts. In Norway, the immunity from attachment and execution of merchant ships employed in commerce have been upheld so long as the vessels remained in the possession of a foreign government.[1]

It may be mentioned that many of the European states including Denmark, Norway, Sweden, Italy, Netherlands and Germany were parties to the Brussels Convention 1926 concerning immunities of public ships.[2] France signed the convention but did not ratify it. Under this convention, a distinction is made between ships owned by governments and used exclusively for state purposes, and other ships. Immunity was allowed to the former category whilst no immunity was admissible to ships falling within the latter description. The decisions of the courts of these countries after 1926 therefore merely confine themselves to discussing whether a ship in respect of which immunity is claimed falls within one category or the other. The principle concerning the immunity having been determined in the convention itself, the cases merely illustrate the application of that principle.

Egypt. The Egyptian mixed courts have consistently denied immunity to foreign states with regard to their acts *de gestion privée, jure gestionis.*[3] The same is the position with regard to government ships. The courts held that the immunity of a public ship applied only when the act complained of was in the exercise of the functions of the state in its public capacity.[4] The cases show that the courts assumed jurisdiction against vessels employed by foreign states for purely commercial purposes.[5]

Latin America. The practice of the Latin American countries also appears to be in favour of denying immunity to state ships engaged in trade.[6] For example, the Federal Court of Appeal of Argentina assumed jurisdiction over a government operated vessel engaged in trade despite

[1] Sucharitkul, op. cit., p. 88.

[2] Rules concerning the Immunities of Government Vessels, 1926. Article II of this convention assimilates the position of state owned and state operated ships engaged in trade and carrying cargoes to that of ordinary private commercial vessels by subjecting the former to the jurisdiction of local courts.

[3] *Gouvernement égyptien* v. *Palestine State Railways Administration*, A.D. 1919–42, Case No. 78.

[4] *Hall* v. *Bengoa*, A.D. 1919–22, Case No. 107.

[5] *Stapledon and Sons* v. *First Lord of the Admirality*, A.D. 1923–24, Case No. 74; *Saglietto v. Tawill*, A.D. 1923–24, Case no. 77.

[6] Sucharitkul, op. cit., p. 90.

its ownership by the U.S.S.B.[1] It may be added that Chile and Brazil are parties to the Brussels Convention; consequently, the decisions of the courts in these countries are influenced by the provisions of that convention.

Decisions of continental courts relating to cases of commercial transactions of governments. Apart from the cases of government ships, there have been a number of decisions by the courts in continental Europe with regard to immunity of states in respect of commercial transactions.

France. In France, the rule of absolute immunity was upheld in the case of *Gouvernement espagnol v. Cassaux* (1849)[2] which related to purchase of boots by the Spanish Government for its army. In this case the distinction sought to be drawn between the public and private acts of states was rejected. It is, however, clear that even if such a distinction was maintained, purchase of boots for the army would have been treated as a public act. In *Hanukiew v. Ministère de l'Afghanistan*,[3] immunity was allowed in respect of a claim arising out of purchase of arms in France by the Government of Afghanistan. Suits resulting from floating of public loans by foreign governments were also non-suited by the French courts for lack of jurisdiction. This position was upheld by the Court of Cassation, the highest judicial tribunal of France, in respect of an action against the Republic of Honduras in 1886[4] and in the case of *Laurans v. Gouvernement du Maroc* in 1934.[5] These decisions, however, cannot be regarded as authority in favour of absolute immunity, because in each of these cases immunity could be justified even on a restricted application of the doctrine. Nevertheless, the observations of the courts in these cases appear to be in favour of the adoption of the doctrine of state immunity in absolute form. Since the First World War, there has been a tendency on the part of the French courts to draw a distinction between different kinds of acts of foreign states as can be seen from the observations in the *Hungerford case.*[6] The Court of Appeal in Paris referred to such a distinction whilst extending immunity to the *Office Suisse des Transports Extérieurs* (1919)[7] in respect of a contract for the purchase of goods to be imported into

[1] *The El Vapor Cakato*, A.D. 1923–24, Case No. 71.
[2] J.P., 1849–I–166.
[3] S. 1933–I–249.
[4] Dalloz, 1886–I–393.
[5] Dalloz, 1932–II–153.
[6] R.I.D.M., (1920–21)–32–345.
[7] R.I.D.M., (1920–21)–32–345.

Switzerland. The court held that the contract was non-commercial in nature. The same principle was applied in *Etat roumain v. Pascalet et Cie* (1924) [1] for denying immunity to the Roumanian Government with regard to an action arising out of a contract for purchase of goods which were to be resold by the government on ordinary commercial lines to its own citizens. In these cases the distinction was drawn between acts which were regarded as *acte de commerce* and other acts of governments. A restrictive view of immunity on this basis was adopted in a number of subsequent cases. For example, in 1929 the Cour de Cassation upheld the jurisdiction of the courts against the Soviet Trade Delegation in the case of *U.R.S.S.* v. *Association France Export* [2] and in *Chaliapine* v. *Représentation Commerciale de l'U.R.S.S. et Société Brenner* (1937).[3] In both these cases the contentions of the Soviet government, that the acts in dispute were non-commercial in nature, were invariably rejected. It may, therefore, be reasonable to conclude that in France state immunity is now admissible in respect of activities which, in the opinion of the courts, are to be regarded as governmental activities as opposed to *actes de commerce* in the sense of trading activities. To be exempt from the jurisdiction of French courts, entities claiming state immunity must, in the first place, prove that they are either organs of a foreign government or are at least representative agents of a foreign state.[4] Thereafter it is the nature of activities carried on by the agency that would determine the claim to immunity. Thus in *Société Viajes* v. *Office National du Tourisme espagnol*,[5] the court declared the Spanish State Tourist Agency immune from jurisdiction holding that the defendant was a state organisation without any commercial character, and as such entitled to state immunity. But immunity was denied to Oficiana del Aceite, which though a state agency, was a trading organ of the state.[6]

Germany. In Germany, it has already been observed, the principle of absolute immunity was adopted and applied by the *Reichsgericht* in the shipping case of the *Ice King* in 1921. Even prior to that decision, the Supreme Court had held in 1905, over-ruling the earlier decisions of the Bavarian Court of Conflicts of Jurisdiction, that the German courts had

[1] A.D. 1919–22, Case No. 83.
[2] Dalloz, 1924–260.
[3] Sucharitkul, op. cit., p. 215.
[4] Ibid., p. 136.
[5] A.D. 1935–37, Case No. 87.
[6] *Oficina del Aceite* v. *Domenech*, A.D. 1938–40, Case No. 81.

no jurisdiction in a suit against the Belgian State Railway. In a case decided in 1910, the Prussian Tribunal of Kompetenz Konflikte declared sovereign immunity to be absolute and refused to recognize any distinction between acts performed in a sovereign capacity and acts of a private law nature. This was in respect of a proceeding against the Russian Government for execution of a judgment for breach of contract where the foreign government had submitted to the jurisdiction of the court at the trial of action but raised the plea of immunity at the stage of execution of the judgment. Again in 1921, the same tribunal held in another case that "according to international law, a foreign state, both in its public capacity and in transactions of a private law nature, is not subject to the jurisdiction of the courts of another country except in cases of voluntary submission and in matters involving immovable property." [1] In *Halig Ltd.* v. *Polish State,* the court disclaimed jurisdiction even though the action arose out of a contract of lease.[2] It is, however, to be noted that after Germany had ratified the Brussels Convention of 1926 with regard to the immunities of public ships, the doctrine of absolute immunity was no longer applicable to cases of public ships. The reversal of policy in this regard necessitated by the terms of the convention appears to have had some effect even on the general position of sovereign immunity as evident from some of the later decisions of the German courts. Thus the Court of Appeal of Hamm in a decision handed down in 1951 observed:

> In international private law, the principle has been developed that jurisdiction over a foreign state exists in principle when the latter appears in the transactions in question not as a sovereign but as the subject of private rights and obligations.

The principle of restrictive immunity was also adopted by Landgericht of Kiel in 1953 in a case against Denmark where it was held that the action for damages arising out of an accident on a Danish bus belonging to the Danish State Railway was concerned not with a transaction *jure imperii* but with an act *jure gestionis.*[3]

Netherlands. It may be worthwhile to take note of some of the decisions of the courts in the Netherlands pronounced after the Royal Decree of May 29, 1917, and enactment of the *law* of *April 26, 1917* which, as stated above, specifically provided for granting of sovereign

[1] *The Polish Loan Bank Case,* A.D. 1919–22, Case No. 78.
[2] A.D. 1927–28, Case No. 104.
[3] Sucharitkul, op. cit., p. 224.

immunity. In *South Africa* v. *Herman Grote* (1921), the District Court of Amsterdam held that immunity was only confined to *acta jure imperii* while the question of jurisdiction in regard to *acta jure gestionis* was kept open.[1] In a later case, however, the District Court of Dordrecht held:

> This principle (of immunity) which at first was recognised in respect of acts *jure imperii* only, has gradually been applied also to cases where a state in consequence of the continuous extension of functions and in order to meet public needs, has embarked upon activities of a private law nature. [2]

The Dutch courts seem to regard all activities of a state as *jure imperii*, as in a case decided in 1942 the Court of Appeal had held that contracts entered into by U.S.S.R. in the exercise of its functions of foreign trade through its trade organs were acts *jure imperii*.[3] The immunity of the state has been extended even to state agencies, such as the trade delegations and the State Bank of Moscow, on the ground that their field of activity constitutes part of the activities of the state.[4] In a recent case, however, immunity was denied to a commercial and industrial undertaking of the Republic of Czechoslovakia.[5] It is thus clear that in the Netherlands, immunity is granted in respect of all acts of foreign states although in theory a distinction is recognised between public and private law acts.

Belgium. It appears that Belgium is one of the states which had adopted a restrictive view of state immunity from the very beginning based upon the distinction between public and private law activities of states. This would be clear from the decision in the *Peruvian Loan Case*.[6] The principle of restrictive immunity in regard to trading activities was applied by the Court of Appeal of Gand in the *Havre case* (1879), where the court assumed jurisdiction in an action for payment of freight on goods shipped for Ostend although the respondents had contended that the goods belonged to and were the properties of the government of Peru. The court held that by assuming jurisdiction in a case where the foreign government engaged in commercial enterprise or entered into commercial contracts, the principles of international law concerning sovereignty and independence of states would not be violated.[7] This

[1] A.D. 1919–22, Case No. 8.
[2] *Advokaat* v. *Schuddinck and the Belgian State*, A.D. 1923–24, Case No. 69.
[3] *Weber* v. *U.S.S.R.*, A.D. 1919–42, Case No. 74.
[4] A.D. 1943–45, Case No. 26.
[5] A.D. 1947, Case No. 27.
[6] P.B., 1881–II–313.
[7] P.B., 1879–II–175.

principle was upheld by the courts in Belgium in a number of subsequent cases. For example, immunity was denied in the case of *Gouvernement Ottoman* v. *Gaspary* (1910) [1] where the Ottoman Government was concerned with selling of excess supplies. Immunity was denied in *Monnoyer et Bernard* v. *Etat française* (1927)[2] where the French Government purchased goods for purposes of resale on commercial lines to its own nationals. Unlike in France where jurisdiction is exercised only in cases concerning trading activities, the Belgian courts appear to have covered a larger field within the exception to the principle of state immunity because there the distinction is made on the basis of public and private acts of states. Thus the Belgian courts assumed jurisdiction against Bulgaria in respect of a contract for the purchase of bullets which was apparently not a trading activity.[3] The reason given for assumption of jurisdiction was that in making contracts with the Belgian Company, Bulgaria acted as a private person and as such submitted itself to all the civil consequences of the contract. It is doubtful whether such reasoning is sound because in purchasing bullets Bulgaria was acting in furtherance of its governmental functions, that is, to arrange for its defence. It is certain that in most of the other countries immunity from jurisdiction would have been admissible in respect of such contracts. The test which determines the question of jurisdiction in Belgium is the "nature of the act" in relation to which immunity is claimed. It makes no difference as to who performs that act i.e., whether it is the state itself or a state agency. If the act is performed *jure gestionis*, immunity will be denied. Thus the French Office of Reconstruction at Valenciennes, a French government agency not engaged in commercial activity, was denied immunity [4] in respect of certain purchases. Although the Belgian courts assumed jurisdiction against foreign governments in respect of acts which the courts considered *jure gestionis*, the courts had consistently taken the view that the property of foreign governments could not be seized or attached. This principle was followed in the case of *Gouvernement Ottoman* v. *Sclessin* (1876) [5] concerning Krupp cannons belonging to the Ottoman Government on their way to Turkey, and in *Brasseur et Associés* v. *République grecque* (1932).[6] In *Socobelge et Etat belge* v. *Etat*

[1] P.B., 1911–III–104.
[2] A.D. 1927–28, Case No. 112.
[3] P.B., 1889–III–62.
[4] A.D. 1927–28, Case No. 112.
[5] Sucharitkul, op. cit., p. 247.
[6] A.D. 1931–32, Case No. 85.

hellénique (1951),[1] however, the court held that the property of a foreign state was not entitled to immunity from seizure, attachment or execution. This decision certainly seems to have gone very far. In the facts of the case, however, the decision seems to be just because notwithstanding an award of an arbitral commission and the decision of the Permanent Court of International Justice holding the arbitral award to be obligatory, Greece refused to pay for the construction of railway lines under a contract with Socobelge.

Italy. The Italian courts seem to have applied the most restrictive test in the matter of immunity of foreign states from jurisdiction. This is not surprising because in Italy the immunities of even the diplomatic representatives have generally been confined to official acts, and jurisdiction has been assumed in cases where the acts are of a private nature. As regards the immunity of states and state organs, it is now the settled law that in so far as Italian courts are concerned, no immunity is admissible with regard to trading activities whether conducted by the state itself or by a state trading agency. The basis of assumption of jurisdiction seems to be that if a foreign state conducts in Italy a trading enterprise, it must be presumed to have consented to submit to the jurisdiction of the Italian courts. The view taken is that a state has dual personality, and that in so far as it acquires and owns property or enters into contracts, even though the same is for the national interests of the citizens, the state stands in the same position as any other juristic person or private individual and as such it can sue or be sued. Such a view would appear to militate against the principle of sovereign immunity which states enjoy under international law because when a state is acting in furtherance of the interests of its citizens, it is acting for a public purpose. In *Guttieres* v. *Elmilik* (1886), the Court of Cassation of Fierenze held that when the government as a civil body descends into the sphere of contracts and transactions so as to acquire rights and assume obligations just as a private person may do, then it is a question solely of private acts and obligations to be governed by the rules of the general laws.[2] Thus in *Storelli v. Governo della Republica francese* (1924),[3] the Civil Court of Rome assumed jurisdiction and gave judgment against the French Government in an action for price of goods sold and delivered to an aviation base at

[1] Clunet, 1952-79-244/266.
[2] Sucharitkul, op. cit., pp. 233-34.
[3] A.D. 1923-24, Case No. 66.

Gallipoli. The decision was upheld by the Court of Cassation. The Italian courts have consistently denied immunity to the Soviet trade delegations in Italy in respect of their trading activities. In *Tesni's case*, [1] the court assumed jurisdiction in an application for injunction brought against the Soviet Commercial Agency by an Italian firm arising out of a contract for delivery of silk cocoons by the Soviet Agency on the ground that the foreign state had renounced immunity by embarking upon commercial or industrial activity in Italian territory. The court held that the Soviet Government's monopolisation of foreign trade for political ends cannot divest the transactions of their character of being a trading operation. In 1930, jurisdiction was again assumed against the Soviet Trade Delegation in regard to an action relating to an order for cinematographic apparatus.[2] Earlier, the Court of Appeal of Genoa had entertained a claim against the French Government in respect of a contract to tow ships from Cattaro to Spezia holding that when a foreign state engages in purely commercial activity or operates in the administration of its property, it stands on no different footing from any foreign juristic person.[3]

As already stated, the distinction between the state as a civil entity and as a political person is widely accepted in Italian case law. With regard to foreign state agencies engaged in trade, the courts have held that the agency represents the foreign state not as a sovereign authority but as a private person. Thus in the case of *U.S.S.R.* v. *Società Italiana Cementi* (1925),[4] the Court of Appeal of Genoa held that the Shipping Board, although a state body, cannot be identified with the American government for the exercise of maritime navigation and business, for the purpose of commercial speculation does not constitute an act pertaining to sovereign rights. In *Floridi* v. *Sovexportfilm* (1951),[5] the Tribunal of Rome in refusing to exempt the defendant from the jurisdiction observed that "trading activities and business undertakings are considered in each case to be public activities and governmental organs only in socialist states. . . . The activities in question may therefore be considered private from the point of view of international law."

Egypt. The mixed courts in Egypt have also followed a restrictive rule of state immunity based on a distinction between *actes de gestion*

[1] A.D. 1925–26, Case No. 127.
[2] *R.C. delle U.R.S.S.* v. *National City Bank of New York*, Rivista 23 (1931), p. 550.
[3] *Governo francese* v. *Serra*, A.D. 1925–26, Case No. 128.
[4] Giu. It., 1925–I–2, pp. 271, 275.
[5] Annali, 1952–X–115.

and *actes de pouvoir*, and their decisions follow more or less the same pattern as the decisions of the Italian courts. Thus the Civil Tribunal of Alexandria assumed jurisdiction against the French National Savings Bank on the ground that it was a commercial enterprise having the character of a private undertaking.[1] Again, in *Monopole des Tabacs de Turquie* v. *Régie Co Intéressée des Tabacs de Turquie* [2] the court authorised the attachment of the property of the Turkish Trading Agency holding that once its activity had been held to be of a private nature, there could be no exemption from the process of execution. Consistently with the practice of the mixed courts, the Egyptian Court of Cassation assumed jurisdiction against the Palestine Railway Administration[3] and held that the activity of running a railway was an act of a private nature which was different from an act in the exercise of sovereignty. Similarly, the Commercial Tribunal of Alexandria refused immunity from jurisdiction to two organs of the Spanish government and issued interim measures of execution against the Spanish Comisariat General in Egypt.[4] The transaction involved purchase of rice for the feeding of the population of Spain. The court considered it as a commercial function. This decision is extremely difficult to support because even on a restrictive interpretation it is obvious that feeding of the country's population by obtaining supplies from abroad in times of scarcity is an essential governmental function. It is true that whilst purchasing supplies from abroad a government would be entering into a transaction similar to those entered into by traders. But that itself should not make it a trading transaction. Similarly, in the case of railways it would appear that provision of essential means of communication within the state is certainly a governmental function.

Austria. The Supreme Court of Austria in a case concerning a nationalized enterprise of Czechoslovakia rejected the claim to immunity on the ground that exemption from local jurisdiction in respect of *acta gestionis* of foreign states is no longer recognised,[5] and consequently it should not be regarded as a part of international law.

[1] *Borg* v. *Caisse Nationale d'Epargne Française*, A.D. 1925–26, Case No. 122.
[2] A.D. 1929–30, Case No. 79.
[3] *Gouvernement égyptien* v. *Palestine State Railway Administration*, A.D. 1919–42, Case No. 78.
[4] *Egyptian Delta Rice Mills Co.* v. *Comisaria General Etc.*, A.D. 1943–45, Case No. 27.
[5] Re *Czecho Hair Tonics National Enterprise*, (1950) I.L.R., Case No. 41.

Switzerland. Swiss courts also appear to draw a distinction between the different types of state activities and assume jurisdiction in actions concerning acts *jure gestionis* of foreign governments and state agencies.[1]

Eastern Europe. The inclination of the courts of Roumania and Poland until the Second World War was in favour of adopting a restrictive view of state immunity. For example, in 1924 the Roumanian courts denied immunity to the Polish Tobacco Monopolies, a branch of the Polish Ministry of Finance, in respect of its trading activities in Roumania. In 1928, the Polish Supreme Court declared in the case of *Russian Trade Delegation* v. *Fajana* that there might be an implied submission to Polish jurisdiction by the very fact of a foreign state taking up commercial activities in Poland.[2] It is doubtful whether these decisions would be regarded as good law by the courts in Poland and Roumania today. As there is no rule of precedent in civil law countries, these decisions would not obviously be binding. Even apart from this with the adoption of a socialistic pattern of administration in the Soviet sense, these countries are bound to look differently at the problem in determining as to what acts should be considered as falling within the governmental functions of a state. In Soviet Russia and the countries which follow the same pattern of government, trading is obviously a governmental function because all means of production and distribution are in governmental hands. The governments and state trading organisations of these countries always claim immunity from jurisdiction of foreign courts when sued even in respect of their commercial or trading activities in the true sense of the term. It may, therefore, be presumed that the courts of the countries in the Soviet sphere would normally accord immunity to foreign governments and state agencies in respect of all their acts.

Position in Asian African countries. The views of the Asian states, which were hitherto not available on this problem, were expressed during a discussion of the subject by the Asian-African Legal Consultative Committee in 1960. From the statements made by the representatives it appears that in Burma the doctrine of sovereign immunity was considered to be absolute, but there was reason to believe that it might be limited in its application in the future. India was in favour of a distinction being drawn between public and private

[1] State Immunity (Switzerland), Case No. II (1941), A.D. 1941–42, Case No. 62.
[2] Sucharitkul, op. cit., p. 149.

acts of states and considered that immunity should be restricted in so far as commercial activities were concerned. Ceylon, Iraq, Japan and the United Arab Republic were of the view that the doctrine of state immunity should be limited in its application to public acts of the state. The Indonesian representative had, on the other hand, stated that it was extremely difficult to distinguish between different kinds of state activity, and that the adoption of any such distinction would necessitate an examination of every activity of the state to determine whether it was private or public, and that this would mean that sovereign immunity of the state itself would become limited. The statements made by the representatives may be said to be indicative of the policies and trends of thought of the various governments though none of these governments have so far declared their policy in the matter in any public declaration. There does not appear to be any decision of the national courts of these countries dealing with the question of state immunity in regard to commercial transactions except those of the mixed courts in Egypt which were abolished in 1947. In India, as has already been stated, the matter is pending consideration of the Supreme Court.

It is apparent that most of the Asian African countries have had occasion to engage in the purchase of materials and equipment in foreign countries for use in public services or public utilities and for maintenance of food supplies within the country. Such transactions appear to have been done through government officials in so far as Burma, Ceylon, India and Iraq are concerned. The Indonesian government makes such purchases through a commercial firm, and in the U.A.R. they are done either by government officials themselves or through companies controlled by the Economic Development Organisation. Ceylon, India, Iraq and Japan take the view that local courts of the countries where such contracts are to be performed should have jurisdiction in respect of any claim arising therefrom. Indonesia, however, considers that any claim against a government would be outside the jurisdiction of the local courts, but it would be different if the transactions were entered into in the name of a state trading organisation and not in the name of the government. The view of the United Arab Republic is that claims arising out of transactions of this nature directly carried on by a government would fall outside the sphere of local jurisdiction, but that claims in respect of contracts performed by state trading organisations should not be granted immunity. It appears that none of these governments have had occasion so far to

raise the plea of sovereign immunity in respect of such transactions in any foreign country.[1]

It may be stated that many of these countries carry on a certain amount of commercial activity in foreign countries either directly through the government or through state trading organisations and public companies. For example, the Iraqi government had recently established a maritime transport corporation and it carries on banking business in some of the Arab countries. Iraq has no state organisation, but there are certain public bodies which conduct their activities on an independent basis. India has several corporations which are fully or substantially owned by the government. These corporations run ships for commercial purposes, engage in international air transport, conduct banking business in foreign countries, and control the export of certain commodities. Burma has two large state organisations, namely the Timber Organisation and the Agricultural Marketing Board. Indonesia has several state trading organisations. It owns the Indonesian Shipping Company, and the Bank of Indonesia has branches in several foreign countries. In the United Arab Republic, there are a few companies controlled by the Economic Development Organisation which conduct banking and insurance business abroad. These companies have separate juristic entities under the law.[2]

Burma, Ceylon, India, Iraq, Japan and the United Arab Republic take the view that the doctrine of sovereign immunity is not applicable to acts arising out of transactions which are purely commercial in nature, whether they are conducted by the government itself or by state trading organisations. Indonesia's point of view is that all activities conducted by a government would attract the doctrine of sovereign immunity, and as such no court should exercise jurisdiction in respect of any action brought against a foreign sovereign state. The position would be different if the activities were carried on by a state trading organisation.[3]

The Asian-African Legal Consultative Committee is unanimously of the view that where the state trading organisation has an entity of its own under the municipal laws, immunity is not applicable to the acts of such organisations. The state trading corporations which have no separate juridical existence, however, stand on a different footing. The transactions entered into by such bodies are to be regarded on

[1] A.A.L.C.C., Report of the Third Session, Colombo, 1960, pp. 70-80.
[2] Ibid.
[3] Ibid.

the same footing as the acts of governments according to the view of Burma, Iraq and Indonesia; Ceylon and India take the opposite view whilst the United Arab Republic considers that granting of immunity to state trading organisations which are not separate juridical entities would depend on the nature and purposes underlying their transactions.[1]

Conclusion. From a review of the decided cases and opinions of governments it appears that there is no dispute on the question that a state is entitled to immunity from the jurisdiction of foreign courts in respect of its activities which may be described as its public acts performed in the exercise of its governmental functions; but the difference of opinion arises as to whether that immunity extends to acts which do not strictly fall within it. In the middle of the nineteenth century, the principle of immunity of states from the jurisdiction of foreign courts was fairly well established in the practice of the majority of European countries and the United States of America, the foundation for such exemption being the sovereignty of states. No distinction appears to have been recognised at that time between different types of activities of states presumably because the states were not pursuing activities of a commercial nature on a very large scale. The differentiation between the public acts (*acta imperii*) and acts of a private law or commercial nature (*acta gestionis* or *acta du commerce*) assumed considerable importance after the First World War, and the decisions of the various national courts invariably appear to contain a discussion of the principle of state immunity from this angle. A good many of the decisions are concerning the question of attachment and seizure of public ships, but the principles laid down in these cases are of general application and illustrate the views of national courts on the question of immunity of states with regard to trading activities. In England, although individual judges have expressed a note of dissent on the application of the doctrine of state immunity in its absolute form, it would be reasonable to state on the basis of decided cases that no distinction is yet recognised between different types of activities of a state. In the United States of America, the doctrine of sovereign immunity had been applied in its absolute form by the courts. But having regard to the attitude of the State Department, as expressly stated in 1952, and the approach of the courts to problems of inter-

[1] Ibid.

national law, as expressed by Stone C.J. in *Mexico* v. *Hoffman*, it is very likely that in future pronouncements on the subject the courts in the United States may take a restrictive view of the doctrine, that is to say, the immunity from jurisdiction might well be confined to cases which involve acts performed in the exercise of governmental functions. A majority of the countries of Western Europe appear to be in favour of making some restriction in the application of the doctrine of sovereign immunity, though there is difference of views regarding the extent of such restrictions and the legal basis for the assumption of jurisdiction. Whilst France would exclude immunity only in case of trading by states or state agencies, Belgian and Italian courts have taken the view of subjecting foreign states to their jurisdiction in respect of all acts which cannot be said to be *acta imperii* in the true sence of the term. Netherlands and Germany appear to be more inclined towards a traditional approach. As has already been seen, many of the countries of the British Commonwealth still adhere to the doctrine of absolute immunity. Same is perhaps the position in the countries of Eastern Europe, and some of the newly independent states of Asia and Africa are likely to take the same attitude. Although the decisions of the mixed courts of Egypt were altogether for extreme limitation of sovereign immunity, the attitude of the United Arab Republic government appears to be much more moderate. Amongst the major Asian countries whilst India, Burma, Ceylon and Japan favour restriction of immunity in respect of commercial activities of states, Indonesia would favour the retention of the old concept of sovereign immunity in its absolute form. There is thus a real conflict of views among various countries on the question whether immunity should extend to the trading and commercial activities of a state. It is necessary in the interest of states as well as individuals that this conflict should be resolved and certain uniformity be achieved in the field. The states and their officials should be in a position to know definitely whether by engaging in trade or other activities of a commercial nature they are liable to be subjected to the jurisdiction of the courts of a foreign state for breach of contract or other obligations arising out of such activities. At the same time, it is equally important for an individual to know as to whether he has any remedy open against a foreign government with whom he is trading.

The matter will have to be considered sooner or later by the International Law Commission and possibly by a conference of plenipotentiaries. The question had been referred to the Asian-African Legal

Consultative Committee for its opinion and the Committee had recommended by a majority that the principle of state immunity should not extend to the trading activities of a state. The Committee took note of the recent trend in the attitude of the states as well as opinions of writers in favour of disallowance of claim to immunity in respect of commercial and other transactions which do not strictly fall within the ambit of "governmental activities" as traditionally understood. The Committee observed that it was being increasingly realised that the doctrine of sovereign immunity of foreign states was not meant to include those new and extended functions which were being assumed by the governments at present.

The further question that would arise is how should one determine and differentiate between acts performed in the exercise of the governmental functions of the state and its other acts. Opinions are found to differ as to what is a governmental function, and this would depend upon different ideologies of governments. The dictum of the United States Supreme Court in *The Pesaro* case is directly in point where it was held that there was nothing in international law to prevent a state from trading in order to enrich its treasury; and who can say that if a state instead of increasing taxes decided to enrich itself by trading that it is not a governmental function? But at the same time, it is essential in the interest of international trade and commerce to ensure that states engaging in such activities do not escape from their obligations by sheltering behind the doctrine of state immunity. The problem is by no means simple, and the only solution perhaps is to judge each case on its own merits. It would be reasonable to suggest that activities of a state which involve purchase of defence equipment or food for the maintenance of essential supplies fall within the governmental functions of a state though such transactions are in the nature of commercial activities. On the other hand, purchase of goods by a government for sale in its own country to its citizens on commercial lines or marketing of goods produced in state owned factories would fall clearly within trading activities. Similarly, the activity of a state in running passenger or cargo liners for hire and air transport services can be described as commercial activity on the part of a state. Transactions involving purchase of machinery for state owned factories and running of press services and news agencies would perhaps fall on the border line.

Acts of governmental agencies having separate legal personality

For the purposes of claim to immunity, a distinction is sometimes drawn between acts of governments and the acts of agencies having an independent legal personality. It is often difficult to determine whether a given entity is a state agency by reference either to the character of its activities or the nature of its functions, for each state has its own notions as to what is the proper scope of state activity and governmental functions. The only possible criterion is perhaps to see whether the particular organ or agency has been constitutionally made an essential part of the central government under the domestic laws of the state. The same functions may be performed in one state by a government department whilst in another by an independent corporation though under the control of the government. For example, in the Soviet Union the trading activities of the state are done through the Soviet Ministry for Foreign Affairs, whereas in India it is an independent corporation called the State Trading Corporation which looks after such functions. In England and India, for example, the air transport services are run by independent corporations though they are government owned.

Position in Great Britain. In Britain, corporations controlled by the government are generally divided into public and private corporations. Public corporations are created or instituted by the government and their shares are wholly owned by the state. Private corporations are created under the general company law and the government has merely the controlling interest in it. Public corporations again fall within two categories, namely those which form part of the central machinery of government and those which are not. Public corporations, which are state agencies, are generally accorded immunity from jurisdiction under the law in England. The distinction between the different types of public corporations assumes importance in Britain because of the prevalence of the doctrine of absolute immunity. The English courts have held that it is possible for a public corporation to be so incorporated as to qualify for enjoyment of state immunity. The question, whether or not a public corporation is to be treated as a state agency exempt from the local jurisdiction, is determined according to English decisions by reference to the instrument creating it as proof of the intention of the state. Thus in *Mackenzy-Kennedy* v. *Air Council*,[1] Lord Atkin made immunity depend on the intention of the legislature

[1] (1927) 2 K.B. 517.

as manifested in the express words of incorporation. The same principle was adopted in respect of foreign corporations. In *Compania Mercantil Argentina* v. *U.S.S.B.*,[1] the courts upheld the immunity of the American state agency on the certificate of the Ambassador that the U.S.S.B. was solely a department of state administered by Commissioners nominated by the President of the United States. Similarly, in the case of *Krajina* v. *Tass News Agency*,[2] the English Court of Appeal upheld the claim to immunity on behalf of the Tass Agency on the basis of the certificate of the Soviet Ambassador that the Tass Agency constituted a department of the Soviet state exercising the rights of a legal entity. In this case the learned judges, namely Lord Justices Cohen and Tucker, took the view that even if a department of state was granted incorporation, it would not necessarily follow that it would thereby lose its right to claim immunity in a foreign court. In the same case Lord Justice Singleton, however, sounded a note of dissent. He suggested a radical modification of the law to provide that public corporations engaging in trade should be subject to local jurisdiction whilst observing that there was no precedent for extending immunity to a corporate body carrying on business in England. In *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[3] immunity was upheld on the ground that though the defendant had a corporate status, its functions were wholly those of a department of state as stated in the certificate of the Spanish Ambassador. The decision is based on the ground that the mere constitution of a body as a legal personality with the right to make contracts, to sue and be sued, is not inconsistent with its remaining and being a department of the state. Here also Singleton L.J. expressed a dissenting view:

> I feel quite sure that the courts of this country would not knowingly do anything which they understood to be a violation of the sovereign immunity of the state of Spain, but the position is wholly different if a separate entity is set up and is allowed to trade with its own people conducting its business.

In Britain, the position seems to be that if the agency in question is in reality a government department, though it may have been given an incorporation, immunity will be extended to acts of such an agency. On the other hand, if the agency has a separate existence of its own in which the government has merely an interest, immunity will not be granted. This is subject to the exception that if the action against the

[1] (1924) 131 L.T. 388.
[2] (1949) 2 All. E.R. 274.
[3] (1957) 1 Q.B. 438.

agency is in effect a proceeding *in rem* against the property of a foreign government in its possession or control, immunity will be attracted.[1]

United States of America. In the practice of the United States, a distinction is drawn between government departments on the one hand and corporations on the other for the purpose of immunity; and unlike in Britain it appears to be an established rule in the United States that foreign corporations are amenable to the jurisdiction of the courts regardless of the assertion by the foreign governments that they have been performing governmental functions.[2] It is in this manner that an effective restriction on the application of the doctrine of immunity operates in practice in America without having to draw a distinction between the various activities of a state. If the defendant sued is a corporation, the practice of the United States courts has been to withhold immunity. It makes no difference as to what extent a foreign state may have an interest in the corporation, nor does it matter that the corporation may be an instrumentality of a foreign government or that it may be doing its work. The assumption of jurisdiction in the case of foreign trading corporations, which are owned or controlled by foreign governments, appears to be based on the principle that when a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen.[3] The courts have further held that the foreign state cannot claim immunity in such cases as a matter of comity or on the basis that a suit against the agent is in fact a suit against the foreign sovereign. This is specially so when the agent is a foreign corporation which is doing business. This principle was first enunciated in the cases of suits against the states forming part of the United States,[4] and later extended to suits against foreign corporations in which foreign states had an interest. Though there is scope for argument as to whether a distinction based on this principle is sound, it appears to be well established in the practice of the courts of the United States. At any rate, the basis of distinction does not appear to be any more artificial than the distinction made in the continental countries between *acta imperii* and *acta gestionis*. Since there is a general feeling that the

[1] See *Vavasseur* v. *Krupp*, (1878) 9 Ch. D. 351; *Dollfus Mieg et Cie* v. *Bank of England*, (1950) 1. Ch. D. 333; (1952) 1 All. E.R. 572.

[2] *United States* v. *Deutsche Kalisyndikat Gesellschaft*, (1930) 31 F. 2d 199.

[3] *Ulen and Co.* v. *National Economy Bank*, 34 N.Y.S. 2d 201, A.D. 1938–40, Case No. 74.

[4] *Bank of United States* v. *Planters' Bank of Georgia*, (1894) 9 Wheat. 904.

application of the doctrine of state immunity ought to be restricted without doing violence to the principle of international comity, the courts have naturally tried to find a solution by which the indiscriminate application of the principle of state immunity can be avoided.

Now the question is as to how is it to be proved that a particular corporation or agency has a separate juristic entity under the municipal laws? In Britain, it is clear that the certificate of the ambassador of the country concerned would be regarded as conclusive. In the United States, however, the courts would probably require a certificate from the State Department. If the State Department takes up a definite position in favour of allowing immunity to a state trading agency, it is the practice of the courts generally to decline jurisdiction. If, however, the Department takes a neutral attitude, the courts may determine for themselves the admissibility of the claim to immunity of the organisation in question according to their own notions. With the exception of a few cases, the courts appear to have reached the conclusion that foreign trading corporations are amenable to American jurisdiction regardless of their position before their own national courts and notwithstanding the fact that they may form part of the central government of a foreign state.[1]

It is worthy of note that in cases where the foreign corporations were not incorporated, they were held to be part of the government as was done in the two cases concerning the Mexican railroads.[2] But where the corporation had been incorporated, immunity has been denied notwithstanding the fact that a foreign government had a substantial interest in the corporation. Thus in *Coale* v. *Société Coopérative Suisse des Charbons*,[3] the Swiss Corporation, which was formed by the government for the purpose of importation of coal, was subjected to jurisdiction although the facts showed that seven out of seventeen directors were appointed by the government and that the government was entitled to its net profits over and above six per cent. Immunity was also denied to the *Société Commerciale des Potasses d'Alsace*,[4] an organisation created and controlled by France for administering potash mines, and to the *Bank Gospodarstwa Krajowego* [5] where sixty per cent of the shares were owned by the state and supreme control was

[1] *Millet et Al* v. *Ferrocarril del Pacifico de Nicaragua*, A.D. 1941–42, Case No. 51.

[2] *Bradford* v. *Director General of Railroads of Mexico*, (1925), A.D. 1925–26, Case No. 132; *Oliver American Trading Co.* v. *Mexico*, A.D. 1923–24, Case No. 21.

[3] A.D. 1919–22, Case No. 88.

[4] 31 F. 2d. 199.

[5] A.D. 1938–40, Case No. 74.

vested in the Minister of Finance. In *Hannes* v. *Kingdom of Roumania Monopolies Institute*,[1] the Supreme Court of New York denied the defendant immunity from jurisdiction, although the institute was wholly owned by the state, on the ground that "foreign corporations as such are not entitled to immunity even though their functions may include to some extent performance of public duties."

Execution of judgments against state agencies. Notwithstanding the tendency of the American courts to deny immunity to all foreign corporations having a separate entity, the courts do not allow execution against the property of a foreign government as evident from the decision in *Dexter and Carpenter* v. *Kunlig*,[2] where the property of the Swedish State Railways, which ultimately belonged to Sweden, was held exempt from execution although the Swedish State Railways as such were amenable to the jurisdiction of the courts of the United States. It is thus clear that notwithstanding the assumption of jurisdiction against state agencies which have a separate entity by reason of their incorporations, no decree can be effective against such agencies if in fact their assets belong to the foreign government. Actions against state agents which in fact implead a foreign government are also not entertained by the United States courts.

Continental Europe. In France, the question as to whether the state agency has a separate legal personality or not is immaterial, because the practice of the courts there is to apply the test as to whether the activity, in respect of which the action arises, is of a trading nature or not. The courts would assume jurisdiction even against a government department if it is found to be trading. In Italy, the courts have invariably come to the conclusion that any foreign state agency engaged in trade represents the foreign state not as a sovereign authority but as a private person, and as such is not immune from jurisdiction of the courts. The Egyptian mixed courts drew no distinction between state agencies on the basis of their having separate existence because the fact that a foreign state carried on commercial transactions in Egypt was sufficient for them to exercise jurisdiction regardless of whether the defendant was separate from or incorporated in the machinery of the government of the foreign state.

[1] 6 N.Y.S. 2d. 960.

[2] *Gallopin* v. *Winsor*, 251 N.Y.S. 484; *Bradford* v. *Chase National City Bank of New York*, 309 U.S. 698; *Dexter and Carpenter* v. *Kunlig*, A.D. 1929–30, Case No. 70.

General tendency towards restriction of sovereign immunity. The above discussion leads to the conclusion that though there is a good deal of divergence in state practice and in the decisions of the national courts, it is clear that there is a general tendency throughout the world for a reconsideration and re-examination of the doctrine of absolute immunity at least in so far as commercial and trading activities of states are concerned. It seems very likely that in a majority of European as well as Asian countries, trading and commercial activities of a state, in the true sense of the term, would be considered as falling within the jurisdiction of local courts and tribunals of the countries where the contracts are to be performed.

It appears that state trading organisations having a separate existence are not likely to be accorded immunity from jurisdiction in any country, though the position in the Soviet Union and countries following the same pattern of society is not very clear. Even in England which goes to the extreme length in favour of granting immunity, the courts have not thought fit to exempt such organisations from their jurisdiction. State agencies and government departments, on the other hand, are likely to be accorded immunity in respect of their activities of a commercial nature in several countries provided such activities do not amount to trading. There is, however, an increasingly larger number of countries which are not inclined to grant immunity even in such cases. Having regard to the general tendency evidenced by opinions of writers and decisions of national courts, it would appear to be wiser for states and state agencies, which find it necessary to engage in trading activities, to voluntarily submit to the jurisdiction of the local courts where the particular contract is to be performed. This, of course, may not apply to cases of purchase of military stores or foodstuffs required to be purchased abroad in the national interest, though some states do submit foreign states to jurisdiction even in respect of transactions of this type. In this connection it may be of interest to observe that the Asian-African Legal Consultative Committee in its recommendations on the subject stated:

> A state which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised, it should not be admissible to deprive the jurisdiction of the domestic courts. [1]

Suits before national courts against foreign governments. If an action is to be instituted before a national court in respect of any

[1] A.A.L.C.C., Report of the Third Session, Colombo, 1960.

claim arising out of a contract, the suit is naturally to be filed against the person or authority who is the party to the contract. If it is a state agency having a distinct entity, the suit may be filed against the organisation and the summons may be served on the representative of the agency. In every other case, it would seem that the suit will have to be instituted against the foreign government. In some instances the claimants may also wish to join as a party defendant the person who had signed the contract, who may well be one of the diplomatic officers. Two questions would need serious consideration, namely the authority on whom the service of summons of the action is to be served in cases where the foreign government is sought to be sued, and secondly, whether a diplomatic representative can be sued in the state of his residence in respect of a transaction of a commercial nature which he enters on behalf of his government? Proceeding on the basis that a foreign state can be subjected to the jurisdiction of the local courts in respect of its commercial activities, it would appear that the court concerned could transmit the writ of summons to the foreign government or the department of that government directly depending on the practice of the particular court for service of writs outside jurisdiction. The service could be effected through the local embassy if it is prepared to accept service on behalf of the government. A government is not bound to appear on such summons. It may just ignore the summons, it may appear and claim immunity, or it may voluntarily submit to jurisdiction. If a decree is passed against the foreign government, it may be infructuous because no execution can levy against the properties of a foreign government. Therefore, unless a foreign government submits to the jurisdiction and agrees to honour the decree passed by the court, there is really no effective remedy against actions of foreign governments for breach of contract arising out of transactions of a commercial nature. In practice, however, governments do honour decrees passed against them because of the necessity to safeguard their international reputation.

Suits against diplomatic representation. As regards suits that may be filed against a diplomatic envoy for breach of contract arising out of commercial transactions entered into on behalf of his government, the position would vary from country to country. In the states where diplomats are accorded absolute immunity, the action would be dismissed as being without jurisdiction. For example, in the United Kingdom and the United States of America, a diplomat could not be sued at all, as the

immunity from jurisdiction extends to all his acts during his term of office. On the other hand, in countries where diplomatic immunity is applied strictly, it may be argued that the immunity which an envoy enjoys is the immunity of his government, and if his government enjoys no immunity in respect of trading activities, how can an envoy who represents his government in such a transaction claim immunity in respect of acts arising out of such contracts?

CHAPTER XVI

RECOGNITION OF STATES AND GOVERNMENTS

As already stated, it is essential that before a state can enter into formal relations with another it must not only be fully sovereign, but it must also be recognised as such by the state with which it seeks to enter into relations. The government of the state must also be similarly recognised. The question of recognition of states and governments is one of the vexed problems of international law as political considerations play a dominant part in determination of such issues. The diplomat posted at the Foreign Office may at times be called upon to advise the Minister on these problems, and in arriving at a decision he may well find the past precedents, and especially the rationale behind such cases of practical value. These will be discussed in the present chapter.

The problem of recognition in respect of states arises when a new state is born and seeks to establish relations with the existing states, and when it applies for membership of international organisations like the United Nations. New states as independent member nations of the international community come into existence by various methods. The most common form during the past decade or two has been through peaceful process of achieving independence from their colonial status. Since the Second World War man has witnessed the birth of many a new nation through this means, such as India, Burma, Pakistan, Ceylon, Indonesia, Philippines, Malaya, Iraq, Syria, Ghana, Nigeria, Morocco, Algeria, Cyprus, Guinea, Congo and a number of other Asian African states. In each of these cases the metropolitan powers in control of the territories had by negotiation and agreement with the people of the land handed over the sovereignty over these territories to the governments which were formed to take over the control of the newly independent states. It is now almost certain that within the next few years a number of other new nations will emerge as sovereign states

through a similar process. In the past, new states have often been formed by revolt and break away of a part of the territory of an existing state as happened in the case of the United States of America, Mexico, the Latin American Republics, Finland, Latvia, Estonia and Poland. States have also come into existence upon disintegration of large empires and under the terms of Peace Treaties following upon a war. For example, a number of new states were formed in Europe upon the break up of the Holy Roman Empire, and countries like Czechoslovakia, Hungary and Yugoslavia owe their existence to the various clauses of the Treaty of Versailles drawn up at the conclusion of the First World War which also coincided with the break up of the Austro-Hungarian Empire. The disintegration of the Ottoman Empire led to the formation of independent entities in West Asia and North Africa, such as Egypt, Syria, Jordon, Palestine and Iraq, some of which after a spell of colonial domination by European powers in the shape of protectorates and mandated territories have emerged as free nations. New states have also been formed as a result of agreement reached between Great Powers as happened in the Geneva Conference on Indo-China in 1955. Laos and Cambodia came into being as independent sovereign states as a result of agreement reached between France, the metropolitan power in control of these territories and other powers, such as Great Britain, United States of America and the U.S.S.R. A state may also come into existence by an union of two or more existing states or by a federation of several states. The most recent example of the formation of a new state by an union of existing states was the United Arab Republic, which was formed by union of Syria and Egypt in 1958. The union has, however, since been dissolved.

Recognition of states

The question of recognition in cases where a state comes into being through peaceful means, as has happened in the case of newly independent countries of Asia and Africa, presents few problems The reason is that since the state which was in control of the territories of the new state itself recognises the independence of the new state, that fact tends to show that it is no longer in control of the territories of the new state, and thus the essential requirement of statehood, i.e., freedom from the political control of any other state, can be easily satisfied. It is true that other states have a right to judge for themselves the question whether the new state possesses all the attributes of the statehood whilst considering the matter of recognition, but

practice shows that normally if the parent state recognises the new state, recognition by others follows. Thus in the case of most of the newly independent countries of the Asian African continents, recognition was accorded almost as soon as the states came into existence, and diplomatic relations were established with them by the existing states. Except for Ceylon, whose admission into the United Nations was postponed for a time by reason of the Russian veto, these states were admitted into the United Nations almost simultaneously with their attainment of independence. India, which was a member of the Organisation even prior to her independence, continued to be a member. Indonesia which attained its statehood after a struggle also encountered no difficulty in being accepted into the community of nations as a sovereign state or in being admitted into the United Nations. There may, however, be cases which are likely to be rare, where though the new state is recognised by the parent state, a group of states may not be willing to recognise the new state. The most recent example of such a situation is Israel which the Arab states refuse to recognise inspite of the fact that it has come into being by reason of a resolution of the United Nations and it was recognised as a state by Britain, the mandatory power. The attitude of the Arab states has certainly created a problem for other states since the viewpoint of a group of states in the same part of the world cannot easily be ignored.

The question of recognition of states which came into being by means of revolt and subsequent break away of a part of the state territory of an existing state often gave rise to problems in the past, particularly when the parent state intended to exercise authority over the territory of the new state and described its government as "rebels". For instance, in the case of Mexico and other American colonies, Spain continued to assert her sovereignty for a considerable period even after she had lost actual control of those territories. Since the premature recognition of a new state could be said to amount to intervention in the affairs of the parent state, which might have even led to war, other states and their governments had to act with caution in the matter of recognition of a new state which came into being as a result of revolt and break away and which had not been recognised by the parent state. It was at the same time felt that if states refused recognition to a new community merely on the ground that the parent state had not accorded recognition, they might be ignoring the realities of the situation or perpetuating a colonial domination

which the people of the territory had shaken off. Happily, cases of this type can be but rare in this modern age when metropolitan powers have by and large not been unresponsive to the wishes of the people in colonial territories and dependencies. However, one such case recently arose, that is concerning Algeria. A group of people claiming to be in control of a part of the state territory declared themselves independent and set up a provisional government a part of which was to function from Cairo. The parent state, France, which was asserting its sovereignty and making attempts to re-establish its control over the whole territory, did not recognise the new state or the provisional government. In this situation various states which were approached for recognition of the new state were faced with a serious difficulty. On the one hand, the recognition, if granted, could well be said to be premature, and as such amounting to infringement of the rights of the parent state, but on the other hand, non-recognition of the new state could be said to offend against the principle of self-determination which is enshrined in the U.N. Charter. The problem was, however, solved by France herself granting Algeria her independence and recognising at the same time the independent statehood of the new nation.

Recognition of states both a matter of international law and politics. It is to be remembered that the decision as to whether or not to recognise a new state must rest with each individual state since recognition is accorded in the exercise of a state's sovereignty. It may be mentioned that there is probably no other subject in the field of international relations in which law and politics are more closely interwoven. According to what can probably be regarded as still the predominant view in the literature of international law, recognition of states or governments is not a matter governed by law, but is a question of policy. At the same time eminent authors like Judge Lauterpacht regard the question of recognition as a matter of international law.[1] Perhaps the true position lies in between these two conflicting views. Recognition can be regarded as a matter of international law in as much as the question whether in a given situation a new state can be said to have come into existence is to be decided by certain objective tests which have been accepted in the practice of states. Politics or political considerations, however, enter the field at the stage when a state is called upon to apply these tests to a specific case.

Effect of recognition. There is difference of opinion among writers

[1] See Lauterpacht, Recognition in International Law.

as to the true effect of recognition on states and this is based on two rival doctrines. According to one theory, the community in question prior to recognition possesses neither the rights nor the obligations which international law associates with full statehood. This is known as the constitutive theory. The other view, known as the declaratory theory, is that even prior to recognition the nascent community exists as a state and is entitled to many of the important attributes of statehood. Whatever may be the difference on the theoretical aspects, it is quite clear that from the point of view of the existing states, the states which do not recognise the new community can have no official relations with it.

Conditions for recognition

It is clear beyond controversy that a new community, howsoever it may come into existence, must fulfil all the conditions of statehood. The more important of such conditions are, (i) that the new community must have a government which is actually independent of the control of any other state, (ii) that the community has acquired a sufficient degree of internal stability, and (iii) that it has a defined territory under its control which can be treated as the state territory of the new state. It appears from state practice that in the past certain other conditions have been insisted upon for recognition which have varied from case to case. It would, however, be reasonable to assume that if a new state satisfies the three conditions mentioned above, it is qualified to be recognised as a sovereign state within the international community.

It becomes clear even at the outset that when it comes to applying these tests to a given situation, recognition must depend upon the subjective satisfaction of the state which is called upon to give recognition. Taking the first of the three tests mentioned above, the determination of the question as to whether the government of the new community is actually independent or not must depend on the ascertainment of facts. In many a situation it may be possible to take more than one view, and it is in such cases that political considerations will hold the balance. Where a new community is established following upon a revolt or civil war, there are often two views possible on the question whether the government which has been set up can be regarded as the government of the new state, as also on the question whether the parent state had lost its control over that part of the state territory. This is especially so when the parent state is endeavouring to regain control of

the territory it has lost. In each case, therefore, the state, which has been approached for recognition of the new community, has to determine for itself according to its own views the question whether the community has a government which is actually independent of the control of any other state including the parent state. As already stated, the recognition of the new state by the parent state raises a very strong presumption that the government of the new state is actually independent, and states often go by the verdict of the parent state in this regard. It is, however, to be mentioned that a state and its government can be regarded as independent irrespective of the attitude of the mother country, but in cases where the parent state disputes the status of the new community as a sovereign entity, clear evidence is required to show that the mother country has been definitely displaced and that effectiveness of its authority does not exceed a mere assertion of right. Once such evidence is available, the manner in which the new state came into being is immaterial. For example, it is of no consequence that the new state came into being as a result of a civil war or revolt resulting in much bloodshed.[1] The new community must, however, be independent of not only the mother country, but also of all other states.[2] If a community after having become detached from the parent state were to become legally or actually a satellite of another state, it would not fulfil the primary condition of independence and would not accordingly be entitled to recognition as a state. Thus upon the disintegration of the Ottoman Empire, a number of territories like Syria, Palestine and Iraq broke away from Turkey, but they did not become independent as they passed under the control of some other states.

Internal stability. If it is found that a new community has a government which is independent of the control of any other state and that the parent state has in fact ceased to exercise control over that community, the further test which has to be applied in considering the question of recognition is whether the government has acquired a sufficient degree of internal stability, that is, whether the government has been enjoying the habitual obedience of the bulk of the population. A community may succeed in shaking off its allegiance to the parent state or its colonial status by ridding itself of the occupying power, but if it is in a condition of such instability as to be deprived of a representative and effective government, it will be lacking in a

[1] See Lauterpacht, op. cit., p. 26.
[2] Ibid., p. 28.

vital condition of statehood. It is also necessary to make certain that the new situation has attained a certain degree of permanence so that it can reasonably be assumed that the new state of affairs has come to stay. These conditions were adopted in the practice of states in connection with the recognition of independence of the Spanish colonies in America. In the case of Mexico and other American states, whose establishment as independent nations was seriously contested by Spain, one of the tests formulated in relation to recognition of the new states by the British government was "Does the state appear to have acquired a reasonable degree of consistency and to enjoy the confidence and goodwill of the several orders of the people?" [1] The government of the United States also applied the same principle whilst denying recognition to Cuba even after the Spanish domination had ceased on the ground that no effective and stable government had been established.[2] This test, however, does not appear to have been strictly followed in the state practice of recent years. For instance, in the case of at least two of the countries of South East Asia which achieved independence in post-War years, no difficulty was encountered in their being recognised as states even though in fact they were not in a position to set up a central government whose writ would run throughout the entire state territory. This is presumably due the fact that in these cases the parent states which granted them independence recognised the independent status of the new communities.

State territory. The third important test of statehood is that it must have a defined territory which can be regarded as the state territory of the new state. In certain cases, however, the fact, that the frontiers of the new state had not been definitely decided, was not held to constitute an impediment in the way of its statehood.[3] Most of the new states which came into being after the First World War were recognised *de jure* or *de facto* before their frontiers were finally determined although as a rule such recognition was accompanied by stipulations relating to the acceptance by the states concerned of the frontiers to be laid down by the Peace Conference.[4] However, when doubts as to the future frontiers were regarded as being of a serious nature, recog-

[1] Canning's despatch of 10th October 1823 printed in Webster, Britain and Independence of Latin America, Vol. I, p. 435.

[2] See Moore, A Digest of International Law, Vol. I, pp. 107–109.

[3] See the decision of the German–Polish Mixed Arbitral Tribunal reported in A. D. 1929–30, Case No. 5(c).

[4] Britain inserted such a clause in her declaration recognising Finland. United States did the same in the case of Yugoslavia. See U.S. Foreign Rel. (1919) II, p. 900.

nition was postponed.[1] In most cases it would not be difficult to determine the position for satisfying this test since the instrument transferring power to a new state by the parent state or the treaty which creates the new state usually contains provisions defining the territory of the new state. It is sometimes asserted that a state may exist even though it has no territory, and in this connection instances of the governments in exile during the World War II are cited. This, however, is not a true illustration because the cases of the governments in exile are merely examples of lawful governments functioning from another country during continuance of military operations. The dispossession of the lawful government by the invader *pendente bello* is no more than an incident of military operations.

Irrelevant considerations. Some of the authorities in the past favoured the view that in considering a case of recognition certain additional factors should be taken into consideration, namely (i) the degree of civilisation of the new state, (ii) the legitimacy of its origin, (iii) its religion, and (iv) its political system. Modern international law, however, knows of no distinction for the purposes of recognition between civilised and uncivilised states. Lorimer's [2] division of humanity into civilised, barbarous and savage people can hardly be applicable now. It would require no argument to support the proposition that the considerations stated above cannot have any relevance in the matter of recognition of states in the present day, and it is doubtful as to whether these tests could ever have been considered legitimate. The days have long past when only the European nations and states populated by persons of European origin were considered to be civilised. Consequently, in the enlightened world of today governed by the principles and purposes of the United Nations, the test of the "degree of civilisation" as a condition of recognition must be held to have become outmoded, if it at all was a proper test. On the question of legitimacy of origin, it may be stated that this principle, although proclaimed for a short time by the Powers of the Holy Alliance at the beginning of the nineteenth century, has never become part of international law. Great Britain never adhered to it; it was invoked only on occasions by absolutist governments. If considerations of legitimacy of origin were brought in on the question of recognition, many a state, which came into being in violation of the constitutional law of

[1] Recognition of Lithuania was postponed on this ground by the Allied Powers.
[2] Lorimer, The Institutes of the Law of Nations, 1883, Vol. I, p. 104.

the parent state or as a consequence of a revolt or civil war, would have gone unrecognised. The state practice proves the contrary, and it may be taken as well established that a state which fulfils the conditions of statehood is eligible to be recognised irrespective of the method by which it came into existence. State religion can safely be said to be an irrelevant consideration in the modern context of tolerance over religious matters and the practice of secularism over state matters by most countries. The political system of a country, though it may have considerable bearing on international relations of a state, should not be a matter for consideration in deciding upon the question of recognition of the state. If recognition was to be refused on the ground that the new state has a totalitarian form of government, a number of important states would have failed to get recognition. Every community has a right to choose its own form of government, and in this age of co-existence, recognition cannot be legitimately denied because of the political system of the new state.

Recognition, a matter of bargain. Since the question of granting or withholding recognition is a matter of absolute discretion for each individual state under international law and a state is not answerable for its decision to any authority, there have been a number of instances in modern history of attempts to make recognition an object of bargain, or a matter dependent upon political conditions or considerations. For example, the British government in according *de facto* recognition to the Finnish government in 1918 made it a condition that British subjects arrested in Finland by the Germans should be released and that Finland should give guarantee for maintenance of neutrality. In October 1920, Poland informed the Latvian government that she was willing to grant immediate recognition to Latvia provided the latter offered a 99 years' lease of a port to be declared a free port. Similarly, in 1922, the United States insisted upon an oil concession as a condition of its recognising Albania.[1] To say the least, attachment of conditions of this nature, which are unconnected with the question of statehood of the new nation, as a prerequisite to recognition would appear to be in violation of the principles governing the matter. Bargains of this character, if practised, will greatly undermine the rule of law in the international community.

[1] See Lauterpacht, op. cit., p. 34.

Conclusion. To sum up the position, when the Foreign Office of a country is faced with the problem of recognition of a new state, it would be advisable to judge the situation by the three tests, which have already been mentioned, in order to see whether the new community fulfils the conditions of statehood, namely whether (i) the community has a government which has shaken off all external control, (ii) it has a defined territory under its control, and (iii) the new situation has acquired a certain degree of permanence. If these conditions are satisfied, then the new state ought to be recognised without recourse to any other consideration. But since all these matters are questions of fact, the Foreign Office will have to be satisfied that in the realities of the situation the tests are fulfilled. The government can act on the facts furnished by its own agents, such as its diplomatic representatives abroad, or on the information supplied by the government of the new state which is seeking recognition. In cases where a new state is created out of the territories of an existing state, it would be safe to recognise it after it has been recognised by the parent state. If the parent state takes too long in recognising it, then it would be legitimate to enquire regarding the degree of control that may still be exercised by the parent state. The attitude of other states in such situations would be a useful guide, and mutual consultations can well be resorted to. It should be mentioned that though a state is not answerable for its action in the matter of recognition, any premature recognition should be avoided since such premature recognition has been held by high authorities in international law and in state practice as amounting to infringement of the rights of the parent state which may be attempting to re-establish its control. Recognition or its denial even when broached in good faith and in a spirit of impartiality may expose the recognising state to protests, reprisals and even war on the part of the parent state. It is therefore of the utmost importance that a new state is not given premature recognition. But at the same time it is to be appreciated that any unnecessary delay may lead to bad relations with the new state from the very beginning.

Premature recognition

Recognition is said to be premature if a community is recognised as independent before it fulfils the essential conditions of statehood. Premature recognition, it is agreed by all authorities,[1] is contrary to international law, since by giving recognition to a community prema-

[1] Lauterpacht, op. cit., p. 9.

turely, it is given the status of statehood which it does not possess at that time. In certain circumstances such premature recognition may adversely affect the rights of the parent state which may be actively engaged in asserting its authority over the seceding territory. For instance, if such territory could be said to have attained statehood, then any action on the part of the parent state to establish its authority would be unlawful, and consequently it would be precluded from taking such action. Again, if a part of the territory of an existing state is recognised as a new state, the sovereignty of the existing state over that part of the state territory will be denied. Whichever way one looks at it, it is clear that any premature recognition of a community as a state before it fulfils the conditions of statehood will amount to intervention in the internal affairs of the parent state since such recognition will amount to a denial of sovereignty over that part of the state territory, and it will also hamper the actions of the parent state in asserting its authority. This is the reason why in the past recognition of communities, which the parent state had considered to be premature, called for protests or retorsion and had even led to war.

It is, however, clear from state practice that the assertions of the parent state are not conclusive on the question as to whether the recognition is premature or not. This is a question of fact and has to be decided in the circumstances of each case. The determination of the question, whether the recognition which is proposed to be accorded is premature or not, has practical importance generally in cases where the new state is carved out of an existing state, and the parent state refuses to recognise the new community. It may also become important in considering the question of recognition of countries which have remained divided pending a political settlement between the authorities who are in control of different parts of the state territory or between other interested powers.

Tests of premature recognition. In judging a situation from the point of view of recognition, it would be safe for a government to ask itself the questions: (i) Has the control of the parent state been effectively removed? and (ii) has the state of affairs assumed conditions of permanency or political cohesion? If the government of the recognising state are satisfied that these conditions are fulfilled, then the recognition will not be premature. It is necessary to make sure before according recognition to a new community that the parent state has in fact ceased to make efforts to reassert its authority. Recognition is un-

lawful if granted *"durante bello"* where the outcome of the struggle is altogether uncertain. As early as in 1823, Mr. Secretary Adams of the United States had stated in connection with the recognition of the independence of certain Latin American states that

> so long as a contest of arms with a rational or even remote prospect of eventual success was maintained by Spain, the United States could not recognise the independence of the colonies as existing *de facto* without trespassing on their duties to Spain.[1]

It is, however, certain that once it is established that the control of the parent state has been effectively removed, granting of recognition would not be premature so as to offend against the rights of the parent state. Mere protests and assertions of sovereignty unaccompanied by attempts to restore the authority of the mother country can safely be disregarded. The formal renunciation of sovereignty by the parent state has never been regarded as a condition precedent to recognition, and state practice has been quite clear in this regard ever since the sixteenth century. The Netherlands, which declared its independence from Spain in 1576, was recognised before the end of the century by Great Britain and France though Spain did not renounce her sovereignty until 1648. Portugal, Belgium, Mexico and the various Latin American Republics were all recognised prior to renunciation of sovereignty by the parent states. The Latin American Republics were recognised by the United States and Great Britain in 1822 though Spain did not recognise their independence until 1836. When Spain protested against the recognition of these regimes, the British Foreign Secretary Canning in his despatch of the 14th March 1825 to the British Special Minister in Lisbon stated

> Once the essential requisite, namely the establishment of a substantive political existence with a competent power to maintain it at home and to cause it to be respected abroad had been ascertained with respect to the several Spanish American provinces, there was nothing to prevent our acknowledgement of each as it became entitled to be considered as practically independent.[2]

The recognising state has, however, to proceed with caution against coming to a conclusion too hastily. Initial success of a rebellion, even if apparently complete, does not establish the independence of the new community in a manner to make recognition permissible. For instance, in the shifting fortunes of war of independence of the Latin American Republics, it would have been dangerous to draw hasty conclusions

[1] Manning, op. cit., Vol. I, p. 194.
[2] See Webster, op. cit., Vol. I, p. 264.

from the apparently well established facts. The matter was aptly put in a statement of Earl Russell to the effect that in order to be entitled to a place among the independent nations of the earth, a state ought to have not only strength and resources for a time but afford stability and permanence.[1] Again, with regard to the recognition of the South American Republics, Foreign Secretary Canning urged "some degree of caution before we can give our fiat."[2] In cases where the mother country because of internal commotions is temporarily not in a position to assert her authority, granting of recognition to an insurgent community would certainly be premature. It was for this reason that Great Britain postponed recognition of Estonia, Latvia and Finland – the states which were formed by breaking away from the Russian Empire in 1917 and 1918.

In the case of countries which have remained divided pending political settlements, the problem which will ultimately arise if they cannot be united by political settlements is whether to recognise each of the divided territories as a separate state, and if so, when would the time be ripe for such recognition. Germany has since the Second World War remained divided in the two zones of East and West Germany though it had been hoped that as a result of agreement between the interested Powers unification of Germany would be possible. But in view of the difficulties envisaged in a possible reunification and possibly due to the time factor involved, a number of states have accorded recognition to West Germany and its government and have opened diplomatic relations with it. Indeed some of the states recognise the West German government as the government for the whole of Germany. Similarly, a group of states has granted recognition to East Germany. It is obvious that in the present situation it would be both difficult and unwise to recognise two states in Germany although from a practical point of view this position has great drawbacks in as much as whichever government a state may recognise, there is no formal relations with the government in control of the other zone. To recognise both the zones as states will no doubt draw protests, but if the unification of Germany is postponed indefinitely, the time may come when the recognition of both the zones as separate states may have to be considered in the interest of the world community because establishment of relations with the whole of Germany is of very great importance. However, to recognise two states in Germany too soon

[1] British and Foreign State Papers, Vol. LV, p. 734.
[2] The Speeches of Rt. Hon. George Canning, edited by Therry, 2nd ed., 1830, Vol. V, p. 302.

will be premature at least as long as there is reasonable likelihood of unification of the country. Here the premature nature of the recognition is not to be judged by traditional standards of encroaching upon the rights of a parent state, but by the standard of reasonableness in the interest of the international community taking into consideration the sentiments of the German people. Any state which prematurely recognises two states in Germany will not offend the rights of any parent state, but will jeopardise the chances of a German unification. In the case of Korea also, where upon renunciation of Japanese sovereignty over the country it became divided into two zones of South and North, the problem is again whether both the states should be recognised. In the case of Vietnam, the Geneva Agreement of 1955, under which France gave up her sovereignty over the territory, contemplated establishment of only one state to be brought about as a result of elections to be conducted in a manner laid down in the Declaration attached to the agreement. States are, therefore, committed to recognising only one Vietnam, but in reality there are two governments each in control of the part of state territory. Recognition in this situation also presents a difficult problem.

Recognition of governments

When recognition is accorded to a new state, the states recognising it are deemed to recognise the government of that state at the same time because without its government being so recognised no formal relations are possible between that state and other states. The question of recognition of a government apart from the question of recognition of a new state arises in certain circumstances. It is generally recognised in international law that every state is entitled to have a government of its choice through which it is to be represented in international relations. Normally, other states are not concerned with the changes in the composition or in the form of government, for changes of this character do not affect the international personality of a state and leave relations with other states unchanged. For example, as a result of elections the government of the day may change, or the form of the government may be altered from monarchy to a republic due to constitutional changes in a country, but these have no concern with the international relations of the state in normal circumstances. There are, however, cases when a change in the government takes place following upon a revolution or a civil war in such a way so as to create an uncertainty. It may be difficult in such a situation to find

out the authority which could be regarded as the lawful government of the state through which its international relations are to be conducted and with which foreign governments should deal in connection with the affairs of that state. For instance, as a result of a revolutionary outbreak the lawful government of the state may be temporarily ousted, or it may be that in the course of a civil war two rival authorities may make contesting claims for being the government of the state. Again, the question may arise, after the hostilities in the civil war had ceased, as to whether the authority which for the time being had triumphantly asserted itself over its opponents may properly be considered to be the government of the state. In all such cases other states have to decide for themselves as to which authority they would regard and recognise as the government of the state. It may be stated that there is a general presumption in favour of continuance of the lawful government of the day which was in power prior to the revolution or the civil war, and conclusive evidence is required to show that its authority has been permanently ousted before another government can be recognised.

In recent years, there have been two or three notable instances of changes in governments of this nature in Asia which called for decision on the part of other states regarding recognition of the governments of certain existing states. For example in China, as a result of a civil war two competing authorities established themselves each in control of a part of state territory and each asserting to be the lawful government for the whole of China. The nationalist government which was the government in power prior to the civil war was pushed out of the entire mainland territory of China by the revolutionary peoples' government; but nevertheless, the nationalist government continued to assert its sovereignty and in fact exercised it over a part of state territory, though comparatively small. In this situation other states had to decide for themselves as to which of the two authorities they would regard as the lawful government of China with which they would conduct diplomatic relations. The situation became further complicated by reason of the armed protection guaranteed to the nationalist government by the United States under mutual defence pacts. A number of states like the United States of America, the Latin American Republics and Japan still regard the nationalist government as the *de jure* government of China which also represents that country in the United Nations. On the other hand, Great Britain, Soviet Russia, India and the majority of Asian African states regard the people's

government as the only lawful government of China. Another case was Iraq, where as a result of a revolutionary outbreak in 1958 following upon the assassination of the monarch the form of government was changed from a monarchy to a republic and a group of people proclaimed themselves as the republican government of Iraq. In this case the situation became clear within a few days of the revolutionary outbreak that the old government had been effectively ousted with the result that other states were left in no doubt as to which authority was to be regarded as the lawful government of Iraq. The problem also arose concerning recognition of the new regime in Yemen.

There have been numerous cases in the past when states have been faced with the problem of recognition of new governments of existing states. For example, in the situation that followed the French Revolution there arose for a time a good deal of uncertainty as to the proper authority which could be regarded as the lawful government of the country, and consequently each state had to decide for itself the government that it would recognise for the purpose of international relations. The Russian Revolution of 1917, the Spanish Revolution of 1936-39 and the Mexican Revolution of 1915 created similar problems. It took a long time for the Soviet government to be recognised; the government of General Franco in Spain was not recognised save by Germany and Italy until after the end of the civil war; and the government of General Carranza in Mexico was recognised only after his authority had been conclusively established.

It is clear from state practice that it is not in every case of change of government by revolutionary means or by *coups d'état* that recognition is necessary. It is only in cases where there is some scope for doubt regarding the ouster of the constituted government or where there is a contest between rival authorities that a formal recognition is called for. Thus in some cases where changes in the governments took place not as a result of normal constitutional process but by *coups d'état* as in Egypt, Sudan, Burma and Pakistan, the formal recognition of the new regimes as the governments of those states was not considered to be necessary by most countries. In the Latin American states where changes in governments by *coups d'état* have been fairly frequent, the question whether a formal recognition is necessary or not has generally been decided on the facts of each situation.

It is to be mentioned that in a situation where formal recognition of the new government is considered necessary, the relations cannot be entered into until a decision is made on the question of recognition as

it is only through the government that a state is represented in the international community. There is a difference of opinion among text writers as to whether the decision of a state regarding recognition of the government of another state would be made on a legal or political basis. It is, however, clear that the decision on such issues must rest entirely with each state. The decision nevertheless has to be arrived at with reference to the particular facts of each case and on the basis of certain tests.

Tests for recognition of new governments

The most important test, which has been adopted in the practice of states in the matter of recognition of governments, is the principle of effectiveness of governmental power of the authority which claims to be recognised. There are certain other considerations which have also been taken into account from time to time, such as (i) the lawfulness of the origin of the new government in relation to the constitutional law of the country, (ii) the manner of revolutionary change, and (iii) the willingness and ability of the new government to fulfil its international obligations. Some of these tests have, however, been largely abandoned in modern state practice, and it is primarily the test of effectiveness which has emerged as the predominant and governing principle. Whether or not the authority in question can be regarded as having the effective governmental power depends upon the facts of each situation. This can be judged with particular reference to the absence or otherwise of any other authority which claims to be the government, the obedience which it is able to command from the people and the governmental agencies including the armed forces, and its ability to fulfil international obligations. The test of "consent of the people governed" has sometimes been treated as one of the criteria of the effectiveness of the government, but it is clear that the absence of such consent could not be a conclusive factor against the government on the issue of effectiveness.

Legality of origin. The test of "legality of origin" as a criterion of recognition was rejected by various states as early as the seventeenth and eighteenth centuries in favour of the principle of effectiveness of the governmental power. In the beginning of the nineteenth century, the application of the doctrine of "legality of origin" became prominent in connection with the events which followed the French Revolution. But during the past hundred years there has not been a single

instance of irrevocable refusal of recognition on the sole ground that the government in question originated in a revolution. If this test were to be accepted as a criterion, then no government which had been established as a result of a revolution could be recognised, and this would have the effect of ignoring the realities of the situation by denying the existence of many governments which possess effective governmental power. The doctrine of "legitimacy of origin" has been rejected by arbitral decisions as having no place in international law. Chief Justice Taft of the United States Supreme Court in the arbitration between Great Britain and Costa Rica in 1923 expressed himself as follows:

> To hold that a government which establishes itself and maintains a peaceful administration of the people for a substantial period of time does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to fundamental laws of the existing government cannot establish a new government. This cannot be and is not true. ... The question is, has it really established itself in such a manner that all within its influence recognise its control ...?[1]

Manner of revolutionary change. The inhumanity and ruthlessness or the violence by which a new government had come to power gave rise in the past to indignation and disapproval in certain countries which found expression in the refusal to recognise the new authority. The attitude of Great Britain towards the government of the French Convention of 1793, the Serbian government of 1903, and the Greek government of 1922, and the refusal of a number of countries to recognise the government of Soviet Russia after 1917 may be mentioned as examples. Such considerations, however, would seem to be inappropriate on the question of recognition of a government which may otherwise be said to have established effective authority. Judge Lauterpacht states that so long as international law does not stigmatise revolutions as being in the nature of a crime against the law of nations, one could not condemn the means, necessarily violent, by which revolutions are achieved.[2]

Ability and willingness to fulfil international obligations. Ability to fulfil international obligations had been used as a test in order to judge the effectiveness of the authority of a new government. In comparatively recent years, a further factor, namely that of willingness

[1] A.D. 1923–24, Case No. 15.
[2] See Lauterpacht, op. cit., pp. 106–107.

to fulfil international obligations on the part of the new government has often been regarded as a criterion for the purpose of recognition of a government. The United States of America evolved this doctrine in 1877 in connection with the recognition of the Diaz government in Mexico, and subsequently this consideration seems to have gained a firm ground in the practice of the United States. One of the main reasons for the refusal of the United States to recognise the Soviet government of Russia was the unwillingness of the latter to fulfil what was regarded as its international obligations in the matter of certain treaties and financial commitments of the former government of Russia as also in the matter of payment of compensation for expropriation of American property. According to Lauterpacht, the soundness or propriety of this test is questionable for a number of reasons.[1] He says that it is difficult to see why in law the mere fact of the advent of a new government should cause other states to raise the issue of the fulfilment of obligations incurred by or binding upon its predecessor. These obligations are in any case binding within reasonable limits upon the new government by virtue of the well established principle of the continuity of state regardless of changes in the composition of its government. He states that the more satisfactory course would be to grant recognition and then to insist by such means, as international law permits, on the fulfilment by the new government of its international obligations. It would, however, appear that insistence on such a condition is not altogether unreasonable, especially when a new government comes into existence following upon a revolution. Foreign states which had maintained relations with the dispossessed government are entitled to make sure as a condition precedent to their agreeing to deal with the new government that the new government will be prepared to abide by the international obligations of the state. The application of such a test serves a twofold purpose, namely it shows the character of the new government to the outside world, and it helps the recognising states to ensure that their interests will not be jeopardised in the hands of the new government. Any government which is not prepared to honour the international commitments of the state has no right, however effective its authority may be internally, to enter into relations with foreign states since such relations are bound to result in reciprocal rights and obligations with states. It cannot complain if the government is not recognised by other states due to its unwillingness to honour the past commitments of the state.

[1] Ibid., p. 111.

Effective control over state territory. As already stated, the effectiveness of an authority has been and should be the primary consideration for its being recognised as the lawful government of the state. One of the essential requirements is that the authority should have complete control over the state territory or a large part thereof. Great Britain in according recognition to the Soviet government of Russia stated as one of her reasons for recognition that the government had "as complete control over the vast territory as any government could possibly have under present conditions, and therefore they have to be recognised as the *de facto* government of the empire." [1] Similar considerations prevailed in the case of the recognition of the people's government of China. Mere control of state territory, however, by itself would not be sufficient, particularly when in a civil war the then established government continues to assert and attempt to re-establish its authority over the state territory. This is the reason why the Franco regime in Spain was not recognised *de jure* for a considerable period of time by Great Britain and other states even though it was in control of virtually the whole of the state territory.

Effectiveness of the government. There may also be active resistance to the rule of an authority even though it may be in control of the territory of the state, and in such cases effectiveness has to be judged by the degree of magnitude of such resistance and the ability of the authority to effectively deal with such resistance. If the authority is in control of the governmental machinery of the state and commands the obedience of the armed forces of the state in addition to its being in control of the state territory, it could well be assumed that the government fulfilled the test of effectiveness. It could also be said that the authority in question was in a position to fulfil the international obligations of the state, if it chose to do so, since it exercised all the powers necessary to enforce within its territory the obligations which had to be met by reason of international commitments of the state undertaken by a previous government. State practice shows that a certain degree of permanence has been insisted upon by governments in order to be satisfied of the effectiveness of the new authority before according it recognition. In some cases the degree of permanence could only be evidenced by passage of time by showing that all resistance to the control of the authority had ceased, and that

[1] House of Commons Debates, Vol. CXXXIX, Col. 2506.

the people of the country by tolerating the government over a period of time had acquiesced in its control. This was the position in the case of Soviet government of Russia and the Franco regime in Spain. On the other hand, there may be cases where the permanence of the control of the authority becomes evident from the very beginning as happened in the case of the recent Iraqi revolution. The situation, therefore, needs to be judged on the facts of each case.

Consent of the people governed. For some time both Great Britain and the United States of America insisted on being satisfied that the new government had the popular support and consent of the people as a test of the effectiveness of the authority. Whilst Great Britain did not subscribe to the continental doctrine of legitimacy of origin as a condition of recognition of a new regime, it insisted that such a regime should show, in order to be recognised as the lawful government of the state, that though it originated in a revolution, it represented the will and the demand of the people. This principle founded on true democratic concepts would no doubt be an ideal test, particularly having regard to the principles enunciated in the United Nations Charter about self-determination. Nevertheless, if this were to be adopted, a number of governments would go unrecognised even though in all other respects they had effective control; at any rate in the case of totalitarian regimes the apparent popular approval could never represent the true will of the people. The practice in recent years, particularly since the First World War, has been a gradual abandonment of this criterion in favour of the test of "long continued acquiescence in a regime actually functioning as the government." The test of the popular consent as a criterion of effectiveness was applied by Great Britain in the case of the governments which followed each other after the French revolution. The British government had consistently persisted in its attitude that it would recognise only the government which was voted into office by the Constituent Assembly,[1] and insisted that new credentials would not be given to its ambassador in France until it could be seen that there was a government sufficiently settled and well supported by the nation which could be considered by foreign powers as the real organ of the nation.[2] The principle of recognition of a government which had been established by popular consent

[1] British Foreign Office Memorandum of 1st October 1874; Smith, Great Britain and the Law of Nations, Vol. I, pp. 113–15.

[2] See Lauterpacht, op. cit., p. 117.

was voiced in the House of Lords by Lord Malmesbury on the 6th December 1852 in the following terms:

> It has been our usual policy ... to acknowledge the constitutional doctrine that the people of every country have the right to choose their own sovereign without any foreign interference, and that a sovereign having been freely chosen by them, that sovereign or ruler or whatever he may be called, being *de facto* the ruler of that country, should be recognised by the sovereign of this. [1]

The practice followed by Britain in the case of successive revolutions in Spain following upon the revolt headed by Marshal Serrano in 1868 was exactly the same. In relation to the frequent revolutions and *coup d'etats* in the Latin American Republics Great Britain for a long time acted on the same principle, namely that formal and full recognition was to be granted only after the new President had been constitutionally elected and installed.[2] The same attitude was adopted by Britain in respect of Portugal in 1910, and with regard to the revolutionary government of China in 1912, the Greek government of 1922 which was confirmed by a plebiscite, and the Albanian government which came into office in 1924.

The other European states also adopted the test of the consent of the governed in order to determine the issue of effectiveness. For example, in 1870 Count de Beust, the Austro-Hungarian Chancellor, insisted on the necessity of the government of the new Republic of France on the fall of the Second Empire to be confirmed by a popular vote.[3] Again, in the case of Portugal when the new constitution was voted upon in 1911, Great Britain, Austria, Germany, Italy and Spain in a joint declaration stated that as the new constitution had been voted upon, the governments were glad to join in the recognition of the new government.[4]

The practice in the United States has been essentially the same as that of Great Britain though certain statements of the State Department have given rise to some confusion from time to time. In 1870, the State Department in connection with the recognition of the government of the French Republic laid down the tests of actual control, possession of power and acknowledgement by the French people so as to be in point of fact *de facto* government.[5] In refusing recognition to the government of Nicaragua in 1855, the Secretary of State stated

[1] House of Lords Debates, Vol. CXXIII, Col. 971.
[2] See British and Foreign States Papers, Vol. XCV (1892), Chile No. 1.
[3] See Archives Diplomatiques, 1871–72, Vol. II, No. 573, p. 703.
[4] See Lauterpacht, op. cit., p. 122.
[5] Moore, op. cit., Vol. I, p. 173.

"It appears to be no more than a violent usurpation of power, brought about by an irregular self-organised military force, as yet unsanctioned by the will or acquiescence of the people of Nicaragua."[1] Again, with regard to the revolution in Brazil in 1899, where notwithstanding the general welcome extended to the substitution of a republican for the monarchical form of government, recognition was made dependent upon the approval of the change by the majority of the people of Brazil.[2]

The test of popular consent was, however, gradually abandoned after the First World War when it was realised that the value of such a test was much diminished and in some cases was completely useless due to establishment of systems of government in Europe and else where which did not provide for free expression in the generally accepted sense of national opinion. In the practical need for international intercourse with governments which did not enjoy the confidence of their people in the true sense, a new formula had to be adopted by treating the "long continued acquiescence in a regime actually functioning as a government" as being a manifestation of the will of the people.[3] It was on this basis that both Britain and the United States recognised the new governments in Argentina, Peru and Bolivia in 1930. Gradually the test of popular consent ceased to be mentioned as a condition of recognition in the practice of states. There was no reference to it in the case of recognition of nationalist government of General Franco in 1939, nor in the case of recognition of the government of People's Republic of China in 1950 or for recognition of the government of Iraq in 1958.

Premature recognition. In the case of recognition of governments as in the case of recognition of states, it is of importance that premature recognition should be avoided though it would be undesirable to postpone recognition after the new government has been able to establish satisfactorily its effectiveness of authority. Since there is a presumption in favour of the continuance of the existing government, recognition of the new government should be avoided until it is established that the effective authority of that government has come to an end. According to Lauterpacht, so long as the revolution has not been fully successful and so long as the lawful government, however adversely

[1] Ibid., p. 140.
[2] Ibid., p. 161.
[3] Hackworth, Digest of International Law, Vol. I, p. 177.

affected by the violence of the civil war, remains within the national territory and asserts its authority, it is presumed to represent the state as a whole.[1] Thus during the Spanish civil war of 1936-39, the lawful government which was deprived of the major part of the national territory continued to represent Spain in the Council and the Assembly of the League of Nations and before the Permanent Court of International Justice. It is clear that during the progress of a civil war or a revolution and until things have taken a permanent shape, it would not be desirable to recognise a government other than the one which existed prior to such outbreak. So long as the lawful government offers resistance which is not hopeless or nominal, the *de jure* recognition of any other authority as the government would constitute premature recognition which the lawful government would be entitled to regard as an act of intervention contrary to international law. Just as premature recognition of a new state offends against the rights of the parent state, the recognition of the revolutionary government also adversely affects the rights of the lawful government of the state. An instance of such premature recognition was the action of Germany and Italy in recognising the Spanish insurgents in the early stages of the civil war.

Recognition de jure and de facto

States, in order to safeguard their position against granting of premature recognition, have often resorted to the practice of according recognition *de facto* before recognising a state or a government *de jure*. This practice had proved to be useful in cases where in the realities of the situation a state appeared to have established itself or where a government appeared to be exercising effective authority, though the legal position had remained unsettled. For instance, when a part of a state territory or a community succeeds in severing itself from the parent state, sets itself up as a new state and claims to be recognised as such, other states may feel hesitant to accord it recognition even when it fulfils all the conditions of statehood, either because they are not sure that the new community has attained that degree of permanence which they consider to be necessary before according formal recognition, or because the parent state may still be asserting its authority over the territory, even though ineffectively, and it makes it known that it would regard any act of recognition of the new state to be an hostile act. Similarly, in the case of a government which

[1] Lauterpacht, op. cit., p. 93.

has come to power through revolutionary means or as a result of a civil war, states may feel reluctant to recognise it straight away even though it may be exercising effective power as they may wish to wait until they are satisfied that the government has established itself permanently or that the government commands the confidence of the people. It may also be that the states wish to be assured that the new government would be willing to fulfil its international obligations before granting it recognition *de jure*. In such situations a *de facto* recognition serves a very useful purpose by taking into account the realities of the situation as may be apparent at that time without having to express any view on the legal claims of the new state or government. A *de facto* recognition may be said to be a provisional recognition which can be withdrawn at any time if the new state ultimately fails to fulfil the condition of stability or the new government is found not to have the effectiveness. According to Phillimore, a well known authority on international law, virtual and *de facto* recognition of a new state gives no just cause for offence to the old state in as much as it decides nothing concerning the asserted rights of the latter.[1] It may, however, be mentioned that a state which has been granted *de facto* recognition can in certain circumstances and subject to specific conditions enter into formal relations with the states which have granted it such recognition. For about a century and half it has often been the practice of states to accord *de facto* recognition initially to be followed by *de jure* recognition. During the first quarter of the nineteenth century, the secession of the Latin American Republics from Spain and Portugal confronted states, particularly Britain and the United States of America, with the problem of their recognition. On the one hand, these states had in reality become completely independent but on the other, Spain still persisted in asserting her sovereignty over these territories. The exigencies of international life necesstiated contacts with this large section of the community which could not be completely excluded from official relations, particularly in the interests of trade and commerce and the investments made in those countries by Britain and the United States. The solution was found in a measure by according *de facto* recognition. The government of the United States of America frequently adopted the practice of according *de facto* recognition when it was found that an authority was actually in power, but it was not considered to fulfil all conditions of recognition

[1] Phillimore,Commentaries Upon International Law, 3rd ed., Vol. II, p. 23.

because of doubts as to its permanence or for other reasons. Thus in the case of Panama in 1903, the United States granted recognition *de facto* before according her *de jure* recognition.[1] The events which accompanied the rise of a number of new states after the First World War and the uncertainty as to their future position also necessitated resort to the practice of granting *de facto* recognition. The new states which established themselves within the territories of the Austro-Hungarian monarchy and of Russia were in the first instance recognised *de facto*. The majority of them like Czechoslovakia, the Baltic States and Poland were subsequently recognised *de jure*. Armenia, Georgia and Azerbaijan which, though given *de facto* recognition, never got recognition *de jure* for the reason that the inhabitants of these territories did not succeed in establisheing themselves as independent states.[2] In the majority of these cases, the expedient of *de facto* recognition was adopted owing to the uncertainty of the situation pending the absence of a definite settlement. Most of the governments in question were effective for a time, but there was in the circumstances no guarantee of the permanence of their rule.

In the case of recognition of new states, it is important to bear in mind that a decision to grant *de facto* recognition in the first place before granting *de jure* recognition should be taken only in cases where there is some scope for doubt as to their permanence, or where the legal position is not clear as to their title to be regarded as new states, that is to say, where the parent state has not completely given up its assertion of control. In cases where the new state is shown to have definitely established herself, the practice of states shows that *de jure* recognition is granted straight away. Thus in the case of countries in Asia and Africa which gained their independence by negotiation and agreement with the parent states, no difficulty was encountered in their being accorded *de jure* recognition.

The practice of granting *de facto* recognition has been followed frequently in the case of new governments which had come into power through revolutionary means or consequent upon a civil war. As already stated, a government in order to be recognised has to successfully establish its effectiveness evidenced by the control it exercises over the state territory and the population. In some cases, states have been slow in according *de jure* recognition to new governments in spite of

[1] Moore, op. cit., Vol. V, p. 55.
[2] Lauterpacht, op. cit., p. 333.

their effectiveness. Thus in the case of the government of Soviet Russia, a number of states recognised that government in the first instance by way of *de facto* recognition granted in a series of provisional agreements.[1] Again, in the case of Italian annexation of Abysinia in 1935 and 1936, the Italian rule was recognised by a number of states including Great Britain and France as *de facto* only in the first instance. In Spain, the revolutionary government of General Franco was first recognised as the "government exercising administrative control over the larger portion of Spain." [2] The revolutionary government was given *de jure* recognition after the final termination of the civil war. In the case of China, the people's government was initially granted *de facto* recognition by Britain prior to its being recognised *de jure*. Even in the last century, this procedure was adopted in the case of Mexico where the government headed by General Carranza was accorded *de facto* recognition by the United States acting in concert with a number of American republics. Britain also accorded this government *de facto* recognition in the first instance.[3]

In deciding upon the question as to whether a state or the government should be recognised as *de facto* in the first instance, the legality or legitimacy of the origin of the state or the government from the point of view of their internal constitutional law has little relevance directly. But at the same time the manner in which the government came to power has some bearing in as much as when a new government is formed in a constitutional way, there can be little scope for any uncertainty which would justify postponement of grant of *de jure* recognition. It is clear that however violent a method the new government might have adopted in coming to power, that factor will not normally deprive it of *de jure* recognition if it fulfils in all other respects the conditions for being recognised *de jure*. For example, the government of the Iraqi republic, which came to power following upon a revolution and assassination of the king, was accorded recognition by most states within the course of only a few days.

It is to be noted that there is an important difference between *de facto* and *de jure* recognition in that according to the British practice *de facto* recognition does not necessarily carry with it full and normal diplomatic intercourse although it may be conceded in individual cases. In the case of *Fenton Textile Association* v. *Krassin*, which was

[1] Ibid., p. 335.
[2] Ibid., p. 336.
[3] Ibid., p. 332.

a case for claim of immunity by Mr. Krassin, the Soviet representative in Britain, the British Foreign Office informed the court that "it is not the practice of the sovereign to receive the representatives of the states which have not been recognised *de jure*, and ... no representative of Soviet government would be received by His Majesty's government because the Soviet government has not been recognised *de jure*.[1] Similarly, in 1915 when Britain recognised the Carranza administration as the *de facto* government of Mexico, she did not resume diplomatic relations with it, but the United States' recognition of that government was accompanied by an intimation of willingness to resume formal diplomatic relations.

Complications do arise in certain circumstances by recognising a government *de facto* whilst the *de jure* government of that state also continues to be recognised. Such cases have arisen out of situations brought about by civil wars. For example, in 1938 Great Britain gave *de facto* recognition to General Franco's government whilst it continued to recognise the old government as the *de jure* government of Spain. Similarly, in the case of China the government of the United Kingdom recognised *de facto* the People's Government at the same time recognising the Nationalist Government as the *de jure* government. In such cases it would be reasonable to hold that whilst diplomatic relations can be maintained only with the *de jure* government, there could be no objection if the recognising state also maintains contacts with or addresses official communications to the other government of the state which is recognised *de facto*.

Method of granting recognition

Recognition to a new state or a government can be granted either expressly or may be implied from the conduct of other states in their dealings with the new state. Express recognition takes the form of a declaration whereby a government accords recognition to a new community which has emerged as a state or an authority which has formed itself into a government by fulfilling the necessary conditions. The practice of states shows that recognition is expressly granted by means of a declaration in cases where there is scope for controversy as to whether a community has formed itself into a state or where there is a dispute between competing authorities each of which claims to be the lawful government of a particular state. For example, express declarations were made by Britain and the United States of America

[1] *Fenton Textile Association* v. *Krassin*, (1922) 38 T.L.R. 259.

recognising Finland, Poland, Estonia, Latvia and Lithuania as states after their attainment of statehood by breaking away from the Russian empire during World War I. Similarly, express declarations were made by Britain, Austria, Germany, Italy and Spain regarding the recognition of the government of the Portuguese Republic in 1911. In many cases and particularly where an express declaration of recognition is deemed to be inexpedient as likely to offend the parent state or other states, recognition to the new state is impliedly granted.

Sometimes, however, new states attach particular value to express recognition as evident from the attitude of the Mexican plenipotentiaries who came to conclude a treaty with Britain. They were reported to have said that implied recognition was "not sufficient for the people, who, just emerging from a long and arduous struggle for liberty, required a clear and positive declaration to that effect."[1] In cases where recognition has been granted expressly by means of declaration, it has sometimes been the practice to recite in the declaration that the new state fulfils the conditions of statehood on the facts of the situation.[2] In cases of new governments, similarly, the declarations had stated that the government which was being recognised fulfilled the test of effectiveness and permanency.

Implied recognition. There are certain kinds or types of conduct on the part of a state from which, in the absence of clear indications to the contrary, recognition of the new state or the government may be implied. For instance, the appointment or reception of diplomatic representatives can be regarded both as a mode of and as an irrebuttable presumption of recognition. Practice of states shows numerous examples of adoption of this method of recognition.[3]

Diplomatic relations. Opening of diplomatic relations with a community which has emerged as a state would conclusively prove its admission into the community of nations. Similarly, in the case of a new government which has come to power, the change of credentials of the envoy and his accreditation to the head of the state under the new regime would establish its recognition by the other state or states. It is, however, to be noted that the retention of existing

[1] Webster, op. cit., Vol. I, p. 291.

[2] See the text of Declaration made by Great Britain and the United States on the Independence of Finland – Lauterpacht, op. cit., p. 29.

[3] See Lauterpacht, op. cit., p. 381; U.S. For. Rel. 1919 (II), p. 741; B.F.S.P., Vol. LXI, p. 995.

diplomatic representatives for the purposes of communicating with a government established as a result of revolution does not imply its recognition unless and until the representative is accredited to the new head of state. For example, the British government's instructions to their ambassador in Paris to communicate with the government of National Defence in 1870 for the purpose of protecting British interests was held as not amounting to recognition of that government. It has also been the practice of Britain, France and the United States to instruct their diplomatic representatives to remain at their posts to maintain the necessary contacts in cases of revolutionary changes without recognising officially the new governments.[1]

Reception of consuls. The appointment and reception of consuls without request for issue of *exequatur* do not amount to recognition. Governmental practice, however, seems to be divided on the question whether the request for an *exequatur* implies recognition, though the preponderance of opinion is that such a request for issue of an *exequatur* would amount to implied recognition. According to the view of the United States government, issue of an *exequatur* for a consular officer at a particular place is not a conclusive recognition of such country's sovereignty over the place in question as evident from a number of examples indicative of that view.[2] However, the practice of the United States in this matter has not always been uniform since in the case of Brazil, the State Department informed the Brazilian government in 1818 that the issue of an *exequatur* to its consul would imply recognition.[3] The British official pronouncements seem to indicate that a request for an *exequatur* is tantamount to recognition as evidenced from the statement of the British representative before the Mandates Commission.[4] The practice of the United Kingdom government with regard to posting of consuls in Austria and Czechoslovakia in 1938 seems to have been otherwise. In these cases the United Kingdom government in accord with the government of the United States asserted that request for an *exequatur* for a consular officer had no relevance on the question of recognition of the authority from whom *exequatur* was requested. The German government in taking the contrary view stated "when one government addresses to another government a re-

[1] See Lauterpacht, op. cit., pp. 382–83.
[2] See Moore, op. cit., Vol. V, p. 13.
[3] B. and F.S.P., Vol. VIII, p. 1062.
[4] Permanent Mandates Commission's Minutes, Vol. XX, p. 133.

quest that such an *exequatur* be granted, it must recognise that the other government is entitled to sovereignty over the area in question."[1]

Conclusion of treaties. Recognition can also be implied from the fact of conclusion of bilateral treaties between two states. It is, however, possible in certain cases to deny recognition to a community or authority for other puposes even whilst admitting its contractual capacity in the domain of treaty making power. An example of this type is the agreement of 23rd March 1935 between the governments of Manchukuo and the U.S.S.R. for the cession to Manchukuo of the rights of Russia in the North Manchurian Railway. Similarly, prior to recognition of Soviet Russia, Britain had concluded an agreement with the Soviet government for exchange of prisoners of war without officially recognising the government in any way. It also entered into a number of trade agreements prior to *de jure* recognition. Similar agreements were concluded between Soviet Russia and other states at the time when they denied the former both *de facto* and *de jure* recognition. It is, however, clear that the conclusion of a bilateral treaty is a proper mode of recognition in all cases in which there is no reasonable doubt as to the intention of the parties on the subject,[2] particularly when a comprehensive treaty of commerce and navigation or a treaty of alliance is entered into. Multilateral treaties, however, stand on a different footing since they may be fully operative as between governments which recognise one another whilst they can remain in abeyance as between others. In some cases, express reservations are made by states to the effect that their adherence to a multilateral convention would not amount to recognition of states which they do not recognise.[3] Such reservations should be treated as being *ex abundante cautela* since neither the signature nor adherence on the part either of the non-recognising or the unrecognised state results by itself in bringing about recognition.[4]

Participation in conferences. Participation in a conference attended by an unrecognised state or government does not amount to recognition of that state or government. Notwithstanding occasional hesi-

[1] Hackworth, op. cit., Vol. IV, p. 869.

[2] Lauterpacht, op. cit., p. 378.

[3] See the declarations of the government of the United States when signing the International Sanitary Convention of 21st June 1926, Convention for Safety of Life at Sea of 1922, and the Narcotic Drugs Convention of 1931. Hudson, International Legislation, Vol. III, p. 1975.

[4] See Lauterpacht, op. cit., p. 374.

tation, this is a view consistently acted upon by governments.[1] Similarly, the appointment of agents or missions not endowed with diplomatic character does not constitute recognition.[2] The membership of general international organisations like the United Nations does not constitute recognition of the state or government by those states which do not recognise it otherwise.

Materials on which government should act. There are two questions in connection with recognition of states or governments which have often confronted the officials in various Foreign Offices, namely whether a state or government, before it is recognised, should apply to the governments of other states for the purpose, and on what material should a Foreign Office act in order to arrive at the conclusion regarding the attainment of statehood by a new community or the effectiveness of a new government which seeks recognition. As regards the first question, the state practice does not appear to be uniform. Strictly speaking, it is possible for the government of a state to recognise a new community or an authority as a new state or government, as the case may be, *suo moto* by taking note of the existing situation either on the report of its own diplomatic representative or otherwise. Past practice shows that this method is generally followed where a government is in a hurry to recognise the new state or the government for gaining political advantages, or where it is considered necessary to recognise the new government as a means of safeguarding the interests of the recognising government or its nationals. The government accords recognition by virtue of its sovereignty; it need not wait to be approached before taking action in the matter. It would, however, seem that the better method is for the new government or the government of a state newly established to approach the other governments by which it wishes to be recognised. The approach need not necessarily be formal. In fact the state practice illustrates that in a majority of cases the governments of the newly established states and the new governments of existing states usually approach the Foreign Offices of other states for recognition. Sometimes the approach is formal, but in most cases the approach has often been made informally. In the case of some of the new governments which had established themselves by *coup d'état* or as a result of a revolution, the practice had been for them to send for the diplomatic representatives resident

[1] See Hackworth, op. cit., Vol. I, p. 348.
[2] Lauterpacht, op. cit., p. 388.

in the capital and seek recognition through them, who in their turn asked for instructions of their governments.

The question whether a community fulfils the conditions of statehood can usually be judged from the political report of a government's own diplomatic agent who may be accredited to the parent state from which the new community has broken away. In the case of new governments, the report of the diplomatic agent who is on the spot is the most valuable material from which the situation can be judged. In addition, the governments often consult one another through their diplomatic agents and exchange information in considering the question of recognition since the views of other governments on the facts and situation of the given case often help in throwing light on the problem and in formulating the views of a government.

CHAPTER XVII

TREATY MAKING

Introductory

The law of treaties is so vast a subject that it is impossible to do full justice to it within a short compass. Members of the foreign service are, however, concerned with certain aspects of the subject, as the formalities connected with treaty making including the drafting of treaties as well as interpretation of treaty provisions fall more particularly within the functions of legal advisers of the governments. The present chapter has, therefore, been confined to matters connected with some broad aspects of the subject. The proposals for conclusion of treaties are usually initiated through diplomatic envoys and are taken up by the political or territorial divisions in the Foreign Offices. In respect of treaties of a technical nature, such as commercial, financial or air agreements, the government departments more directly concerned with the subject will in all probability be in charge of negotiations, but it is almost the invariable practice to associate a diplomatic officer or some member of the Foreign Office with such negotiations. It may, therefore, be useful for a foreign service officer to familiarise himself generally with the subject.

Nature and scope of treaties

Treaties are international agreements of a contractual character between states or organisations of states which create legal rights and obligations between the contracting parties. Since international law is still nebulous in many respect and views may differ as to what the given rule is on particular aspects of the subject, treaties or international agreements, wherever they exist, constitute the surest means of determining the rights and obligations of parties with respect to matters specified therein. Such matters may include cession or exchange of territory, political agreements relating to peace, alliance, friendship

neutrality, guarantee etc. and agreements relating to commerce, consular rights, extradition, air transport and a variety of other subjects. Treaties are also concluded between a group of states on matters which may be regarded as of general application to all the states. To this category belong the various Hague conventions relating to pacific settlement of international disputes, laws and custom of war on land, nationality laws; the Geneva conventions on the treatment of prisoners of war; the conventions on slavery; the convention relating to neutralisation of Switzerland and the various multilateral conventions that have been entered into from time to time under the auspices of international organisations like the League of Nations, the International Labour Office and the United Nations. It is by means of treaties that international or regional organisations are set up. For example, the Charter of the United Nations, the Covenant of the League of Nations and the instruments creating the International Labour Office, the Universal Postal Union, the Specialised Agencies, the North Atlantic Treaty Organisation, and the South East Asia Treaty Organisation can all be regarded as multipartite agreements between states. The international organisations thus established themselves become capable of entering into treaties and agreements with states and other international organisations.

Since early times treaties have been in use among states for the purpose of undertaking binding obligations under international law towards one another. By this means states have agreed to limit their freedom of action in the specified fields and to follow a certain course of action for their mutual advantage. Hyde observes that agreements between states have been regarded as a necessary incident of international intercourse, and they increase in number and variety as that intercourse expands and produces a consciousness and mutual dependency. In scope and design such compacts have recorded with precision the changing needs of the international society reflecting the extent of the progress of individual states on the pathway from isolation to intimacy of association with other nations.[1] Having regard to the common advantage flowing from such agreements, states have resorted more and more to the use of treaties in their relations with one another; and this increasing disposition to enter into contractual obligations has resulted in a variety of agreements whereby numerous states have undertaken to lay down special rules of conduct for their

[1] Hyde, International Law Chiefly As Interpreted and Applied in the United States, 2nd Rev. ed., Vol. II, p. 1369.

common observance. Since treaties represent agreement among states regarding observance of a certain set of rules in their mutual intercourse, they are looked upon as an important source of international law by text writers as well as by international courts and tribunals.[1]

Essential elements of a treaty

State practice as well as judicial and juristic opinion indicates that the essential elements of a treaty are: (i) Treaties are agreements; (ii) They are agreements between states including international organisations of states; and (iii) Such agreements have as their aim the creation of legal rights and obligations between the parties thereto which operate within the sphere of the law of nations.

It is not every international instrument, however formal it may be, that would be regarded as a treaty. Unless the instrument creates contractual obligations between two or more states, the essential requirements of a treaty are not fulfilled. Thus documents solemnly declared or signed by representatives of states or unilaterally proclaimed by them may on occasions be regarded as declarations of policy, which though morally and politically binding do not create legal obligations between the states. To this category may be said to belong the historic Atlantic Charter dated 14th August 1941 embodying the joint declaration of President Roosevelt and Prime Minister Churchill, the Moscow Declaration of October 30, 1943, concerning post war general security, the Universal Declaration of Human Rights and the Panchsheel embodying the five principles of co-existence.

Since treaties are agreements operating within the sphere of international law, transactions between governments which are of a private law nature, such as those concerning loans of money, purchase of food, regulation of supplies and prices by means of commodity agreements, are not generally regarded as treaties since they are governed by the municipal laws or by rules of private international law. A contract between a state and a private individual or a company can never be regarded as a treaty since such contracts are not the subject matter of international law but of municipal law.[2]

[1] See Oppenheim, International Law, 8th ed., Vol. I, pp. 27–28; Schwarzenberger, International Law, 3rd ed., Vol. I, p. 421; see also Article 38(1) of the Statutes of the Permanent Court of International Justice and that of the Court of International Justice.

[2] In the *Anglo-Iranian Oil Co. (Jurisdiction) case (1952)* between the United Kingdom and Iran, the International Court of Justice held that the concessionary contract between the Iranian government and the Anglo-Iranian Oil Co. was subject to municipal law of Iran, and not to international law. (1952) I.C.J. Reports, 112.

Binding nature of treaty obligation. The oldest and doubtless the most fundamental rule of international law is the binding nature of treaty obligations. The principle that good faith between states, which forms the basis of international agreements, must be respected has been from the earliest times regarded not only as a matter of legal duty between the parties to an international agreement, but also as a matter of common concern to the entire community of nations. The Greeks considered the rule of good faith as part of the universal law. To the Romans, it was part of the *jus gentium* common to all people. Indeed, normal relations between the family of nations would be imperilled and international law itself would disappear if the sanctity of treaty obligations was not respected by states. The practice of states and the opinions of jurists are unanimous in regarding treaties as binding, their binding force and other basic conditions of their operation being grounded on customary international law. Some writers hold the view that the binding force of international agreements is founded in the self-restraint exercised by a state in becoming a party thereto, and that it is the will of the contracting parties that supplies the binding force to treaties. Oppenheim, however, maintains that treaties are legally binding because there exists a customary rule of international law that treaties are binding.[1]

Treaties being in essence transactions of a contractual character, they are regarded as binding only as between the states parties to the agreement. There are, however, certain multilateral treaties which are concluded for the purpose of laying down general rules of conduct among a large number of states. Such treaties may at times be regarded as law making treaties, that is to say, the rules embodied therein are regarded as of universal application and not confined to the states parties to the convention. This would be the case where it appears that a majority of the states of the world at the time when the treaty was concluded had subscribed to it and when the subject matter of the treaty is found to relate to something which is capable of universal application. Treaties of this character have assumed importance since the Vienna Congress of 1815 whose Final Act, because of the dominant position of the signatory powers, became in time the law for all Europe and in part for the entire world. The Final Act of the Congress of Vienna included law making stipulations of world wide significance concerning four points, namely (i) neutralisation of Switzerland, (ii) free navigation on certain international rivers, (iii)

[1] Oppenheim, op. cit., pp. 880–81.

abolition of negro trade, and (iv) classification of diplomatic envoys. The Declaration of Paris of 1856 providing for the freedom of navigation on the river Danube, the Treaty of Paris 1856, the Geneva Conventions of 1864, 1906, 1929 and 1949 regarding the treatment of prisoners of war and amelioration of the conditions of the wounded in armies in the field, the Hague Conventions of 1899 and 1907 providing for Pacific Settlement of International Disputes, the Slavery Conventions of 1926 and 1956, the Covenant of the League of Nations 1919, the Pact of Paris containing the General Treaty for the Renunciation of War 1928, and the Charter of the United Nations, may be regarded as examples of law making treaties.[1] The position that some treaties may be regarded as law making treaties, that is, binding on all states, was recognised by the International Court of Justice in the *United Nations Reparation case*.[2]

Treaty making capacity

The competence to enter into treaties is an attribute of state sovereignty,[3] as it is in the exercise of their sovereignty that states enter into binding obligations with one another and undertake self-imposed restraints on their sovereign acts. It follows that a state in order to be competent to make treaties ought itself to be sovereign. Thus all states, which are fully sovereign, have the power to make treaties and the right of entering into international engagements. In the case of the normal fully independent state, there is practically no limit to the exercise of this power. However, the power of a state to enter into a valid engagement with another may be impaired by reason of the existence of a prior agreement with another state or states. International law recognises that a sovereign state, that is, a state which holds full membership in the community of nations, can bind itself by an agreement with another state not to enter into treaties of a certain

[1] Oppenheim, op. cit., pp. 5 and 878–80; Fenwick, International Law, pp. 428–30; McNair, Law of Treaties, 1961 ed., pp. 215–16, 729–739.

[2] See 1949 I.C.J. Reports 185.

[3] In the *Wimbledon case* (1923), the Permanent Court of International Justice had stated that "the right of entering into international engagements is an attribute of state sovereignty."

See Article 3 of the Draft prepared by Sir Humphrey Waldock, Special Rapporteur for the International Law Commission, which provides: "Capacity in international law to become a party to treaties is possessed by every independent state, a federation or other form of union of states and by other subjects of international law involved with such capacity by treaty or by international custom."

character with other states which might bring about conditions which the first treaty sought to prevent. Thus by the Treaty of London of 1839, Belgium promised to observe towards all other states the obligations of neutrality imposed upon her by the Powers which guaranteed her that status. Belgium could not, therefore, enter into treaties of alliance during the period of her neutralisation. The same was the position of Luxembourg under the treaty of 1867. Both these states, however, have no longer any such fetter on their treaty making power and they are now parties to the North Atlantic Treaty of 1949. Under the treaty of 1903 entered into between the United States of America and Cuba, the latter agreed not to enter into any treaty with a foreign state which would have the effect of impairing its independence or of authorising any foreign power to obtain a lodgment in or control over the island. Numerous restrictions were imposed upon the treaty making power of Germany by the Treaty of Versailles of 1919. Again under Article 88 of the Peace Treaty of St. Germain 1919, Austria was enjoined not to alienate its independence except with the consent of the Council of the League of Nations. In a protocol signed on October 4, 1922, she undertook to abstain from any economic or financial engagement calculated directly or indirectly to compromise her independence. Every obligation thus undertaken constitutes a legal limitation of the contractual capacity of the state concerned, and it is not lawful for it to enter into any agreement which would involve a breach of prior obligations.

Neutralised states. The position of permanently neutralised states needs to be considered in this connection. Such states while remaining fully sovereign retain only a limited treaty making capacity. Such a limitation is inherent in the status and is not merely contractual. The limitation operates primarily in precluding the neutralised state from contracting treaties of a political nature, but not those of economic or technical character with other states. The examples of permanently neutralised states at present are Switzerland and Austria. Switzerland was guaranteed her neutrality under the Eight Power Declaration of March 20, 1815 signed at Paris by Austria, France, Great Britain, Prussia, Russia and three other states. Although she was a member of the League of Nations with the understanding that she would not have to participate in the enforcement of military sanctions, she has not become a member of the United Nations, as in her view the membership of that body might involve her in obligations conflicting with

those of a permanently neutralised state. Austria which was given the status of a permanently neutralised state in 1955 by agreement between Russia, United States and Austria nevertheless became a member of the United Nations on the assumption that her duties as a neutral state take precedence over those of a member state of the United Nations.

Position of sovereign states members of the Commonwealth of Nations. At the beginning of the present century, the actual exercise of the treaty making power for the whole of the British empire including the self-governing dominions was concentrated in the government of the United Kingdom in London although it consulted the self-governing dominions concerned whenever treaties affecting their particular interests were to be concluded by Great Britain for the entire British empire. This was so notwithstanding the fact that in several multilateral conventions since 1919 the dominions and India were shown as independent parties. The position, however, changed when the dominions acquired the status of fully independent states consequent upon the passing of the *Statute of Westminster* in *1931* by the British Parliament. At the Imperial Conference of 1937 it was decided that each member of the Commonwealth would participate in multipartite treaties as a separate and individual entity, and that in the absence of specific provisions to the contrary no member of the Commonwealth would in any way be responsible for the obligations undertaken by any other member. Ever since the Second World War with the increasing number of fully sovereign states in the Commonwealth, the position has undergone yet another change. Member states of the Commonwealth, some of which like India, Pakistan, Ghana, Tanganyika, Malayasia and Cyprus have their own heads of state, today enter into treaties like any other fully sovereign state and their membership of the Commonwealth has no significance whatsoever in so far as their treaty making power from the point of view of international law is concerned. It is no doubt true that the members of the Commonwealth, or most of them, keep one another informed upon treaty negotiations and consult with one another in cases where other Commonwealth countries might be interested. This, however, has little significance from the point of view of international law.

Federal states. The treaty making power in a federal state is usually vested in the central government and not in the component units of

the federation,[1] because the essence of a federal structure is to empower the federal government at the centre to deal in matters connected with the external relations of the state. In some constitutions the treaty making power is expressly given to the centre whilst in others there are no express provisions on the subject. It is possible that in some cases, as in Switzerland, the component units of the federation may have a limited treaty making power, but even in such cases the view is held that the regional or state government merely acts as the agent of the central government.[2] According to Lord McNair, normally it is the federal government that exercises the totality of international capacity to conclude treaties and it is the exception to find any of the member states being permitted to participate in this function.[3] It follows that the treaty making power of the centre would relate also to matters which fall within the exclusive jurisdiction of the governments of the component units. It may be stated that in every federal form of government the legislative, executive and judicial powers are distributed as between the government at the centre and the governments of the component states, with the result that in certain subjects the state governments may have the exclusive legislative and executive power. Even so, it is the central government which normally is the only organ of the federation competent to enter into treaties with respect to matters falling within the exclusive provincial field. Some constitutions expressly provide for this position, but even otherwise the position would be the same. Where the constitution of a federal state grants its component units treaty making power, international law recognises this grant and regards the treaties concluded by them as binding when they are within their contractual competence. In the absence of an express provision in the constitution, the presumption is that the units do not have such competence. On the other hand, if the constitution is silent about the treaty making power, the presumption

[1] Hall observes: "The distinguishing marks of a federal state upon its international side consist in the existence of a central government to which the conduct of all external relations is confided and in the absence of any right on the part of the states forming the corporate whole to separate themselves from it." Hall, Treatise on International Law, 1917, pp. 24-25.

[2] Fitzmaurice declines to attribute any treaty making power to a component state in its own right, and he regards any treaty making power conferred upon a component unit merely as the authority of a subordinate agent or organ contracting on behalf of the federation. Waldock, on the other hand, considers that the component units may possess a measure of international treaty making power if the state's separate international personality is recognised by the federal constitution as well as by third states.

See the Second and Third Reports on the Law of Treaties presented before the International Law Commission.

[3] McNair, op. cit., p. 37.

is that this power is endowed in all its plenitude in the central government.

United States of America. The constitution of the United States of America confers treaty making power on the federal government. Article II(2) of the constitution authorises

> the President . . . by and with the advice and consent of the Senate, to make treaties provided two-thirds of the Senators concur.

which, according to the Supreme Court of the United States, vests the federal government with exclusive power to make treaties.[1] Section 10 of Article I of the constitution provides "(1) No state shall enter into any treaty, alliance or confederation — (3) No state shall, without the consent of the Congress enter into any agreement or compact with another state or with a foreign power." It is obvious that the power to enter into agreement or compact contemplated in this article is something other than the power to enter into treaties. The executive branch of the government has also taken the view that the power to enter into treaties is an exclusively federal power.[2] Nevertheless, it is to be noted that in 1934 the United States Congress passed a resolution authorising the State of New York to enter into an agreement with Canada regarding maintenance and operation of the highway bridge over the Niagara river. The Congress passed a similar resolution in 1956 with regard to maintenance of the Buffalo Eric Bridge by agreement between the State of New York and Canada. Thus it appears that the component units of the United States may be permitted to enter into non-political agreements with foreign states with the consent of the Congress. Practice reveals that the consent may be withheld when an agreement is likely to affect the legislative sphere of the union. While granting its consent, Congress allows little freedom to the state concerned to deviate from the terms of the proposed agreement as approved by it. At times Congress requires the participation of a representative of the federal government during the course of negotiation and the approval by the Secretary of the State of the resulting agreement before it can become a binding international agreement. Thus the power of the state to enter into agreements or compacts can be described as a subordinate power which is exercised more or less as an agent on behalf of the federal government.

[1] *United States* v. *Arizona*, (1887) 120 U.S. 497; *Illinois* v. *United States; Hines* v. *Davidowitz*, (1941) 312 U.S. 52,68; See also *United States* v. *Rauscher*, 119 U.S. 407, 414.

[2] See Hackworth, Digest of International Law, Vol. V, p. 25.

Australia. In Australia, the constitution does not have any specific provision regarding the treaty making power, but it has been held that since the federal government has the exclusive legislative and executive power over external affairs, that power includes the competence to enter into treaties.[1] Since there is no express treaty making power conferred on the states in the Australian constitution, it is to be presumed that they have none.

Canada. The position appears to be the same in Canada, but any legislation which may become necessary for the implementation of a treaty is required to be passed by the provincial legislature if the subject matter falls within the provincial legislative field.[2]

India. In India also, the treaty making power vests exclusively in the central government, and the states do not have any competence in this regard. Entering into treaties and agreements with foreign countries as well as implementation of treaties, agreements and conventions with foreign countries has been placed under the exclusive federal field in the Indian constitution. Unlike Canada, legislations to implement treaties have to be undertaken exclusively by the centre.[3]

Switzerland. In Switzerland, however, whilst the federal government possesses complete treaty making capacity, a concurrent power, is given to the cantons under Article 9 of the Constitution of Switzerland though such power is somewhat limited.[4] By virtue of this power Swiss cantons have entered into agreements with foreign states with regard to the matters specified in Article 9.

Soviet Russia. In Soviet Russia, each of the union republics enjoys the right to enter into direct relations with foreign states and to conclude agreements as well as to exchange diplomatic or consular representatives with them.[5] Thus Ukraine and Byelorussia became sepa-

[1] *King* v. *Bingers, ex parte Henry,* (1936), A.D. 1935–37, Case No. 66.

[2] *Re Regulation and Control of Aeronautics in Canada,* (1932) A.C. 54; *Attorney General for Canada* v. *Attorney General for Ontario,* (1937)A. C. 326.

[3] See List I, Item 14 of the Seventh Schedule to the Constitution. See also Article 253 of the Constitution. *Union of India* v. *Jain and Others,* (1954) In. L.R. 256–57.

[4] Article 9 of the Constitution provides: "Exceptionally the cantons retain the right to conclude treaties with foreign countries in respect of matters of public economy and neighbourship and police relations; nevertheless, such treaties must not contain anything prejudicial to the confederation or the rights of other cantons."

Article 10, however, provides that official intercourse between the cantons and foreign governments or their representatives shall take place through the federal council.

[5] Article 18A of the Constitution (Fundamental Law) of the U.S.S.R. 1936 as amended.

rately members of the United Nations. These two component republics of the U.S.S.R. have also become parties to several multilateral conventions in their own name.[1]

Germany. Under Article 78 of the *Weimar Constitution of 1919*, the member states of the German Republic enjoyed a limited treaty making capacity. The constitution of the Federal Republic of Germany (West Germany) confers upon its member states a limited capacity which is to be exercised subject to the approval of the federal government. The treaty making power of the component units (Landers) is therefore somewhat similar to those in the United States of America.

As already observed, in the absence of the authority conferred by the federal constitution, member states of a federation cannot be regarded as endowed with treaty making capacity. According to the law of nations, it is the federation which in the absence of provisions of the constitution to the contrary is the only organ entitled to transact international relations and to enter into treaties. It would follow that an agreement made by a constituent state without specific authorisation in the federal law is not a treaty in the contemplation of international law and is as such void.

Dependent states. The term "dependent state" signifies the status of a state as being subject to the authority of one or more of the independent sovereign states. It comprises both protected and vassal states. Since colonial territories are regarded as part of the territory of the metropolitan power, they have no independent existence as such so far as international law is concerned, and are not therefore included within the term "dependent states."

Protectorates. It is not practicable to lay down a hard and fast rule defining the competence of the semi-sovereign states like protectorates or vassal states in the matter of treaty relations. In so far as protectorates are concerned, it is the treaty of protection whereby the weaker state puts itself under the protection of a strong power that determines the competence of the protected state. Protectorates do retain for some purposes an international personality [2] because the

[1] See McNair, op. cit,. p. 38.

[2] In *Rights of Nationals of the United States of America in Morocco (1952)* the International Court of Justice held that notwithstanding the protection of France, Morocco remained a sovereign state and retained its personality as a state in international law. (1952), I.C.J. Reports, pp. 182, 185.

basis on which the protecting power acts on behalf of a protectorate is the treaty entered into by the protected state itself. The normal pattern of a treaty of protection is to vest in the protecting state the power to conduct international relations on behalf of the protected state; consequently, the competence to make treaties on behalf of the protectorate would normally rest with the protecting power. In some cases, however, the treaties of protection, while placing the general conduct of the state's foreign relations in the hands of the protecting state, may not exclude all possibility of agreements being made directly between the protected state and a foreign state. In such a case, the protected state may have a limited treaty making capacity exercisable with or without the consent of the protecting state. For example, both Morocco and Tunis, whilst under the protection of France, became signatories to a number of multilateral treaties in their own right, such as the International Sanitary Convention of 1926 and the Convention concerning Unification of Methods of Analysis of Wines in International Commerce, 1935. There are numerous other examples of the exercise of the treaty making power by protectorates.[1] In all such cases, it seems that the protected state retained a certain measure of treaty making capacity notwithstanding its exercise being subject to the consent of the protecting state. On the other hand, it appears that the former British protectorates in Malaya such as Kelantan and Johore, the Persian Gulf protectorates and the Indian protectorate of Sikkim retained no treaty making power. The African protectorates of various European Powers were more in the nature of colonial territories and had no international personality whatsoever. There could therefore be no question of such protectorates having any competence to enter into treaties.

Vassal states. The position of vassal states, that is, states under the suzerainty of another state, also varied from case to case depending on the degree of control exercised by the suzerain power. While enjoying autonomy in the management of their domestic affairs, the vassal states were dependent to a greater or lesser degree upon their suzerain state in respect of their foreign affairs. Suzerainty is by no means sovereignty, and vassal states not only retained an international personality of their own, but they also enjoyed a limited treaty making competence in many cases. Thus for instance, by the Convention of London

[1] See Yearbook of the International Law Commission, 1953, Vol. II, p. 137; Hackworth, op. cit., Vol. V, p. 154; Oppenheim, op. cit., Vol. I, p. 193.

of February 27, 1884, the South African Republics, which came under the suzerainty of Great Britain, retained the power to conclude treaties and engagements with foreign states provided the approval of Her Majesty the Queen was obtained. Similarly, Bulgaria, which by the Treaty of Berlin 1878 was constituted an autonomous and tributary principality under the suzerainty of His Imperial Majesty the Sultan of Turkey, was held to have the competence to enter into treaties with other states in respect of matters on which she could legislate.[1] Tibet, which was under the suzerainty of China, also entered into a number of treaties, such as the Lhasa Convention of September 7, 1904 between Great Britain and Tibet and the Convention between Great Britain, China and Tibet in 1914. In cases where dependent states such as the states under a protectorate or suzerainty of another state retain a limited treaty making competence subject to the concurrence of the superior state, the treaties entered into by dependent states even without obtaining such concurrence cannot be regarded as mere nullity. The dependent states have an international personality and their treaty engagements are international contracts. Their validity, of course, depends on the concurrence of the dominant state. Most of the authorities regard such treaties not as void but voidable at the option of the protecting state.[2] The position, however, is different in cases where the dependent state under its treaty with the suzerain or the protecting power does not retain any treaty making capacity.

International organisations. Generally speaking, the treaty making capacity of an international organisation depends upon its constituent instrument. McNair observes that

> If fully sovereign states possess a treaty power, when acting alone, it is not surprising to find the same power attributed to an international organisation which they have created and the members of which are usually sovereign states.[3]

As international organisations are established by means of international agreements between sovereign states, the latter often find it convenient to endow the international organisation a personality of its own in order to enable it to perform its allocated functions with greater efficiency. Although comparatively few multilateral treaties esta-

[1] McNair, op. cit., p. 56 quoting the opinion of Law Officers of the Crown.

[2] Hyde, op. cit., Vol. II, p. 492; see also International Law Commission, Yearbook 1953, Vol. II, p. 138; Lauterpacht, however, takes the view that treaties concluded in violation of earlier treaties are void.

[3] McNair, op. cit., p. 50.

blishing international organisations include provisions authorising the conclusion of treaties by the organisations themselves, a good number of them have been regarded as competent to enter into treaties for the purposes of realizing the aims and objectives of the organisation concerned. According to Lauterpacht, international organisations possess, in general, the capacity to conclude treaties. The International Court of Justice held that under international law an organisation must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[1] It is, however, obvious that the treaty making power of an international organisation is not unlimited, but is confined to the purposes for which the organisation was set up. The League of Nations, which did not have specific treaty making power in the Covenant, concluded mandate agreements with various mandatories. Likewise, the United Nations have entered into trusteeship agreements with the various administering authorities. Among other agreements entered into by the United Nations are the General Convention on the Privileges and Immunities of the United Nations 1946, the United Nations Headquarters Agreement 1947, the various co-operation agreements concluded between the United Nations and the Specialised Agencies, and the agreement concluded between the United Nations and Egypt concerning the United Nations Emergency Force. The Specialised Agencies like the International Monetary Fund, the International Bank for Reconinstruction and Development, the U.N.E.S.C.O., the Civil Aviation Organisation, the Food and Agricultural Organisation, the International Labour Office and the World Health Organisation have been endowed with international personality, and they have in fact entered into agreements with one another and with states. Same is the position with regard to other international organisations like the Council of Europe, the Brussels Treaty Organisation (now Western European Union) and the European Coal and Steel Community.

Constitutional requirements

Since a state cannot act internationally except by the instrumentality of some organ, such as the King, the President, a federal council, or a minister, the question naturally arises as to whether or not the particular organ of the state, which had concluded a treaty, was duly

[1] *Reparation for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. Reports, 149.

authorised by the law of that state to create an international obligation binding on that state. In the case of every state enjoying treaty making capacity, some provisions must exist either as a part of a written constitution or as a rule of customary law and practice which would indicate the organ or organs possessing power to conclude treaties and define the mode of exercise of that power.[1]

There is a difference of opinion among writers on international law as regards the relevance of constitutional requirements in the matter of validity of treaties. According to one school of thought, the sanctity of international transactions may be jeopardised if the parties to a treaty cannot rely on the ostensible authority of the organs accepting binding obligations on behalf of their states and that difficulties would arise if they are compelled to probe into the provisions, often obscure and uncertain, of the constitutional law of the other contracting party or parties. Neither can a negotiating party be expected to assume the function of an arbiter of controversial questions of constitutional law of the other party or to question the authority of the organ representing it.[2] The other view is that a treaty concluded by the agents of the state, whether it be the head of the state or its government or other persons appointed for the purpose, in disregard of constitutional limitations is invalid,[3] and that decisive weight must be attached to the principle that acts done without or in excess of the authority conferred upon the organ of the state are not binding upon it.[4] The reasons underlying this point of view is that international law leaves it to the municipal laws of states to determine the scope of representative authority conferred upon their agents and that to the extent to which an agent acts outside the scope of his authority, he acts without any authority at all. It is said that the notion that a state may become bound by acts of persons acting outside the scope of their authority is unacceptable as being totally out of harmony with modern concepts of representative government and principles of democracy.[5] McNair observes:

> It may be objected that the acceptance of this submission makes it necessary for every government negotiating the conclusion of a treaty with another state to possess or acquire accurate knowledge of the relevant provisions of the

[1] McNair, op. cit., pp. 59–60.

[2] International Law Commission, Year Book 1953, Vol. II, p. 142.

[3] In the opinion of Basdevant, where there has been a manifest violation of the constitution, the other party cannot insist upon its execution although technically the treaty so concluded may be binding. See Jones, Full Powers and Ratification, 1949, p. 154.

[4] Oppenheim, op. cit., Vol. I, p. 889.

[5] International Law Commission, Yearbook 1953, Vol. II, p. 142.

constitution of that other state and that this duty would place too heavy a burden upon governments. But is it unreasonable that a government engaged in negotiating a treaty with another state should satisfy itself that the organ of that other state responsible for signing and (where necessary) ratification of the treaty is duly authorised to do so? Is it not a commonplace amongst reasonable men that when you are dealing with some person, who is acting in a representative capacity, you first satisfy yourself that he has power to bind his principal.[1]

It may be stated that in countries where there are written constitutions, it is not at all difficult to find what the constitutional provisions are relating to the treaty making power of that state. According to Mervyn Jones, a state may lawfully organise and distribute its treaty making power as it wishes. The competent authority to make treaties is determined by its laws since it is for it to prescribe through what organs and by what procedure it shall make treaties. But a treaty perfect in point of form cannot be declared null or be affected by reason of the fact that the contents of the treaty are opposed to the municipal laws of one of the contracting parties or that the subject matter of the treaty is such as the constitutional laws of one of the parties prohibit.[2] Some writers, however, argue that an independent state has the power to resolve through the medium of a constitution not to avail itself of the full measure of its capacity to contract and so strive to prevent itself from agreeing to accept classes of undesirable undertakings or obligations, and consequently such constitutional limitations cannot be ignored. The Permanent Court of International Justice held in its advisory opinion on the *Treatment of Polish Nationals in Danzig* that a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[3]

The practice of states shows relatively few instances of attempts to avoid a treaty by reference to alleged disregard of constitutional limitations once the treaty has been entered into. On the other hand, a recent case shows that even constitutional provisions are sometimes changed in order to carry out implementation of treaties. In September 1958, the governments of India and Pakistan entered into an agreement whereby certain territories forming part of India were to be transferred to Pakistan. The Supreme Court of India in its advisory opinion in response to a reference by the President held that the territories of India could not be ceded having regard to the provisions of the Indian

[1] McNair, op. cit., p. 61.
[2] Jones, op. cit., p. 152.
[3] P.C.I.J. Series A/B, Case No. 44.

constitution. The government of India thereupon amended the constitution so as to be able to implement the provisions of the Indo-Pakistan agreement.

A substantial number of cases, particularly those in the American continent show that states insist on the constitutional requirements of the contracting parties being satisfied before a treaty can be ratified. It follows that constitutional limitations both on the form and substance of treaty making power are regarded as decisive. In several cases, treaties have been avoided on the ground of absence of ratification by the legislature, the validity of treaties being dependent on ratification by the Senate in the United States of America and legislative bodies in other American countries.[1]

The constitutional requirements regarding the treaty making competence of states vary to a considerable extent. The most common form of limitation on the executive power of the state is the requirement of legislative approval prior to ratification of treaties.[2] In France the consent of the population concerned is also required for the validity of a treaty of cession. The constitutions of several countries contain provisions regarding the competent organs who are empowered to enter into treaties on behalf of the state.[3] Since states are bound by their own constitutions, it is essential that before entering into negotiations for a treaty the diplomatic representative or the foreign service officer who has been entrusted with the task by his government must make sure that there is no constitutional bar in the other country to enter into the treaty in question and that the representative of the other side is duly authorised.

[1] See Jones, op. cit., p. 149.

[2] For example, see the Constitution of Burma 1947, Section 213(1); Constitution of Czechoslovakia 1948, Section 74; Constitution of Denmark, Article 19(1); Constitution of France 1946, Article 27; Article 56 of the Provisional Constitution of the United Arab Republic 1958; Constitution of Italy 1948, Article 80; Constitution of the Netherlands, Article 60; Constitution of Thailand, Section 92; Constitution of the Philippines, Art. VII, Sec. 10(7); Constitution of the United States of America, Art. II, Section 2(2).

[3] For example, see Constitution of Czechoslovakia 1948, Section 74; Constitution of Denmark, Article 19(1); Constitution of Indonesia 1945, Article 11; Article 53(1), Item 10, List I, Seventh Schedule to the Constitution of India 1950; Constitution of Japan, Articles 73 and 74; Constitution of Pakistan 1962, Articles 31, 32 and 131; Constitution of the Netherlands, Article 60; Constitution of the Philippines, Article VII, Section 10(7) and Executive Order No 18 of September 16, 1946; Constitution of Thailand 1952, Section 92; Constitution of U.S.A., Article II, Section 2(2).

Title and form of international agreements

In international law and diplomatic practice the term "treaty" is used in two senses. In the generic sense, it refers to all agreements between states which are of a binding character, and in the restricted sense it refers to a title given to instruments containing such international agreements. Instruments setting out agreements between states bear different titles, such as Treaty, Agreement, Convention, Protocol, Act, Declaration, Statute, Regulations, Provisions, Pact, Covenant, Compromis, Accord, Arrangements, Modus Vivendi, Exchange of Notes and Concordat. It is, however, not obligatory to give a title to an international agreement because agreements can be concluded even by exchange of letters or telegrams. Some of the agreements are highly formal in character whilst others are not. The titles given to international agreements have little significance from the legal point of view, as all international agreements, by whatever name called, are equally binding in nature.[1] The essential requirement is that the instrument must embody an agreement of a contractual character and that the parties must have the intention to create legal rights and obligations. In diplomatic literature, the terms "treaty," "convention," and "protocol" are all applied more or less indiscriminately to international agreements. Sometimes the same instrument is designated in different places in its text by different terms. There is little method in and no obvious explanation for this diversity of terminology.

International law prescribes neither the form nor the procedure for the making of international agreements, and consequently the form of inter-state agreements depends upon the will and convenience of the parties. The jurisprudence of international juridical institutions establishes the position that international agreements, which are intended to have an obligatory character, may be entered into in a number of ways. Thus in the case concerning the *Free Zones of Upper Savoy and the District of Gex*,[2] the Permanent Court of International Justice held that a manifesto of the Royal Sardinian Court of Accounts recording the assent of the King of Sardinia to the claim of the Canton of Valais that the Sardinian customs line should be withdrawn had the character of a treaty stipulation, which France as the successor was bound to respect. It may be noted that the agreement in question was not recorded in any instrument signed by both parties. In the case

[1] Hudson, *Cases and Other Materials on International Law*, 3rd ed., 1951, p. 443.
[2] P.C.I.J. Series A, Case No. 24, p. 17.

of the *Austro-German Customs Union* (1931),[1] the same court held as regards the Protocal signed at Geneva on October 4, 1922 by Austria, France, Great Britain, Italy and Czechoslovakia that it could not be denied that although it took the form of a declaration, Austria did assume thereby certain undertakings in the economic sphere. Likewise in the report on the British claim regarding the British consulate at Martin Te-Tuan, Judge Max Huber treated an exchange of letters between authorised British and Moroccan negotiators as an internationally binding agreement which bound France when she became the protecting power of Morocco.[2] In the *Eastern Greenland case* (1933), the Permanent Court in connection with an oral statement made by the Norwegian Minister for Foreign Affairs to the Danish Minister accredited to Norway in the course of an interview between them observed:

> The court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his government in response to a request by the diplomatic representative of a foreign power in regard to a question falling within his province is binding upon the country to which the Minister belongs.[3]

Title of agreements, treaties and conventions. Formal agreements on political matters are generally entitled "treaties" or "conventions." While the two terms are more or less interchangeable, the latter is more commonly employed for multipartite agreements of a technical character.[4] Satow observes that having regard to the great number of terms which are now used to describe binding international agreements, it seems appropriate that the word "treaty" should be used today principally in connection with agreements of a particularly solemn character, e.g. peace treaties.[5] The term "convention" is used for formal agreements on political matters and also to describe international agreements of a general character including those known as law making treaties. The term "convention" was employed in connection with several important agreements like the Suez Canal Convention of 1888, the Hague Convention on the Pacific Settlement of International Disputes 1907, the Hague Convention on War on Land 1907, the Barcelona Convention on the Regime of Navigable Waterways 1921, Havana

[1] P.C.I.J. Series A/B, Case No. 41, p. 47.
[2] Schwarzenberger, op. cit., p. 431.
[3] P.C.I.J. Series A/B, Case No. 53.
[4] Hudson, op cit., p. 443.
[5] Satow, A Guide to Diplomatic Practice, 4th ed., 1962, p. 324.

Convention on Asylum 1928, Montivedeo Convention on Political Asylum 1933, Genocide Convention 1948, and European Convention on Human Rights 1950.

Declaration. The term "declaration" usually denotes a treaty that declares existing law with or without modification, or creates new law, such as the Declaration of Paris of 1856 or the Declaration of London 1919.[1] It may, however, be pointed out that all declarations are not to be regarded as treaties as they do not create contractual obligations between two or more states. To this category belongs, as has already been stated, the Atlantic Charter containing the joint declaration of President Roosevelt and Prime Minister Churchill. While it is clear that such declarations cannot in law be relied upon by states other than those which made them, it is not certain to what extent they create rights and obligations as between the latter. The answer would depend to a large extent on the precision of the language used in the declaration. A mere general statement of policy and principles cannot be regarded as intending to give rise to a contractual obligation in the strict sense of the word.[2] Although declarations of the type of the Declaration of 1856 are important international agreements in themselves, declarations are more often appended to a treaty or convention to form a subsidiary compact, or to place on record some understanding reached or some explanation given. Thus the Treaty of Peace with Turkey signed at Lausanne in July 24, 1923 was supplemented by four declarations. The Final Declaration of the Conference on Indo-China in 1955 has, however, been regarded as an international agreement of considerable importance.

Agreement. The term "agreement" is used for international transactions intended to have an obligatory character but less formal in nature than treaties and conventions. It is often used to describe instruments constituting agreements between government departments of two states or agreements concluded in pursuance of a treaty or convention for the purpose of working out details on application of the principles contained in the parent treaty. It is also used in connection with non-political treaties of subordinate agencies, such as the treaties entered into by the constituent states of America as well as the agreements entered into by the Swiss cantons. The term "agreement"

[1] McNair, op. cit., p. 23.
[2] Oppenheim, op. cit., pp. 872–73; McNair, op. cit., p. 6; Satow, op. cit., pp. 324–25.

is invariably used for instruments setting out obligations of a contractual nature between international organisations or between states and international organisations.

Protocol. The term "protocol" is used to describe either the same thing as a *procès verbal* or an international agreement itself, though very often one of a supplementary nature or of a less formal and important character than a treaty. In some instances, however, international agreements of highest importance have been cast in the form of protocols, such as the Protocol of December 16, 1920, establishing the Permanent Court of International Justice, and the Protocol of the Proceedings of the Berlin Conference dated August 2, 1945. It sometimes happens that on the conclusion of a multilateral treaty or convention it is found desirable to supply simultaneously observations, declarations and agreements elucidiary of the text which may be recorded in a final protocol forming part of the compact.[1] The protocol or supplementary protocol appended to the European Convention on Establishment signed in Paris on December 13, 1955, by the member nations of the Council of Europe could be cited as an example. Protocols are frequently used to amend or alter as well as to extend the life of multilateral conventions. Sometimes protocols relating to subsidiary matters may also be appended to existing treaties. Moreover, the form of protocol has been used to conclude armistice agreements, to interpret the provisions of a former treaty, to provide for the delimitation of a boundary, to record the work of a boundary commission, to re-establish diplomatic relations, to prolong a treaty of alliance, to regulate the status of international military headquarters and to regulate the exercise of criminal jurisdiction over foreign armed forces.[2]

Exchange of Notes. Innumerable international agreements between states are concluded in the form of Exchange of Notes or Exchange of Letters. This procedure of concluding international compacts provides a simplified form of reaching and recording understandings, and more particularly for purposes of concluding agreements between government departments or agencies. It also supplies the appropriate method for conclusion of technical agreements requiring expeditious action for their initiation and execution. In recent years, practically

[1] Satow, op. cit., p. 339.
[2] Ibid., p. 349.

a half of all international agreements are in the form of exchange of notes or exchange of letters. In the modern international relations, exchange of notes are used to regulate matters of both major and minor importance. For example, the limitation of naval armaments was agreed upon by means of exchange of notes between the governments of the United Kingdom and Germany on June 18, 1935. The settlement of boundary disputes between the governments of the United Kingdom and Brazil in 1940 as well as a similar settlement between the governments of the United Kingdom and China in 1941 were effected through the exchange of notes.

Act. The term "Act" is used to describe a multilateral treaty, which seeks to lay down rules of general international law which may be formulated at international conferences. Final Acts of conferences are, however, not agreements of a binding character. The final act is usually a formal statement or summary of proceedings of a congress or conference enumerating the treaties or conventions drawn up as the result of its deliberations. Signature in the final act does not in itself signify acceptance of the treaties or conventions so enumerated, which require separate signature. Sometimes, however, depending on circumstances the final act may itself become a treaty, such as in the case of *Acte Final* of the Congress of Vienna 1815 or the *Acte Final* of the Berlin Conference of 1885 relating to African matters. The title "General Act" is given to an instrument promulgated by an international conference, which lays down rules of general international law which are intended to be binding upon several states. General acts are themselves treaties. Examples of such general acts adopted at international conferences are the General Act of the Brussels Conference 1890 concerning the African slave trade, the General Act of Algciras Conference of 1906 relating to the affairs of Morocco, the General Act of Arbitration signed at Geneva in 1928 under the auspices of the League of Nations for Pacific Settlement of International Disputes, and the Revised General Act prepared under the auspices of the United Nations in 1949 for the Pacific Settlement of International Disputes.

Procès Verbal. The term *procès verbal* usually refers to the record of the terms of some agreement reached between participating states or governments in an international conference. During a congress or conference, the minutes of meetings of plenipotentiaries are sometimes

styled as *procès verbal* which are regarded as the official record or minutes of the daily proceedings of the conference. The term is also used to record an exchange or deposit of ratifications as well as for administrative arrangements of a purely minor character. Accession to multilateral conventions may also be done by means of a *procès verbal*.

Modus Vivendi. The title of *modus vivendi* is given to an instrument recording an international agreement of a temporary and provisional nature intended to be replaced by one of a more permanent and detailed character. According to Moore, a *modus vivendi* is in its nature a temporary or working arrangement made in order to bridge over some difficulty pending a permanent settlement.[1] This type of temporary arrangement is generally made in a most informal way and does not require ratification. Commercial agreements of a temporary character have often been entered into in the form of a *modus vivendi* by the United States as well as Great Britain.

Constitution or Statute. The basic instrument of an international organisation or institution is generally known as the "Constitution" or "Statute." For example, the constituent instruments of the various specialised agencies of the United Nations that have been established by inter-governmental agreements are called their constitutions. The basic instruments of the International Court of Justice and the Council of Europe are called statutes. These documents, whether called constitutions or statutes, are also treaties in the true sense as they denote agreements of a binding nature between the states concerned. The term "statute" is also used to denote an accessory instrument to a convention setting out certain regulations to be applied, for example, the Statute on Freedom of Transit annexed to the Barcelona Convention of 1921.

Pact; Covenant; Charter. The term "Pact" is used to denote some specially solemn agreement such as the Briand-Kellogg Pact of 1928 which is also known as the Pact of Paris containing the General Treaty for Renunciation of War. The term "Covenant "was used first in connection with the basic instrument of the League of Nations. This title has also been given to the draft Covenant on Human Rights. The term "Charter" denotes a multilateral treaty establishing a comprehensive international organisation, namely the United Nations.

[1] Moore, P.S.Q., Vol. XX, pp. 385–97.

Similarly, the Bogota Charter of 1948 created the Organisation of American States.

Form of agreements. Treaties and international agreements are generally entered into in various forms, such as agreements between heads of states, inter-governmental agreements, executive agreements, agreements between states and agreements between departments, or ministers, or other subordinate organs or agencies of governments.

Heads of states form. Treaties in the heads of states form, which are cast as agreements between sovereigns or heads of states are regarded as historically the oldest, and in practice the most orthodox of the forms in the treaty relations between nations. In early times when a monarch possessed the entire treaty making power of his state, treaties and agreements used to be concluded as between sovereigns and they were naturally expressed as between them. Gradually, the treaty making power of sovereigns came to be regulated by the constitutional provisions or practice of each state. Nevertheless, the practice of concluding treaties in the form of agreements between heads of states continued. This form is, however, not frequently used in the present day practice, and broadly speaking, it is reserved for special cases such as political treaties and solemn kinds of international agreements.[1] An example of a treaty in this form is the Holy Alliance of Paris of 1815 concluded between Emperors of Austria and Russia and the King of Prussia.

Inter-state agreements. Treaties in the form of agreements between states have now generally replaced treaties in the heads of states form. It has been the practice for the treaties drawn up under the auspices of the League of Nations to be in this form. It is also used in drawing up of multilateral conventions. Furthermore, the peace treaties are usually cast in the form of agreements between states. For example, the Peace Treaties of Nevilly, St. Germain, and Versailles of 1919, and the treaties concluded between the Allied and Associated Powers and Italy, Bulgaria, Hungary and Roumania on February 10, 1947 were all expressed as treaties between the states concerned. McNair is of the view that in an era of revolutionary changes where governments are not likely to be stable, there is a great deal to be said in favour of all important and permanent international agreements being made as

[1] Starke, An Introduction to International Law, 1954, p. 283.

between states. Although an agreement between governments is binding upon their states independently of changes of governments for political reasons, an agreement between states is likely to attract greater sanctity.[1]

Inter-governmental form. Inter-departmental agreements have become more and more common in the international treaty relations of modern times. According to the British practice, such agreements concern matters of private law rather than matters of an international legal character, e.g. arrangements for or in connection with the purchase of goods or for the sale on a commercial basis of materials or supplies. Examples of such agreements are the inter-governmental Agreement made in 1931 between the United Kingdom, France, Italy and Switzerland concerning financial obligations of Hungary, which was signed by the diplomatic agents of the parties concerned; and the Agreement of 1949 made between the United Kingdom Minister of Food and the Norwegian Director of Fisheries relating to the landing of fresh whale fish in the United Kingdom from the Norwegian fishing vessels. It may be stated that agreements expressed as made between departments or ministries or other subordinate organs or agencies of governments are, in their legal effect, in the same category as ordinary treaties concluded on behalf of states. As in the eye of the law the real contracting parties are the states, the international validity of such agreements is the same as that of ordinary treaties.[2] The main reason for adopting this form of treaty is that it is attended by a smaller degree of formality and that occasionally it obviates certain inconveniences connected with the municipal law of the country concerned. For example, in the United States of America, this form of treaty sometimes offers the advantage of a more speedy procedure than is permitted by an ordinary treaty requiring for its ratification the advice and consent of two-thirds of the Senate. Inter-departmental agreements are known in French practice as *arrangements administratifs* and in German practice as *agreements nich solenne*. Agreements in this form also deal with technical matters falling within the sphere of the department concerned. Generally, such technical agreements are discussed and negotiated by departmental officials and finally signed by diplomatic agents in the form of inter-state or inter-governmental agreements. However, the phenomenal increase of international business

[1] McNair, op. cit., pp. 17–18.
[2] Oppenheim, op. cit., pp. 901–902.

during recent years has led to the practice of allowing such agreements sometimes to be concluded directly by the departments concerned.

Executive agreements in the United States practice. In the United States of America, it has long been the practice to enter into engagements with foreign states in relation to a number of matters through the instrumentality of what are known as executive agreements. In the constitutional practice of the United States, it is not necessary to have the advice and consent of the Senate which is required for the conclusion of treaties under the federal constitution. It is primarily on account of this that United States prefers to enter into treaties of minor importance in the form of executive agreements. This category of agreements include inter-governmental and inter-departmental agreements as well. Thus the President has concluded numerous agreements concerning commerce and navigation in the form of reciprocal arrangements as well as agreements concerning international copyright, protection of trade marks, loan agreements with foreign powers and various other matters. Even the acquisition of territory such as Hawaii and Texas has been done by means of executive agreements. Although in the practice of the United States the terms "treaty" and "executive agreement" are differently used in so far as international law is concerned, they have the same binding effect.

Languages used in international agreements

In so far as the language of international agreements is concerned, it is said that until about the beginning of the eighteenth century the texts of agreements between European powers were generally written in Latin. During the nineteenth century, French practically became the language of diplomacy, but after the First World War French lost its dominant position as the English language became at least as important as the French. During the inter-War period most of the multipartite instruments were drawn up in both the English and French languages, which also became the official languages of the League of Nations and that of the Permanent Court of International Justice. The text of the United Nations Charter is in five languages, but for many purposes English and French are commonly employed as working languages. The inter-American agreements are usually in English, French, Portuguese and Spanish. Although multipartite treaties in the past were expressed first in the French language and thereafter

in English and French, the present day practice indicates that it is usually done in more than one language.

State practice shows that parties are at liberty to choose the language or languages in which an international agreement is to be written. In bilateral treaties, it is now customary for states to employ their respective languages in case they are different. Both Britain and the United States insist that one of the languages to be used in treaties to which they are parties must be English. In the practice of the United States of America, where the languages of the parties to a bilateral treaty are different, the texts of the treaty in the two languages should be engrossed in parallel columns on the same page, if possible, or on opposite pages of the same sheet.

Where an international agreement is written in two or more languages, all the versions are to be taken into account by all the parties in the absence of a stipulation to the contrary. For purposes of construing the agreement, equal weight is to be attached to the texts in each of the languages of the treaty. In order to exclude possible conflicting interpretations or inaccuracies due to errors in translation, it is customary for states to provide in the treaty itself which text or texts are to be regarded as authoritative.

Negotiation of treaties

Full Powers – Since treaties are international transactions between states or governments, it is necessary that the person or persons who wish to negotiate with regard to such matters must be authorised to do so on behalf of the state. Such authority is known as *Full Powers*. The object of issuing a full power to a representative for the negotiation of a treaty has radically changed during the past century and a half, although the old traditional language of the full power has continued to linger.[1] Formerly, a full power issued by the sovereign was intended to empower the agent with authority to bind his sovereign or the state with treaty obligations, that is to say, the agent armed with the full powers could negotiate and enter into a treaty and his signature was enough to create binding obligations on his state. Today, however, a full power issued to an agent is nothing more than the authority to negotiate and sign a treaty; it does not give authority to the agent to bind the state or the government because the treaty becomes binding only when it is ratified. There are, however, cases where the treaty

[1] Jones, op. cit., p. 43.

does not require ratification, and in such cases the agent acting with a full power could enter into binding obligations. This is usually so where agreements are concluded by means of exchange of notes or letters and in cases of inter-departmental agreements.

When a government intends to enter upon negotiations for a treaty, the first step that is generally taken is to issue full power to one or more plenipotentiaries. The full power is prepared in the Foreign Office and signed either by the head of the state or the Minister for Foregn Affairs depending on the nature of the treaty and the form in which it is sought to be entered into. The full powers are usually presented for inspection by the other party before discussions begin in order to ensure that the persons entering into negotiations are duly authorised by their governments. In the case of conferences convoked for the purpose of drawing up multipartite conventions, the inspection of full powers is either done by a credentials committee or by a representative of the host government, that is, the government of the country where the conference is held. In some cases the full powers are exchanged between the plenipotentiaries where negotiations are undertaken for conclusion of a bipartite treaty. They are sometimes deposited with the host government in cases of multipartite conventions. Treaty making, like many other matters connected with international relations, has in recent years become much more informal, and in the case of many intergovernmental agreements the necessity of full powers is dispensed with and it suffices merely to recite in the text of the agreement that the signatories are "duly authorised thereto" or they sign on "behalf of their governments." [1]

Signature

When the negotiations are concluded and the treaty is drawn up in its final shape, it is usual for the plenipotentiaries to append their signatures and seals to the document. Satow mentions that if the plenipotentiary has no special seal, it is customary to use a seal bearing his initials.[2] In cases where an interval is likely to elapse between the conclusion of negotiations and the signature, the plenipotentiaries append to the draft their signatures *"ne varietur"* as a guarantee of authenticity of the text.[3] In the case of some of the multipartite conventions drawn up under the auspices of the League of Nations as

[1] McNair, op. cit., p. 123.
[2] Satow, op. cit., para 566.
[3] McNair, op. cit., p. 123.

well as the United Nations, signatures by the plenipotentiaries have been dispensed with and the texts of the conventions had been authenticated by the President and the Secretary-General of the organisation concerned.[1]

Ratification

The term "ratification" is generally used to describe the act of the appropriate organ of the state whereby the willingness of the state to be bound by a treaty, which has already been signed, is signified. The appropriate authority which can do this act depends on the constitutional practice of each state. Formerly, the act of ratification was regarded as purely formal as the full powers issued to a plenipotentiary itself stipulated that the monarch agreed to be bound by the act of his agent who was carrying the full powers. Later, however, when the full powers were confined to negotiations and signature, ratification became an important step as without such act the state could not be said to be bound. In recent years, due to the somewhat informality of approach in the matter of international transactions, the necessity of ratification is often done away with. Nevertheless, in the case of important treaties and conventions, ratification still retains a prominent place, and in such cases the treaty does not become binding until the act of ratification is completed. It is difficult to lay down any hard and fast rule regarding the types of treaties which would require ratification as this usually depends on the intention of the parties to the treaty. It may, however, be reasonable to say that in the case of treaties of a formal character ratification would be necessary. In modern practice, the position, however, is hardly left in doubt as the treaty or convention itself usually indicates whether ratification is necessary or not. This may be done by express stipulation or be implied from the various provisions of the treaty. For example, in a treaty or convention it is usual to find a clause stipulating that the treaty or convention shall be ratified by a particular date and that it should come into force after the ratifications have been exchanged or deposited. Where, however, the treaty merely states that it should come into effect on a certain date or on the happening of a certain event, it is generally considered that ratification is not necessary.

[1] This procedure was followed in the case of the General Act for the Pacific Settlement of International Disputes adopted at Geneva on 26th September 1928 by the League Assembly and in the case of the Convention on the Privileges and Immunities of the United Nations.

The International Court of Justice has held that the ratification of a treaty, which provides for ratification, is an indispensable condition for bringing it into operation. It is not, therefore, a mere formal act, but an act of vital importance.[1] Ratification has its obvious advantages as the interval between the signature and ratification of a treaty gives the appropriate authorities of the government time to consider the merits and demerits of the treaty as a whole much more thoroughly than would have been possible at the time of negotiations. McNair observes:

> However careful may have been the preparation of their instructions, it rarely happens that the representatives of both parties can succeed in producing a draft which embodies the whole of their respective instructions; some concession on one side and some element of compromise are present in practically every negotiation. It is, therefore, useful that in the case of important treaties governments should have the opportunity of reflection afforded by the requirement of ratification.[2]

He suggests that ratification is an essential requirement of a treaty unless (a) by its express terms the requirement of ratification is dispensed with, or (b) it can be inferred from the nature or the form of the treaty or the circumstances in which it was negotiated that the parties intended to dispense with the requirement of ratification.[3] It would perhaps be reasonable to state that protocols, declarations or other instruments, which merely modify a former instrument, would not require ratification unless the main instrument itself had been ratified. Exchange of notes, agreements relating to provisional arrangements and agreements prolonging the duration of commercial treaties would also appear to require no ratification.[4]

Ratification of bilateral treaties is done by means of exchange of instruments of ratifications whilst in the case of multilateral conventions the instrument has to be deposited with the depositary government as may be indicated in the convention itself. In the cases of conventions concluded under the auspices of international organisations like the League or the United Nations, it has been customary to deposit the instrument of ratification with the Secretary-General of the international organisation concerned. Ratification of treaties drawn up in the heads of states form is done by means of an instrument issued in the name of the head of state and signed by him. In the case

[1] *The Ambatielos (Jurisdiction) case*, (1952) I. C.J. Reorts, 43.
[2] McNair, op. cit., pp. 133–34.
[3] Ibid., p. 134.
[4] This position obtains in the practice of the United Kingdom.

of treaties which are agreements between states, it is also usual to issue the instrument of ratification in the name of the head of the state. In all other cases, the ratification is issued and signed by the head of the government or a minister authorised for the purpose. In the United Kingdom and most of the Commonwealth countries, no legislative approval is necessary for ratification of a treaty; but in the United States of America, the consent of the Senate is required under the provisions of the constitution. Such matters are, however, to be determined by the provisions of the constitutions and municipal law of each state.

Accession

A state may become a party to a treaty by means of accession or adhesion.[1] This method is adopted when a state accepts the offer or avails itself of the opportunity of becoming a party to a treaty or convention which has already been signed by some other states. This procedure is also adopted when a state wishes to be a party to an instrument intended to become a treaty, the text of which has been drawn up at an international conference or under the auspices of an international organisation like the League of Nations, the United Nations, the Specialised Agencies, the Council of Europe etc. and which has been thrown open for accession.

In so far as the first category of cases is concerned, no state has a right to become a party to a treaty between two or more states unless the treaty itself provides for accession by other states, or the original parties to the treaty consent to one or more of other states becoming parties thereto. It is entirely upto the original parties, who drew up the treaty, to decide on the choice of states or to stipulate conditions for accession. For example, they may throw the treaty open for accession by all states, or they may restrict the same by naming in the treaty itself the states or group of states to whom accession is offered. It is also possible to lay down conditions for accession, such as the consent of all the contracting parties. The time during which accession can take place is usually provided in the treaty, though in some cases the treaties place no limit of time whatsoever upon accessions.

Accession is generally done by depositing a formal instument which

[1] Article 12 of the Harvard Draft Convention on the subject uses the term "accession" to denote the act by which the provisions of a treaty are formally accepted by a state on behalf of which the treaty has been signed or ratified. The Draft Convention provides that when an accession becomes effective, the acceding state thereupon becomes a party to the treaty upon a basis of equality with other parties.

is also known as "accession" with the depositary government, which may be named in the treaty, or with the international organisation in cases where the treaty is drawn up under the auspices of such organisation. There is no precise form for the instrument of accession; a mere notification to the original contracting parties or the authority named in the treaty usually suffices. An accession does not require ratification unless it is made subject to ratification.[1] The reason is that the governments do have adequate time to consider the matter fully before it may decide to accede to a treaty.

Reservations

It frequently happens that after the text of a treaty has been finalised, a state may as a condition of its willingness to become a party to the treaty specify certain terms subject to which it is prepared to accept the provisions of the treaty. A state may also agree to be a party to the treaty as a whole whilst objecting to certain clauses of the treaty which it does not accept. Such conditions are known as "reservations." The effect of such reservations is to limit the operation of the treaty in so far as it may apply in the relations of that state with the other state or states which may be parties to the treaty. Reservations may be made at the time of signing or ratifying or whilst acceding to a treaty. According to McNair, a state which considers that it can become a party to a treaty only if it can exclude or modify the application to itself of one or more of its particular provisions can achieve this object in one of the following ways: (i) by a reservation attached to the signature of a treaty by its representatives and duly recorded in a *procès verbal* or protocol of signature, (ii) by a reservation attached to the ratification and duly recorded, and (iii) in the case of a treaty left open for accession, by a reservation attached to its accession and duly recorded.[2] The question of making reservations frequently arises in the case of multilateral conventions as it is difficult to formulate the provisions of a treaty in such a way as to be acceptable to a large number of states. In the practice of states, it is therefore usual to permit states to make reservations whilst entering into or acceding to multilateral treaties, though there is nothing to prevent the parties from stipulating that no reservation will be permitted or that reservation will not be allowed in respect of certain clauses of the treaty.[3]

[1] McNair, op. cit., p. 161.

[2] Ibid.

[3] For example, no reservation was permitted in respect of the Covenant of the League of Nations. Reservation was not permitted in respect of certain clauses in the Convention on

Questions of some importance have often arisen regarding the validity of reservations in respect of multipartite treaties. Treaties being contractual in nature, it follows that parties must be *ad idem* regarding their reciprocal rights and obligations under the treaty. Hackworth therefore observes:

> If reservations are not made at the time of signing a multilateral treaty, ratifications with reservations in order to be binding must be brought to the knowledge of the other contracting powers and receive their approval unless otherwise specified in the treaty since they constitute a modification of the agreement.[1]

It is considered that as to the signatories whose ratifications had been deposited prior to the receipt by them of notice of the deposit of a ratification with reservation, acceptance by such states of the reservations by some positive act would be necessary in order to give the treaty binding force as between the parties who had already deposited their ratifications and the party subsequently ratifying with reservations. McNair considers that in all cases of reservations, it is essential that other parties to the treaty should assent to the making of the reservation. If they do not, the signature or ratification or accession which the reservation purports to qualify is a nullity.[2] There is, however, a practical difficulty in obtaining the assent of all the parties to a treaty in respect of all reservations, particularly if they are made at the time of ratification or accession to the treaty. It is therefore sometimes supposed that if no objection is raised to the reservation by the other powers, that reservation is accepted. This, however, is not a very satisfactory position. There can be a proper solution only if the treaty provides some means or standard by which the validity of the reservation can be judged and the consent of the other parties can be obtained. The International Court of Justice, in its advisory opinion relating to the reservations on the Genocide Convention which was adopted by the General Assembly of the United Nations in December 1948, by a majority laid down a new test for admissibility of reservations. It laid down the test that the reservation "must be compatible with the object and purpose of the Convention." [3] The question, however, still remains as to who is to decide about the compatibility of the reservation with

the Nationality of Married Women, 1957, and the Convention relating to the Status of Refugees, 1951.

[1] Hackworth, op. cit., Vol. V, para 482.

[2] McNair, op. cit., p. 161.

[3] See I.C.J. Reports, 1951, p. 51.

Lord McNair, who was a member of the Court, however, considers the observations made in this case as being confined to the Genocide Convention. See McNair, op. cit., p. 167.

the objects and purposes of the treaty. In the absence of a provision to the contrary in the treaty itself, the matter has naturally to be judged by the other contracting parties and the requirement of "unanimous consent" therefore has to be fulfilled. It is obvious that if the reservation goes to the very root of the treaty, that is to say, if the reservation is with regard to a provision without which the treaty cannot stand, the reservation is not valid, and a state which makes reservations of such a character cannot become a party to the treaty. On the other hand, if the treaty has several parts consisting of separate and severable provisions, a state can become a party to the treaty though it does not accept all the provisions thereof.

Registration of treaties

The question of registration and publication of treaties first arose during the years following the First World War when public opinion was aroused by revelations of secret diplomatic exchanges and secret treaties. The dissatisfaction of the states with regard to conclusion of secret treaties found expression in Article 18 of the Covenant of the League of Nations which provided:

> "Every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered."

It thus became obligatory on the members of the League to register their international agreements entered into with states, both members and non-members of the League. Registration was made a condition of the validity of the treaty in so far as the members of the League were concerned. The Covenant, however, could not impose any obligation on non-members. The Charter of the United Nations whilst providing for registration of treaties, however, has not insisted on registration as a condition of validity of the treaty. Under the Charter, the treaties are to be registered after they come into force. The effect of non-registration is that the treaty or agreement in question cannot be invoked before any organ of the United Nations including the International Court of Justice. The members and non-members of the United Nations have been put on the same footing with regard to reliance on non-registered treaties before an organ of the United Nations. Article 102 of the Charter provides:

"1. Every international agreement entered into by any member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this article may invoke the treaty or agreement before any organ of the United Nations."

It is the practice of the member states of the United Nations to transmit copies of treaties entered into by them to the Secretariat of the United Nations. These are then registered with the United Nations and published in the *United Nations Treaty Series*. Registration is purely a mechanical act and has no effect on the validity or otherwise of the treaty in question.

Date of entry into force of a treaty

A treaty enters into force from such date or dates as may be expressly mentioned in the treaty itself or implied from its various provisions. Parties are at complete liberty to fix such date either by relating to a particular event or by specifying the date itself. Practice shows that the crucial date is usually related to exchange of ratifications, the deposit or notification of all or a certain number of ratifications, the passing of certain legislations by parties, or formal promulgation of the treaty etc. But when the treaty itself does not make any provision in this regard, the matter has to be determined by law. McNair states that in the absence of contrary provision, express or implied, in the treaty, the date of entry into force is (a) where ratification is not necessary, the earliest date at which the signature of all the parties have taken place and the exchange or deposit of copies has been effected, or (b) where ratification is necessary, the earliest date at which ratification takes place.[1] It is, however, possible that parties may agree that a treaty requiring ratification or part of it shall come into force before ratification.

[1] McNair, op. cit., p. 192.

APPENDIX I

EXTRACTS FROM THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961.

I. ESTABLISHMENT AND CONDUCT OF DIPLOMATIC RELATIONS

Article 2 – The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.

Article 4 – 1. The sending State must make certain that the *agrément* of the receiving State has been given for the person it proposes to accredit as head of the mission to that State.

2. The receiving State is not obliged to give reasons to the sending State for a refusal of *agrément.*

Article 5 – 1. The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission or assign any member of the diplomatic staff, as the case may be, to more than one State, unless there is express objection by any of the receiving States.

2. If the sending State accredits a head of mission to one or more other States, it may establish a diplomatic mission headed by a chargé d'affaires *ad interim* in each State where the head of mission has not his permanent seat.

3. A head of mission or any member of the diplomatic staff of the mission may act as representative of the sending State to any international organisation.

Article 6 – Two or more States may accredit the same person as head of mission to another State, unless objection is offered by the receiving State.

Article 7 – Subject to the provisions of Articles 5, 8, 9, and 11, the sending State may freely appoint the members of the staff of the mission. In the case of military, naval or air attachés, the receiving State may require their names to be submitted beforehand for its approval.

Article 8 – 1. Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State.

2. Members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the receiving State, except with the consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 9 – 1. The receiving State may, at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is *persona non-grata* or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared *non-grata* or not acceptable before arriving in the territory of the receiving State.

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

Article 10 – 1. The Ministry of Foreign Affairs of the receiving State, or such other Ministry as may be agreed, shall be notified of:

(a) the appointment of members of the mission, their arrival and their final departure or the termination of their functions with the mission;
(b) the arrival and final departure of a person belonging to the family of a member of the mission and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the mission;
(c) the arrival and final departure of private servants in the employ of persons referred to in sub–paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;
(d) the engagement and discharge of persons resident in the receiving State as members of the mission or private servants entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Article 11 – 1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.

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

Article 12 – The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the mission in localities other than those in which the mission itself is established.

Article 13 – 1. The head of the mission is considered as having taken up his functions in the receiving State either when he has presented his credentials or when he has notified his arrival and a true copy of his credentials has been presented to the Ministry for Foreign Affairs of the receiving State, or such other Ministry as may be agreed, in accordance with the practice prevailing in the receiving State which shall be applied in a uniform manner.

2. The order of presentation of credentials or of a true copy thereof will be determined by the date and time of the arrival of the head of the mission.

Article 14 – 1. Heads of missions are divided into three classes, namely

(a) that of ambassadors or nuncios accredited to heads of State, and other heads of missions of equivalent rank;
(b) that of envoys, ministers and internuncios accredited to heads of state;
(c) that of chargés d'affaires accredited to Ministers for Foreign Affairs.

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

Article 15 – The class to which the heads of their missions are to be assigned shall be agreed between States.

Article 16 – 1. Heads of missions shall take precedence in their respective classes in the order of the date and time of taking up their functions in accordance with Article 13.

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

3. This article is without prejudice to any practice accepted by the receiving State regarding the precedence of the representative of the Holy See.

Article 17 – The precedence of the members of the diplomatic staff of the

mission shall be notified by the head of the mission to the Ministry for Foreign Affairs or such other Ministry as may be agreed.

Article 18 – The procedure to be observed in each State for the reception of heads of missions shall be uniform in respect of each class.

Article 19 – 1. If the post of head of the mission is vacant, or if the head of the mission is unable to perform his functions, a charge d'affaires *ad interim* shall act provisionally as head of the mission. The name of the charge d'affaires *ad interim* shall be notified either by the head of the mission or, in case he is unable to do so, by the Ministry for Foreign Affairs of the sending State to the Ministry for Foreign Affairs of the receiving State or such other Ministry as may be agreed.

2. In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission.

Article 21 – 1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws, by the sending State of premises necessary for its mission or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist missions in obtaining suitable accommodation for their members.

Article 25 – The receiving State shall accord full facilities for the performance of the functions of the mission.

II. FUNCTIONS AND DUTIES OF DIPLOMATIC AGENTS

Article 3 – 1. The functions of a diplomatic mission consist *inter alia* in:

(a) representing the sending State in the receiving State;
(b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
(c) negotiating with the government of the receiving State;
(d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the government of the sending State;
(e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission.

Article 41 – 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other Ministry as may be agreed.

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

Article 42 – A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity.

Article 46 – A sending State may, with the prior consent of a receiving State and at the request of a third State not represented in the receiving State, undertake the temporary protection of the interests of the third State and of its nationals.

III. DIPLOMATIC IMMUNITIES AND PRIVILEGES

Article 20 – The mission and its head shall have the right to use the flag and emblem of the sending State on the premises of the mission, including the residence of the head of the mission and on his means of transport.

Article 22 – 1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

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

3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

Article 23 – 1. The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission.

Article 24 – The archives and documents of the mission shall be inviolable at any time wherever they may be.

Article 26 – Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the mission freedom of movement and travel in its territory.

Article 27 – 1. The receiving State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the government and the other missions and consulates of the sending State, wherever situated, the mission may employ all appropriate means, including diplomatic couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.

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

4. The packages constituting the diplomatic bag must bear visible external marks of their character and may contain only diplomatic documents or articles intended for official use.

5. The diplomatic courier, who shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag, shall be protected by the receiving State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State or the mission may designate diplomatic couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply, except

that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge.

7. A diplomatic bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a diplomatic courier. The mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft.

Article 28 – The fees and charges levied by the mission in the course of its official duties shall be exempt from all dues and taxes.

Article 29 – The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.

Article 30 – 1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.

Article 31 – 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of

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

(b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) an action relating to any professional or commercial activity exefcised by the diplomatic agent in the receiving State outside his official functions.

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

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

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

Article 32 – 1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

Article 33 – 1. Subject to the provisions of paragraph 3 of this article, a diplomatic agent shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall also apply to private servants who are in the sole employ of a diplomatic agent on condition

(a) that they are not nationals of or permanently resident in the receiving State; and
(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. A diplomatic agent who employs persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

Article 34 – A diplomatic agent shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except
(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) dues and taxes on private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
(c) estate, succession or inheritance duties levied by the receiving State subject to the provisions of paragraph 4 of Article 39;
(d) dues and taxes on private income having its source in the receiving State and capital taxes on investments made in commercial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of Article 23.

Article 35 – The receiving State shall exempt diplomatic agents from all personal services, from all public services of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 36 – 1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on
(a) articles for the official use of the mission;
(b) articles for the personal use of a diplomatic agent or members of his family forming part of his household, including articles intended for his establishment.

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

Article 37 – 1. The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in Articles 29 to 36.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households,

shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in Articles 29 to 35, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 1 of Article 31 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in Article 36, paragraph 1, in respect of articles imported at the time of first installation.

3.Members of the service staff of the mission, who are not nationals of or permanently resident in the receiving State, shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption contained in Article 33.

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

Article 38 – 1. Except in so far as additional privileges and immunities may be granted by the receiving State, a diplomatic agent who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions.

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

Article 39 – 1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other Ministry as may be agreed.

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

3. In case of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country.

4. In the event of the death of a member of the mission not a national of or permanently resident in the receiving State or a member of his family forming part of his household, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property the presence of which in the receiving State was due solely to the presence there of the deceased as a member of the mission or as a member of the family of a member of the mission.

IV. POSITION IN THIRD STATES

Article 40 – 1. If a diplomatic agent passes through or is in the territory of a third State, which has granted him a passport visa if such visa was necessary, while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges or immunites who are accompanying the diplomatic agent, or travelling separately to join him or to return to their country.

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

3. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as is accorded by the receiving State. They shall accord to diplomatic couriers, who have been granted a passport visa if such visa was necessary, and diplomatic bags in transit the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1,2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and diplomatic bags, whose presence in the territory of the third State is due to *force majeure*.

V. TERMINATION OF MISSION

Article 43 – The function of a diplomatic agent comes to an end, *inter alia*

(a) on notification by the sending State to the receiving State that the functions of the diplomatic agent have come to an end;
(b) on notification by the receiving State to the sending State in accordance with paragraph 2 of Article 9, that it refuses to recognise the diplomatic agent as a member of the mission.

Article 44 – The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 45 – If diplomatic relations are broken off between two States, or if a mission is permanently or temporarily recalled:

(a) the receiving State must, even in case of armed conflict, respect and protect the premises of the mission, together with its property and archives;
(b) the sending State may entrust the custody of the premises of the mission, together with its property and archives, to a third State acceptable to the receiving State;
(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

VI. RECIPROCITY AND DISCRIMINATION

Article 47 – 1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.

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

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;

(b) where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

APPENDIX II

EXTRACTS FROM THE VIENNA CONVENTION ON CONSULAR RELATIONS 1963.

I. ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

Article 2 – Establishment of consular relations – 1. The establishment of consular relations between States takes place by mutual consent.

2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Article 3 – Exercise of consular functions. – Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

Article 4 – Establishment of a consular post. – 1. A consular post may be established in the territory of the receiving State only with that State's consent.

2. The seat of the consular post, its classification and the consular district shall be established by the sending State and shall be subject to the approval of the receiving State.

3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.

4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.

5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 6 – Exercise of consular functions outside the consular district. – A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7 – Exercise of consular functions in a third State. – The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8 – Exercise of consular functions on behalf of a third State. – Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9 – Classes of heads of consular posts – 1. Heads of consular posts are divided into four classes, namely:

(a) consuls-general;
(b) consuls;
(c) vice-consuls;
(d) consular agents.

2. Paragraph 1 of this Article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

Article 10 – Appointment and admission of heads of consular posts – 1. Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.

2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending State and of the receiving State respectively.

Article 11 – The consular commission or notification of appointment – 1. The head of a consular post shall be provided by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.

2. The sending State shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the government of the State in whose territory the head of a consular post is to exercise his functions.

3. If the receiving State agrees, the sending State may, instead of a commission or similar instrument, send to the receiving State a notification containing the particulars required by paragraph 1 of this Article.

Article 12 – The exequatur – 1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an *exequatur*, whatever the form of this authorization.

2. A state which refuses to grant an *exequatur* is not obliged to give to the sending State reasons for such refusal.

3. Subject to the provisions of Articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an *exequatur*.

Article 13 – Provisional admission of heads of consular posts – Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

Article 14 – Notification to the authorities of the consular district – As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

Article 15 – Temporary exercise of the functions of the head of a consular post –

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.

2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving State may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending State in the receiving State conditional on its consent.

3. The competent authorities of the receiving State shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving State shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.

4. When, in the circumstances referred to in paragraph 1 of this Article, a member of the diplomatic staff of the diplomatic mission of the sending State in the receiving State is designated by the sending State as an acting head of post, he shall, if the receiving State does not object thereto, continue to enjoy diplomatic privileges and immunities.

Article 16 – Precedence as between heads of consular posts –1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.

2. If, however, the head of a consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.

3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of Article 11 were presented to the receiving State.

4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of Article 15.

5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.

6. Heads of consular posts shall have precedence over consular officers not having that status.

Article 17 – Performance of diplomatic acts by consular officers – 1. In a State where the sending State has no diplomatic mission and is not represented by a diplomatic mission of a third State, a consular officer may, with the consent of the receiving State, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.

2. A consular officer may, after notification addressed to the receiving State, act as representative of the sending State to any inter-governmental organ-

isation. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

Article 18 – Appointment of the same person by two or more States as a consular officer – Two or more States may, with the consent of the receiving State, appoint the same person as a consular officer in that State.

Article 19 – Appointment of members of consular staff – 1. Subject to the provisions of Articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.

2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending State to the receiving State in sufficient time for the receiving State, if it so wishes, to exercise its rights under paragraph 3 of Article 23.

3. The sending State may, if required by its laws and regulations, request the receiving State to grant an *exequatur* to a consular officer other than the head of a consular post.

4. The receiving State may, if required by its laws and regulations, grant an *exequatur* to a consular officer other than the head of a consular post.

Article 20 – Size of the consular staff – In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular post.

Article 21 – Precedence as between consular officers of a consular post – The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending State or, if that State has no such mission in the receiving State, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Article 22 – Nationality of consular officers – 1. Consular officers should, in principle, have the nationality of the sending State.

2. Consular officers may not be appointed from among persons having the nationality of the receiving State except with the express consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Article 23 – Persons declared non grata – 1. The receiving State may at any time notify the sending State that a consular officer is *persona non grata* or that any other member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.

2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this Article, the receiving State may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.

3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving State or, if already in the receiving State, before entering on his duties with the consular post. In any such case, the sending State shall withdraw his appointment.

4. In the cases mentioned in paragraphs 1 and 3 of this Article, the receiving State is not obliged to give to the sending State reasons for its decision.

Article 24 – Notification to the receiving State of appointments, arrivals and departures – 1. The Ministry for Foreign Affairs of the receiving State or the authority designated by that Ministry shall be notified of:

(a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;
(b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;
(c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;
(d) the engagement and discharge of persons resident in the receiving State as members of a consular post or as members of the private staff entitled to privileges and immunities.

2. When possible, prior notification of arrival and final departure shall also be given.

Article 28 – Facilities for the work of the consular post – The receiving State shall accord full facilities for the performance of the functions of the consular post.

Article 30 – Accommodation – 1. The receiving State shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending State of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

Article 69 – Consular agents who are not heads of consular posts – 1. Each State is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending State.

2. The conditions under which the consular agencies referred to in paragraph 1 of this Article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending State and the receiving State.

Article 70 – Exercise of consular functions by diplomatic missions – 1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry of Foreign Affairs of the receiving State or to the authority designated by that Ministry.

II. FUNCTIONS OF CONSULAR OFFICERS

Article 5 – Consular functions – Consular functions consist in:

(a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
(c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the government of the sending State and giving information to persons interested;
(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;
(e) helping and assisting nationals, both individuals and bodies corporate, of the sending State;
(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;
(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;
(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;
(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article, and to their crews, taking statement regarding the voyage of a vessel, examining and stamping the ship's papers, and without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;
(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are

referred to in the international agreements in force between the sending State and the receiving State.

Article 36 – Communication and contact with nationals of the sending State – 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub–paragraph;

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under this Article are intended.

Article 37 – Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents – If the relevant information is available to the competent authorities of the receiving State, such authorities shall have the duty:

(a) in the case of the death of a national of the sending State, to inform without delay the consular post in whose district the death occurred;

(b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving State concerning such appointments;

(c) if a vessel, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consular post nearest to the scene of the occurrence.

Article 38 – Communication with the authorities of the receiving State – In the exercise of their functions, consular officers may address:

(a) the competent local authorities of their consular district;

(b) the competent central authorities of the receiving State if and to the extent that this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

Article 39 – Consular fees and charges – 1. The consular post may levy in the

territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this Article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving State.

III. CONSULAR PRIVILEGES AND IMMUNITIES

Article 29 – Use of national flag and coat-of-arms – 1. The sending State shall have the right to the use of its national flag and coat-of-arms in the receiving State in accordance with the provisions of this Article.

2. The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.

3. In the exercise of the right accorded by this Article, regard shall be had to the laws, regulations and usages of the receiving State.

Article 31 – Inviolability of the consular premises – 1. Consular premises shall be inviolable to the extent provided in this Article.

2. The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this Article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

Article 32 – Exemption from taxation of consular premises – 1. Consular premises and the residence of the career head of consular post of which the sending State or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the person acting on its behalf.

Article 33 – Inviolability of the consular archives and documents – The consular archives and documents shall be inviolable at all times and wherever they may be.

Article 34 – Freedom of movement – Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure freedom of movement and travel in its territory to all members of the consular post.

Article 35 – Freedom of communication – 1. The receiving State shall permit and protect freedom of communication on the part of the consular post for all

official purposes. In communicating with the government, the diplomatic missions and other consular posts, wherever situated, of the sending State, the consular post may employ all appropriate means, including diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving State.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all corespondence relating to the consular post and its functions.

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this Article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving State he shall be neither a national of the receiving State, nor unless he is a national of the sending State, a permanent resident of the receiving State. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending State, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this Article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

Article 40 – Protection of consular officers – The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

Article 41 – Personal inviolability of consular officers – 1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this Article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this Article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this Article, it has become necessary

to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 42 – Notification of arrest, detention or prosecution – In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving State shall notify the sending State through the diplomatic channel.

Article 43 – Immunity from jurisdiction – 1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either;

(a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending State; or

(b) by a third party for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft.

Article 44 – Liability to give evidence – 1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this Article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending State.

Article 45 – Waiver of privileges and immunities – 1. The sending State may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this Article, and shall be communicated to the receiving State in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 46 – Exemption from registration of aliens and residence permits – 1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

2. The provisions of paragraph 1 of this Article shall not, however, apply to

any consular employee who is not a permanent employee of the sending State or who carries on any private gainful occupation in the receiving State or to any member of the family of any such employee.

Article 47 – Exemption from work permits – 1. Members of the consular post shall, with respect to services rendered for the sending State, be exempt from any obligation in regard to work permits imposed by the laws and regulations of the receiving State concerning the employment of foreign labour.

2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving State, be exempt from the obligations referred to in paragraph 1 of this Article.

Article 48 – Social security exemption – 1. Subject to the provisions of paragraph 3 of this Article, members of the consular post with respect to services rendered by them for the sending State and members of their families forming part of their households shall be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this Article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:

(a) that they are not nationals of or permanently resident in the receiving State, and
(b) that they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this Article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this Article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Article 49 – Exemption from taxation – 1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
(b) dues or taxes on private immovable property situated in the territory of the receiving State, subject to the provisions of Article 32;
(c) estate, succession or inheritance duties, and duties on transfers levied by the receiving State, subject to the provisions of paragraph (b) of Article 51;
(d) dues and taxes on private income, including capital gains, having its source in the receiving State and capital taxes relating to investments made in commercial or financial undertakings in the receiving State;
(e) charges levied for specific services rendered;
(f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.

3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving State shall observe the obligations which the laws and regulations of that State impose upon employers concerning the levying of income tax.

Article 50 – Exemption from customs duties and inspection – 1. The receiving State shall, in accordance with such laws and regulations as it may adopt,

permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the consular post;

(b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.

2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this Article in respect of articles imported at the time of first installation.

3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub–paragraph (b) of paragraph 1 of this Article, or articles the import or export of which is prohibited by the laws and regulations of the receiving State or which are subject to its quarantine laws and regulations. Such inspection shall be carried out in the presence of the consular officer or member of his family concerned.

Article 51 – Estate of a member of the consular post or of a member of his family – In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving State:

(a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving State the export of which was prohibited at the time of his death;

(b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

Article 52 – Exemption from personal services and contributions – The receiving State shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 53 – Beginning and end of consular privileges and immunities – 1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and inmunities in accordance with paragraph 1 of this Article or from the date of their entry into the territory of the receiving State or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving State or on the expiry of a reasonable period in which to do so, whichever is the sooner, but shall subsist until that time, even in case of armed conflict. In the case of the persons referred to in paragraph 2 of this Article, their privileges and immunities shall

come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving State within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving State or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

Article 55 – Respect for the laws and regulations of the receiving State – 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.

3. The provisions of paragraph 2 of this Article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

Article 56 – Insurance against third party risks – Members of the consular post shall comply with any requirement imposed by the laws and regulations of the receiving State in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

Article 57 – Special provisions concerning private gainful occupation – 1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving State.

2. Privileges and immunities provided in this Chapter shall not be accorded:

(a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving State;

(b) to members of the family of a person referred to in sub–paragraph (a) of this paragraph or to members of his private staff;

(c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving State.

Article 71 – Nationals or permanent residents of the receiving State – 1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving State, consular officers who are nationals of or permanently resident in the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions and the privilege provided in paragraph 3 of Article 44. So far as these consular officers are concerned, the receiving State shall likewise be bound by the obligation laid down in Article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving State and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this Article, shall enjoy facilities, privileges and immunities only in so far as these are

granted to them by the receiving State. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving State shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

IV. POSITION OF HONORARY CONSULAR OFFICERS

Article 58 – General provisions relating to facilities, privileges and immunities – 1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 59, 60, 61 and 62.

2. Articles 42 and 43, paragraph 3 of Article 44, Articles 45 and 53 and paragraph 1 of Article 55 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles 63, 64, 65, 66 and 67.

3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.

4. The exchange of consular bags between two consular posts headed by honorary consular officers in different States shall not be allowed without the consent of the two receiving States concerned.

Article 59 – Protection of the consular premises – The receiving State shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

Article 60 – Exemption from taxation of consular premises – 1. Consular premises of a consular post headed by an honorary consular officer of which the sending State is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this Article shall not apply to such dues and taxes if, under the laws and regulations of the receiving State, they are payable by the person who contracted with the sending State.

Article 61 – Inviolability of consular archives and documents – The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents, and in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

Article 62 – Exemption from customs duties – The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemptions from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services on the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats–of–arms, flags, signboards, seals and stamps,

books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending State to the consular post.

Article 63 – Criminal proceedings – If criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible. When it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted with the minimum of delay.

Article 64 – Protection of honorary consular officers – The receiving State is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.

Article 65 – Exemption from registration of aliens and residence permits – Honorary consular officers, with the exception of those who carry on for personal profit any professional or commercial activity in the receiving State, shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

Article 66 – Exemption from taxation – An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Article 67 – Exemption from personal services and contributions – The receiving State shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

Article 68 – Optional character of the institution of honorary consular officers – Each State is free to decide whether it will appoint or receive honorary consular officers.

V. TERMINATION OF CONSULAR FUNCTIONS

Article 25 – Termination of the functions of a member of a consular post – The functions of a member of a consular post shall come to an end *inter alia:*

(a) on notification by the sending State to the receiving State that his functions have come to an end;
(b) on withdrawal of the *exequatur;*
(c) on notification by the receiving State to the sending State that the receiving State has ceased to consider him as a member of the consular staff.

Article 26 – Departure from the territory of the receiving State – The receiving State shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving State, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving State the export of which is prohibited at the time of departure.

Article 27 – Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances – 1. In the event of the severance of consular relations between two States:

(a) the receiving State shall, even in case of armed conflict, respect and protect

the consular premises, together with the property of the consular post and the consular archives;

(b) the sending State may entrust the custody of the consular premises, together with the property contained therein and the consular archives to a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

2. In the event of the temporary or permanent closure of a consular post, the provisions of sub-paragraph 1 of this Article shall apply. In addition,

(a) if the sending State, although not represented in the receiving State by a diplomatic mission, has another consular post in the territory of that State, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving State, with the exercise of consular functions in the district of that consular post; or

(b) if the sending State has no diplomatic mission and no other consular post in the receiving State, the provisions of sub-paragraphs (b) and (c) of paragraph 1 of this Article shall apply.

VI. POSITION IN THIRD STATES

Article 54 – Obligations of third States – 1. If a consular officer passes through or is in the territory of a third State, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending State, the third State shall accord to him all immunities provided for by the other Articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending State.

2. In circumstances similar to those specified in paragraph 1 of this Article, third States shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

3. Third States shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving State is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord under the present Convention.

4. The obligations of third States under paragraphs 1, 2 and 3 of this Article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*.

VII. RECIPROCITY AND DISCRIMINATION

Article 72 – Non-discrimination – 1. In the application of the provisions of the present Convention the receiving State shall not discriminate as between States.

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

(a) where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending State;
(b) where by customs or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

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