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Comissão Preparatória das Nações Unidas

Londres, em 31 de outubro de 1945.

N° 25

Recomendações do Comité n° 5
(Côrte Internacional de Justiça e Assuntos Jurídicos)

SECRETARIA DE ESTADO DAS RELAÇÕES EXTERIORES
DIVISÃO DE COMUNICAÇÕES
21 NOV 1945
N° 17368

602.(04)
605.(04)

Senhor Ministro,

Tenho a honra de passar às mãos de Vossa Excelência o relatório do Senhor George A. Maciel relativo às recomendações do Comité n° 5 (Côrte Internacional de Justiça e Assuntos Jurídicos) tal como, ao cabo, as adotou o Comité Executivo.

1/1

2. Conforme Vossa Excelência terá a bondade de verificar as recomendações segunda e quarta, relativas à dissolução da Côrte Permanente de Justiça Internacional e ao registo de tratados, foram objeto dos ofícios verbais nos. 14 e 16 desta Delegação.

3. No que se refere à 1a. recomendação, cabe-me acrescentar que algumas delegações, especialmente a da Austrália, se mostraram contrárias à realização da eleição dos juizes na primeira fase da Assembléia, havendo possibilidade de que a questão seja levantada por ocasião da Comissão Preparatória.

Aproveito a oportunidade para renovar a Vossa Excelência os protestos da minha respeitosa consideração.

Cyro de Freitas-Valle

A Sua Excelência o Senhor P. Leão Velloso,
Ministro de Estado das Relações Exteriores.

T.G.

Com.Prep.N.U./25/1945/Anéxo único

Comissão Preparatória das Nações Unidas

Londres, em 31 de outubro de 1945.

s/n

Recomendações do Comité nº 5
(Côrte de Justiça Internacional
e Questoes Jurídicas)

Senhor Embaixador,

Além dos pareceres às consultas sôbre problemas de ordem jurídica que lhe foram feitas, o Comité nº 5 preparou cinco recomendações, que se encontram anexas, sôbre a Côrte de Justiça Internacional e sôbre outras questões de direito cujo estudo lhe
1/1 havia sido atribuido.

2. Originada de um ante-projeto elaborado por um pequeno sub-comité especialmente designado, a primeira recomendação sofreu poucas modificações no correr dos debates. A solução dada ao problema de como promover a designação dos juizes pelos grupos nacionais da Côrte Permanente de Arbitragem póde ser explicada do seguinte modo: pelo artigo nº 5 do Estatuto da Côrte Internacional de Justiça, o Secretário Geral das Nações Unidas é a autoridade que deveria convidar os grupos nacionais a indicar os nomes dos seus candidatos, três mêses antes das eleições. Na falta do Secretário Geral, a Comissão Preparatória, com poderes

A Sua Excelência o Senhor Embaixador C. de Freitas-Valle,
Representante do Brasil na Comissão Preparatória das Nações Unidas

T.G.

poderes para exercer as funções de sua competência, havia delegado as mesmas ao Comité Executivo. Dessa maneira, o Secretário Executivo poderia tomar as providências necessárias para a expedição dos convites aos grupos nacionais, com a urgência necessária, para que a primeira sessão da Côrte possa realizar-se o mais brevemente possível.

3. Depois de longas discussões e de um trabalho preliminar feito por um sub-comité especial sôbre um ante-projeto da Delegação do Reino-Unido, foi adotado um projeto de recomendação sôbre a maneira por que se deveria dissolver a antiga Côrte Permanente de Justiça Internacional. A solução a ser encontrada deveria levar em conta pelo menos três categorias de Estados: 1) Estados membros da Sociedade das Nações, não membros das Nações Unidas; 2) Estados membros das Nações Unidas, não membros da Sociedade das Nações; e 3) Estados inimigos, signatários do Protocolo da velha Côrte. O projeto submetido ao Comité resolvia cada uma das hipóteses do seguinte modo: 1) a Sociedade das Nações deveria declarar a extinção da Côrte; 2) os Estados membros das Nações Unidas, representados na Comissão Preparatória, como é o caso do Brasil, concordariam, pela adoção mesma do documento, na dissolução da antiga Côrte internacional; e 3) os tratados de paz deveriam conter uma clausula no mesmo sentido. Restava entretanto um país que não podia ser incluido em qualquer dessas categorias: a Espanha. Apresentaram-se três soluções para o problema. A primeira consistia em solicitar o consentimento do Govêrno espanhol, hipótese esta que foi logo afastada, por pouco prática. A segunda solução proposta era considerar a Côrte dissolvida para todos os efeitos, presumindo-se então o acôrdo unânime de todos os seus componentes, a menos que algum Govêrno apresentasse objeções dentro de um prazo determina-

determinado. Mas êsse metodo consistia em adotar uma medida unilateral, que poderia legitimamente deixar de ser reconhecida pela Espanha. A terceira solução era ignorar a Espanha pura e simplesmente. Ainda nesta última hipótese, a Espanha poderia, de direito, considerar o Protocolo de Assinatura em vigor, uma vez que não havia dado o seu assentimento à revogação do mesmo, muito embora todos os outros signatários o houvessem rejeitado. Depois de muita argumentação a tése realista venceu os escrupulos jurídicos de alguns representantes no Comité, sendo aceita a terceira solução. Considerava-se assim que os fatos políticos e sociais da guerra e a Conferência de San Francisco, de repercussão mundial, haviam por si só destruido a velha Côrte, substituindo-a por outra, nova. Tratava-se agora do simples reconhecimento "de jure" de uma situação "de facto", que se impunha a todos os países, independentemente de qualquer formalidade.

4. A recomendação nº 3, que teve por base uma agenda apresentada pelo Secretário, relativa às medidas a serem tomadas para a convocação da nova Côrte, tem um carater essencialmente prático e o seu preparo foi relativamente fácil.

5. Após demorados debates, desde a necessidade de ser estudado o assunto pelo Comité, até os seus efeitos jurídicos, foi aprovado o texto da recomendação concernente ao registo e publicação dos tratados e acôrdos internacionais, cujo ante-projeto havia sido elaborado por um pequeno sub-comité. Tomando em consideração os problemas técnicos que só poderiam ser resolvidos pela propria Organização, resolveu o Comité indicar apenas alguns pontos essenciais para exame da Assembléia e pedir ao Secretário Executivo que informasse os membros das Nações Unidas que os tratados firmados após a entrada em vigor da Carta se-

seriam recebidos e registados em caráter provisório. Os efeitos jurídicos dêsse registo provisório seriam nulos no momento, mas poderiam ser considerados retroativos, depois de estabelecidas as regras definitivas. O fim visado na publicação dos tratados, nêsse periodo de medidas provisórias, é evitar que se forme uma lacuna entre o fim da série da Sociedade das Nações e o início da série das Nações Unidas.

6. Finalmente, a recomendação referente a privilégios e imunidades, baseada numa proposta da Delegação do Reino Unido, sofreu algumas modificações, durante as discussões a que foi submetida. Do relatório que acompanha essa recomendação, constam entre outros os seguintes pontos de grande interesse: situação das agências especializadas e a coordenação dos seus privilégios e imunidades com os das Nações Unidas; adotando-se o critério restritivo de que só deveriam ser exigidos em casos de necessidade absoluta, para a realização das finalidades dos órgãos das Nações Unidas; a criação de um passaporte internacional, o que é uma ideia inteiramente nova; a situação dos funcionários e agentes em países de que são nacionais ou "ressortissants".

7. Deve o Comité grande parte de suas realizações ao representante do Reino-Unido (Mr. Beckett) e ao seu segundo presidente, tambem da Delegação britânica, mas naturalmente sem voto, Mr. McKinnon Wood, que substituiu o Professor Krylov, da Delegação soviética. Para um Comité encarregado de examinar pormenores técnicos de questões jurídicas, era demasiado grande o número de quatorze membros. O resultado era que a discussão iniciada sôbre um ponto determinado variava sôbre outros assuntos ou fugia do problema essencial para questões secundárias, chegando-se muitas vezes a uma certa desorientação.

desorientação. A morosidade e perda de tempo que isso acarretava eram agravadas pela obrigatoriedade das traduções. O fato é que para escapar à nebulosidade do Comité pleno adotou-se invariavelmente o processo de constituir-se um pequeno sub-comité de quatro ou cinco membros, quando era necessário obter-se algum resultado preciso e rápido. Frequentemente o próprio Comité resolvia dispensar o trabalho dos interpretes, restringindo as traduções apenas às ocasiões em que se faziam absolutamente imprescindíveis.

Tenho a honra de renovar a Vossa Excelência os protestos da minha respeitosa consideração.

Jorge Macedo

COM. PREP. N.U. /S/N/1945/ANEXO ÚNICO

CHAPTER V.

Section I: Recommendation Concerning the Nomination of Candidates for the Election of Members of the International Court of Justice.

THE EXECUTIVE COMMITTEE

CONSIDERING that it is essential that the election of the Judges of the International Court of Justice should take place at the first sessions of the General Assembly and the Security Council of the United Nations; but that the Secretary-General of the United Nations whose function it is, under Article 5 of the Statute of the Court, to issue the invitation for the nomination of candidates will himself not be appointed until the first session of the General Assembly;

TAKING INTO ACCOUNT the fact that the Governments which signed the Charter of the United Nations, which includes the Statute of the Court, having in mind the above considerations, provided by Article 4 (e) of the Interim Arrangements establishing the Preparatory Commission signed at San Francisco on the 26 June, 1945, that the Preparatory Commission was to issue the invitations in accordance with the provisions of the Statute of the Court; and,

CONSIDERING that the said provisions require the invitations to be issued at least three months before the date of the election of the Judges, and that it is therefore necessary that they should be issued as soon as possible;

RECOMMENDS

That the Preparatory Commission approve the action of the Executive Committee, in directing the Executive Secretary to issue the invitations and to take all necessary action thereafter required under Article 7 of the Statute.

CHAPTER V.

Section 2: Proposed Declaration Concerning the Dissolution of the Permanent Court of International Justice.

THE EXECUTIVE COMMITTEE

SUBMITS for the approval of the Preparatory Commission, the following draft resolution :

"The Preparatory Commission of the United Nations:

HAVING BEEN INFORMED by certain of its members, which are also Members of the League of Nations, that it is their intention to move at the forthcoming session of the Assembly of the League of Nations a resolution for the purpose of effecting the dissolution of the Permanent Court of International Justice, the text of which has been communicated for information to the members of the Preparatory Commission;

HAVING BEEN INFORMED of the intention of the Powers concerned to require, under the terms of the peace treaties made with them or in some other appropriate form, the assent of those States parties to the Protocol of Signature of the Permanent Court's Statute, which have been or still are at war with certain of the Members of the United Nations, to any measures taken to bring the Permanent Court to an end; and,

RECORDING by the present resolution the assent to the dissolution of the Court of those Members of the Preparatory Commission which are parties to the Protocol of Signature, whether Members of the League of Nations or not;

DECLARES

That it would welcome the taking by the League of Nations of appropriate steps for the purpose of dissolving the Permanent Court.

Resolution to be moved in the Assembly of the League of Nations.

"The Assembly of the League of Nations,

CONSIDERING that by Article 92 of the Charter of the United Nations provision is made for an International Court of Justice which shall be the principal judicial organ of the United Nations and shall be open to states not members of the United Nations on terms to be determined by the United Nations;

CONSIDERING that the establishment of this Court and the impending dissolution of the League of Nations render it desirable that measures for the formal dissolution of the Permanent Court of International Justice be taken in as simple and expeditious a manner as is possible;

[CONSIDERING that by a resolution of ..... the Preparatory Commission of the United Nations has declared that it would welcome the taking of appropriate steps by the League of Nations for the purpose of dissolving the Permanent Court, and that the above mentioned resolution of the Preparatory Commission is stated to record the assent to the

dissolution of the Permanent Court of all the Members of the United Nations which are parties to the Protocol of Signature of the Permanent Court's Statute, whether Members of the League of Nations or not;/+ and,

CONSIDERING further that the Assembly has been informed that, under the terms of the peace treaties to be made with them or in some other appropriate form, those States parties to the Protocol of Signature but not Members of the League, which have been or still are at war with certain of the Members of the United Nations, have been or will be required to assent to any measures taken to bring the Permanent Court to an end;

RESOLVES

That the Permanent Court of International Justice shall be deemed to be dissolved and shall cease to exist on ....., without prejudice to such subsequent measures as may be necessary for the complete liquidation of its affairs."

+ This paragraph has been bracketed since it presupposes the adoption by the Preparatory Commission of the United Nations of the Resolution concerning the Dissolution of the Permanent Court.

CHAPTER V.

Section 3: Recommendation Concerning the Steps to be Taken for the Convening of the First Session of the International Court of Justice.

THE EXECUTIVE COMMITTEE

CONSIDERING it desirable that the International Court of Justice should be established as soon as possible after the election of its judges by the General Assembly and the Security Council;

CONSIDERING that the use of premises at The Hague, the seat of the International Court of Justice in accordance with Article 22 of the Statute, should be secured for the Court as soon as possible; and,

CONSIDERING that the judges should be accorded emoluments such as to guarantee their absolute independence and also to render the office of judge acceptable to the most eminent of the persons qualified, in accordance with Article 2 of the Statute, to hold that office;

RECOMMENDS

1. That the Preparatory Commission should invite the Executive Secretary (or the Secretary-General if he has been appointed at the time when the action in question is required):

   (a) to take the necessary steps to convene a first meeting of the Court at The Hague as soon as can be conveniently arranged after the election of the judges;

   (b) to appoint a secretary and such other temporary staff as may be required to assist the Court and to act for so long as the Court desires during the period preceding the appointment by the Court of its Registrar and his staff; and,

   (c) to make any arrangements necessary to ensure that premises are available for the first session of the Court.

2. That the Preparatory Commission should call the attention of the General Assembly to the necessity for fixing the emoluments of the judges early in the first session and to the desirability of ensuring that their real value shall be not less than that of those of the judges of the Permanent Court of International Justice during the period 1936 - 1939.

CHAPTER V.

Section 4: Recommendation Concerning the Registration and Publication of Treaties and International Agreements.

I

THE EXECUTIVE COMMITTEE

CONSIDERING that the preparation of recommendations for procedures which might be followed on the registration and publication of Treaties and international agreements requires the working out of technical details; that this work can be done most satisfactorily by the Secretary-General when he is appointed; that this work need not be performed by the Preparatory Commission;

CONSIDERING, however, that it is the duty of the Preparatory Commission to point out the following problems, which in their opinion will have to be dealt with by the General Assembly of the United Nations:

(i) the provision of facilities for the registration of Treaties and international agreements as from the date of the entry into force of the Charter;

(ii) the taking of all necessary measures to avoid any gap in the publication of these instruments between the termination of the League of Nations Treaty Series and the beginning of the Treaty Series of the United Nations;

(iii) the taking of steps to secure the voluntary registration with the United Nations of treaties by non-members:

CONSIDERING that other problems such as (1) the exact interpretation of the words "treaty and international agreement" in Article 102 of the Charter, (2) the detailed regulations for registration, and (3) the languages in which the Treaty Series of the United Nations should be published, can be left for subsequent study by the General Assembly after the Secretary-General has been able to report upon them;

DIRECTS

The Executive Secretary to send a circular letter to the Members informing them that, as from the date of the entry into force of the Charter of the United Nations, Treaties and international agreements which the Members send in will be received and filed on a provisional basis until the adoption of the detailed regulations referred to in paragraph 1(a) above.

II

THE EXECUTIVE COMMITTEE

RECOMMENDS

That the Preparatory Commission should invite the General Assembly to consider :

(a) inviting non-Members voluntarily to send Treaties and international agreements for registration with and publication by the Secretariat of the United Nations; and

(b) inviting all Governments, whether or not Members of the United Nations, voluntarily to send for publication by the Secretariat of the United Nations, Treaties and international agreements, concluded in recent years but before the date of the entry into force of the Charter, which have not been included in the Treaty Series of the League of Nations.

CHAPTER V.

Section 5: Recommendation Concerning Privileges and Immunities.

THE EXECUTIVE COMMITTEE

RECOMMENDS

1. that the attached study on privileges and immunities, drawn up by a Committee of the Executive Committee should, if approved by the Preparatory Commission, be referred to the General Assembly for its consideration;

2. that the Preparatory Commission should instruct the Executive Secretary to remind the Members of the United Nations that under Article 105 of the Charter the obligation to accord to the United Nations organisation, its officials and the representatives of the Members of the United Nations all privileges and immunities necessary for the accomplishment of its purposes, operates from the coming into force of the Charter and is therefore applicable even before the General Assembly has made the recommendations referred to in paragraph (3) of the Article, or the conventions there mentioned have been concluded.

Study on Privileges and Immunities.

I. Provisions of the Charter.

1. Chapter XVI of the Charter contains the following provisions:

"Article 104.

The Organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes."

"Article 105.

1. The Organisation shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organisation shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

II. Privileges and Immunities at the seat of the organisation and elsewhere.

2. The question of privileges and immunities for the United Nations is of the greatest importance in connection with the country in which the Organisation has its seat. In the case of the League of Nations, including the International Labour Organisation, the Covenant of the League contains only the following short provision in Article 7 :

> "Representatives of the Members of the League and officials of the League, when engaged on the business of the League, shall enjoy diplomatic privileges and immunities."

As a result, all the detailed arrangements for the privileges and immunities of the League of Nations and the I.L.O. were worked out in agreements concluded between the Secretary-General of the League and the Swiss Government. It would seem desirable that the working out of the detailed privileges and immunities of the United Nations should be deferred until the question of the seat of the Organisation has been decided.

3. However, although the question of privileges and immunities arises in the greatest degree as between the United Nations and the country in which it has its seat, the same question arises as between the Organisation and all its Members. The difference is one of degree rather than one of kind. The United Nations may have offices elsewhere than at its seat. The officials of the Organisation may be travelling on its business in any part of the world. The United Nations may wish to conclude contracts and hold funds or property elsewhere than at its seat. For these and similar reasons, therefore, the Organisation will require, in the territories of all Members, the same kind of privileges and immunities as it has in the country of its seat.

III. Precedents afforded by the Constitutions of specialised agencies.

4. A number of specialised agencies are already in existence. Their constitutions, or the agreements under which they are set up, have for the most part detailed provisions with regard to privileges and immunities based to a large extent on the arrangements made between the League of Nations and the Swiss Government. These specialised agencies include the following : The International Monetary Fund (see Article IX), the International Bank for Reconstruction and Development (see Article VII), United Nations Relief and Rehabilitation Administration (see Resolutions Nos. 32, 34 and 36 of the first session of the Council), Food and Agriculture Organisation (see Articles VIII and XV), European Central Inland Transport Organisation (see Article VIII, paragraphs 13, 14, 15, 16, 17). These provisions are on the same lines in each case, though in some instances they have been worked out in more detail than in others.

IV. Co-ordination of the privileges and immunities of the United Nations with those of specialised agencies.

5. There are many advantages in the unification, as far as possible, of the privileges and immunities enjoyed by the United Nations and the various specialised agencies. On the other hand, it must be recognised that not all specialised agencies require all the privileges and immunities which may be needed by others. No specialised agency would, however, require greater privileges that the United Nations itself. The privileges and immunities, therefore, of the United Nations might be regarded as a maximum within which the various specialised agencies should enjoy just such privileges and immunities as the proper fulfilment of their respective functions may require. It should be a principle that no immunities and privileges, which are not really necessary, should be asked for. An example of a case where a differentiation has been made between immunities, for practical reasons, may be seen by comparing Section 3 of Article IX of the Articles of Agreement of the International Monetary Fund and Section 3 of Article VII of the Articles of Agreement of the International Bank for Reconstruction and Development. There are certain privileges and immunities which probably every specialised agency would require as well as the United Nations itself, such as recognition that it possesses legal capacity to contract and to hold property, and to be a party to legal proceedings, the immunity of its premises and papers, and the granting of travelling facilities to its officials. When the privileges and immunities of the United Nations have been determined in detail, and the specialised agencies are being brought into relationship with the United Nations, reconsideration of the privileges and immunities accorded to such specialised agencies may be desirable if it is found that they enjoy privileges and immunities in excess of those to be given to the United Nations or of what is really required.

V. Creation of an International Passport.

6. In order to facilitate the travelling of officials it may be found desirable to institute an international passport issued by the organisation, describing the holder as its official. The United Nations might issue such passports also to the senior officials of specialised agencies. The creation of this passport would not, of course, impair the sovereign rights of States Members of the United Nations in respect of the granting of visas. It might, however, be hoped that any necessary visas would be granted speedily. Member governments are already required to grant visas speedily under the constitutions of some specialised agencies. It may be desirable to confine the holding of these special passports to superior officials.

VI. Privileges and Immunities.

7. In this report the expression "diplomatic privileges and immunities" is used for convenience to describe the whole complex of privileges and immunities which are in fact accorded to diplomatic envoys. While it will clearly be necessary that all officials, whatever their rank, should be granted immunity from legal process in respect of acts done in the course of

their official duties, whether in the country of which they are nationals or elsewhere, it is by no means necessary that all officials should have diplomatic immunity. On the contrary, there is every reason for confining full diplomatic immunity to the cases where it is really justified. Any excess or abuse of immunity and privilege is as detrimental to the interests of the international organisation itself as it is to the countries who are asked to grant such immunities. In the case of existing specialised agencies, the practice has up to now been to confine diplomatic immunity to the senior official of the agency concerned and those of his assistants, whose rank is equivalent to that of Deputy Secretary-General. (In the case of the I.L.O. the range of officials to whom diplomatic immunity has been accorded is somewhat wider). It is also a principle that no official can have, in the country of which he is a national, immunity from being sued in respect of his non-official acts and from criminal prosecution. It is further most desirable that both the United Nations and all specialised agencies should adopt the principle that privileges and immunities are only given to their officials in the interests of the organisation in whose service they are and in no way for the benefit of the individual concerned, and that, in consequence, the Secretary-General both can waive immunity and will in fact do so in every case where such a course is consistent with the interests of the United Nations. This rule has long been in force in the International Labour Office. It has been accepted by most of the new specialised agencies which have come into being. Similarly it is desirable that where the United Nations or a specialised agency concludes contracts with private individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, if it is not prepared to go before the Courts. Most of the existing specialised agencies have already agreed to do this.

VII. Taxation of officials in the country of which they are nationals.

8. The provisions in the agreements or constitutions of the new specialised agencies, while providing in general that no taxation should be levied on the salaries of officials, leave complete latitude to governments to tax the salaries of officials who are their own nationals or persons resident in their territory. As a result, in the Act of Parliament of the United Kingdom which was passed to enable the United Kingdom to give effect to its obligations as regards privileges and immunities for international organisations (the Diplomatic Privileges Extension Act 1944) excepts from the immunity from income tax the salaries of those international officials who are both British subjects and whose usual place of abode is in the United Kingdom. A similar practice has been followed in certain other countries. It is, however, a matter for consideration whether this latitude or this exception are really sound. One of its effects is that some of the members of the staff have salaries, which are tax free because being resident outside their own countries they do not fall under the income tax provisions of their own country, while other officials doing the same work for the same nominal salary are subject to income tax. This has led to certain administrative difficulties and has indeed raised the question whether the United Nations should not pay some special allowance to those of its employees who are paying income tax in order to produce equality.