DIPLOMATIC FREEDOM OF COMMUNICATION

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I. DIPLOMATIC PRIVILEGES AND IMMUNITIES

The rules relating to the privileges and immunities of diplomatic envoys are among the oldest and most firmly established rules of international law. Their main purpose is—at any rate from a modern point of view—to enable the envoys to perform their functions properly, first and foremost by securing their independence.

1. Most of the privileges are *personal*—i.e. they relate to the individual diplomatic representatives. It is these privileges that are the most striking and that have been primarily discussed in *la doctrine*. The most important is the representative's inviolability and immunity: he cannot be arrested, punished or subjected to legal process in the courts of the host country. So far as the discharge of his functions is concerned, this is a fundamental privilege—for these functions are really acts of the state he represents. This causes little difficulty in practice. But the most striking and controversial privileges and immunities are the purely personal ones: immunity in respect of private transactions, freedom from taxation and customs duties. In this regard the considerations relating to the protection of the representative's independence are not so obvious—and there are, in fact, also other considerations that to some extent lie behind it, the protection of the diplomat's dignity, the claims of courtesy, and simple reciprocity.

2. The privileges and immunities appertaining to the diplomatic mission and to *the sending state as such* are in a different category altogether. In this sphere there exist a number of fundamental rights.

First of all, there are two rights that are not mentioned in the Vienna Convention on Diplomatic Relations of 1961, because they appertain to the state as such and embrace all its organs.

One of these rights may be referred to as *internal self-government*. Despite the fact that the diplomatic mission is not extraterritorial in the sense that the receiving state's laws would not apply

The views expressed are those of the writer and do not necessarily reflect those of the Norwegian Ministry for Foreign Affairs.

on its premises, nevertheless the internal conditions of service are governed only by the law of the sending state. The receiving state's laws relating to hours of work, minimum wages, notice of dismissal, social security, etc. are inapplicable except in those (few) cases where the sending state has accepted them.[1] This produces effects similar to those of an immunity—but it is simply an aspect of the state's exclusive jurisdiction over *all* its organs, wherever these may happen to be and whatever they may happen to be called. The Vienna Convention on Diplomatic Relations therefore makes no mention of this immunity—with the exception of social security, because in that instance it was found to be necessary for practical reasons to make an exception for locally employed personnel.

Another right that also appertains to the state in general is its immunity from legal process before a foreign court in connection with its transactions *as a sovereign state, jure imperii.* This immunity naturally includes the diplomatic mission also, as it does every organ of the state at home and abroad, and it is therefore not mentioned in the Vienna Convention.

3. The three genuine diplomatic privileges and immunities of a non-personal nature—and those which are referred to in the Vienna Convention—are:

(*a*) Inviolability of the diplomatic premises.
(*b*) Inviolability of the archives and documents.
(*c*) Right of free communication.

But even these rights are not confined to permanent diplomatic missions. Consular stations, too—as well as delegations and other temporary special missions—all have these three rights, although not always to the same degree or in the same manner (the most important distinctions relate to (*a*)).

(*a*) The inviolability of the diplomatic premises implies that the receiving state's authorities cannot set foot in the precincts without permission—and that the receiving state must take the necessary measures to prevent private persons from encroaching on the premises or from disturbing the peace there. This is now specified in art. 22 of the Vienna Convention.

(*b*) The Convention does not, on the other hand, specify what is entailed in the provision in art. 24 relating to the *inviolability*

[1] See Seyersted, "Jurisdiction over Organs and Officials of States, the Holy See and Intergovernmental Organizations" in *The International and Comparative Law Quarterly*, XIV (1965) pp. 33–47 and 493–527.

of the archives and documents. But the effect must be the same: the receiving state's authorities cannot confiscate them or in any other way obtain access to them. And the receiving state must take the necessary precautions to prevent others from doing so. Otherwise it is important to note that art. 24 expressly declares that the documents are protected "no matter where they are", and thus even though they may, for example, be in the pocket or brief-case of a diplomatic representative or lying on the table in his dwelling or hotel room.[2]

(*c*) *The right of free communication* means that the diplomatic mission has the right to correspond with its Foreign Ministry and with other official connections without the receiving state's preventing it or becoming acquainted with the contents of the correspondence.

The archives and documents of a diplomatic mission contain, of course, a great deal of the mission's correspondence—with its own authorities and with others. It is therefore obvious that the rules relating to the inviolability of the premises and that of the archives and documents—in addition to their other purposes—are an important means of securing uninhibited communication with the mission. In the present study, however, only the right of free communication itself will be discussed. But it should be said generally of all these three diplomatic privileges—which relate to the mission as such and not to the diplomatic representatives personally—that they are very important as regards the mission's ability to function properly and its independence. This applies not least to the right of free communication itself; it is *absolutely necessary* for the carrying out of the mission's functions.

4. Mr. Justice A. Sandström in his first draft of codification of 1955[3] described the different theoretical bases on which legal writers have founded diplomatic privileges and immunities:

(i) The theory of "extraterritoriality".

(ii) The theory that the diplomat represents his state or its head and that therefore he has a claim to the same protection of his dignity as these enjoy.

(iii) The functional theory: privileges and immunity are intended to put the diplomat in a position to carry out his functions in complete independence.

The last-mentioned theory is, generally speaking, the basis of the privileges and immunities of international organizations. But

[2] See also arts. 30(2) and 36(2) of the Vienna Convention.

[3] *Yearbook of the International Law Commission* 1955: II, p. 14.

—as Sandström points out and as also appears from the examples given above—it is a little too narrow to provide a sufficient basis for all diplomatic privileges and immunities.

Nevertheless, it is clear that the most important purpose of privileges and immunities is to put diplomats in a position to carry out their functions with complete independence. They must be able to act fully as representatives of their own country, free from fear or pressure, even in situations in which there is disagreement or tension between the sending state and the receiving state and in other situations in which the latter may wish to exert pressure on the envoys. Many diplomatic privileges and immunities may be rather meaningless in normal times when relations are friendly. But they must nevertheless be maintained to meet crises and difficult situations. And they must be so designed and so extensive that they cover such situations also.

It is at any rate clear that the *right of free communication* has this functional purpose. In principle it has no other: the Vienna Convention of 1961 on Diplomatic Relations expressly confines the right to "official purposes" (art. 27(1)) and to "official correspondence". And it defines the latter expression as "all correspondence relating to the mission and its functions" (art. 27(2)).

II. THE LEGAL SOURCES

1. The right of free communication is only sporadically discussed in the otherwise comprehensive *literature* relating to diplomatic privileges and immunities.[4]

[4] See Cahier, *Le droit diplomatique contemporain*, Geneva 1962, pp. 211–6 and 326; Hyde, *International Law* vol. 2, Boston 1947, pp. 1255–9; Genet, *Traité de diplomatie et de droit diplomatique*, vol. 1, Paris 1931, pp. 509–13; Lyon, "Personal Immunities of Diplomatic Agents", *The British Year Book of International Law*, XXXI (1954) pp. 334–7; Reynaud, "Les relations et immunités diplomatiques", *Revue de droit international et de sciences diplomatiques et politiques*, XXXVI (1958) pp. 426–7; *Satow's Guide to Diplomatic Practice*, 4th ed. London 1964, pp. 180–1; Verdross, *Völkerrecht*, 5th ed. Vienna 1964, p. 340. See also Harvard Research in International Law's Draft Convention on Diplomatic Privileges and Immunities, *American Journal of International Law*, XXVI (1932) Supplement, pp. 79–85. The two most important questions that were discussed at the Vienna Conference on Diplomatic Intercourse and Immunities (wireless transmitters and opening of diplomatic bags) are discussed in Kerley, "Some aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", *American Journal of International Law*, LVI (1962) pp. 110–8, and Colliard, "La Convention de Vienne sur les relations diplomatiques", *Annuaire français de droit international*, VII (1961) pp. 22–5.

2. As regards the *practice,* a certain amount of material is contained in Hackworth's digest of American practice.[5] The corresponding digests of British and French practice contain comparatively little about the right of free communication.[6] A number of the national legal provisions can be found collected in the United Nations Legislative Series, Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities,[7] which was compiled in preparation for the United Nations' work of codification.

The right of free communication is used in practice every day by hundreds of diplomatic missions all over the world. It is an old and well-established right that is recognized by all. It is based on undoubted customary law. But it gives rise to doubtful borderline questions and to violations—as do most other rights—and it is especially those questions with which the publicly available material regarding the practice is concerned.[8]

3. In recent years the right of free communication has been formulated in written provisions, as a step in the work of the United Nations on the *codification of international law.*

In 1955 the Swedish member of the International Law Commission, Mr. Justice Sandström, produced a draft of some articles relating to *diplomatic* intercourse and immunities, with a very short commentary in French.[9] On this basis the International Law Commission worked out a more complete draft in 1957 with a more complete commentary.[1] The governments concerned proceeded to offer their written comments on the draft. On the basis of these governmental comments[2] the International Law Commission adopted a complete draft with a commentary[3] in 1958. The UN thereupon summoned a diplomatic conference in Vienna in 1961.[4] And this conference adopted a comparatively comprehen-

[5] *Digest of International Law,* vol. 4, Washington 1942, pp. 615–22, and—in time of war—pp. 624–32.

[6] Alexandre Kiss, *Répertoire de la pratique française en matière de droit international public,* vol. 3, Paris 1965, pp. 358–9; Clive Parry, *A British Digest of International Law, Compiled Principally from the Archives of the Foreign Office,* vol. 7, London 1965, pp. 934–8 and 946–50.

[7] United Nations Publication 58.V.3.

[8] On violations, see especially Genet, *op. cit.,* pp. 509–12, and Hyde, *op cit.,* pp. 1256–9.

[9] *Yearbook of the International Law Commission* 1955: II, pp. 11 and 16.

[1] *Ibid.,* 1957: II, pp. 137–8, cf. I. pp. 74–85.

[2] *Ibid.,* 1958: II, p. 111.

[3] *Ibid.,* p. 97, cf. I, pp. 138–43.

[4] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records,* vols. I–II, United Nations Publication 61.X.2 and 62.X.1. On free communication, see I, pp. 17–18, 152, 154–64 and 177–81.

sive convention on the basis of the Commission's draft.[5] This convention came into force on 24 April 1964. The convention contains a detailed provision regarding the right of free communication in art. 27. It has, in addition, other more or less relevant provisions in arts. 22, 24, 30(2), and 36(2).[6] Art. 27 states:

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

As will be observed, it is only the first two paragraphs that have general significance. The next two paragraphs deal with the diplomatic bag, and the last three with diplomatic couriers.

Two years later—in 1963—a similar conference in Vienna

[5] *Ibid.* II, p. 85.

[6] See also arts. 39(2), 44 and 47.

adopted a Convention relating to *Consular* Relations, which came into force in 1967.[7] And in 1969 the General Assembly of the United Nations adopted a third Convention on *Special Missions*.[8] Finally, the International Law Commission in 1969 adopted draft articles on permanent missions to international organizations.[9] All these documents contain a provision regarding the right of free communication (arts. 35, 28 and 29, respectively) which is nearly identical with that in the diplomatic convention, but which develops it further on certain points.

The Convention on Special Missions covers individual representatives and delegations that are travelling on a temporary mission to one or more states in order to negotiate particular matters, in order to represent their government at a ceremony, etc. The concept special missions really also encompasses delegations to *international conferences*. These are not, however, included in the Convention on Special Missions. They are instead to be dealt with in connection with the Commission's codification of the relationship between *international organizations* and states. But in this regard a number of special conventions already exist. And these contain provisions relating to the right of free communication, for the organization itself as well as for delegations. In *content* these provisions are not so very different from those of the Vienna conventions. Thus sec. 12 of the Convention on the Priv-

[7] *United Nations Conference on Consular Relations, Official Records*, vols. I–II, United Nations Publication 63.X.2 and 64.X.1.

[8] Text annexed to General Assembly Resolutions 2530 (XXIV), *Travaux préparatoires* in Report of the International Law Commission on the Work of its Nineteenth Session, 1967, *OR GA, XXII*, Suppl. No. 9, and *Yearbook of the International Law Commission* 1967: II; see *ibid.*, I, and 1965: I, pp. 109–10, and 1964: I, pp. 216–20, and II, p. 67 (Bartos' report).

[9] *Report of the International Law Commission on the Work of Its Twenty-First Session*. In its commentary to art. 29 of the draft, the Commission states, *inter alia:*

(2) Permanent missions to the United Nations, the specialized agencies and other international organizations enjoy in general freedom of communication on the same terms as the diplomatic missions accredited to the host State.

(3) Replies of the United Nations and the specialized agencies indicate also that the inviolability of correspondence, which is provided for in article IV, section 11(b), of the Convention on the Privileges and Immunities of the United Nations and in article V, section 13(b), of the Convention of Privileges and Immunities of the Specialized Agencies, has been fully recognized.

(4) One difference between this article and article 27 of the Vienna Convention on Diplomatic Relations is the addition in paragraph 1 of the words "its special missions" in order to co-ordinate the article with article 28, paragraph 1, of the draft articles on special missions. Another is the addition of the words "its permanent missions" to enable the permanent missions of the sending State to communicate among each other.

ileges and Immunities of the Specialized Agencies, of 21 November 1947, provides:[1]

> No censorship shall be applied to the official correspondence and other official communications of the specialized agencies.
>
> The specialized agencies shall have the right to use codes and to dispatch and receive correspondence by courier or in sealed bags, which shall have the same immunities and privileges as diplomatic couriers and bags.
>
> Nothing in this section shall be construed to preclude the adoption of appropriate security precautions to be determined by agreement between a State party to this Convention and a specialized agency.

This right appertains to the *organization.* As regards *representatives of the member states,* sec. 13 of the same convention grants them:

> (*b*) Inviolability for all papers and documents;
> (*c*) The right to use codes and to receive papers or correspondence by courier or in sealed bags;

This covers delegations to meetings summoned by the *organization.* Delegations to conferences summoned by *states* will have to be covered by the new articles that are to be worked out by the International Law Commission. But it is probably implicit in its decision to deal with the two types of conference jointly that the Commission does not intend to make the rules essentially different.

4. The legal basis for the right of free communication is thus firmly established customary law—and now also the provisions in the Vienna Convention of 1961 and in other conventions. In the following sections of the present study the most important problems of international law relating to the right of free communication will be examined. It will be attempted to establish, as far as possible, how these problems stand, first under the treaties —between those states that have adhered to these—and then under the general international law that applied formerly and in principle continues to apply in relation to states that have not adhered to the conventions.

[1] *United Nations Treaty Series,* vol. 33, p. 270.

III. WHO IS ENTITLED TO FREE COMMUNICATION?

This question has already been touched on above, under II (3).

1. The right of free communication appertains first and foremost to the *permanent diplomatic missions.* This is expressly stated in art. 27 of the Vienna Convention. But it is also old and time-honoured customary law, which applies to all states.

2. Secondly, the right appertains to the *consular* posts. This, too, has now been expressly stated—in art. 35 of the Vienna Convention of 1963 on Consular Relations. But in this regard, too, it is merely a matter of codification of a right that is based on customary law, and which thus also appertains to the states that have not yet adhered to the conventions.[2]

3. The same is true of *special missions.* It is now stated in art. 28 of the UN convention of 1969. But right from 1960 the International Law Commission took the standpoint that special missions have in principle the same right as diplomatic missions. However, the Special Rapporteur, Professor Bartos from Yugoslavia, and the International Law Commission itself have since pointed out that special missions are not always granted the right to use *code or cypher* messages, and that normally they do not have the right to use radio transmitters.[3] The special missions, however, as a rule carry on their correspondence with their home country through the latter's permanent diplomatic mission in the host country.[4]

4. As regards the international—or intergovernmental—organizations, there exist—as has been mentioned under II—treaty provisions that grant both the organization itself and the national delegations to meetings the right of free communication. The permanent delegations also have the right of free communication. It is often expressly stated in the bilateral agreements relating to privileges and immunities that each organization enters into with the host country—the so-called "headquarters agreements"—that members of the permanent delegations shall have the same rights as regular diplomatic representatives. But international organizations and permanent and *ad hoc* delegations to them have prac-

[2] Zourek in *Yearbook of the International Law Commission* 1957: II, p. 98.
[3] *Ibid.*, 1964: II, pp. 109–10, and 1965: II, p. 183.
[4] See below, under V 2 (d).

tised free communication even without such treaty authority,[5] and the right thereto must probably be considered to be established in customary law—even though not all organizations have needed to avail themselves of all forms of free communication.

5. Warships, *military forces* stationed on foreign territory, etc., clearly fall outside the framework of diplomacy, apart from the guards that the United States of America and some other countries maintain at their diplomatic missions and delegations.

On the whole the present study will mainly be concerned with the *permanent diplomatic missions*. But their right of free communication branches out to all the other institutions mentioned—both those that are of a diplomatic character (delegations to international organizations, which the International Law Commission without more ado regards as included under the expression "diplomatic mission",[6] and certain delegations to international conferences)—and those that are not (consulates and international organizations as such); cf. below, under V. Besides, most of them, of course, enjoy in their own right broadly the same freedom of communication as permanent diplomatic missions.

IV. WHO IS BOUND TO AFFORD—OR TO RESPECT—FREEDOM OF COMMUNICATION?

1. The duty to afford—and respect—freedom of communication rests first and foremost upon the *receiving state*.

2. But a *third country*, too, has the same obligation in respect of communications and couriers that are in transit through its territory or have come there by reason of *force majeure*. This is expressly stated in art. 40(3)–(4) of the Vienna Convention. But no doubt it also applied before.[7]

The statement made above is true if the third country permits such transit. But has it a *duty* to do so? The duty to forward *mail* and *telegrams en clair* or in cypher normally results from

[5] For example, the League of Nations before concluding the so-called *modus vivendi* with Switzerland in 1926.

[6] Commentary (4) to art. 28 in the draft of 1967 on special missions, see *supra*, p. 201, note 9.

[7] *Yearbook of the International Law Commission* 1957: II, p. 142, art. 32, commentary (4). In this sense also several writers, see, for example, *Satow's Guide to Diplomatic Practice*, 4th ed. London 1964, p. 180.

other conventions.[8] But is a third country bound to allow transit to couriers and sealed courier mail? The International Law Commission was divided on this point. It stated in its commentary that it did not wish to go further into this question.

At the Vienna conference the U.S.A. proposed the addition to art. 40 of a provision to the effect that:

> A State shall have the right in its discretion to deny to any person the privilege of transit through its territory pursuant to this article or to require that such transit shall be subject to such conditions as it may specify.[9]

Two representatives of the Eastern bloc opposed the proposal. One of them—Mr. Tunkin of the U.S.S.R.—said that it conflicted with international law. The other—Mr. Glaser of Rumania—said the opposite:

> Every State was admittedly entitled to deny passage through its territory to any person; but it was unnecessary to say so in the convention.

The American proposal was withdrawn.[1] However, the conference by a large majority adopted a Spanish addition to art. 40(1) relating to the transit of a diplomatic representative through a third country. According to this addition the third country's duty to afford such a representative privileges and immunities is contingent on his having obtained a visa if a visa is necessary.[2] The speakers who supported this proposal (Rumania, Spain, the U.S.S.R.) all seemed to regard it merely as a clarification that did not introduce anything new, but France apparently feared that it was intended to mean that the transit

[8] Art. 1 of the constitution of the Universal Postal Union of 10 July 1964 provides, *inter alia:* "Freedom of transit is guaranteed throughout the entire territory of the Union." See also arts. 1–3 of the Universal Postal Convention of the same date, and the International Telecommunication Convention of 12 November 1965, arts. 31–41. The latter article imposes an absolute duty to transmit government telegrams and service telegrams in secret language, while only countries of transit have such absolute duty in respect of private telegrams. However, the member states are according to arts. 32–33 entitled to suspend telecommunication service, generally or in part, but must notify the other members through the Secretariat. This Pakistan did temporarily in respect of telecommunications to India in September 1965, see circular telegram from the International Telecommunication Union of 8 September 1965.

[9] *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records,* vol. II, p. 37.

[1] According to the committee's report, *ibid.,* p. 67. The summary records of the meeting, *ibid.,* I, p. 210, are silent on this.

[2] *Ibid.,* I, p. 210, and II, p. 46.

country was bound to give a visa. After the Spanish addition had been adopted in respect of diplomatic representatives, it was also quietly added to the provision in article 40(3) relating to couriers. It must have been the drafting committee (or the Secretariat or the Rapporteur) who did this. They probably took it for granted that couriers should in this respect be in the same position as diplomatic representatives.

The result must then at any rate be that the courier can be denied transit through a country for which a visa is required. But the *travaux préparatoires* indicate that the assumption has been that there does not exist any duty to allow transit, even in the case of countries that do not require a visa. Besides the withdrawal of the American proposal one can also point to a proposal from a representative of the Netherlands, who was also the Rapporteur, to the effect that the rights of both the diplomat and the courier should be contingent upon their obtaining the transit country's *permission* for the transit.[3] He withdrew this proposal as unnecessary after the Spanish addition had been adopted. But Portugal reintroduced it and it was adopted unanimously.[4] Nevertheless it did not ultimately find its way into the text—it disappeared in the proceedings of the drafting committee or at some other stage on the way to the plenary session. This must have been because it was felt that the Spanish addition was really the same thing. It may have been in this connection that the Spanish addition was also added to art. 27.

From these complicated *travaux préparatoires* one can probably draw the conclusion that neither according to earlier unwritten law nor according to the Vienna Convention has the courier any *right* to transit. But if the transit country allows him in, it must give him the same protection and rights as he can claim in the host country. That is in any event the rule of the *Convention*. This is also established practice.[5]

[3] *Ibid.*, II, p. 27.
[4] *Ibid.*, I, p. 210.
[5] See, e.g., the Soviet regulations, para. 8, in *United Nations Legislative Series, vol. VII, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities* (1958), pp. 338 and 345.

V. WITH WHOM HAS THE DIPLOMATIC MISSION THE RIGHT TO COMMUNICATE?

1. The first two sentences of art. 27 in the Vienna Convention state:

> 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 cypher.[6]

It is thus quite generally stated at the outset that the mission has the right of free communication "for all official purposes", i.e. with everyone it needs to communicate with in order to carry out its functions properly. But it is further stated that in communications with its own government and with its other "missions and consulates" the mission can use *every suitable means of communication*—except radio.

There are thus two categories of potential correspondents: the unlimited circle with which the mission is entitled to have free and uninhibited communication—and the limited circle with which it is entitled to correspond by *every means*.

2. First let us see who comes into the *second* category.

(*a*) In the first place there is the mission's *own government*. That will probably mean *all authorities* in the home country. This is, of course, the most important thing.

(*b*) Next come the sending state's *consulates in the receiving* state.[7] This is also important—*inter alia* because they are normally subordinate to the diplomatic mission, even though many of them (especially career consulates) correspond direct with the sending state's authorities.[8]

[6] Italics supplied.

[7] *Yearbook of the International Law Commission*, 1958: II, p. 97. When the U.S. Government during World War I restricted free communication for non-allied (neutral) countries' diplomatic representatives, it made an exception for correspondence with the home authorities and with consulates in American possessions (Hackworth, *op. cit.*, vol. 4., p. 630, cf. pp. 629 and 631). However, Chapter 7, § 20, of the Instructions for the Norwegian Foreign Service, adopted by Royal Decree of 11 March 1960, makes the use of couriers by Norwegian consulates contingent upon the consent of the host state.

[8] Cf. *United Nations Conference on Consular Relations, Official Records*, vol. II, p. 23, and Harvard Research, *American Journal of International Law*,

(*c*) Formerly it was only with these two categories that the diplomatic mission had the right to use every means of communication.[9] The correspondence with the *sending state's diplomatic and consular stations in third countries* always passed through the Foreign Ministry at home. Nowadays this has changed. It has become normal, for example, for reports to the Foreign Ministry at home to be simultaneously sent direct to the sending state's diplomatic missions in other countries that the report concerns. For example, a report from the embassy in Washington or Ottawa that concerns a United Nations question is also sent direct to the UN delegation in New York. Other forms of direct correspondence between missions from the same country can also occur.

It was for this reason that the International Law Commission included in the article the phrase "the other missions and consulates of the sending State, wherever situated". It pursued this course even after Switzerland had objected that it was not general international custom to allow the use of all means of direct communication with missions in a third country.[1] In this regard a fear of the smuggling of drugs and other contraband made itself felt. But the Vienna conference of 1963 on *consular* relations solved this problem in another way: it maintained the principle of the consulate's right to use diplomatic bags, but gave the receiving state the right to request that the bag be opened or re-

XXVI (1932) Suppl., p. 84. Japan denied the right of consulates under international law to use diplomatic bag or courier, *Yearbook of the International Law Commission* 1958: II, p.120.

[9] Harvard Research went much further in its Draft Convention on Diplomatic Privileges and Immunities, but without claiming it to be customary law (*American Journal of International Law*, XXVI (1932) pp. 80–1).

[1] *Yearbook of the International Law Commission* 1958: II, p. 130, cf. p. 120; *United Nations Legislative Series, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities* (1958), p. 307. The U.S. Department of State, however, maintained as early as 1862 that the diplomatic missions of one sending state were entitled to correspond by courier, "which communications should be inviolable by the authorities of the countries through which they pass" (Moore, *A Digest of International Law*, vol. 4, Washington 1906, p. 711). But Harvard Research stated in 1932 that "communication between a mission of a sending state in one receiving state with missions of the same state in other receiving states has generally been regarded as a matter of comity only, and probably has no long-established practice for its support", *American Journal of International Law*, XXVI (1932) Suppl., pp. 84–5. During World War I the United States granted such freedom of communication to allied, but not to neutral states (Hackworth, *op. cit.*, pp. 629–31). Soviet law accords freedom of communication also with the sending state's diplomatic representatives in third countries (*United Nations Legislative Series, op. cit.*, pp. 337 and 338).

turned if there was serious reason to believe that it contained something illicit.[2] The Nordic countries—which favour the system of consular stations—opposed this limitation, too.

(*d*) The expression "other missions" in art. 27(1) also includes *special missions* from the sending state. This is the practice, apart from the fact that, as mentioned above, under III, the Rapporteur on special missions for the International Law Commission has pointed out that they cannot always in practice be afforded the right to use *code or cypher* messages.[3] Free communication between the permanent diplomatic mission and special missions is especially important, because the special missions normally do not carry on their confidential correspondence direct with the home authorities, but make use of the permanent diplomatic mission and its facilities for doing so. So the use of couriers between the two of them must at any rate be permissible. And this is undoubtedly the existing practice. But after the provision in the Vienna Convention cited above, it is clear that *every means,* including cypher, can be used. Besides, art. 28(1) of the Convention on Special Missions expressly states that such missions can communicate by every means with their government, with its diplomatic and consular missions, and with its other special missions, no matter where they are.

(*e*) The officials of the diplomatic mission have, of course, the right to speak to *one another* without being overheard through microphones hidden on the premises. This is a consequence of the inviolability of the mission's premises. If the mission's officials are travelling around the country, they have the right to communicate with their colleagues at headquarters by every means, including cypher.[4] It is now expressly stated in art. 28(1) in the Convention on Special Missions that they also have the right to communicate by every means "with sections of the same mission, wherever situated".

(*f*) According to the *customary law* now in force the diplomatic mission thus has the right to use every suitable means of communication in its connections with the *home authorities,* and probably also with its own officials in the provinces and with *subordinate consulates.* In accordance with the new *treaty* law they also have the right to use every appropriate means of communication in relation to *special missions* and the *sending state's diplo-*

[2] Art. 35(3) of the consular convention.
[3] *Yearbook of the International Law Commission* 1964: II, p. 109.
[4] Hackworth, *op. cit.,* vol. 4, p. 616.

matic missions and consulates in third countries, i.e. in fact with all their own country's authorities.

3. But the official correspondence of diplomatic missions is not limited to the above-mentioned parties. They also have—in accordance with the Vienna Convention and to a great extent in accordance with customary law[5]—the right to conduct free and uninhibited correspondence with other important categories, the only reservation being that in this instance they cannot make use of every means, even under the new conventions.

(*g*) The diplomatic missions have the right to correspond—in writing, verbally or over the telephone—with the *receiving state's Foreign Ministry.*[6] It is precisely this that is the diplomatic mission's main task—to represent its country before the authorities of the receiving state. But in this regard no question of the preservation of secrecy arises.

A diplomatic mission can also carry out consular functions, and then it has the right to correspond with the *receiving state's local authorities.* This is now expressly stated in art. 70(3) of the consular convention of 1963. In consular matters it *must* communicate with the local authorities, unless legal provisions or the practice in the receiving state or an international agreement permits it to communicate with the central authorities.

Otherwise a diplomatic mission cannot communicate with *authorities in the receiving state other than the Foreign Ministry* except with the latter's consent. Art. 41(2) of the Vienna Convention states that the diplomatic mission can communicate with "such other ministry as may be agreed". But it is clear that the parties can agree that the mission shall also have access to communication with authorities other than government departments—whether central or local. The Committee of the Whole at the Vienna conference adopted a wider formulation, which covered this. But the drafting committee put it into a clumsy form, which the conference in plenary session reduced[7] to the meaningless and confusing addition that now subsists.

[5] Hyde, *International Law,* vol. 2, Boston 1947, p. 1255, mentions only a right of free communication with the home government and its officials in the host country. See also Harvard Research, *American Journal of International Law,* XXVI (1932) Suppl., pp. 81 and 84–5.

[6] See Hans Blix, "The Rights of Diplomatic Missions and Consulates to Communicate with Authorities of the Host Country" in 8 *Sc.St.L.* (1964), pp. 9–43; in Swedish in Blix, *Statsmyndigheternas internationella förbindelser,* Stockholm 1964.

[7] The discussion in the Committee of the Whole is reported in *Official Records,* vol. I, pp. 210–11. The proposal of the drafting committee and the decision of the plenary meeting are reported there at p. 38, but more clearly by Blix in 8 *Sc.St.L.,* pp. 26–7 (1964).

(*h*) The diplomatic mission also has the right to free and uninhibited communication with *its nationals*—in the receiving state and elsewhere.[8] This, too, is important, for it is, of course, one of the tasks of diplomats and consuls to protect their countrymen's interests in the receiving state. The Vienna Convention of 1963 on *Consular* Relations contains in art. 36 an express provision relating to the right of consulates to communicate with their fellow citizens. But this cannot be interpreted antithetically, as precluding *diplomatic* missions from enjoying the same right. For them the matter is covered by the first sentence of art. 27 of the Vienna Convention of 1961 on Diplomatic Relations. In his original draft Sandström had also listed the sending state's citizens among those with whom the diplomatic mission could communicate by *every means.* But this went too far and was struck out by the Commission.

(*i*) Further, the mission has the right to communicate with authorities of *third countries,* especially with their *diplomatic missions* in the receiving state.[9] This is also important, for there is a lively exchange of information between the diplomatic missions of the different countries to the same capital. Much that is contained in the reports home is based on information that colleagues from other countries have received. This is especially the case in countries in which the diplomatic representatives for political or linguistic reasons have little contact with the local population.

(*j*) The missions also have a right to free and uninhibited communication with *international organizations.* This is especially practical when the organization has its headquarters in the receiving state's territory. The sending state will then often make use of its diplomatic mission on the spot as a permanent link—a permanent delegation—to the organization. Only in certain cases (including UN, OAS, NATO, OECD, and certain European organizations) is it considered necessary, to establish *special* permanent delegations.

These three categories—fellow citizens, other countries' diplomatic and consular missions, and international organizations—are not mentioned in the Vienna Convention. But they are mentioned in the *commentary* of the International Law Commission as examples of what is covered by the general provision in art. 27. first sentence.[1]

[8] Cf. Harvard Research, *American Journal of International Law*, XXVI (1932) Suppl., p. 85.

[9] Cf. Harvard Research, *loc. cit.*, p. 84.

[1] On the other hand, the delegation is usually entitled to correspond *by any means* with its own government, see above under V 2 (d).

(*k*) But there are also some categories that are not mentioned at all. This is especially true of *private persons* who are not citizens of the sending state, but of the receiving state or of a third country, and firms and associations in these countries. In this regard there is little conclusive material to build on. In principle the right to free and uninhibited communication must subsist—at any rate in accordance with art. 27 of the Vienna Convention—if the communication is "for official purposes". But what does this cover?

Art. 27(2) defines the corresponding expression "official correspondence" as "all correspondence relating to the mission and its functions". A diplomatic mission's "functions" are defined in art. 3 of the Vienna Convention, which reads as follows:

> 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.[2]

This provision follows the Commission's draft, which claims to "reproduce the actual practice of states as it has existed for a very long time".[3] In the commentary to the article[4] there is frequent mention of the receiving state's government, but never of its citizens. Nevertheless, no limitation in this direction has been expressed. If one regards the individual tasks that are taken into account, there are at any rate some that cannot be carried out completely or in a satisfactory manner without contact with private citizens also. This especially concerns point (*d*): "Ascertaining by all lawful means conditions and developments in the receiving State . . .". The legislative history does not enable one to decide

[2] Italics supplied.
[3] *Yearbook of the International Law Commission,* 1957: II, p. 133.
[4] *Ibid.,* 1958: II, p. 97.

definitely whether the word "lawful" refers to the receiving state's municipal law in the sense that it has an unlimited right to decide what is "lawful means".

The receiving state must have a right to establish reasonably based (*saklige*) limitations in certain respects—*limited limitations*. It must, e.g., be entitled to forbid certain categories of its citizens from intercourse with foreigners—or especially with diplomats—in order to guard against spying, for example. Here one can think of military or civil officials who are working on secret matters. But a general prohibition against intercourse with foreigners or diplomats would probably be in conflict with the Convention, and perhaps also with general international law. It is true that receiving states sometimes seek to hinder their citizens from having any connection with foreigners in general and especially with foreign diplomats. But as far as is known, *legal provisions* are not then used, but rather other means which are not so easy to prove or to protest against.

The Government of the Chinese People's Republic, however, has clearly gone too far in declaring certain sources of information unlawful for diplomats accredited to Peking. In June 1967 two Indian diplomats were found guilty of collecting political and military information in an unlawful manner. One was declared to be *persona non grata,* while the other was deprived of his diplomatic immunity and sentenced to deportation by a people's court in the presence of 15,000 people. The actual charge related to taking photographs in a prohibited military area. But in connection with the affair the Chinese Foreign Ministry declared, *inter alia:*

> Out of their needs to oppose China, these foreign reactionaries are snooping around with ulterior motives, surreptitiously photographing, copying and stealing big-character posters; resorting to all kinds of sinister methods to collect large numbers of such materials as papers, journals, pamphlets and leaflets put out by the various Chinese revolutionary mass organizations; probing for inside information from our masses by posing as personnel from friendly countries; . . .[5]

(*l*) Without going into the many doubtful questions arising in other relations in connection with the limitation of "official purposes", "official correspondence", and "official use", it must be mentioned that in practice officials are also permitted to send

[5] Official statement by the Chinese Foreign Office on 14 June 1967.

and receive *private letters and small packages in the diplomatic bag*,[6] despite the fact that art. 27(4) states that the bag "may contain only diplomatic documents or articles intended for official use".[7] It is doubtful whether one can interpret these expressions more narrowly than the expression "official correspondence" has been interpreted in the past. In this connection it can be mentioned that during the First World War the American State Department instructed its diplomatic and consular missions in these terms:

> The immunity of sealed official pouches exchanged between the Department and American diplomatic missions and between American diplomatic missions in the various belligerent countries is recognized by belligerent governments upon the understanding that *only official correspondence* will be transmitted in those pouches. The Department has interpreted this to permit the transmission in the pouches of the sealed personal letters of diplomatic and consular officers to and from their families with the understanding that those letters shall be confined to the personal affairs of the officers and shall not relate to public or political affairs and to subjects concerning the war. All other private correspondence sent in the official pouches to consular officers is required to be unsealed in order that the Department may be able to determine whether it may properly be admitted to the pouches under the agreement with the belligerent governments.
>
> The foregoing does not apply to letters for private individuals (other than those specified), and firms, and the Department expects diplomatic and consular officers to exert every possible effort to exclude from the pouches all letters of this character . . .

The Department later declared that this might be interpreted to mean that "private business letters of members of an embassy

[6] The U.S. Department of State has expressly permitted this in instructions issued to its diplomatic missions, see Hackworth, *op. cit.*, vol. 4, pp. 625–6.

[7] The Norwegian *Stortingsproposisjon nr. 49* (1964–65), p. 19, interprets this to preclude "private letters or objects to or from the persons attached to the mission". In the corresponding provision in the Convention on Consular Relations (art. 35(4)) the term "exclusively" was added before "official use" on the proposal of South Africa (*United Nations Conference on Consular Relations, Official Records*, vol. I, p. 325). Art. 23 in the Colombian Decree No. 615 of 6 April 1935 to Define the Privileges and Immunities of Foreign Diplomatic Agents is also rather categoric: the diplomatic pouch must carry only official documents or publications and "no additions may be accepted to the diplomatic pouches which reach Colombia" (*United Nations Legislative Series, op. cit.*, p. 67). On the other hand, it follows from art. 30 of the Convention on Diplomatic Relations that even the private papers of the diplomatic agent are inviolable.

staff, relating to their personal affairs" could also be sent by diplomatic pouch.[8] The American Government likewise excepted foreign diplomatic representatives' personal correspondence from its own wartime censorship, even when it was not sent by diplomatic pouch. However, it apparently limited this to *allied* countries' representatives after the United States itself became a belligerent.[9] It has been regarded as more objectionable if the diplomatic pouch were regularly to be used to transmit correspondence of external private persons and of firms.[1] In wartime this has been expressly forbidden.[2]

VI. WHAT MEANS OF COMMUNICATION HAS THE DIPLOMATIC MISSION THE RIGHT TO USE?

The question in the heading has already been answered in principle under V. There are two categories:

1. First, communications with its *own authorities* at home and abroad. With these the mission has, according to the Vienna Convention, the right to use *every* means, with one important exception, radio, which will be discussed below. Otherwise it depends upon the state of technical development at any particular period what particular means can come into question. The traditional means is *couriers* who travel with sealed bags. Such a bag is called "diplomatic pouch" or "diplomatic bag". Later the *normal postal service* and *telegraph* became available. This resulted in the development of *code* and *cypher* in order to maintain secrecy. The most modern means of communication available are *telephone* and *radio.*

2. The Convention does not give any indication as to which of these means can also be used in respect of *persons other than the sending state's own authorities.* But in the light of practice one must assume that it is the normal public means of communication

[8] Hackworth, *op. cit.*, vol. 4, pp. 626 and 628, see also p. 629. Italics supplied.

[9] Hackworth, *op. cit.*, vol. 4, p. 630. During the Spanish Civil War the Spanish Ministry for Foreign Affairs stated in a note to the American Embassy that it had requested the Ministry of Communications "to take all necessary measures in order that official, as well as personal, correspondence of diplomatic representatives accredited in Madrid be completely exempt from all censorship" (Hyde, *op. cit.*, pp. 1258–9).

[1] See the quotation in the text above and Hackworth, *op. cit.*, p. 619.

[2] Hackworth, *op. cit.*, vol. 4, pp. 624–30.

that can be used in this instance: post, telegraph, and telephone. The means that are reserved for communications with one's own authorities are in the first place the diplomatic pouch and perhaps cypher,[3] in other words the means that are specially mentioned in art. 27 as permitted for communications with one's own authorities.

3. There is, however, one means that cannot be used in communications with the sending state's authorities without the receiving state's consent, namely radio transmitters. This is expressly stated in art. 27(1). After stating that the mission can use every appropriate means of communication with its own authorities, it continues:

> However, the mission may install and use a wireless transmitter only with the consent of the receiving State.

This clause was added at the Vienna conference at the request of the smaller nations, by 41 votes against 20 and 9 abstentions. It availed nothing that all the great powers and the Communist countries collectively and energetically opposed it. Reference can here be made to Kerley's detailed report from the conference.[4]

This question has thus now been clarified between the states that have adhered to the Convention. But what is the position of those who have not done so? One must here refer again to the International Law Commission. There the question was controversial, but a compromise was agreed upon. It was that wireless was simply mentioned in the *commentary* to the article—in the following manner:

> If a mission wishes to make use of its own wireless transmitter it must, in accordance with the international conventions on telecommunications, apply to the receiving State for special permission. Provided that the regulations applicable to all users of such communications are observed, such permission must not be refused.[5]

[3] This restriction applies at any rate in time of war; see the correspondence from World War I between the U.S. Department of State and the American diplomatic missions to Great Britain and China, cited by Hyde, *International Law*, vol. 2, Boston 1947, p. 1256.

[4] *American Journal of International Law*, LVI (1962) pp. 111–16. Cahier adds: "Il nous paraît toutefois que si le refus a lieu il doit s'appliquer, en vertu du principe de non-discrimination, à toutes les missions diplomatiques accréditées dans le pays" (*Le droit diplomatique contemporain*, Geneva 1962, p. 213). See also Colliard in *Annuaire français de droit international*, VII (1961) pp. 23–4.

[5] *Yearbook of the International Law Commission* 1958: II, p. 97.

This was a logical interpretation of the provision as it then stood. The only limitation of the right to use wireless that was recognized was such as resulted from *other* conventions and was based on simply technical conditions. This was in fact a victory for those members of the International Law Commission who supported the right to use wireless transmitters. But even they did not assert that this was recognized by the international law then in force.[6] One must therefore assume that the rule which the Vienna conference adopted also reflects general international law. This is certainly correct so far as special missions are concerned.[7] But it is probably true also of permanent diplomatic missions. Professor Castberg took this view in 1945.[8] Thus, even in relation to states that have *not* adhered to the Convention the exception from free communication applies that wireless transmitters cannot be installed in a mission without the receiving state's consent, and that the receiving state has a *discretionary* right to refuse such consent.

4. One can ask whether this means that a mission does not have an unconditional right to make use of *other new means of communication* that may be developed in the future. The answer must be that in accordance with the *provision* as it now reads it has the right to make use of the new method if it is "appropriate". Under general international law the answer is more doubtful. What has occurred in the case of wireless can, of course, repeat itself if the new means of communication interferes with the interests of the sending state or lends itself to misuse for other purposes.

5. In the present study the special rules that apply to each individual means of communication will not be dealt with. It may merely be noted that most of the communications still go by mail—even though telex plays an increasing part—and that most of the confidential correspondence is sent by diplomatic bag.

Couriers and the diplomatic bag are thus the means that still receive particular attention in legal writing,[9] and they are also the only means that are subject to detailed regulation in art. 27 of the Vienna Convention. Of the article's seven paragraphs the last five are exclusively concerned with couriers and diplomatic

[6] Kerley, *American Journal of International Law* 1962, p. 111. In this sense also Hackworth, vol. 4, p. 617.

[7] *Yearbook of the International Law Commission* 1964: II, p. 110.

[8] Opinion of 26 November 1945 (*Utredninger*, 1942–51, p. 77).

[9] See notably Cahier and Reynaud, *loc. cit.*, p. 198 at note 4.

bags. In accordance with these provisions sealed bags can be sent —and are in fact sent—in four different ways:

(i) With professional couriers. This is the usual method employed by the great powers.

(ii) With *ad hoc* couriers. These may be officials or private persons.

(iii) With a ship's or aircraft's captain, even though only the latter is expressly mentioned in the diplomatic convention of 1961.[1] The consular convention of 1963, art. 35(7), and the Convention on Special Missions of 1969, art. 28(7), expressly mention ship's captains also.

(iv) By ordinary mail, unaccompanied.[2]

Otherwise it follows from the provisions that a diplomatic bag cannot be opened or delayed, and that a professional courier cannot be arrested. Nor can an *ad hoc* courier be arrested before he has delivered the courier post to the address in question; ship's and aircraft's captains can, however, be arrested.[3]

VII. WHAT DUTIES DO THE RECEIVING STATE AND THE TRANSIT COUNTRY HAVE AS REGARDS PROTECTING COMMUNICATIONS AND RESPECTING THEIR SECRECY?

1. The duty of the receiving state and the transit state to respect secrecy is in principle absolute. The relevant provisions in art. 27 of the Vienna Convention read:

> 1. The receiving State shall *permit and protect free* communication on the part of the mission for all official purposes . . . .
>
> 2. The official correspondence of the mission shall be *inviolable* . . . .
>
> 3. The diplomatic bag shall not be *opened* or *detained*.[4]

[1] The Norwegian *Stortingsproposisjon nr. 49* (1964–65), p. 19.

[2] *Satow's Guide to Diplomatic Practice*, 4th ed. London 1964, p. 181. American states have concluded a number of bilateral agreements on this, see *American Journal of International Law*, XXVI (1963) Suppl., pp. 82–3.

[3] On the reason see the Norwegian *Stortingsproposisjon nr. 49* (1964–65), p. 19, cf. *Wien-konferansen i 1963, Rapport fra den norske delegasjon* (mimeographed, Ministry for Foreign Affairs, Oslo 1964), p. 140.

[4] Italics supplied.

Both under these provisions and under customary law the receiving state and the transit state (cf. art. 40, 3–4) have the following duties:

(*a*) It must accept and transmit the messages that the sending state and the diplomatic mission deliver for transmission by the public means of communication: post, telegraph, telephone.[5]

(*b*) The receiving state's authorities must not prevent, delay,[6] or interfere with the communications, either those just mentioned or those which the sending state and the diplomatic mission themselves dispatch by courier or wireless transmitter. But as regards wireless transmission from the diplomatic mission, this only applies if the receiving state has permitted such transmission.

(*c*) The receiving state must take all reasonable precautions to ensure that private persons do not prevent, delay, or interfere with these communications. If it does not succeed in doing so, it must take steps to punish the persons concerned.

(*d*) The receiving state must not attempt to become acquainted with the contents of the communications—and it must take all reasonable precautions to prevent others from doing so. Thus the receiving state does not have the right to censor ordinary mail, or to open the diplomatic bag, or to listen in to telephones or private conversations, or to copy or decipher telegrams. If it employs these practices in respect of its own citizens, it must make an exception for diplomatic communications. In principle this also applies in wartime,[7] cf. below.

As regards the Vienna Convention this conclusion follows from art. 27(1) and (2), which provide, respectively, that communication shall be "free" and that correspondence shall be "inviolable". But these principles must also be general international law, which applies in relation to states which have not ratified the conventions.

2. It is true that both censorship of mail and listening in to conversations occur in *practice,* as regards both outgoing telephone conversations and personal conversations between the officials themselves on the mission premises. But the receiving state will never admit that censorship and listening in have taken

[5] On practice, see Hackworth, *op. cit.*, vol. 4, p. 615.

[6] Cf. Kiss, *Répertoire de la pratique française en matière de droit international public,* vol. 3, pp. 358–9.

[7] Hackworth, *op. cit.*, vol. 4, p. 618. See also the American regulations during World War I as quoted by Hyde, *International Law,* vol. 2, Boston 1947, pp. 1257–8, and the violations reported by Genet, *Traité de diplomatie et de droit diplomatique,* vol. 1, Paris 1931, pp. 509–10.

place. And this must be regarded as proof that the state in question also considers these practices to be in conflict with international law. It is thus not done *opinione juris.*

From the limited material that is publicly available it does not appear that those who have been subjected to censorship or tapping of telephone conversations have protested. But the difficulty is that censorship and listening in cannot as a rule be proved. When microphones have been found in embassies, protests have, of course, been made, but the receiving state has never, so far as one knows, admitted that it has installed them. And modern microphones are unwired and are so small that it is difficult to discover them at all. But even if they are used, it must be maintained that their use is contrary to international law. No one appears to assert that they are lawful or to behave as if they were. On the contrary, Professor Bartos from Yugoslavia, the Special Rapporteur on special missions for the International Law Commission, expressly stated in his report that from a legal point of view he regarded listening-in devices as a breach of the inviolability of the special mission's premises.[8] One must accord more weight to the legal opinion than to a practice that is not performed *opinione juris.* To draw a parallel from municipal law: speed limits for motor vehicles are often transgressed, perhaps by most drivers. Nevertheless, no one, not even the transgressor himself, regards it as lawful to do so.

3. Another question is whether the receiving state can break the rules when there exists a reasonable suspicion of their abuse. This has not infrequently occurred in practice as far as diplomatic bags are concerned. Thus in 1917 the police in Oslo arrested the German courier, Baron von Rautenfels, and opened his diplomatic bag with the consent of the Norwegian Minister of Justice, but against the protest of the German Legation. The Norwegian authorities had invited the Legation to be present at the opening, but it did not appear. As expected, the diplomatic bag turned out to contain bombs intended for ships leaving Norwegian ports.[9] The American Foreign Ministry assumed as early as 1862 that a diplomatic bag could be opened if "its bulk or other circumstances afford reasonable ground for suspicion that the courier has abused his official position for the purpose of smuggling".[1]

[8] *Yearbook of the International Law Commission* 1965: II, p. 108.

[9] Joh. Søhr, *Spioner og bomber,* Oslo 1935, pp. 72–98. See also Reynaud in *Revue de droit international* (Geneva) XXXVI (1958) pp. 426 f.

[1] Moore, *A Digest of International Law,* vol. 4, Washington 1906, p. 711.

Sandström originally proposed to include in the article relating to free communication a provision to the effect that the Foreign Ministry of the receiving state could decide to open a diplomatic bag in the presence of a representative of the mission if there existed very serious reason to believe that it contained illicit objects.[2] But the withdrew this proposal,[3] and the International Law Commission declared in its commentary:

> The Commission has noted that the diplomatic bag has on occasion 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. While recognizing that States have been led to take such measures in exceptional cases where there were serious grounds for suspecting that the diplomatic bag was being used in a manner contrary to paragraph 4 of the article, and with detriment to the interests of the receiving State, the Commission wishes nevertheless to emphasize the overriding importance which it attaches to the observance of the principle of the inviolability of the diplomatic bag.[4]

However, the question was again taken up at the Vienna conference. But there, too, the majority rejected all proposals to allow the receiving state to *open or turn back a diplomatic bag* when there was serious reason to suspect its misuse.[5] Nevertheless, such a right must exist in especially serious cases, on the basis of the principle of necessity (*Notrecht*) in international law[6] not to mention *self-defence*. Even under the Vienna Convention Norway, therefore, would have had the right to open Baron Rautenfels' luggage. In the Vienna Convention of 1963 on *Consular* Relations an express provision in this sense was adopted in art. 35(3), and under this it is presumably possible to go somewhat beyond the principle of necessity. But this provision has *not* been repeated in the Convention on *Special Missions*.

4. It is not clear to what extent the receiving state and the transit country must respect diplomatic freedom of communication if they are at *war*—though not at war with the sending state. Free communication has often been limited in war, but rarely beyond

[2] *Yearbook of the International Law Commission* 1955: II, pp. 11 and 16.
[3] *Ibid.*, 1957: I, p. 74.
[4] *Ibid.*, 1958: II, p. 97.
[5] See the more detailed account by Kerley in *American Journal of International Law*, LVI (1962) pp. 116–18, and Colliard in *Annuaire français de droit international*, VII (1961) pp. 24–5.
[6] In this sense also the Norwegian *Stortingsproposisjon nr. 49* (1964–65). Cahier, *op. cit.*, pp. 214–15 appears more restrictive.

the customary minimum which has been described above.[7] In certain temporary situations, however, the right of free communication has been *suspended.* Thus Britain suspended the right to secret correspondence before the invasion of Normandy in 1944.[8] A French decree of 1952 authorizes the French Foreign Ministry to suspend the right of diplomatic missions to use cypher in wartime, without mentioning any time limit.[9] It will possibly be correct to say that the right of free communication subsists in principle in wartime also, but that it can be suspended in temporary situations as justified by the principle of necessity.[1]

VIII. THE RELATIONSHIP BETWEEN CODIFICATION AND CUSTOMARY LAW

In the foregoing an attempt has been made to distinguish between the law applicable under the Vienna Convention between states which have adhered to it and the customary law in force before it, and which in principle remains in force in relation to states that have *not* adhered to the Vienna Convention. The differences that have been discovered are perhaps not numerous—but they

[7] See practice in Hackworth, *op. cit.,* vol. 4. pp. 624–32; Hyde, *op. cit.,* pp. 1257 f.; Genet, *op. cit.,* p. 511; Parry, *op. cit.,* pp. 935–7 and 946–50.

[8] Verdross, *Völkerrecht,* 5th ed. Vienna 1964, p. 340, and Lyons in *British Yearbook of International Law,* XXXI (1954) p. 337, who also cites an example from the German siege of Paris in 1870. Israel stated to the United Nations in a note of 2 October 1956:

"During the highly critical periods of hostilities of 1948–49 the Government asserted its right to impose censorship on diplomatic correspondence proceeding in and out of the country. This applied to diplomatic mails as well as to radio and telephone communications. In this connexion, it was learnt early in 1949 that some diplomatic and consular missions, which had apparatus for radio transmission on their premises, were permitting journalists and other unauthorized persons to transmit abroad non-official communications. The attention of all diplomatic and consular missions was drawn to the fact that this meant the circumvention of the military censorship, and foreign diplomatic and consular missions maintaining their own transmission stations were requested to exercise meticulous care that such installations should only be used for the despatch of official messages of the mission." (*United Nations Legislative Series, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities,* pp. 180–81.

[9] Kiss, *op. cit.,* p. 359. Cf. the International Telecommunication Convention of 12 November 1965, arts. 32–3.

[1] Lyons in *British Yearbook of International Law,* XXXI (1954) pp. 336–7, appears to go somewhat further in favour of the host state's right to interfere with communications during war.

exist. And they are significant enough for several governments to have found it necessary to state expressly in their written commentaries on the Commission's draft that the article relating to free communication or the Commission's commentaries on it departed in certain respects from the international law in force.[2]

A codification in the narrower sense should not depart from customary law—it should simply record what already *is* customary law. However, it is not possible to confine oneself to this, first, because it is not clear on all points what the customary law is and, secondly, because in the course of the written formulation of the rules one will always touch on questions on which no customary law exists[3] or because one simply wishes to alter the existing rule. There will therefore always be *some* differences between the codification and the law previously in force.

The codification, however, will soon exert an influence on customary law. This will especially be the case if the codification is adopted by the International Law Commission and published—or if it is adopted by a resolution of the General Assembly of the United Nations. If those who are concerned with particular cases in practice in the respective Foreign Ministries know that articles have been worked out by the Commission, they will in the great majority of cases look these up *and follow them*. These articles are in fact simultaneously the most authoritative and the most easily accessible account of the relevant rules of international law. If no international dispute is involved, the officials concerned will rarely spend time looking up other sources in order to check whether the codification is in this particular instance based on customary law. The result is that the states in fact follow the codification, and that what was not previously customary law becomes so.

The position can be different if the articles are adopted in the form of a convention—as has become the usual practice in the United Nations. A convention binds only those who adhere to it. It divides the states into two classes—those that are bound by the convention and those that are not. There is then a risk of a development in the opposite direction—namely that states which do not adhere attempt to use this fact as an excuse for avoiding what really *was* customary law. It was especially for this reason

[2] Switzerland and the U.S.A., *Yearbook of the International Law Commission* 1958: II, pp. 130 and 136.

[3] Sandström in *Yearbook of the International Law Commission* 1955: II, p. 15.

that in 1958 at the first codification conference of the United Nations—on the law of the sea—the Nordic and Anglo-Saxon countries proposed that the second convention (on the high seas) should only be adopted by resolution as a declaration of the law already in force. Other groups, however, wanted a convention. As a compromise it was agreed to adopt a convention which in its preamble expressly stated that its provisions were "generally declaratory of established principles of international law". Thereby practically the same result was achieved. But no similar preamble was included in the Vienna Convention. Nevertheless one cannot exclude the possibility that even those states that have not adhered to this convention follow it on the basis of the consideration that it is essentially a codification of the law in force, and that they also accept into the bargain rules that were not previously customary law. The weight attached to the Convention will also increase in consequence of the great number of states that have ratified it (by 1 January 1970 it had been ratified by 89 states, including the Scandinavian countries).[4] It would require a thorough examination of prevailing practice subsequent to the three major codifications to decide which of these two conflicting tendencies made itself more strongly felt. This could perhaps form an interesting subject for a doctoral thesis with a practical end in view.

[4] The consular convention had been ratified by 38 states, not including the Scandinavian countries.