UNITED NATIONS

REPORT
OF THE
INTERNATIONAL LAW COMMISSION

Covering the work of its thirteenth session
1 May–7 July 1961

GENERAL ASSEMBLY
OFFICIAL RECORDS : SIXTEENTH SESSION
SUPPLEMENT No. 9 (A/4843)

NEW YORK

(87 p.)

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NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the Statute of the Commission annexed thereto, as subsequently amended, held its thirteenth session at Geneva from 1 May to 7 July 1961. The meetings were held at the European Office of the United Nations until 2 June and thereafter at the International Labour Office at the invitation of its Director-General. The work of the Commission during the present session is described in this report. Chapter II of the report contains the draft articles on consular relations, with commentaries. Chapter III deals with a number of administrative and other questions.

I. Membership and attendance

2. The Commission consists of the following members:

Name	*Nationality*
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Nihat Erim	Turkey
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. André Gros	France
Mr. Shuhsi Hsu	China
Mr. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Faris El-Khouri	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. A. E. F. Sandström	Sweden
Mr. Senjin Tsuruoka	Japan
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil Yasseen	Iraq
Mr. Jaroslav Zourek	Czechoslovakia

3. On 2 May 1961, the Commission elected Mr. André Gros (France), Mr. Senjin Tsuruoka (Japan) and Sir Humphrey Waldock (United Kingdom of Great Britain and Northern Ireland) to fill the vacancies caused by the death of Mr. Georges Scelle, the resignation of Mr. Kisaburo Yokota and the election of Sir Gerald Fitzmaurice to the International Court of Justice. Mr. Gros attended the meetings of the Commission from 5 May, Sir Humphrey Waldock from 8 May and Mr. Senjin Tsuruoka from 23 May onwards. Mr. Faris El-Khouri did not attend the meetings of the Commission.

II. Officers

4. At its 580th meeting, held on 1 May 1961, the Commission elected the following officers:

Chairman: Mr. Grigory I. Tunkin;

First Vice-Chairman: Mr. Roberto Ago;

Second Vice-Chairman: Mr. Eduardo Jiménez de Aréchaga;

Rapporteur: Mr. Ahmed Matine-Daftary.

5. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

III. Agenda

6. The Commission adopted an agenda for the thirteenth session consisting of the following items:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Consular intercourse and immunities
3. State responsibility
4. Law of treaties
5. Co-operation with other bodies
6. Planning of future work of the Commission
7. Date and place of the fourteenth session
8. Other business

7. In the course of the session, the Commission held forty-eight meetings. It considered all the items on its agenda except item 3 (State responsibility). The decisions taken on items 4, 5, 6 and 7 are dealt with in chapter III below.

Chapter II

CONSULAR INTERCOURSE AND IMMUNITIES

I. Introduction

8. At its first session, in 1949, the International Law Commission drew up a provisional list of fourteen topics the codification of which it considered necessary or desirable. On this list was the subject of "Consular intercourse and immunities", but the Commission did not include this subject among those to which it accorded priority.[1]

9. At its seventh session, in 1955, the Commission decided to begin the study of this topic and appointed Mr. Jaroslav Zourek as Special Rapporteur.[2]

10. In the autumn of 1955 the Special Rapporteur, wishing to ascertain the views of the members of the Commission on certain points, sent them a questionnaire on the matter.

11. The subject of "Consular intercourse and immunities" was placed on the agenda for the eighth session of the Commission, which devoted two meetings to a brief exchange of views of certain points made in a paper submitted by the Special Rapporteur. The Special Rapporteur was requested to continue his work in the light of the debate.[3]

12. The topic was retained on the agenda for the Commission's ninth session. The Special Rapporteur submitted a report (A/CN.4/108), but in view of its work on other topics, the Commission was unable to examine this report.[4]

13. The Commission began discussion of the report towards the end of its tenth session, in 1958. After an introductory exposé by the Special Rapporteur, followed by an exchange of views on the subject as a whole and also on the first article, the Commission was obliged, for want of time, to defer further consideration of the report until the eleventh session.[5]

14. At the same session, the Commission decided to make the draft on consular intercourse and immunities the first item on the agenda for its eleventh session (1959) with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft on which Governments would be invited to comment. It further decided that if, at the eleventh session, it could complete a first draft on consular intercourse and immunities to be sent to Governments for comments, it would not take up the subject again for the purpose of preparing a final draft in the light of those comments until its thirteenth session (1961), and would proceed with other subjects at its twelfth session (1960).[6]

15. The Commission also decided, because of the similarity of this topic to that of diplomatic intercourse and immunities which had been debated at two previous sessions, to adopt an accelerated procedure for its work on this topic. Lastly, it decided to ask all the members who might wish to propose amendments to the existing draft presented by the Special Rapporteur to come to the session prepared to put in their principal amendments in writing within a week, or at most ten days, of its opening.[7]

16. The Special Rapporteur for this topic, Mr. Jaroslav Zourek, having been prevented by his duties as *ad hoc* judge on the International Court of Justice from attending the meetings of the Commission during the first few weeks of the eleventh session, the Commission was not able to take up the consideration of the draft articles on consular intercourse and immunities until after his arrival in Geneva, starting from the fifth week. At its 496th to 499th, 505th to 511th, 513th, 514th, 516th to 518th and 523rd to 525th meetings, the Commission considered articles 1 to 17 of the draft and three additional articles submitted by the Special Rapporteur. It decided that at its next session, in 1960, it would give top priority to "Consular intercourse and immunities" in order to be able to complete the first draft of this topic and submit it to Governments for comments.[8]

17. At the twelfth session the Special Rapporteur submitted his second report on consular intercourse and immunities (A/CN.4/131), dealing with the personal inviolability of consuls and the most-favoured-nation clause as applied to consular intercourse and immunities, and containing thirteen additional articles. For the convenience of members of the Commission and to simplify their work, he also prepared a document reproducing the text of the articles adopted at the eleventh session, a partially revised version of the articles included in his first report, and the thirteen additional articles (A/CN.4/L.86).

18. At the twelfth session, the Commission devoted to this topic its 528th to 543rd, 545th to 564th, 570th to 576th, 578th and 579th meetings, taking as a basis for discussion the two reports and the sixty draft articles submitted by the Special Rapporteur. In view of the Commission's decisions concerning the extent to which the articles concerning career consuls should be applicable to honorary consuls, it proved necessary to insert more detailed provisions in the chapter dealing with honorary consuls, and consequentially, to add a number of new articles. The Commission provisionally adopted sixty-five articles together with commentaries. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the draft to Govern-

[1] *Official Records of the General Assembly, Fourth Session, Supplement No. 10* (A/925), paras. 16 and 20.
[2] *Ibid., Tenth Session, Supplement No. 9* (A/2934), para. 34.
[3] *Ibid., Eleventh Session, Supplement No. 9* (A/3159), para. 36.
[4] *Ibid., Twelfth Session, Supplement No. 9* (A/3623), para. 20.
[5] *Ibid., Thirteenth Session, Supplement No. 9* (A/3859), para. 56.
[6] *Ibid.*, paras. 57 and 61.
[7] *Ibid.*, para. 64.
[8] *Ibid., Fourteenth Session, Supplement No. 9* (A/4169), paras. 7, 29 and 30.

ments, through the Secretary-General, for their comments.[9]

19. In accordance with the Commission's decision, the draft articles on consular intercourse and immunities were transmitted to the Governments of the Member States by circular letter dated 27 September 1960, which asked them to communicate their comments on the draft by 1 February 1961.

20. During the discussion by the General Assembly of the International Law Commission's report on the work of its twelfth session,[10] of which the draft articles on consular intercourse and immunities form the main part, there was an exchange of views on the draft as a whole and on the form it should take, although, owing to its provisional nature, the draft had been submitted to the Assembly for information only. While reserving the positions of their respective Governments, the representatives in the Sixth Committee of the General Assembly expressed general satisfaction with the draft.

21. Almost all representatives approved the Commission's proposal to prepare a draft which would form the basis of a multilateral convention on the subject.[11]

22. During the Sixth Committee's debate on the Commission's report, several representatives stressed the need to maintain separate provisions on the legal status of honorary consuls and on their privileges and immunities.[12]

23. In some cases, the remarks of representatives in the Sixth Committee also related to particular articles or chapters of the draft. These remarks were summarized in the Special Rapporteur's third report, which analysed the comments of Governments (see paragraph 25 below).

24. By 16 June 1961, the date on which it completed its consideration of the comments of Governments, the Commission had received comments from nineteen Governments. The text of these comments (A/CN.4/136 and Add.1-11) was circulated to the members of the Commission and is reproduced as an annex to the present report.

25. On the whole, the draft articles on consular intercourse and immunities were considered by the Governments which submitted comments as an acceptable basis for the conclusion of an international instrument codifying consular law. The Government of Guatemala said it was prepared to accept the draft as worded by the Commission. The Government of Niger said it had no comments to make, and the Government of Chad stated that it was not in a position to present comments. The other comments received contained a number of proposals and suggestions relating to the various articles of the draft. To facilitate discussion of the comments of Governments, the Special Rapporteur, in his third report on consular intercourse and immunities (A/CN.4/137), analysed and arranged the comments in accordance with the Commission's usual practice, adding the conclusions drawn from them and proposals for amending or supplementing the draft accordingly. The comments transmitted later by Governments were, for the most part, considered by the Commission in connexion with articles still remaining to be dealt with at the time when the comments were received.

26. At its present session, the Commission discussed the text of the provisional draft at its 582nd to 596th, 598th to 614th, 616th to 619th and 622nd to 627th meetings, taking the comments of Governments into account. In producing the final text of the draft, it also took into account and on some points followed, as far as it thought possible, the wording of the Vienna Convention on Diplomatic Relations of 18 April 1961. In addition, it dealt with certain articles left outstanding in its report on the work of its twelfth session (1960), and certain new articles proposed by the Special Rapporteur in the light of the comments of Governments.

II. Recommendation of the Commission to convene an international conference on consular relations

27. At its 624th meeting, the Commission, considering that it should follow the procedure previously adopted by the General Assembly in the case of the Commission's draft concerning diplomatic privileges and immunities, decided, in conformity with article 23, paragraph 1(*d*), of its Statute, to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft on consular relations and conclude one or more conventions on the subject.

III. General considerations

28. Consular intercourse, privileges and immunities are governed partly by municipal law and partly by international law. Very often regulations of municipal law deal with matters governed by international law. Equally, consular conventions sometimes regulate questions which are within the province of municipal law (e.g., the form of the consular commission). In drafting a code on consular intercourse and immunities, it is necessary, as the Special Rapporteur has pointed out,[13] to bear in mind the distinction between those aspects of the status of consuls which are principally regulated by municipal law and those which are regulated by international law.

29. The codification of the international law on consular intercourse and immunities involves another special problem arising from the fact that the subject is regulated partly by customary international law and partly by a great many international conventions which today constitute the principal source of consular law. A draft which codified only the international customary law would perforce remain incomplete and have little practical value. For this reason, the Commission agreed, in accordance with the Special Rapporteur's proposal, to base its draft articles not only on customary international law, but also on the material furnished by international conventions, especially consular conventions.

30. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-

[9] *Ibid., Fifteenth Session, Supplement No. 9* (A/4425), para. 18.

[10] *Ibid., Fifteenth Session, Supplement No. 9* (A/4425).

[11] *Ibid.*, para. 24.

[12] *Official Records of the General Assembly, Fifteenth Session, Annexes*, agenda item 65, document A/4605, para. 12.

[13] *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II), p. 80, para. 80.

favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which, if incorporated in a draft codification, may be expected to obtain the support of many States.

31. If it should not prove possible, on the basis of the two sources mentioned—conventions and customary law—to settle all controversial and obscure points, or if there remain gaps, it will be necessary to have recourse to the practice of States as evidenced by internal regulations concerning the organization of the consular service and the status of foreign consuls, in so far, of course, as these are in conformity with the fundamental principles of international law.

32. It follows from what has been said that the Commission's work on this subject is both codification and progressive development of international law in the sense in which these concepts are defined in article 15 of the Commission's Statute. The draft to be prepared by the Commission is described by the Special Rapporteur in his report in these words:

> "A draft set of articles prepared by that method will therefore entail codification of general customary law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."[14]

33. The choice of the form of the codification of the topic of consular intercourse and immunities is determined by the purpose and nature of the codification. The Commission had this fact in mind when (bearing in mind also its decision on the form of the Draft Articles on Diplomatic Intercourse and Immunities) it approved at its eleventh session, and again at the present session, the Special Rapporteur's proposal that the draft should be prepared on the assumption that it would form the basis of a convention.

34. The draft articles on consular relations consist of four chapters, preceded by article 1 (Definitions).

(*a*) Chapter I deals with *Consular relations in general* and is subdivided into two sections entitled respectively *Establishment and conduct of consular relations* (articles 2 to 24) and *End of consular functions* (articles 25 to 27).

(*b*) Chapter II, entitled *Facilities, privileges, and immunities of career consular officials and consular employees* contains the articles dealing with the facilities, privileges and immunities accorded to the sending State both in regard to its consulates and in regard to consular officials and employees. This chapter is subdivided into two sections, the first containing articles dealing with *Facilities, privileges and immunities relating to a consulate* (articles 28 to 39) and the second with *Facilities, privileges and immunities regarding consular officials and employees* (articles 40 to 56).

(*c*) Chapter III contains the provisions governing the facilities, privileges and immunities accorded to the sending State in respect of *honorary consular officials;* for the purposes of facilities, privileges and immunities, *career consular officials who carry on a private gainful occupation* (article 56) are placed on a footing of equality with honorary consular officials.

(*d*) Chapter IV contains the *General provisions.*

35. The chapters, sections and articles are headed by titles indicating the subjects to which their provisions refer. The Commission regards the chapter and section titles as helpful for an understanding of the structure of this draft. It believes that the titles of articles are of value in finding one's way about the draft and in tracing quickly any provision to which one may wish to refer. The Commission hopes, therefore, that these titles will be retained in any convention which may be concluded in the future, even if only in the form of marginal headings, such as have been inserted in some earlier conventions.

36. The Commission having decided that the draft articles on consular relations should form the basis for the conclusion of a multilateral convention, the Special Rapporteur also submitted a draft preamble,[15] for which purpose he was guided by the preamble of the Vienna Convention of 18 April 1961 on Diplomatic Relations. When this draft preamble, as amended by the Drafting Committee, was submitted to the Commission some members took the view that the drafting of the preamble should be left to the conference of plenipotentiaries which might be convened to conclude such a convention. Not having the time to discuss the point, the Commission decided that the text proposed for the preamble would be inserted in the commentary introducing this draft. The preamble prepared by the Drafting Committee reads as follows:

"*The States Parties to the present Convention,*

"*Recalling* that consular relations have been established among peoples of all nations since ancient times,

"*Having in mind* the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,

"*Considering* that a United Nations Conference adopted on 18 April 1961 the Vienna Convention on Diplomatic Relations,

"*Believing* that an international convention on consular relations would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

"*Affirming* that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention,

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[14] *Ibid.*, para. 84.

[15] The text of this draft preamble reads as follows:

"*The States Parties to this Convention,*

"*Recalling* that, since the most ancient times, economic relations between peoples have given rise to the institution of consular missions,

"*Conscious* of the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security and the development of friendly relations among nations,

"*Considering* it desirable to establish the essential rules governing relations between States in the matter of consular relations,

"*Considering* that in the Vienna Convention on Diplomatic Relations dated 18 April 1961 it is stipulated (article 3) that nothing in that Convention shall be construed as preventing the performance of consular functions by a diplomatic mission,

"*Convinced* that an international convention on consular relations, privileges and immunities would contribute to the development of friendly relations among countries, irrespective of the diversity of their constitutional and social systems,

"*Affirming* that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of this Convention,

"*Have agreed* as follows:"

"*Have agreed* as follows:"

37. The text of draft articles 1 to 71 and the commentaries, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below.

IV. Draft articles on consular relations and commentaries

Article 1

Definitions

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

(*a*) "Consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(*b*) "Consular district" means the area assigned to a consulate for the exercise of its functions;

(*c*) "Head of consular post" means any person in charge of a consulate;

(*d*) "Consular official" means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

(*e*) "Consular employee" means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

(*f*) "Members of the consulate" means all the consular employees in a consulate;

(*g*) "Members of the consular staff" means the consular officials other than the head of post, and the consular employees;

(*h*) "Member of the service staff" means any consular employee in the domestic service of the consulate;

(*i*) "Member of the private staff" means a person employed exclusively in the private service of a member of the consulate;

(*j*) "Consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

(*k*) "Consular archives" means all the papers, documents, correspondence, books and registers of the consulate, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular officials may be career officials or honorary. The provisions of chapter II of this draft apply to career officials and to consular employees; the provisions of chapter III apply to honorary consular officials and to career officials who are assimilated to them under article 56.

3. The particular status of members of the consulate who are nationals of the receiving State is governed by article 69 of this draft.

Commentary

(1) This article has been inserted in order to facilitate the interpretation and application of the convention.

(2) Paragraph 1 of this article contains definitions of certain expressions which need to be defined and are used more than once in the text of the articles. As regards the expressions which are used in one article only, the Commission preferred to define them in the relevant articles. For example, the term "*exequatur*" is defined in article 11 and the expression "official correspondence" in article 35, paragraph 2, of this draft.

(3) The Commission considered it unnecessary to define expressions the meaning of which is quite clear, such as "sending State" and "receiving State".

(4) The expression "members of the consulate" means all the persons who belong to a particular consulate, that is to say, the head of post, the other consular officials and the consular employees. By contrast, the expression "members of the consular staff" means all persons working in a consulate under the responsibility of the head of post, that is to say, consular officials other than the head of post, and the consular employees.

(5) The expression "private staff" means not only the persons employed in the domestic service of a member of the consulate, but also persons employed in any other private service, such as private secretaries, governesses, tutors, and the like.

(6) The expression "consular archives" means all the papers of the consulate, the correspondence, documents, books, the registers of the consulate, the codes and ciphers, card-indexes and the articles of furniture intended for the protection and safekeeping of all papers and objects coming under the definition of consular archives. The term "books" covers not only the books used in the exercise of the consular functions but also the consulate's library. It should be noted that although this definition of consular archives covers the official correspondence and documents of the consulate, it does not make the use of these two expressions superfluous in certain articles and in particular in articles 32 and 35 of the draft. It is necessary, sometimes, to use these expressions separately as, for example, in the provisions regulating the freedom of communications. Further, the correspondence which is sent by the consulate or which is addressed to it, in particular by the authorities of the sending State, the receiving State, a third State or an international organization, cannot be regarded as coming within the definition if the said correspondence leaves the consulate or before it is received at the consulate, as the case may be. Similarly, documents drawn up by a member of the consulate and held by him can hardly be said to form part of the consular archives before they are handed over to the chancery of the consulate. For all these reasons, certain expressions comprised by the general term "consular archives" have to be used according to the context and scope of a particular provision.

(7) As some Governments in their comments drew attention to the desirability of defining the family of a member of the consulate, the Special Rapporteur had included in the draft of article 1 a clause defining this expression as meaning, for the purposes of these articles, the spouse and unmarried children who are not engaged in any occupation and who are living in the home of a member of the consulate. The Drafting Committee proposed the following definition: "Member of the family of a member of the consulate means the spouse and the unmarried children not of full age, who live in his home". The Commission was divided with respect to the insertion of a definition of "family" in the draft and also as to the scope of the definition submitted by the Drafting Committee, which several members found too restrictive. Eventually, inasmuch as the United

Nations Conference on Diplomatic Intercourse and Immunities had been unable to reach agreement on this point, the Commission decided by a majority not to include a definition of member of the family of a member of the consulate in the draft.

(8) Since article 1 constitutes a sort of introduction to the whole draft, paragraph 2 was included in order to indicate that there are two categories of consular officials, namely, career consular officials and honorary consular officials, the two categories of consular officials having a different legal status so far as consular privileges and immunities are concerned.

(9) The purpose of paragraph 3 of this article is to indicate that members of the consulate who are nationals of the receiving State are in a special position since they enjoy only very limited privileges and immunities as defined in article 69 of the draft. Several Governments suggested in their comments that in certain articles of the present draft express reference should be made to article 69 in order to show more clearly that the provisions in question do not apply to members of the consulate who are nationals of the receiving State. The Commission did not feel able to follow this suggestion, for it is not possible to refer to article 69 in certain articles only, as the limitation laid down in that article covers all the articles which concern consular privileges and immunities. It considered that the same purpose could be achieved by inserting in article 1 a provision stipulating that members of the consulate who are nationals of the receiving State are in a special position. For the purpose of interpreting any of the articles of the draft one has to consult article 1 containing the definitions, which gives notice that the members of the consulate who are nationals of the receiving State enjoy only the privileges and immunities defined in article 69. As a consequence it is unnecessary to encumber the text with frequent references to article 69, and yet it is not difficult to find one's way in the draft or to interpret its provisions.

CHAPTER I. CONSULAR RELATIONS IN GENERAL

SECTION I: ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

Article 2

Establishment of consular relations

1. The establishment of consular relations between States takes place by mutual consent.

2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Commentary

(1) The expression "consular relations" means the relations which come into existence between two States by reason of the fact that consular functions are exercised by authorities of one State in the territory of the other. In most cases these relations are mutual, consular functions being exercised in each of the States concerned by the authorities of the other. The establishment of these relations presupposes agreement between the States in question, and such relations are governed by international law, conventional or customary. In addition, the legal position of consuls is governed by international law, so that by reason of this fact also, a legal relationship arises between the sending State and the receiving State. Finally, the expression in question has become hallowed by long use, and this is why the Commission has retained it, although some members would have preferred another.

(2) Paragraph 1 which lays down a rule of customary international law indicates that the establishment of consular relations is based on the agreement of the States concerned. This is a fundamental rule of consular law.

(3) Consular relations may be established between States that do not entertain diplomatic relations. In that case, the consular relations are the only official relations of a permanent character between the two States in question. In some cases, they merely constitute a preliminary to diplomatic relations.

(4) Where diplomatic relations exist between the States in question, the existence of diplomatic relations implies the existence of consular relations, unless these latter relations were excluded by the wish of one of the States concerned at the time of the establishment of diplomatic relations. It is in this sense that the words "unless otherwise stated" should be interpreted.

(5) As a first consequence of the rule laid down in paragraph 2, if one of the States between which diplomatic relations exist decides to establish a consulate in the territory of the other State, the former State has no need to conclude an agreement for the establishment of consular relations, as provided in article 2, paragraph 1, but solely an agreement respecting the establishment of the consulate as laid down in article 4 of the present draft. This consequence is important both from the theoretical and from the practical points of view.

(6) Paragraph 3 lays down a generally accepted rule of international law.

Article 3

Exercise of consular functions

Consular functions are exercised by consulates. They are also exercised by diplomatic missions in accordance with the provisions of article 68.

Commentary

(1) Paragraph 2 of article 2 of this draft lays down that the consent given to the establishment of diplomatic relations implies, unless otherwise stated, consent to the establishment of consular relations. The rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions. The rule in question was recently confirmed by article 3, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, which provides that "nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission".

(2) It follows that, in modern times, consular functions may be exercised by consulates or by diplomatic missions. If the sending State has no consulates in the receiving State the competence of the diplomatic mission in consular affairs covers automatically the entire territory of the receiving State. If the sending State has consulates in the territory in question, the exercise of consular functions by the diplomatic mission is limited as

a general rule to that part of the territory of the receiving State which is outside the consular district or districts allotted to the consulates of the sending State. Hence only in the exceptional cases where the sending State has in the receiving State consulates whose consular districts cover the whole territory of the State in question will the diplomatic mission not exercise consular functions. But even in such cases the sending State may reserve certain consular activities to its diplomatic mission. For example, questions of special importance or the issue of visas on diplomatic passports are sometimes reserved to the diplomatic missions in the case under discussion.

Article 4

Establishment of a consulate

1. A consulate may be established in the territory of the receiving State only with that State's consent.

2. The seat of the consulate and the consular district shall be determined by mutual agreement between the receiving State and the sending State.

3. Subsequent changes in the seat of the consulate or in the consular district may be made by the sending State only with the consent of the receiving State.

4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or an agency in a locality other than that in which it is itself established.

5. The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the consulate in localities other than those in which the consulate itself is established.

Commentary

(1) Paragraph 1 of this article lays down the rule that the consent of the receiving State is essential for the establishment of any consulate (consulate-general, consulate, vice-consulate or consular agency) on its territory. This principle derives from the sovereign authority which every State exercises over its territory, and applies both in those cases where the consulate is established at the time when the consular relations are established, and in those cases where the consulate is to be established later. In the former case, the consent of the receiving State to the establishment of a consulate will usually already have been given in the agreement for the establishment of consular relations; but it may also happen that this agreement is confined to the establishment of consular relations, and that the establishment of the consulate is reserved for a later agreement.

(2) An agreement on the establishment of a consulate presupposes that the States concluding it agree on the boundaries of the consular district and on the seat of the consulate. It sometimes happens in practice that the agreement on the seat of the consulate is concluded before the two States have agreed on the boundaries of the consular district. The agreement respecting the seat of the consulate and the consular district will, as a general rule, be an express agreement. Nevertheless it may also be concluded tacitly. If, for example, the receiving State grants the *exequatur* on presentation of a consular commission in which the seat of the consulate and the consular district are specified as laid down in article 10, then it must be concluded that that State has consented to the seat of the consulate being established at the place designated in the consular commission and that the consular district is the district mentioned therein.

(3) The consular district, also sometimes called the consular region, determines the territorial limits within which the consulate is authorized to exercise its functions with respect to the receiving State. Nevertheless, in the case of any matter within its competence it may also apply to the authorities of the receiving State which are outside its district in so far as this is allowed by the present articles or by other international agreements applicable in the matter (see article 38 of this draft).

(4) The Commission has not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving State, that the sending State may not change the seat of the consulate, nor the consular district, without the consent of the receiving State. The silence of the article as to the powers of the receiving State must not be taken to mean that this State would always be entitled to change the consular district or the seat of the consulate unilaterally. The Commission thought, however, that in exceptional circumstances the receiving State had the right to request the sending State to change the seat of the consulate or the consular district.

(5) The sole purpose of paragraph 3 is to govern any changes that may be made with respect to the seat of the consulate or the consular district. It does not restrict the right of the sending State to close its consulate temporarily or permanently if it so desires.

(6) Paragraph 4 applies to cases where the consulate, having already been established, desires to open a vice-consulate or consular agency within the boundaries of its district. Under the municipal law of some countries the consuls-general and the consuls have authority to appoint vice-consuls or consular agents. Under this authority the consuls-general and the consuls may establish new consular posts on the territory of the receiving State. It has therefore been necessary to provide that the consent of the receiving State is required even in those cases.

(7) As distinct from the case mentioned in the preceding paragraph which refers to the establishment of a vice-consulate or a consular agency, i.e. of a new consular post, the purpose of paragraph 5 is to regulate those cases in which the consulate desires, for reasons of practical convenience, to establish outside the seat of the consulate an office which constitutes part of the consulate.

(8) The expression "sending State" means the State which the consulate represents.

(9) The expression "receiving State" means the State in whose territory the activities of the consulate are exercised. In the exceptional case where the consular district embraces the whole or part of the territory of a third State, that State should for the purposes of these articles also be regarded as a receiving State.

Article 5

Consular functions

Consular functions consist more especially of:

(a) Protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(*b*) Promoting trade and furthering the development of economic, cultural and scientific relations between the sending State and the receiving State;

(*c*) Ascertaining conditions and developments in the economic, commercial, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(*d*) Issuing passports and travel documents to nationals of the sending State, and visas or other appropriate documents to persons wishing to travel to the sending State;

(*e*) Helping and assisting nationals of the sending State;

(*f*) Acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature;

(*g*) Safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State;

(*h*) Safeguarding the interests of minors and persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(*i*) Representing nationals of the sending State before the tribunals and other authorities of the receiving State, where, because of absence or any other reason, these nationals are unable at the proper time to assume the defence of their rights and interests, for the purpose of obtaining, in accordance with the law of the receiving State, provisional measures for the preservation of these rights and interests;

(*j*) Serving judicial documents or executing letters rogatory in accordance with conventions in force or, in the absence of such conventions, in any other manner compatible with the law of the receiving State;

(*k*) Exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels used for maritime or inland navigation, having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(*l*) Extending necessary assistance to vessels and aircraft mentioned in the previous subparagraph, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping ships' papers, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the law of the sending State.

Commentary

(1) The examination of the questions relating to consular functions passed through several stages and gave rise to a broad exchange of views in the Commission. At first, the Special Rapporteur had prepared two variants on consular functions. The first, following certain precedents, specially the Havana Convention (article 10) merely referred the matter to the law of the sending State, and provided that the functions and powers of consuls should be determined, in accordance with international law, by the States which appoint them. The second variant, after stating the essential functions of a consul in a general clause, contained a detailed enumeration of the most important functions of a consul, by way of example.[16]

(2) During the discussion, two tendencies were manifested in the Commission. Some members expressed their preference for a general definition of the kind which had been adopted by the Commission for the case of diplomatic agents, in article 3 of its Draft Articles on Diplomatic Intercourse and Immunities. They pointed to the drawbacks of an excessively detailed enumeration, and suggested that a general definition would be more acceptable to Governments. Other members, by contrast, preferred the Special Rapporteur's second variant with its detailed list of examples, but requested that it should be shortened and contain only the heads of the different functions as set out in Arabic numerals 1-15 in the Special Rapporteur's draft. They maintained that too general a definition, merely repeating the paragraph headings, would have very little practical value. They also pointed out that the functions of consuls are much less extensive than those of diplomatic agents, and that it was therefore impossible to follow in this respect the Draft Articles on Diplomatic Intercourse and Immunities. Lastly, they argued that Governments would be far more inclined to accept in a convention a detailed and precise definition than a general formula which might give rise to all kinds of divergencies in practice. In support of this opinion they pointed to the fact that recent consular conventions all defined consular functions in considerable detail.

(3) In order to be able to take a decision on this question the Commission requested the Special Rapporteur to draft two texts defining consular functions: one containing a general and the other a detailed and enumerative definition. The Special Rapporteur prepared these two definitions and the Commission, after a thorough examination of the first proposal, decided to submit both definitions to the Governments for comment. In addition, it decided to include the general definition in the draft and to reproduce the more detailed definition in the commentary.[17]

(4) Although the majority of the Governments which sent in comments on the Commission's draft expressed a preference for the general definition, nevertheless several of them, as also several representatives at the fifteenth session of the General Assembly, expressed the wish that the definition should be supplemented by an enumeration of the principal and most important functions.

(5) The Special Rapporteur took these views into account and in his third report proposed a new formula respecting consular functions.[18] This text reproduced the various paragraphs of the definition adopted at the twelfth session of the Commission and added to each paragraph some examples selected from the more detailed version of the definition.

(6) The Commission adopted several of the Special Rapporteur's proposals and broadened the definition of the consular functions which enumerates by way of

[16] *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 1957.V.5, vol. II) pp. 91 to 92, article 13.

[17] Report of the International Law Commission covering the work of its Twelfth Session, *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9* (A/4425), pp. 6, *et seq.*

[18] A/CN.4/137, pp. 15, *et seq.*

example—as is clearly reflected in the words "more especially" in the introductory phrase—the most important consular functions recognized by international law.

(7) The function of safeguarding the interests of the sending State and of its nationals is the most important of the many consular functions. The consul's right to intervene on behalf of the nationals of his country does not, however, authorize him to interfere in the internal affairs of the receiving State.

(8) As the article itself says expressly the term "national" means also bodies corporate having the nationality of the sending State. It may occur that the receiving State declines to recognize that the individual or body corporate whose interests the consul desires to protect possesses the nationality of the sending State. A dispute of this nature should be decided by one of the means for the pacific settlement of international disputes.

(9) For the sake of consistency with the terminology of the Vienna Convention on Diplomatic Relations (article 3, paragraph 1(*b*)) the Commission employs the term "interests" in paragraph (*a*), although some members of the Commission would have preferred different expressions.

(10) The provision of paragraph (*a*) concerning the protection of the interests of the State and of its nationals is distinct from that of paragraph (*e*), which concerns the help and assistance to be given to the nationals of the sending State, in that the former relates to the function which the consular official exercises vis-à-vis the authorities of the receiving State, whereas the latter covers any kind of help and assistance which the consul may extend to nationals of his State: information supplied to a national, provision of an interpreter, introduction of commercial agents to business concerns, assistance in case of distress, assistance to nationals working in the receiving State, repatriation and the like.

(11) The notarial functions are varied and may consist, for instance, in:

(*a*) Receiving in the consular offices, on board vessels and ships or on board aircraft having the nationality of the sending State, any statements which the nationals of the sending State may have to make;

(*b*) Drawing up, attesting and receiving for safe custody, wills and all unilateral instruments executed by nationals of the sending State;

(*c*) Drawing up, attesting and receiving for safe custody, deeds the parties to which are nationals of the sending State, or nationals of the sending State and nationals of the receiving State, or of a third State, provided that they do not relate to immovable property situated in the receiving State or to rights *in rem* attaching to such property;

(*d*) Attesting or certifying signatures, stamping, certifying or translating documents, in any case for which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or a declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consular official.

(12) In his capacity as registrar, the consul or any other consular official keeps the registers and enters all relevant documents relating to births, marriages, deaths, legitimations, in accordance with the laws and regulations of the sending State. Nevertheless, the persons concerned must also make all the declarations required by the laws of the receiving State. The consular official may also, if authorized for that purpose by the law of the sending State, solemnize marriages between nationals of his State or between nationals of the sending State and those of another State, provided that this is not prohibited by the law of the receiving State.

(13) The administrative functions mentioned under paragraph (*f*) are determined by the laws and regulations of the sending State. They may consist, for instance, in:

(*a*) Keeping a register of nationals of the sending State residing in the consular district;

(*b*) Dealing with matters relating to the nationality of the sending State;

(*c*) Certifying documents, indicating the origin of goods, invoices and the like;

(*d*) Transmitting to the persons entitled any benefits, pensions or compensation due to them under the law of the sending State or international conventions, in particular under social welfare legislation;

(*e*) Receiving payments of pensions or allowances due to the nationals of the sending State absent from the receiving State, provided that no other method of payment has been agreed to between the States concerned.

(14) Paragraph (*g*), which provides for the safeguarding of the interests of the nationals of the sending State in matters of succession *mortis causa*, recognizes the right of the consul, in accordance with the law of the receiving State, to take all measures necessary to ensure the conservation of the estate. He may, accordingly, represent, without producing a power of attorney, the heirs and legatees or their successors in title until such time as the person concerned undertakes the defence of his own interests or appoints an attorney. By virtue of this provision, consuls have the power to appear before the courts or to approach the appropriate authorities of the receiving State with a view to collecting, safeguarding or arranging for an inventory of the assets, and to propose to the authorities of the receiving State all measures necessary to discover the whereabouts of the assets constituting the estate. The consul may, when the inventory of the assets is being drawn up, take steps in connexion with the assessment of the assets left by the deceased, the appointment of an administrator and all legal acts necessary for the preservation, administration and disposal of the assets by the authorities of the receiving State. The consular conventions frequently contain provisions conferring upon consuls, in matters of succession, rights that are much more extensive and in particular, the right to administer the estate. As the previous agreements concluded between the States who will become parties to the convention are to remain in force pursuant to article 71, the provisions of those agreements will apply in the first instance to the cases under consideration.

(15) Among the nationals of the sending State, minors and persons lacking full capacity are those who stand in special need of protection and assistance from the consulate. That is why it seemed necessary to set forth in paragraph (*h*) the consul's function of safeguarding the interests of minors and persons lacking full capacity who are nationals of the sending State. This function will be exercisable in particular where the institution of trusteeship and guardianship is required.

(16) Paragraph (*i*) recognizes the consul's right to represent before the courts and other authorities of the

receiving State nationals of the sending State who are unable to defend their own rights and interests. Nevertheless, the consul's right of representation is limited to provisional measures for the preservation of the rights and interests of the person concerned. Where judicial or administrative proceedings have already been begun, the consul may arrange for the representation of the national of the sending State before the court or administrative authority concerned. In no case, however, does this provision empower the consul to dispose of the rights of the person he is representing. Furthermore, the consul's right of representation is also limited in time; it ceases as soon as the person concerned himself assumes the defence of his rights or appoints an attorney. The right of representation, as is stressed in the text, must be exercised in accordance with the laws and regulations of the receiving State. This right is absolutely essential to the exercise of consular functions which consist (among others) of that of protecting the interests of the sending State and of its nationals (article 5, paragraph (*a*)). The consul could not carry out these functions without the power of inquiring into the affairs of absent nationals of the sending State from courts and administrative authorities, transmitting to courts and other competent authorities information and proposals which may help to safeguard the rights of nationals of the sending State, drawing the attention of the courts to the provisions of any international treaties which may be applicable to the particular case, and arranging for the representation of absent nationals before the courts and other competent instances until the persons concerned can themselves assume the defence of their rights and interests.

(17) The function referred to in paragraph (*i*) is a general one, which relates to all cases where the nationals of the sending State, whether individuals or bodies corporate, are in need of representation owing to their absence or for any other reason. The latter phrase means, in particular, cases where the person concerned is prevented from looking after his interests by serious illness or where he is detained or imprisoned. Nevertheless, since the purpose of this provision is to ensure provisional representation, it cannot apply to the special case contemplated in paragraph (*h*) where the consul's function of safeguarding the interests of minors and persons lacking full capacity is necessarily exercised on a long-term basis, and where his powers must therefore be broader than those provided for in paragraph (*i*).

(18) Paragraph (*j*) confirms a long-established practice whereby consuls ensure the service on the persons concerned, directly or through local authorities, of judicial documents sent to them by the authorities of the sending State. They may do so, as this provision indicates, by procedures laid down by a convention in force, or in the absence of such a convention, in a manner compatible with the law of the receiving State. This practice found expression in the Hague Convention of 17 July 1905 relating to Civil Procedure, replacing an earlier Convention of 14 November 1896. This Convention prescribes that notifications shall be made "at the request of the Consul of the requesting State, such request being addressed to the authority designated by the requested State" (article 1). Proof of service is given either by a dated authenticated receipt from the addressee or by an attestation by the authority of the requested State, stating that the document has been served and specifying the manner and date of service (article 5). In its article 6, the Convention expressly stipulates that its provisions shall be without prejudice to the power of each State to have documents addressed to persons abroad served directly through its diplomatic or consular agents. The Convention contains a general reservation whereby the right of direct communication exists only if it is recognized in conventions between the States concerned or if, in default of such conventions, the receiving State does not object. But the article also stipulates that this State may not object where documents are served by diplomatic or consular agents if the document is to be served on a national of the requesting State without duress. This provision was reproduced without change in the Convention relating to Civil Procedure of 1 March 1954, to which twelve States have so far become parties.

(19) The execution of certain procedural or investigatory documents through consuls meets practical needs. A consul may execute letters rogatory in accordance with the procedure prescribed by the law of the sending State, whereas the courts of the receiving State would be obliged to do so in accordance with the procedure prescribed by the law of the receiving State. Furthermore, this procedure is much speedier, apart from the fact that the foreign court is not obliged, in the absence of conventions on the subject, to accede to the request made in the letters rogatory. However, a consul cannot execute letters rogatory in the absence of a convention authorizing him to do so, unless the receiving State does not object. This opinion is confirmed by article 15 of the Hague Convention of 1905 relating to Civil Procedure and this rule was reproduced in the similar Convention of 1954 (article 15).

(20) From time immemorial consuls have exercised manifold functions connected with maritime shipping by virtue of customary international law, but their scope has been considerably modified in the course of centuries. Nowadays, functions are defined in great detail in certain consular conventions. As the Commission decided on a general definition of consular functions, it obviously could not adopt this method. It confined itself to including in the general definition the most important functions which consuls exercised in connexion with shipping.

(21) It is generally recognized nowadays that consuls are called upon to exercise rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels used for maritime or inland navigation which have the nationality of the sending State and aircraft registered in that State and in respect of their crews. These rights of supervision and protection, referred to in paragraph (*k*), are based on the sending State's rights in respect of vessels having its nationality, and the exercise of those rights is one of the prerequisites for the exercise of consular functions in connexion with navigation.

(22) The question of the criteria for determining the nationality of vessels, boats and other craft, in cases of conflict of laws, should be answered by reference to article 5 of the 1958 Geneva Convention on the High Seas and to other rules of international law.

(23) One of the consul's important functions in connexion with navigation is to extend necessary assistance to vessels, boats and aircraft having the nationality of the sending State and to their crews. This function is provided for in paragraph (*l*) of this article. In the exercise of this function, a consul may go personally on board a vessel as soon as it has been admitted to *pratique*, examine the ship's papers, take statements concerning the voyage, the vessel's destination and any

incidents which occurred during the voyage (log book) and, in general, facilitate the ship's or boat's entry into port and its departure. He may also receive protests, draw up manifests, and, where applicable, conduct investigations into any incidents which occurred and, to this end, interrogate the master and the members of the crew. The consul or a member of the consulate may appear before the local authorities with the master or members of the crew to extend to them any assistance, and especially to obtain any legal assistance they need, to act as interpreter in any business they may have to transact or in any applications they have to make, for example, to local courts and authorities. Consuls may also take action to enforce the maritime laws and regulations of the sending State. They also play an important part in the salvage of vessels and boats of the sending State. If such a vessel or boat runs aground in the territorial sea or the internal waters of the receiving State, the competent authorities are to inform the consulate nearest to the scene of the occurrence without delay, in accordance with article 37. If the owner, manager-operator or master is unable to take the necessary steps, consuls are empowered, under paragraph (*l*) of this article, to take all necessary steps to safeguard the rights of the persons concerned.

(24) This article does not itemize all the functions which consuls may perform in accordance with international law. Consuls may exercise, in addition to the functions enumerated in this article, the functions of arbitrator or conciliator *ad hoc* in any disputes which nationals of the sending State submit to them, provided that this is not incompatible with the laws and regulations of the receiving State.

(25) Furthermore, consuls may exercise the functions entrusted to them by the international agreements in force between the sending State and the receiving State.

(26) Lastly, consuls may also perform other functions which are entrusted to them by the sending State, provided that the performance of these functions is not prohibited by the laws and regulations or the authorities of the State of residence.

Article 6

Exercise of consular functions in a third State

The sending State may, after notifying the States concerned, entrust a consulate established in a particular State with the exercise of consular functions in a third State. unless there is express objection by one of the States concerned.

Commentary

Sometimes States entrust one of their consulates with the exercise of consular functions in a third State. Sometimes the territory in which the consulate exercises its functions covers actually two or more States. This article authorizes this practice, but leaves each of the States concerned the right to make an express objection.

Article 7

Exercise of consular functions on behalf of a third State

With the prior consent of the receiving State and by virtue of an agreement between the sending State and a third State, a consulate established in the first State may exercise consular functions on behalf of that third State.

Commentary

(1) Whereas article 6 deals with the case in which the competence of a consulate extends to all or part of the territory of the third State, the purpose of this article is to regulate cases in which a consulate is also called upon to exercise consular functions on behalf of a third State within the consular district. Such a situation may arise, first, if a third State does not maintain consular relations with the receiving State but still wishes to ensure consular protection for its nationals in that State. Thus the Agreement of Caracas between Bolivia, Colombia, Ecuador, Peru and Venezuela concerning the powers of consuls in each of the contracting Republics, signed on 18 July 1911, provided that the consuls of each contracting Republic residing in any of them could exercise their powers on behalf of individuals of the contracting Republics which did not have a consul at the place in question (article VI).

(2) The law of a large number of countries makes provision for the exercise of consular functions on behalf of a third State, subject to the authorization either of the head of State or of the Government or of the Minister for Foreign Affairs.

(3) Obviously, in the cases covered by this article, consuls will rarely be in a position to perform all consular functions on behalf of a third State. In some cases they may exercise only some of these functions. The article covers both the occasional exercise of certain consular functions and the continuous exercise of these functions. The consent of the receiving State is essential in both cases.

Article 8

Appointment and admission of heads of consular posts

Heads of consular posts are appointed by the sending State and are admitted to the exercise of their functions by the receiving State.

Commentary

This article states a fundamental principle which is developed in the ensuing articles. It states that a person must fulfil two conditions if he is to have the status of head of consular post within the meaning of these articles. He must, first, be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent. Secondly, he must be admitted to the exercise of his functions by the receiving State.

Article 9

Classes of heads of consular posts

1. Heads of consular posts are divided into four classes:

(1) Consuls-general;

(2) Consuls;

(3) Vice-consuls;

(4) Consular agents.

2. The foregoing paragraph in no way restricts the power of the contracting parties to fix the designation of the consular officials other than the head of post.

Commentary

(1) Whereas the classes of diplomatic agents were determined by the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818 and recently codified anew at the 1961 Vienna Conference, the classes of consuls have not yet been codified. Since the institution of consuls first appeared in international relations, a large variety of titles has been used. At present, the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 9 to enable the classes of heads of consular posts to be codified.

(2) This enumeration of four classes in no way means that States accepting it are bound in practice to have all four classes. They will be obliged only to give their heads of consular posts one of the four titles in article 9. Consequently, those States whose domestic law does not provide for all four classes (e.g. does not recognize the class of consular agents) will not be in any way obliged to amend it.

(3) It should be emphasized that the term "consular agent" is used in this article in a technical sense differing essentially from the generic meaning given to it in some international instruments, as denoting all classes of consular officials.

(4) The domestic law of some (but not very many) States allows the exercise by consular officials, and especially by vice-consuls and consular agents, of gainful activities in the receiving State. Some consular conventions authorize this practice by way of exception (see, as regards consular agents, article 2, paragraph 7 of the consular convention of 31 December 1951 between the United Kingdom and France). Career consuls who carry on a private gainful activity are treated on the same footing, as regards facilities, privileges and immunities, as honorary consular officials (see article 56 of this draft).

(5) It should be added that some States restrict the title vice-consul or consular agent solely to honorary consular officials.

(6) In the past, various titles were used to designate consuls: *commissaires*, residents, commercial agents and so forth. The term "commercial agent" was still used to designate a consular agent as recently as in the Havana Convention of 1928 regarding consular agents (article 4, paragraph 2).

(7) Although paragraph 1 determines the title to be held by the head of a consular post, it in no way purports to restrict the powers of States which become parties to the convention to determine the rank and title of officials other than the head of post. They may use for this purpose the titles specified in paragraph 1 of this article or any other title specified by their laws and regulations. In practice, the most diverse titles are used: alternate consuls, deputies, pro-consuls, consular attachés, pupil consuls, chancery attachés, chancery pupils, *chanceliers*, consular secretaries, pupil *chanceliers*, interpreters, etc. Paragraph 2 has been added precisely to prevent paragraph 1 being construed as reserving the titles used in that paragraph solely to heads of post.

Article 10

The consular commission

1. The head of a consular post shall be furnished by the sending State with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, the full name of the head of post, his category and class, the consular district, and the seat of the consulate.

2. The sending State shall communicate the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the State in whose territory the head of a consular post is to exercise his functions.

3. If the receiving State so accepts, the commission or similar instrument may be replaced by a notice to the same effect, addressed by the sending State to the receiving State.

Commentary

(1) As a general rule, the head of a consular post is furnished with an official document known as "consular commission" (variously known in French as *lettre de provision, lettre patente* or *commission consulaire*). Vice-consuls and consular agents are furnished with a similar instrument which bears a different name—*brevet, décret, patente* or *licence*.

(2) For purposes of simplification, article 10 uses the expression "consular commission" to describe the official documents of heads of consular posts of all classes. While it may be proper to describe differently the full powers given to consular officials not appointed by the central authorities of the State, the legal significance of these documents from the point of view of international law is the same. This *modus operandi* is all the more necessary in that the manner of appointment of consuls pertains to the domestic jurisdiction of the sending State.

(3) While the form of the consular commission remains none the less governed by municipal law, paragraph 1 of the article states the particulars which should be shown in any consular commission in order that the receiving State may be able to determine clearly the powers and legal status of the consul. The expression "as a general rule" indicates expressly that this is a provision the non-observance of which does not have the effect of nullifying the consular commission. The same paragraph specifies, in keeping with practice, that a consular commission must be made out in respect of each appointment. Accordingly, if a consul is appointed to another post, a consular commisison must be made out for that appointment, even if the post is in the territory of the same State. Another consular commission will also be necessary if the head of post receives promotion and the rank of the consular post is raised simultaneously. In the practice of some States the head of a consular post is even supplied with a new consular commission if the consular district is altered or the location of the consulate is moved.

(4) Some bilateral conventions specify the content or form of the consular commission (see, for example, article 3 of the convention of 31 December 1913 between Cuba and the Netherlands, the convention of 20 May 1948 between the Philippines and Spain, article IV of which stipulates that regular letters of appointment shall be duly signed and sealed by the Head of State). Obviously, in such cases the content or form of the consular commission must conform to the provisions of the convention in force.

(5) The consular commission, together with the *exequatur*, is retained by the consul. It constitutes an

important document which he can make use of at any time with the authorities of his district as evidence of his official position.

(6) While the consular commission as described above constitutes the regular mode of appointment, the recent practice of States seems to an ever-increasing extent to permit less formal methods, such as a notification of the consul's posting. It was therefore thought necessary to allow for this practice in paragraph 3 of the present article.

Article 11

The exequatur

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an *exequatur*, whatever the form of this authorization.

2. Subject to the provisions of articles 13 and 15, the head of a consular post may not enter upon his duties until he has received an *exequatur*.

Commentary

(1) The *exequatur* is the act whereby the receiving State grants the foreign consul final admission, and thereby confers upon him the right to exercise his consular functions. The same term also serves to describe the document by which the head of post is admitted to the exercise of his functions.

(2) In accordance with the general practice of States, it is the municipal law of each State which determines the organ competent to grant the *exequatur*. In many States, the *exequatur* is granted by the Head of the State if the consular commission is signed by the Head of the sending State, and by the Minister for Foreign Affairs in other cases. In many States, the *exequatur* is always granted by the Minister for Foreign Affairs. In certain countries, competence to grant the *exequatur* is reserved to the Government.

(3) As is evident from article 12, the form of the *exequatur* is likewise governed by the municipal law of the receiving State. As a consequence, it varies considerably. According to the information at the Commission's disposal, the types of *exequatur* most frequently found in practice are the following.

Exequaturs may be granted in the form of:

(*a*) A decree by the Head of the State, signed by him and countersigned by the Minister for Foreign Affairs, the original being issued to the head of consular post;

(*b*) A decree signed as above, but only a copy of which, certified by the Minister for Foreign Affairs, is issued to the head of consular post;

(*c*) A transcription endorsed on the consular commission, a method which may itself have several variants;

(*d*) A notification to the sending State through the diplomatic channel.

(4) In certain conventions the term "*exequatur*" is used in its formal sense as referring only to the forms mentioned under (*a*) to (*c*) above. As allowance must also be made for cases in which the *exequatur* is granted to the consul in a simplified form, these conventions mention, besides the *exequatur*, other forms of final authorization for the exercise of consular functions (consular convention of 12 January 1948, between the United States and Costa Rica, article I), or else do not use the term "*exequatur*".

(5) The term "*exequatur*" is used in these articles to denote any final authorization granted by the receiving State to a head of consular post, whatever the form of such authorization. The reason is that the form is not *per se* a sufficient criterion for differentiating between acts which have the same purpose and the same legal significance. The term "*exequatur*" also denotes the authorization given to any other consular official in the special case provided for in article 19, paragraph 2.

(6) Inasmuch as subsequent articles provide that the head of a consular post may obtain provisional admission before obtaining the *exequatur* (article 13), or may be allowed to act as temporary head of post in the cases referred to in article 15, the scope of the article is limited by an express reference to these two articles.

(7) The grant of the *exequatur* to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility. It is therefore not necessary for consular officials who are not heads of post to present consular commissions and obtain an *exequatur*. Notification by the head of a consular post to the competent authorities of the receiving State suffices to admit them to the benefits of the present articles and of the relevant agreements in force. However, if the sending State wishes in addition to obtain an *exequatur* for one or more consular officials who are not heads of post, there is nothing to prevent it from making a request accordingly. Provision is made for this case in article 19, paragraph 2.

(8) It is universally recognized that the receiving State may refuse the *exequatur* to a consul. This right is recognized implicitly in the article, and the Commission did not consider it necessary to state it explicitly.

(9) The only controversial question is whether a State which refuses the *exequatur* ought to communicate the reasons for the refusal to the Government concerned. The Commission preferred not to deal with this question in the draft. The draft's silence on the point should be interpreted to mean that the question is left to the discretion of the receiving State, since, in view of the varying and contradictory practice of States, it is not possible to say that there is a rule requiring States to give the reasons for their decision in such a case.

Article 12

Formalities of appointment and admission

Subject to the provisions of articles 10 and 11, the formalities for the appointment and for the admission of the head of a consular post are determined by the law and usage, respectively of the sending and of the receiving State.

Commentary

(1) As distinct from the case of diplomatic representatives, there is no rule of international law specifying the mode of appointing heads of consular posts. This matter is governed by the law and usage of each State which determine the requirements for appointment as head of a consular post, the procedure for appointment and the form of documents with which consuls are supplied. In some States, for example, consular agents are appointed by a central authority on the recommendation of the head of post under whose orders and responsibility they are to work. In other States they are appointed by the consul-general or by

the consul, subject to confirmation by the Minister for Foreign Affairs.

(2) The mistaken opinion has sometimes been voiced that only Heads of State are competent to appoint consuls, and some claims have even been based on these opinions. Accordingly, it seemed desirable to state in this article that the modes of appointing heads of consular posts are determined by the law and usage of the sending State; for this purpose the term "formalities" should be construed as meaning also the determination of the organ of the State competent to appoint heads of consular posts. Such a rule, by removing all possibility of differences of view on the point, will prevent friction that may harm good relations between States.

(3) International law does not settle the question which particular authority is competent to admit consuls to the exercise of consular functions nor does it settle, except for the provisions of article 11 dealing with the *exequatur*, the forms of such admission. To avoid all divergence of opinion it was necessary to state expressly that the formalities for the admission of heads of consular posts are determined by the law and usage of the receiving State, including the determination of the organ competent to grant admission to the head of a consular post.

(4) As this draft in its articles 10 and 11 contains certain other provisions relating to the formalities of the appointment and admission of the head of a consular post, the scope of the rule stated has had to be restricted by an explicit reference to those articles.

(5) The idea underlying this article was codified in a different form in the 1928 Havana Convention regarding consular agents, article 2 of which provides:

> "The form and requirements for appointment, the classes and the rank of the consuls, shall be regulated by the domestic laws of the respective State."

Article 13

Provisional admission

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefit of the present articles.

Commentary

(1) The purpose of provisional admission is to enable the head of post to take up his duties before the *exequatur* is granted. The procedure for obtaining the *exequatur* takes some time, but the business handled by a consul will not normally wait. In these circumstances the institution of provisional admission is a very useful expedient. This also explains why provisional admission has become so prevalent, as can be seen from many consular conventions, including the Havana Convention of 1928 regarding consular agents (article 6).

(2) It should be noted that the article does not prescribe a written form for provisional admission. It may equally be granted in the form of a verbal communication to the authorities of the sending State, including the head of post himself.

(3) Certain bilateral conventions go even further, and permit a kind of automatic recognition, stipulating that consuls appointed heads of posts shall be provisionally admitted as of right to the exercise of their functions and to the benefit of the provisions of the convention unless the receiving State objects. These conventions provide for the grant of provisional admission by means of a special act only in cases where this is necessary. The Commission considered that the formula used in the article was more suitable for a multilateral convention such as is contemplated by the present draft.

(4) By virtue of this article, the receiving State will be under a duty to afford assistance and protection to a head of post who is admitted provisionally and to accord him the privileges and immunities conferred on heads of consular posts by the present articles and by the relevant agreements in force.

Article 14

Obligation to notify the authorities of the consular district

As soon as the head of a consular post is admitted to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of the consular post to carry out the duties of his office and to have the benefit of the provisions of the present articles.

Commentary

(1) Under this article, the admission of the head of a consular post to the exercise of his functions, whether provisional (article 13) or definitive (article 11), involves a twofold obligation for the Government of the receiving State:

(*a*) It must immediately notify the competent authorities of the consular district that the head of post is admitted to the exercise of his functions;

(*b*) It must ensure that the necessary measures are taken to enable the head of post to carry out the duties of his office and to enjoy the benefits of the present articles.

(2) As is evident from article 11, the exercise by the head of post of his functions does not depend on the fulfilment of these obligations.

Article 15

Temporary exercise of the functions of head of a consular post

1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, an acting head of post may act provisionally as head of the consular post. He shall as a general rule be chosen from among the consular officials or the diplomatic staff of the sending State. In the exceptional cases where no such officials are available to assume this position, the acting head of post may be chosen from among the members of the administrative and technical staff.

2. The name of the acting head of post shall be notified, either by the head of post or, if he is unable to do so, by any competent authority of the sending State, to the Ministry for Foreign Affairs of the receiving State or to the authority designated by it. As a general rule, this notification shall be given in advance.

3. The competent authorities shall afford assistance and protection to the acting head of post and admit him, while he is in charge of the post, to the

benefit of the present articles on the same basis as the head of the consular post concerned.

4. If a member of the diplomatic staff is instructed by the sending State to assume temporarily the direction of a consulate, he shall continue to enjoy diplomatic privileges and immunities while exercising that function.

Commentary

(1) The institution of acting head of post has long since become part of current practice, as witness many national regulations concerning consuls and a very large number of consular conventions. The text proposed therefore merely codifies the existing practice.

(2) The function of acting head of post in the consular service corresponds to that of *chargé d'affaires ad interim* in the diplomatic service. In view of the similarity of the institutions, the text of paragraph 1 follows very closely that of article 19, paragraph 1, of the Vienna Convention on Diplomatic Relations of 18 April 1961.

(3) It should be noted that the text leaves States quite free to decide the method of designating the acting head of post, who may be chosen from among the officials of the particular consulate or of another consulate of the sending State, or from among the officials of a diplomatic mission of that State. Where no consular official is available to take charge, one of the consular employees may be chosen as acting head of post (see the Havana Convention of 1928 regarding consular agents, article 9). Since the function of acting head of post is, of necessity, temporary, and in order that the work of the consulate should not suffer any interruption, the appointment of the acting head of post is not subject to the procedure governing admission. However, the sending State has the duty to notify the name of the acting head of post to the receiving State in advance in all cases where that is possible.

(4) The word "provisionally" emphasizes that the function of acting head of post may not, except by agreement between the States concerned, be prolonged for so long a period that the acting head would in fact become permanent head.

(5) The question whether the consul should be regarded as unable to carry out his functions is a question of fact to be decided by the sending State. Unduly rigid regulations on this point are not desirable.

(6) The expression "any competent authority of the sending State" used in paragraph 2 means any authority designed by the law or by the Government of the sending State as responsible for consular relations with the State in question. This may be the head of another consular post which under the laws and regulations of the sending State is hierarchically superior to the consulate in question, the sending State's diplomatic mission in the receiving State or the Ministry for Foreign Affairs of the sending State, as the case may be.

(7) While in charge of the consular post the acting head has the same functions and enjoys the same facilities, privileges and immunities as the head of post. The question of the precedence of an acting head of post is dealt with in article 16, paragraph 4.

(8) Paragraph 4 of article 15 deals with the case where a member of the diplomatic staff is designated acting head of post. As the secondment of a member of the diplomatic mission is necessarily temporary, the Commission considered, in the light of the practice of States, that the exercise of consular functions does not in this case affect the diplomatic status of the person in question.

Article 16

Precedence

1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.

2. If, however, the head of the consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.

3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments were presented or of the notice referred to in article 10, paragraph 3.

4. Acting heads of post rank after all heads of post in the class to which the heads of post whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of post.

5. Honorary consuls who are heads of post shall rank in each class after career heads of post, in the order and according to the rules laid down in the foregoing paragraphs.

6. Heads of post have precedence over consular officials not holding such rank.

Commentary

(1) The question of the precedence of consuls, though undoubtedly of practical importance, has not as yet been regulated by international law. In many places, consuls are members of a consular corps, and the question of precedence arises quite naturally within the consular corps itself, as well as in connexion with official functions and ceremonies. In the absence of international regulations, States have been free to settle the order of precedence of consuls themselves. There would appear to be, as far as the Commission has been able to ascertain, a number of uniform practices, which the present article attempts to codify.

(2) It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls.

(3) Paragraph 4 of this article establishes the precedence of acting heads of post according to the order of precedence of the heads of post whom they replace. This is justified by the nature of the interim function. It has undoubted practical advantages, in that the order of precedence can be established easily.

(4) This text met with the almost unanimous acceptance of the Governments which have sent comments on the 1960 draft articles on consular intercourse and immunities. The Commission therefore retained the wording adopted at its previous session, with a few drafting changes. It transferred to this article the text of article 62 relating to the precedence of honorary consuls, so that all the provisions dealing with the precedence of consular officials should be grouped together in a single article. The text of former article 62 has become paragraph 5 of the present article.

Article 17

Performance of diplomatic acts by the head of a consular post

1. In a State where the sending State has no diplomatic mission, the head of a consular post may, with the consent of the receiving State, be authorized to perform diplomatic acts.

2. A head of consular post or other consular official may act as representative of the sending State to any inter-governmental organization.

Commentary

(1) The Commission's provisional draft, adopted at the twelfth session, contained two articles dealing with the exercise of diplomatic activities by consuls. Article 18 regulated the occasional performance of diplomatic acts in States where the sending State had no diplomatic mission and article 19 made provision for cases in which the sending State wished to entrust its consul with the performance, not merely of occasional diplomatic acts, but with diplomatic functions generally, a possibility for which the law makes provision in several States.

(2) Article 19 read as follows:

"In a State where the sending State has no diplomatic mission, a consul may, with the consent of the receiving State, be entrusted with diplomatic functions, in which case he shall bear the title of consul-general-*chargé d'affaires* and shall enjoy diplomatic privileges and immunities."

(3) The Commission considered the two articles in the light of the comments of Governments and decided to delete article 19, on the ground that the matter dealt with therein falls within the scope of diplomatic relations regulated by the Vienna Convention on Diplomatic Relations of 1961. There is nothing to prevent a head of consular post from being appointed a diplomatic agent and so acquiring diplomatic status.

(4) Having deleted article 19, the Commission broadened the provisions of former article 18 in order to enable the head of a consular post to exercise diplomatic activities to a greater extent than was contemplated by the original text of article 18.

(5) The present article takes account of the consul's special position in a country where the sending State is not represented by a diplomatic mission and where the head of a consular post is the only official representative of his State. As has been found in practice, a head of consular post in such a case tends to perform acts which are normally within the competence of diplomatic missions and hence are outside the scope of consular functions. For the performance of acts of a diplomatic nature, the consent—express or implied—of the receiving State is, under the article, indispensable.

(6) The performance of diplomatic acts, even if repeated, in no way affects the legal status of the head of a consular post and does not confer upon him any right to diplomatic privileges and immunities.

Article 18

Appointment of the same person by two or more States as head of a consular post

Two or more States may appoint the same person as head of a consular post in another State, unless this State objects.

Commentary

(1) This article, unlike article 7 which provides for the exercise of consular functions on behalf of a third State, deals with the case where two or more States appoint the same person as head of consular post in another State, if this State does not object. In the case covered by article 7, the consulate is an organ of the sending State alone, but is instructed to exercise consular functions on behalf of a third State. In the circumstances contemplated here, on the other hand, the head of consular post is an organ of two or more States at the same time. Accordingly, in this case there are at the same time two or more sending States, but only one receiving State.

(2) Except in so far as honorary consuls are concerned, the article represents rather an innovation in consular law. The Commission realized that the practical application of the article might even give rise to certain difficulties, since the scope of consular functions may vary according to the provisions of consular conventions and in consequence of the operation of the most-favoured-nation clause. Moreover, two States might have different interests in certain matters falling within the scope of consular functions. Nevertheless, the Commission considered that the possibility contemplated in this article might under certain conditions answer a practical need in the future development of consular law and, following the direction laid down in diplomatic law by article 6 of the 1961 Vienna Convention on Diplomatic Relations, inserted this article in the final draft.

Article 19

Appointment of the consular staff

1. Subject to the provisions of articles 20, 22 and 23, the sending State may freely appoint the members of the consular staff.

2. The sending State may, if such is required by its law, request the receiving State to grant the *exequatur* to a consular official appointed to a consulate in conformity with paragraph 1 of this article who is not the head of post.

Commentary

(1) The receiving State's obligation to accept consular officials and employees appointed to a consulate flows from the agreement by which that State gave its consent to the establishment of consular relations, and in particular from its consent to the establishment of the consulate. In most cases, the head of post cannot discharge the many tasks involved in the performance of consular functions without the help of assistants whose qualifications, rank and number will depend on the importance of the consulate.

(2) This article is concerned only with the subordinate staff that assists the head of post in the performance of the consular functions; for the procedure relating to the appointment of the head of post, to his admission by the receiving State, and to the withdrawal of such admission is dealt with in other articles of the draft.

(3) The consular staff is divided into two categories:

(*a*) *Consular officials,* i.e., persons who belong to the consular service and exercise a consular function; and

(*b*) *Consular employees*, i.e., persons who perform administrative or technical work, or belong to the service staff.

(4) The sending State is free to choose the members of the consular staff. But there are exceptions to this rule, as appears from the proviso in paragraph 1:

(*a*) As stipulated in article 22, consular officials may not be appointed from among the nationals of the receiving State except with the consent of that State. The same rule may apply, if the receiving State so wishes, to the appointment of nationals of a third State.

(*b*) Article 20, which gives the receiving State the possibility of limiting the size of the consular staff in certain circumstances, is another exception.

(*c*) A third exception to the rule laid down in article 19 consists in the power given the receiving State, under article 23, at any time to declare a member of the consular staff not acceptable, or, if necessary, to refuse to consider him as a member of the consular staff.

(5) The right to appoint consular officials and employees to a consulate is expressly provided for in certain recent consular conventions, in particular the conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (article 6), with France on 31 December 1951 (article 3, paragraph 6), with Sweden on 14 March 1952 (article 6), with Greece on 17 April 1953 (article 6), with Italy on 1 June 1954 (article 4), with Mexico on 20 March 1954 (article 4, paragraph 1) and with the Federal Republic of Germany on 30 July 1956 (article 4, paragraph 1).

(6) The free choice of consular staff provided for in this article naturally does not in any way imply exemption from visa formalities in the receiving State in cases where a visa is necessary for admission to that State's territory.

(7) The whole structure of this draft is based on the principle that only the head of consular post needs an *exequatur* or a provisional admission to enter upon his functions. According to this principle, which is well established in practice, the consent to the establishment of a consulate and the *exequatur* granted to the head of consular post cover the consular activities of all the members of the consular staff, as is explained in the commentary to article 11. Nevertheless, the sending State may see fit also to request an *exequatur* for consular officials other than the head of post. Such cases arise, in particular, if, under the law of the sending State, it is a condition of the validity of acts performed by the consular official that he must have obtained the *exequatur*. In order to take these special needs into account, the Commission inserted a new provision, which constitutes paragraph 2 of this article. This paragraph provides that the sending State may, if such is required by its law, request the receiving State to grant the *exequatur* to a consular official who is not the head of post and who is appointed to a consulate in that State. This is an optional and supplementary measure, which is not required by international law.

Article 20

Size of the staff

In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within reasonable and normal limits, having regard to circumstances and conditions in the consular district and to the needs of the particular consulate.

Commentary

(1) This article deals with the case where the sending State would increase the size of the consular staff disproportionately.

(2) The Commission considered that the receiving State's right to raise the question of the size of the staff should be recognized.

(3) If the receiving State considers that the consular staff is too large, it should first try to reach an agreement with the sending State. If these efforts fail, then, in the opinion of the majority of the members of the Commission, it should have the right to limit the size of the sending State's consular staff.

(4) This right of the receiving State is not, however, absolute, for this State is obliged to take into account not only the conditions prevailing in the consular district, but also the needs of the consulate concerned, i.e., it must apply objective criteria, one of the most decisive being the consulate's needs. Any decision by the receiving State tending to limit the size of the consular staff should, in the light of the two criteria mentioned in the present article, remain within the limits of what is reasonable and normal. The Commission, recognizing that in this respect there are practical differences between diplomatic missions and consulates, preferred this formulation to that used in article 11, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, considering that it would better provide objective criteria for settling possible divergences of views between the two States concerned. In addition, it had to take into account the fact that several Governments wanted the article to be deleted, and for that reason also it did not consider it advisable to broaden the scope of the obligation stipulated in the article.

Article 21

Order of precedence as between the officials of a consulate

The order of precedence as between the officials of a consulate shall be notified by the head of post to the Ministry for Foreign Affairs of the receiving State or to the authority designated by the said Ministry.

Commentary

As has been explained in the commentary to article 16, the question of precedence is of undoubted practical interest. In some cases, it may arise not only with regard to heads of consular posts, but also with regard to other consular officials. In that case it will be important to know the order of precedence of the officials of a particular consulate *inter se*, particularly since the rank and titles may differ from one consulate to another. Accordingly, the Commission thought it advisable to insert this article, which corresponds to article 17 of the 1961 Vienna Convention on Diplomatic Relations.

Article 22

Appointment of nationals of the receiving State

1. Consular officials should in principle have the nationality of the sending State.

2. Consular officials may not be appointed from among persons having the nationality of the receiving State except with the consent of that State which may be withdrawn at any time.

3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State.

Commentary

(1) This article as adopted at the Commission's twelfth session read as follows (article 11):

"Consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State."

(2) This text, by stipulating that consular officials may not be chosen from amongst the nationals of the receiving State except with its express consent, implied that consular officials should, as a rule, have the nationality of the sending State.

(3) At the present session, the Commission decided to draft the article in more explicit terms and to follow article 8 of the 1961 Vienna Convention on Diplomatic Relations, although several members of the Commission would have preferred to keep the wording adopted in 1960. In conformity with the Commission's decision, the article states explicity that consular officials should in principle have the nationality of the sending State. Paragraph 2 reproduces the terms of the article as it appears in the 1960 draft, with the difference that, in order to bring the text into line with paragraph 2 of article 8 of the Vienna Convention, the word "express" was omitted and the phrase "which may be withdrawn at any time" added. Lastly, paragraph 3 of this article, consistent with article 8, paragraph 3, of the Vienna Convention on Diplomatic Relations, recognizes the receiving State's right to make the appointment of consular officials who are nationals of a third State and not also nationals of the sending State conditional on its consent.

Article 23

Withdrawal of exequatur

Persons deemed unacceptable

1. If the conduct of the head of a consular post or of a member of the consular staff gives serious grounds for complaint, the receiving State may notify the sending State that the person concerned is no longer acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consulate.

2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving State may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.

3. A person may be declared unacceptable before arriving in the territory of the receiving State. In any such case, the sending State shall withdraw his appointment.

Commentary

(1) This article combines the provisions contained in two separate articles in the draft adopted at the previous session, namely article 20 concerning the withdrawal of the *exequatur* and article 23 specifying the conditions under which the receiving State may declare a member of the consular staff not acceptable. This article therefore defines what are the rights of the receiving State if the conduct of the head of a consular post or a member of the consular staff gives rise to serious grounds for complaint.

(2) The right of the receiving State to declare the head of post or a member of the consular staff unacceptable is limited to the case where the conduct of the persons in question has given serious grounds for complaint. Consequently, it is an individual measure which may only be taken in consequence of such conduct. This constitutes some safeguard for the sending State against arbitrary measures. This safeguard is all the more necessary since the arbitrary withdrawal of the *exequatur* of the head of a consular post or the fact that in the absence of serious grounds a member of the consular staff is declared unacceptable might cause grave prejudice to the sending State by abruptly or unjustifiably interrupting the performance of consular functions in matters where more or less daily action by the consul is absolutely essential (e.g., various trade and shipping matters, the issue of visas, the attestation of signatures, translation of documents, and the like). Such an interruption might also cause great harm to the receiving State.

(3) The expression "not acceptable" used in this article corresponds to the phrase "*persona non grata*" which is customarily used where diplomatic personnel are concerned.

(4) If the head of post or a member of the consular staff has been declared unacceptable by the receiving State, the sending State is bound to recall the person in question or to terminate his functions at the consulate, as the case may be.

(5) The expression "terminate his functions" applies above all to the case where the person concerned is a national of the receiving State or to a case where the person in question, although a national of the sending State or of a third State, was permanently resident in the territory of the receiving State before his appointment to the consulate of the sending State.

(6) If the sending State refuses to carry out the obligation specified in paragraph 1, or fails to carry it out within a reasonable time, the receiving State may, in the case of the head of post, withdraw the *exequatur* and, in the case of a member of the consular staff, cease to regard him as a member of the consular staff.

(7) As the text of the article implies, the sending State is entitled to ask the receiving State for the reasons for its complaint of the conduct of the consular official or employee affected.

(8) In the case of the withdrawal of the *exequatur*, the head of post affected ceases to be allowed to exercise consular functions.

(9) If the receiving State ceases to regard a person as a member of the consular staff, that means that the person in question loses the right to participate to any extent whatsoever in the exercise of consular functions.

(10) Nevertheless, the head of a consular post whose *exequatur* has been withdrawn and the member of the consular staff whom the receiving State has ceased to consider as a member of the consulate continue to enjoy consular privileges and immunities under article 53 until they leave the country or until the expiry of a reasonable time limit granted to them for that purpose.

(11) As is clear from paragraph 3 of this article, the receiving State may declare a person unacceptable before his arrival in its territory. In that case, the receiving State is not obliged to communicate the reasons for its decision.

Article 24

Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff

1. The Ministry for Foreign Affairs of the receiving State, or the authority designated by that Ministry, shall be notified of:

(*a*) The appointment of members of the consulate, their arrival after appointment to the consulate, as well as their final departure or the termination of their functions with the consulate;

(*b*) The arrival and final departure of a person belonging to the family of a member of the consulate forming part of his household and, where appropriate, the fact that the person becomes or ceases to be a member of the family of a member of the consulate;

(*c*) The arrival and final departure of members of the private staff in the employ of persons referred to in sub-paragraph (*a*) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

(*d*) The engagement and discharge of persons resident in the receiving State as members of the consulate or as members of the private staff entitled to privileges and immunities.

2. Where possible, prior notification of arrival and final departure shall also be given.

Commentary

(1) This article imposes on the sending State the obligation to notify the receiving State of:

(*a*) The appointment of members of the consulate;

(*b*) The arrival of members of the consulate after their appointment to the consulate;

(*c*) Their final departure or the termination of their functions with the consulate;

(*d*) The arrival of members of the families of members of the consulate;

(*e*) The fact that a person has become a member of the family of a member of the consulate and forms part of his household;

(*f*) The final departure of a person belonging to the family of a member of the consulate, forming part of his household, and, if the case should arise, the fact that that person has ceased to be a member of the family of a member of the consulate;

(*g*) The arrival of members of the private staff of members of the consulate;

(*h*) The final departure of members of the private staff and, where applicable, the fact that they have left the service of the persons concerned;

(*i*) The engagement or dismissal of persons residing in the receiving State either as members of the consulate or as members of the private staff.

(2) The notification is in the interest both of the receiving and of the sending State. The former has a great interest in knowing at any particular time the names of the persons belonging to the sending State's consulate, since these persons may, though in differing degrees, claim the benefit of consular privileges and immunities. And so far as the sending State is concerned, the notification is a practical measure enabling the members of its consulate, the members of their families and their private staff to become eligible as quickly as possible for the benefit of the privileges and immunities accorded to them by these articles or by other applicable international agreements.

(3) It should be noted that the enjoyment of consular privileges and immunities is not conditional on notification, except in the case of persons who were in the territory of the receiving State at the time of their appointment or at the time when they entered the household of a member of the consulate (article 53 of this draft). In this case, the notification marks the commencement of the privileges and immunities of the person in question.

(4) Save as otherwise provided by the law of the receiving State, the notification is addressed to the Ministry for Foreign Affairs, which may however, designate some other authority to which the notifications referred to in article 24 are to be addressed.

(5) The present article corresponds to article 10 of the 1961 Vienna Convention on Diplomatic Relations.

SECTION II: END OF CONSULAR FUNCTIONS

Article 25

Modes of termination of the functions of a member of the consulate

The functions of a member of the consulate come to an end in particular:

(*a*) On notification by the sending State to the receiving State that the functions of the member of the consulate have come to an end;

(*b*) On the withdrawal of the *exequatur* or, as the case may be, the notification by the receiving State to the sending State that the receiving State refuses to consider him as a member of the consular staff.

Commentary

This article deals with the modes of termination of the functions of the members of the consulate. The enumeration is not exhaustive, and it contains only the most common causes. The functions may also be terminated by other events, e.g., the death of the consular official or employee, the closure of the consulate or the severance of consular relations, the extinction of the sending State, the incorporation of the consular district into another State. The events terminating the functions of a member of the consulate are sometimes set out in consular conventions.

Article 26

Right to leave the territory of the receiving State and facilitation of departure

The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their na-

tionality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Commentary

(1) This article lays down the obligation of the receiving State to allow members of the consulate, members of their families and members of the private staff in their service to leave its territory. With the exception of members of the family, this article does not apply to persons who are nationals of the receiving State.

(2) The article corresponds to and is modelled on article 44 of the Vienna Convention on Diplomatic Relations. The expression "at the earliest possible moment" should be construed as meaning, first, that the receiving State should allow the persons covered by this article to leave its territory as soon as they are ready to leave and, secondly, that it should allow them the necessary time for preparing their departure and arranging for the transport of their property.

Article 27

Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances

1. In the event of the severance of consular relations between two States:

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

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

(*c*) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

2. In the event also of the temporary or permanent closure of a consulate, the provisions of paragraph 1 of the present article shall apply if the sending State has no diplomatic mission and no other consulate in the receiving State.

3. If the sending State, although not represented in the receiving State by a diplomatic mission, has another consulate in the territory of that State, that consulate may be entrusted with the custody of the archives of the consulate which has been closed and, with the consent of the receiving State, with the exercise of consular functions in the district of that consulate.

Commentary

(1) In the case referred to in paragraph 2 of this article, the sending State may entrust the custody of the consular archives to a third State acceptable to the receiving State, unless it decides to evacuate the archives. The third State having the custody of the consular premises and archives may entrust this task to its diplomatic mission or to one of its consulates.

(2) If a consulate has been temporarily or permanently closed in the receiving State, a fresh agreement between the receiving State and the sending State is necessary for the purpose of the provisional or permanent transfer of the consular functions of the closed consulate to another consulate of the sending State in the receiving State.

(3) This article corresponds to article 45 of the 1961 Vienna Convention on Diplomatic Relations.

CHAPTER II. FACILITIES, PRIVILEGES AND IMMUNITIES OF CAREER CONSULAR OFFICIALS AND CONSULAR EMPLOYEES

SECTION 1. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO A CONSULATE

Article 28

Use of the national flag and of the State coat-of-arms

The consulate and its head shall have the right to use the national flag and coat-of-arms of the sending State on the building occupied by the consulate and at the entrance door and on the means of transport of the head of post.

Commentary

(1) The rule set forth in this article states in the first place the right to display the national flag and the State coat-of arms on the building in which the consulate is housed and at the entrance door of that building. This right, which is vested in the sending State, is confirmed by numerous consular conventions and must be regarded as being based on a rule of customary international law. It is commonly admitted that the inscription appearing on the coat-of-arms of the sending State may also be in the official language, or one of the official languages, of that State.

(2) In the case where the whole of the building is used for the purposes of the consulate, the national flag may be flown not only on the building but also within its precincts. The right to use the national flag is embodied in many national regulations.

(3) A study of the consular conventions shows that the right of the consulate to fly the national flag on the means of transport of the head of post is recognized by a large number of States. The means of transport in question must be individual ones, such as motor vehicles, vessels of all kinds used exclusively by the head of consular post, aircraft belonging to the consulate, etc. Accordingly, this right is not exercisable when the head of consular post uses public means of transport (trains, ships and boats, commercial aircraft).

(4) Besides the head of post who has received the *exequatur* (article 11) or been admitted on a provisional basis to the exercise of his functions (article 13), an acting head of post (article 15) may also exercise the privilege referred to in paragraph 3 of this commentary.

(5) The consular regulations applied by some States provide for the use of a consular flag (*fanion*) by their consuls. Article 28 should be interpreted as applying to these cases also.

(6) The duty of the receiving State to permit the use of the national flag of the sending State implies the duty to provide for the protection of that flag. Some conventions stipulate that consular flags are inviolable (e.g., the Convention of Caracas of 1911, article III, paragraph 1).

(7) This article corresponds to article 20 of the 1961 Vienna Convention on Diplomatic Relations.

Article 29

Accommodation

1. The receiving State shall either facilitate the acquisition in its territory, in accordance with its municipal law, by the sending State of premises necessary for its consulate or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist in obtaining suitable accommodation for the members of the consulate.

Commentary

(1) The right to procure on the territory of the receiving State the premises necessary for a consulate derives from the agreement by which that State gives its consent to the establishment of the consulate. The reference in the text of the article to the municipal law of the receiving State signifies that the sending State may procure premises only in the manner laid down by the law of the receiving State. That municipal law may however contain provisions prohibiting the acquisition of the ownership of premises by aliens or by foreign States, so that the sending State may be obliged to rent premises. Even in this case, the sending State may encounter legal or practical difficulties. Hence, the Commission decided to include in the draft an article making it obligatory for the receiving State to facilitate, as far as possible, the procuring of suitable premises for the consulate of the sending State.

(2) This article corresponds to article 21 of the 1961 Vienna Convention on Diplomatic Relations.

Article 30

Inviolability of the consular premises

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

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

3. The consular premises, their furnishings, the property of the consulate and its means of transport shall be immune from any search, requisition, attachment or execution.

Commentary

(1) The consular premises comprise the buildings or parts of buildings and the appurtenant land which, whoever the owner may be, are used for the purposes of the consulate (article 1 (*j*)). If the consulate uses an entire building for its purposes, the consular premises also comprise the surrounding land and the appurtenances, including the garden, if any; for the appurtenances are an integral part of the building and are governed by the same rules. It is hardly conceivable that the appurtenances should be governed by rules different from those applicable to the building to which they are attached.

(2) The inviolability of the consular premises is a prerogative granted to the sending State by reason of the fact that the premises in question are used as the seat of its consulate.

(3) The article places two obligations on the receiving State. In the first place, that State must prevent its agents from entering the consular premises unless they have previously obtained the consent of the head of post (paragraph 1). Secondly, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage, and to prevent any disturbance of the peace of the consulate or impairment of its dignity (paragraph 2). The expression "special duty" is used to emphasize that the receiving State is required to take steps going beyond those normally taken in the discharge of its general duty to maintain public order.

(4) Paragraph 3 extends the inviolability also to the property of the consulate and in particular to the means of transport of the consulate. The paragraph provides that the consular premises must not be entered even in pursuance of an order made by a judicial or administrative authority. It confers immunity from any search, requisition, attachment or execution upon the consular premises, their furnishings and other objects therein and also on the property of the consulate, in particular the assets of the consulate and its means of transport. This immunity naturally includes immunity from military requisitioning and billeting.

(5) If the consulate uses leased premises, measures of execution which would involve a breach of the rule of inviolability confirmed by this article must not be resorted to against the owner of the premises.

(6) By reason of article 27 of the present draft, the inviolability of the consular premises will subsist even in the event of the severance of consular relations or of the permanent or temporary closure of the consulate.

(7) This article reproduces, *mutatis mutandis*, the text of article 22 of the 1961 Vienna Convention on Diplomatic Relations.

(8) The principle of the inviolability of the consular premises is recognized in numerous consular conventions, including the following: Cuba-Netherlands, 31 December 1913 (article 5); Albania-France, 5 February 1920 (article 6); Czechoslovakia-Italy, 1 March 1924 (article 9); Greece-Spain, 23 September 1926 (article 9); Poland-Yugoslavia, 6 March 1927 (article VIII); Germany-Turkey, 28 May 1929 (article 6); Costa Rica-United States of America, 12 January 1948 (article VI); Philippines-Spain, 20 May 1948 (article IX, paragraph 2); the consular conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (article 10, paragraph 4), with France on 31 December 1951 (article 11, paragraph 1), with Sweden on 14 March 1952 (article 10, paragraph 4), with Greece on 17 April 1953 (article 10, paragraph 3), with Mexico on 20 March 1954 (article 10, paragraph 3) and with the Federal Republic of Germany on 30 July 1956 (article 8, paragraph 3); the conventions concluded by the Union of Soviet Socialist Republics with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 2), with the Mongolian People's Republic on 28 August 1957 (article 13, paragraph 2), with the Romanian People's Republic on 4 September 1957 (article 9, paragraph 2), with the People's Republic of Albania on 18 September 1957 (article 3, paragraph 2), with the People's Republic of Bulgaria on 16 December 1957 (article 13, paragraph 2), with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 3), with Austria on 28 February 1959 (article 13, para-

graph 2), with the Democratic Republic of Viet-Nam on 5 June 1959 (article 13, paragraph 2) and with the People's Republic of China on 23 June 1959 (article 13, paragraph 2); the consular convention of 23 May 1957 between Czechoslovakia and the German Democratic Republic (article 5, paragraph 2); and the Havana Convention of 1928 regarding consular agents (article 18). Although some of these conventions allow certain exceptions to the rule of inviolability, in that they allow the police or other territorial authorities to enter the consular premises in pursuance of an order of the courts under certain conditions, even without the consent of the head of post or in cases where his consent is presumed, as in the case of fire or other disasters or where a crime is committed on the consular premises, nevertheless many conventions lay down the rule of inviolability and admit of no exception whatsoever. As the inviolability of consular premises has the same importance for the exercise of consular functions as the inviolability of the premises of a diplomatic mission for that of diplomatic functions, the majority of the Commission was of the opinion that, in this matter, the text adopted at the Vienna Conference should be followed.

(9) Some bilateral consular conventions even recognize the inviolability of the consul's residence. The municipal law of some (though of very few) countries also recognizes the inviolability of the consul's residence.

Article 31

Exemption from taxation of consular premises

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

2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or the head of the consular post.

Commentary

(1) The exemption provided for in article 31 relates to the dues and taxes which, but for the exemption, would, under the law of the receiving State, be leviable on the consular premises owned or leased by the sending State or by the head of a consular post. The exemption covers the dues and taxes charged on the contract of sale, or on the lease, and also those charged on the building and rents.

(2) The expression "all national, regional or municipal dues and taxes whatsoever" should be construed as meaning those charged by the receiving State or by any of its territorial or political sub-divisions such as: the State (in a federal State), *canton*, autonomous republic, province, county, region, department, district, *arrondissement*, commune or municipality.

(3) This exemption is subject to an exception indicated in the final phrase of paragraph 1 in respect of dues and taxes which represent payment for specific services, e.g., the tax on radio and television sets, taxes on water, electricity, gas consumption, etc.

(4) This article reproduces *mutatis mutandis* the text of article 23 of the 1961 Vienna Convention on Diplomatic Relations.

Article 32

Inviolability of the consular archives and documents

The consular archives and documents shall be inviolable at any time and wherever they may be.

Commentary

(1) This article lays down one of the essential rules relating to consular privileges and immunities, recognized by customary international law. While it is true that the inviolability of the consular archives and of the documents of the consulate (hereinafter designated as the papers of the consulate) is to some extent guaranteed by the inviolability of the consular premises (article 30), the papers of the consulate must as such be inviolable wherever they are, even, for example, if a member of the consulate is carrying them on his person, or if they have to be taken away from the consulate owing to its closure or on the occasion of a removal. For the reasons given, and because of the importance of this rule for the exercise of the consular functions, the Commission considered it necessary that it should form the subject of a separate article.

(2) The expression "consular archives" means the papers, documents, correspondence, books and registers of the consulate and the ciphers and codes together with the card-indexes and furniture intended for their protection or safekeeping (article 1, paragraph 1(*k*)).

(3) The term "documents" means any papers which do not come under the heading of "official correspondence", e.g., memoranda drawn up by the consulate. It is clear that "civil status" documents, such as certificates of birth, marriage or death issued by the consul, and documents such as manifests, drawn up by the consul in the exercise of his functions, cannot be described for the purposes of this article as documents entitled to inviolability, for these certificates, manifests, etc., are issued to the persons concerned or to their representatives as evidence of certain legal acts or events.

(4) The protection of the official correspondence is also ensured by paragraph 2 of article 35.

(5) This article corresponds to article 24 of the 1961 Vienna Convention on Diplomatic Relations.

(6) The papers of the consulate enjoy inviolability even before the *exequatur* or special authorization is issued to the consul, for the inviolability is an immunity granted to the sending State and not to the consular official personally.

Article 33

Facilities for the work of the consulate

The receiving State shall accord full facilities for the performance of the functions of the consulate.

Commentary

(1) This article, which follows the terms of article 25 of the 1961 Vienna Convention on Diplomatic Relations was inserted because the consulate needs the assistance of the Government and authorities of the receiving State, both during its installation and in the exercise of its functions. Consuls could not successfully carry out any of the functions enumerated by way of example in article 5 without the assistance of the authorities of the receiving State. The obligation which this article imposes on the receiving State is moreover

in its own interests, for the smooth functioning of the consulate helps to develop consular intercourse between the two States concerned.

(2) It is difficult to define the facilities which this article has in view, for this depends on the circumstances of each particular case. It should, however, be emphasized that the obligation to provide facilities is confined to what is reasonable, having regard to the given circumstances.

Article 34

Freedom of movement

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

Commentary

This article corresponds to article 26 of the 1961 Vienna Convention on Diplomatic Relations.

Article 35

Freedom of communication

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the Government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag and messages in code or cipher. However, the consulate may install and use a wireless transmitter only with the consent of the receiving State.

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

3. The consular bag, like the diplomatic bag, shall not be opened or detained.

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

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. A consular 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 consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.

Commentary

(1) This article predicates a freedom essential for the discharge of consular functions; and, together with the inviolability of consular premises and that of the consulate's official archives, documents and correspondence, it forms the foundation of all consular law.

(2) By the terms of paragraph 1, freedom of communication is to be accorded "for all official purposes". This expression relates to communication with the Government of the sending State; with the authorities of that State, and, more particularly, with its diplomatic missions and other consulates, wherever situated; with the diplomatic missions and consulates of other States; and, lastly with international organizations.

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag, and messages in code or cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, i.e., of the couriers dispatched by the Ministry for Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's way-bill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

(4) However, by reason of its geographical position, a consulate may have to send a consular courier to the seat of the diplomatic mission or even to the sending State, particularly if the latter has no diplomatic mission in the receiving State. The text proposed by the Commission provides for this contingency. The consular courier shall be provided with an official document certifying his status and indicating the number of packages constituting the consular bag. The consular courier must enjoy the same protection in the receiving State as the diplomatic courier. He enjoys inviolability of person and is not liable to any form of arrest or detention.

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official correspondence, documents or articles intended for official purposes or all these together. The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of article 32 and of paragraph 2 of article 35 of the draft. As is specified in paragraph 4 consular bags must bear visible external marks of their character, i.e., they must bear an inscription or other external mark so that they can be identified as consular bags.

(6) Freedom of communication also covers messages in cipher, i.e., messages in secret language, and, of course, also messages in code, i.e., messages in a conventional language which is not secret and is employed for reasons of practical utility and, more particularly, in order to save time and money.

(7) Following the example of article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, the Commission has added a rule concerning the installation and use of a wireless transmitter by a consulate and stated in the text of the article the opinion which it had expressed at its previous session in paragraph (7) of the commentary to article 36. According to paragraph 1 of the present article, the consulate may not install or use a wireless transmitter except with the consent of the receiving State.

(8) The Commission, being of the opinion that the consular bag may be entrusted by a consulate to the captain of a commercial aircraft, has inserted a rule to that effect by adapting the text of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

(9) Correspondence and other communications in transit, including messages in cipher, enjoy protection in third States also, in conformity with the provisions of article 54, paragraph 3, of the present draft. The same protection is enjoyed by consular couriers in third States.

(10) Independently of the fact that the expression "consular archives" includes the official correspondence (article 1, paragraph 1(*k*)), the Commission considered it indispensable—and in this respect it followed article 27, paragraph 2, of the Vienna Convention on Diplomatic Relations—to insert in this draft a special provision affirming the inviolability of the official correspondence. In this way it meant to stress—as is, incidentally, explained in the commentary to article 1—that the official correspondence is inviolable at all times and wherever it may be, and consequently even before it actually becomes part of the consular archives.

Article 36

Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(*a*) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the consular officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;

(*b*) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;

(*c*) Consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these rights.

Commentary

(1) This article defines the rights granted to consular officials with the object of facilitating the exercise of the consular functions relating to nationals of the sending State.

(2) First, in paragraph 1 (*a*), the article establishes the freedom of nationals of the sending State to communicate with and have access to the competent consular official. The expression "competent consular official" means the consular official in the consular district in which the national of the sending State is physically present.

(3) The same provision also establishes the right of the consular official to communicate with and, if the exercise of his consular functions so requires, to visit nationals of the sending State.

(4) In addition, this article establishes the consular rights that are applicable in those cases where a national of the sending State is in custody pending trial, or imprisoned in the execution of a judicial decision. In any such case, the receiving State would assume three obligations under the article proposed:

(*a*) First, the receiving State must, without undue delay, inform the consul of the sending State in whose district the event occurs, that a national of that State is committed to custody pending trial or to prison. The consular official competent to receive the communication regarding the detention or imprisonment of a national of the sending State may, therefore, in some cases, be different from the one who would normally be competent to exercise the function of providing consular protection for the national in question on the basis of his normal residence;

(*b*) Secondly, the receiving State must forward to the consular official without undue delay any communications addressed to him by the person in custody, prison or detention;

(*c*) Lastly, the receiving State must permit the consular official to visit a national of the sending State who is in custody, prison or detention in his consular district, to converse with him, and to arrange for his legal representation. This provision is designed to cover cases where a national of the sending State has been placed in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgement is still open to appeal or cassation; and also cases where the judgement convicting the national has become final. This provision applies also to other forms of detention (quarantine, detention in a mental institution).

(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody, against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of

a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.

(6) The expression "without undue delay" used in paragraph 1 (*b*) allows for cases where it is necessary to hold a person incommunicado for a certain period for the purposes of the criminal investigation.

(7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question.

Article 37

Obligations of the receiving State

The receiving State shall have the duty:

(*a*) In the case of the death of a national of the sending State, to inform the consulate in whose district the death occurred;

(*b*) To inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State;

(*c*) If a vessel used for maritime or inland navigation, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consulate nearest to the scene of the occurrence.

Commentary

(1) This article is designed to ensure co-operation between the authorities of the receiving State and consulates in three types of cases coming within the scope of the consular functions. The duty to report to the consulate the events referred to in this article is often included in consular conventions. If this duty could be made general by means of a multilateral convention, the work of all consulates would be greatly facilitated.

(2) In case of the death of a national of the sending State, the obligation to inform the consulate of the sending State exists, of course, only in those cases in which the authorities of the receiving State are aware that the deceased was a national of the sending State. If this fact is not established until later (e.g., during the administration of the estate) the obligation to inform the consulate of the sending State arises only as from that moment.

(3) The obligation laid down in paragraph (*c*) has been extended to include not only the case where a sea-going vessel or a boat is wrecked or runs aground on the coast in the territorial sea but also the case where a vessel is wrecked or runs aground in the internal waters of the receiving State.

Article 38

Communication with the authorities of the receiving State

1. In the exercise of the functions specified in article 5, consular officials may address the authorities which are competent under the law of the receiving State.

2. The procedure to be observed by consular officials in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the municipal law and usage of the receiving State.

Commentary

(1) It is a well-established principle of international law that consular officials, in the exercise of their functions as set out in article 5, may address only the local authorities. The Commission was divided on the question of what these authorities are.

(2) Some members of the Commission, pointing out that the exercise of the competence of the consulate with respect to the receiving State is restricted to the consular district—as is apparent, also, from article 5 (*b*) of the present draft—considered that the only cases in which consular officials could address authorities outside the consular district were those where a particular service constituted the central service for the entire territory of the State, or for one of the State's territorial or political sub-divisions (e.g., the emigration or immigration services, the chambers of commerce or the Patent Office in many States). They held that if the consular official's applications to the local authorities or to the centralized services were not given due consideration, he could address the Government through the diplomatic mission of the sending State, direct communication with a Ministry of the receiving State being permissible only if the sending State had no diplomatic mission in the receiving State.

(3) Other members of the Commission took the view that consular officials might, in the case of matters within their consular district, address any authority of the receiving State direct, including the central authorities. In their opinion, any restrictions in this sense imposed upon consular officials by the regulations of the sending State are internal measures without relevance for international law.

(4) The text of the article represents a compromise between the two points of view. It leaves it for each receiving State to determine what are the competent authorities which may be addressed by consular officials in the exercise of their functions, and yet it does not exclude recourse to central authorities. The text gives consular officials the right to apply to the authority which, in accordance with the law of the receiving State, is competent in a specific case. Nevertheless, at the same time it reserves under paragraph 2 of this article the right to regulate the procedure of this communication, in the absence of an international agreement, in accordance with the municipal law and usage of the receiving State.

(5) Paragraph 2 of the article provides, in conformity with the practice of States, that the procedure to be observed by consular officials in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the law and usage of the receiving State. For example, the law of some countries requires consular officials who wish to address the Government of the receiving State to communicate through their diplomatic mission; or it provides that consular officials of countries which have no diplomatic representation in the receiving State may address only certain officials of the Ministry for Foreign Affairs in well-defined cases. The receiving

State may also prescribe other procedures to be observed by foreign consular officials.

(6) It should be noted that the communications of consular officials with the authorities of the receiving State are often governed by consular conventions. For example, the consular convention of 1913 between Cuba and the Netherlands (article 6) and the consular convention of 1924 between Czechoslovakia and Italy (article 11, paragraph 4) provide that consular officials may not address the central authorities except through the diplomatic channel. The consular convention of 1923 between Germany and the United States of America (article 21) gives only the consul-general or consular official stationed in the capital the right to address the Government. Other conventions authorize the consular official to communicate not only with the competent authorities of his district but also with the competent departments of the central Government; however, he may do so only in cases where there is no diplomatic mission of the sending State in the receiving State. (See in particular the consular conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 19, paragraph 2) and with France on 31 December 1951 (article 24, paragraph 2). Other conventions authorize the consular official to correspond with the Ministries of the central Government, but stipulate that he may not communicate directly with the Ministry for Foreign Affairs except in the absence of a diplomatic mission of the sending State. (See the consular convention of 17 April 1953 between Greece and the United Kingdom (article 18, paragraph 1 (*d*)).

Article 39

Levying of fees and charges and exemption of such fees and charges from dues and taxes

1. The consulate may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees or charges, shall be exempt from all dues and taxes in the receiving State.

Commentary

(1) This article states a rule of customary international law. Since the earliest times consuls have levied fees for services rendered to their nationals, originally fixed as a percentage of the quantity or of the value of goods imported through the ports by the nationals concerned. At the present time, every State levies fees provided by law for official acts performed by its consulates. It must be borne in mind that since the levying of consular fees and charges is bound up with the exercise of consular functions it is subject to the general limitation laid down in the introductory sentence of paragraph 1 of article 55. For this reason, a consulate would not be entitled to levy charges on consular acts which are not recognized by the present articles or by other relevant international agreements in force, and which would be a breach of the law of the receiving State.

(2) Paragraph 2 of this article stipulates that the revenue obtained from the fees and charges levied by a consulate for consular acts shall be exempt from all dues and taxes levied either by the receiving State or by any of its territorial or local authorities. In addition, this paragraph recognizes that the receipts issued by a consulate for the payment of consular fees or charges are likewise exempt from dues or taxes levied by the receiving State. These dues include, amongst others, the stamp duty charged in many countries on the issuance of receipts.

(3) The exemption referred to in paragraph 2 of this article should be interpreted as including exemption from all dues or taxes charged by the receiving State or by a territorial or local authority: State (in a federal State), *canton*, autonomous republic, province, county, region, department, district, *arrondissement*, commune, municipality.

(4) This article leaves aside the question of the extent to which acts performed at a consulate between private persons are exempt from the dues and taxes levied by the law of the receiving State. The opinion was expressed that such acts should be subject to the said dues or taxes only if intended to produce effects in the receiving State. It was contended that it would be unjustifiable for the receiving State to levy dues and taxes on acts performed, for example, between the nationals of two foreign States and intended to produce legal effects in one or more foreign States. Several Governments have declared themselves in agreement with this point of view. Nevertheless, as the Commission had not sufficient information at its disposal concerning the practice of States, it contented itself with bringing the matter to the attention of Governments.

(5) The exemption of the members of the consulate and members of their families forming part of their households from taxation is dealt with in article 48.

SECTION II: FACILITIES, PRIVILEGES AND IMMUNITIES REGARDING CONSULAR OFFICIALS AND EMPLOYEES

Article 40

Special protection and respect due to consular officials

The receiving State shall be under a duty to accord special protection to consular officials by reason of their official position and to treat them with due respect. It shall take all appropriate steps to prevent any attack on their persons, freedom or dignity.

Commentary

(1) The rule that the receiving State is under a legal obligation to accord special protection to consular officials and to treat them with respect must be regarded as forming part of customary international law. Its basis lies in the fact that, according to the view generally accepted today, the consular official represents the sending State in the consular district, and by reason of his position is entitled to greater protection than is enjoyed in the territory of the receiving State by resident aliens. He is also entitled to be treated with the respect due to agents of foreign States.

(2) The rule laid down tends in the direction of assuring to the consular official a protection that may go beyond the benefits provided by the various articles of the present draft. It applies in particular to all situations not actually provided for, and even assures to the consular official a right of special protection where he is subjected to annoyances not constituting attacks on his

person, freedom or dignity as mentioned in the second sentence of this article.

(3) The fact of receiving the consul places the receiving State under an obligation to ensure his personal safety, particularly in the event of tension between that State and the sending State. The receiving State must therefore take all reasonable steps to prevent attacks on the consular official's person, freedom, or dignity.

(4) Under the provisions of article 53, a consular official starts to enjoy the special protection provided for in article 40 as soon as he enters the territory of the receiving State on proceeding to take up his post, or, if already in that territory, as soon as his appointment is notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry.

(5) The protection of the consul after the termination of his functions is dealt with in article 26 of the draft.

(6) The expression "appropriate steps" must be interpreted in the light of the circumstances of the case. It includes all steps which the receiving State is in a position to take, having regard to the actual state of affairs at the place where the consular official's residence or the consulate is situated, and to the physical means at its disposal.

(7) The rule codified in this article is embodied in many consular conventions, including, amongst recent ones, the conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (article 5, paragraph 2), with Greece on 17 April 1953 (article 5, paragraph 2), with Mexico on 20 March 1954 (article 5, paragraph 2) and with Italy on 1 June 1954 (article 5, paragraph 2); and the convention concluded by the Soviet Union with the Federal Republic of Germany on 25 April 1958 (article 7), and with the People's Republic of China on 23 June 1959 (article 5).

Article 41

Personal inviolability of consular officials

1. Consular officials may not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this article, consular officials shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular official, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible.

Commentary

(1) The purpose of this article is to settle the question of the personal inviolability of consular officials, which has been controversial both as a matter of doctrine, and in the practice of States, since the time when consular officials, having ceased to be public Ministers, became subject to the jurisdiction of the State in which they discharge their functions. Since the *Barbuit* case in 1737, when an English court refused to recognize the immunity from jurisdiction of a consul (agent for commerce) of the King of Prussia, the personal inviolability of consular officials has not been recognized by the case law of the national courts of many countries of Europe and America.

(2) Reacting against this practice, States have attempted to provide for the personal inviolability of their consular officials through conventions, by including personal immunity clauses in consular conventions. The practice of including a personal immunity clause has become very widespread since the Convention of Pardo, signed on 13 March 1769 between France and Spain, which provided that the consular officials of the two contracting parties should enjoy personal immunity so as not to be liable to arrest or imprisonment except for crimes of an atrocious character, or in cases where the consuls were merchants (article II).

(3) The personal immunity clause was for a long time interpreted in fundamentally different ways. Some writers claimed that it conferred virtual exemption from civil and criminal jurisdiction, except in cases where the consular official was accused of a felony. Others have interpreted the immunity as conferring exemption from arrest and from detention pending trial, except in case of felony, and exemption from attachment of the person in a civil matter. Courts, which were at first divided as to the meaning to be given to the expression "personal immunity" have interpreted the expression as meaning personal inviolability and not immunity from jurisdiction.

(4) From an analysis of recent consular conventions, it is evident that States, while asserting the subjection of consular officials to the jurisdiction of the receiving State, recognize their personal inviolability except in cases where they have committed a grave crime. While some conventions exempt consular officials not only from arrest, but also from prosecution save in cases of felony (e.g., the convention of 12 January 1948 between Costa Rica and the United States of America, article II), a very great number of recent conventions do no more than exempt consular officials simply from arrest or detention or, in general, from any restriction on their personal freedom, except in cases where they have committed an offence the degree of seriousness of which is usually defined in the convention.

(5) Some conventions provide simply for exemption from arrest and detention pending trial, while others are general in scope and cover all forms of detention and imprisonment.

(6) Apart from this difference in scope, the conventions differ only in the manner in which they determine the nature of the offences in respect of which personal inviolability is not admitted. Some conventions which recognize personal inviolability make an exception in the case of "serous criminal offences", while others (much more numerous) permit the arrest of consular officials only when they are charged with penal offences defined and punished as felonies by the criminal law of the receiving State. Sometimes the offences in respect of which involability is not recognized are defined by reference to the type of penalty applicable (death penalty or penal servitude). In other cases the crimes in respect of which inviolability does not apply are enumerated. Lastly, a large group of bilateral conventions uses as the criterion for determining the cases in which the arrest of consular officials is permitted the length of the sentence which is imposed by the law of the receiving State for the offence committed. Some conventions even contain

two different definitions of the offence, or specify two different lengths of sentence, one being applicable in one of the contracting States and the other in the other State.

(7) Some consular conventions allow arrest and detention pending trial only on the double condition that the offence is particularly serious (according to the definition given in the convention concerned) and that the consular official is taken *in flagrante delicto*.

(8) Where conventions do no more than exempt consular officials from arrest pending trial except in the case of felonies, they sometimes contain clauses which provide that career consular officials may not be placed under personal arrest, either pending trial, or as a measure of execution in a civil or commercial case; and equally neither in the case of an alleged offence nor as punishment for an offence subject to prosecution by way of administrative proceedings. Other conventions expressly exclude arrest in civil and commercial cases.

(9) The scope of the provisions designed to ensure personal immunity is restricted *ratione personae* in that:

(*a*) Conventions generally exclude consular officials who are nationals of the receiving State from the benefit of clauses granting personal inviolability; and

(*b*) They exclude consular officials engaged in commercial activities from exemption from personal constraint in connexion with such activities.

(10) Conventions determine in various ways what persons shall enjoy inviolability. Some grant personal inviolability to consuls only (consular officers); others grant it also to other consular officials, and some even to certain categories of consulate employees.

(11) The Commission considered that, despite the divergent views on the technical question of the definition of offences for which personal inviolability could not be admitted, there was enough common ground in the practice of States on the substance of the question of the personal inviolability of consular officials to warrant the hope that States may accept the principle of the present article.

(12) The article refers solely to consular officials, i.e., heads of post and the other members of the consulate who are responsible for carrying out consular functions in a consulate (article 1, paragraph 1 (*d*)). Hence, personal inviolability does not extend to consulate employees. Moreover, only consular officials who are not nationals of the receiving State (article 69), and who do not carry on a gainful private occupation (article 56), enjoy the personal inviolability provided for in this article.

(13) Paragraph 1 of this article refers to immunity from arrest and detention pending trial. On this point the Commission proposed two variants in its 1960 draft. Under the first variant the exemption does not apply in the case of an offence punishable by a maximum term of not less than five years' imprisonment. Under the second variant the exemption was not to be granted "in case of a grave crime". As most of the Governments which commented on the draft articles on consular intercourse and immunities preferred the second alternative, the Commission has adopted that alternative. Paragraph 1 of the new text confers upon consular officials exemption from arrest and detention pending trial in every case except that of a grave crime. Even in that case, however, in accordance with the terms of paragraph 1 they cannot be placed under arrest or detention pending trial except by virtue of a decision of the competent judicial authority. It should be pointed out that this paragraph by no means excludes the institution of criminal proceedings against a consular official. The privilege under this paragraph is granted to consular officials by reason of their functions. The arrest of a consular official hampers considerably the functioning of the consulate and the discharge of the daily tasks—which is particularly serious inasmuch as many of the matters calling for consular action will not admit of delay (e.g., the issue of visas, passports and other travel documents; the legalization of signatures on commercial documents and invoices; various activities connected with shipping, etc.). Any such step would harm the interests, not only of the sending State, but also of the receiving State, and would seriously affect consular relations between the two States. It would therefore be inadmissible that a consular official should be placed under arrest or detention pending trial in connexion with some minor offence.

(14) Paragraph 2 of the article provides that consular officials, save in cases where, under paragraph 1 of the article, they are liable to arrest or detention pending trial, may not be imprisoned or subjected to any other form of restriction upon their personal freedom except in execution of a judicial decision of final effect. According to the provisions of this paragraph consular officials:

(*a*) May not be committed to prison in execution of a judgement unless that judgement is final;

(*b*) May not be committed to prison in execution of a mere decision of a police authority or of an administrative authority;

(*c*) Are not liable to any other restriction upon their personal freedom, such as, for instance, enforcement measures involving restrictions of personal liberty (imprisonment for debt, imprisonment for the purpose of compelling the debtor to perform an act which he must perform in person, etc.) save and except under a final judicial decision.

(15) Paragraph 3 of this article, which deals with the conduct of criminal proceedings against a consular official, prescribes that an official against whom such proceedings are instituted must appear before the competent authorities. The latter expression means other tribunals as well as ordinary courts. Save where arrest pending trial is admissible under paragraph 1, no coercive measure may be applied against a consular official who refuses to appear before the court. The authority concerned can of course always take the consular official's deposition at his residence or office, if this is permissible under the law of the receiving State and possible in practice.

(16) The inviolability which this article confers is enjoyed from the moment the consular official to whom it applies enters the territory of the receiving State to take up his post. He must, of course, establish his identity and claim status as a consular official. If he is already in the territory of the receiving State at the time of his appointment, inviolability is enjoyed as from the moment when the appointment is notified to the Ministry for Foreign Affairs, or to the authority designated by that Ministry (see article 53 of this draft). A consular official enjoys a like inviolability in third States if he passes through or is in their territory when proceeding to take up or return to his post, or when returning to his own country (article 54, paragraph 1).

(17) By virtue of article 69, this article does not apply to consular officials who are nationals of the receiving State.

Article 42

Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving State shall promptly notify the head of the consular post. Should the latter be himself the object of the said measures, the receiving State shall notify the sending State through the diplomatic channel.

Commentary

This article applies not only to consular officials but also to all the other members of the consulate. It establishes the obligation of the receiving State to notify the head of the consular post if a member of the consular staff is arrested or placed in custody pending trial, or if criminal proceedings are instituted against him. The duty to notify the sending State through the diplomatic channel if the head of the consular post is himself the object of the said measures is to be accounted for both by the gravity of the measures that affect the person in charge of a consulate and by practical considerations.

Article 43

Immunity from jurisdiction

Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.

Commentary

(1) Unlike members of the diplomatic staff, all the members of the consulate are in principle subject to the jurisdiction of the receiving State, unless exempted by one of the present rules or by a provision of some other applicable international agreement. In particular, they are, like any private person, subject to the jurisdiction of the receiving State in respect of all their private acts, more especially as regards any private gainful activity carried on by them.

(2) The rule that, in respect of acts performed by them in the exercise of their functions (official acts) members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State, is part of customary international law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative. Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them. Consequently, consular officials enjoy complete inviolability in respect of their official acts.

(3) In the opinion of some members of the Commission, the article should have provided that only official acts within the limits of the consular powers enjoy immunity from jurisdiction. The Commission was unable to accept this view. It is in fact often very difficult to draw an exact line between what is still the consular official's official act performed within the scope of the consular functions and what amounts to a private act or communication exceeding those functions. If any qualifying phrase had been added to the provision in question, the exemption from jurisdiction could always be contested, and the phrase might be used at any time to weaken the position of a member of the consulate.

(4) This article does not apply to members of the consulate who are nationals of the receiving State. Their legal status is governed by article 69 of these draft articles.

Article 44

Liability to give evidence

1. Members of the consulate may be called upon to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if a consular official should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular official shall avoid interference with the performance of his functions. In particular it shall, where possible, take such testimony at his residence or at the consulate or accept a statement from him in writing.

3. Members of the consulate are under no obligation to give evidence concerning matters connected with the exercise of their functions nor to produce official correspondence and documents relating thereto.

Commentary

(1) In contrast to members of a diplomatic mission, consular officials and other members of the consulate are not exempted by international law from liability to attend as witnesses in courts of law or in the course of administrative proceedings. However, the Commission agreed that if they should decline to attend, no coercive measure or penalty may be applied to them. This privilege is confirmed by a large number of consular conventions. For this reason, the letter of the judicial or administrative authority inviting consular officials to attend should not contain any threat of a penalty for non-appearance.

(2) The Commission noted that consular conventions apply different methods so far as concerns the procedure to be followed in taking the testimony of consular officials. In view of the provisions contained in numerous conventions, the Commission merely inserted two fundamental rules on the subject in paragraph 2 of this article:

(*a*) The authority requiring the evidence shall avoid interference with the performance by the consular official of his official duties;

(*b*) The authority requiring the evidence shall, where possible, arrange for the taking of such testimony at the consular official's residence or at the consulate or accept a written declaration from him.

As can be seen from the words "where possible", the testimony of a consular official cannot be taken at his residence or at the consulate unless this is permitted by the legislation of the receiving State. But even in cases where the legislation of that State allows testimony to be taken at the consular official's residence or at the consulate, e.g., through a judge deputed to act for the president of the court (*juge délégué*), there may be exceptional cases in which the consular official's appearance in court is, in the opinion of the court, indispensable. The Commission wished to make allowance for this case by inserting the word "possible". If the testimony of

the consular official is to be taken at his residence or at the consulate, the date and hour of the deposition should of course be fixed by agreement between the court and the consulate to which the official in question belongs. The date of the deposition should be fixed in such a way as not to delay the proceedings unnecessarily. While the second rule may be regarded as an application of the first, the first rule nevertheless expresses a general principle which should be applied both in cases which are covered by the second rule and in cases in which the consular official is to appear before the court.

(3) The right of members of the consulate to decline to give evidence concerning matters connected with the exercise of their functions, and to decline to produce any official correspondence or documents relating thereto, is confirmed by a large number of consular conventions. The right to decline to produce official correspondence and papers in court is a logical corollary of the inviolability of the correspondence and documents of the consulate. However, the consular official or any other member of the consulate should not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths; and he should not decline to produce the documents relating thereto.

(4) This article applies only to career consular officials and to consular employees. By article 57, paragraph 2, honorary consular officials enjoy only the immunity conferred by paragraph 3 of this article.

(5) By virtue of article 69 only paragraph 3 of this article applies to members of the consulate who are nationals of the receiving State.

Article 45

Waiver of immunities

1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in articles 41, 43 and 44.

2. The waiver shall in all cases be express.

3. The initiation of proceedings by a member of the consulate in a matter where he might enjoy immunity from jurisdiction under article 43, shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Commentary

(1) This article, which follows closely article 32 of the 1961 Vienna Convention on Diplomatic Relations, provides that the sending State may waive the immunities provided for in articles 41, 43 and 44. The capacity to waive immunity is vested exclusively in the sending State, for that State holds the rights granted under these articles. The consular official himself has not this capacity.

(2) The text of the article does not state through what channel the waiver of immunity should be communicated. If the head of the consular post is the object of the measure in question, the waiver should presumably be made in a statement communicated through the diplomatic channel. If the waiver relates to another member of the consulate, the statement may be made by the head of the consular post concerned.

(3) Inasmuch as members of the consulate are amenable to the jurisdiction of the judicial and administrative authorities of the receiving State in respect of all acts other than acts performed in the course of duty, the rule laid down in paragraph 3 of this article applies only in cases where a member of the consulate appears as plaintiff before the courts of the receiving State in a matter where he might enjoy immunity from jurisdiction.

(4) The waiver of immunity may be made with respect to both judicial and administrative proceedings.

(5) It should be noted that once the immunity has been waived, it cannot be pleaded at a later stage of the proceedings(for example on appeal).

Article 46

Exemption from obligations in the matter of registration of aliens and residence and work permits

1. Members of the consulate, members of their families forming part of their households and their private staff shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

2. The persons referred to in paragraph 1 of this article shall be exempt from any obligations in regard to work permits imposed either on employers or on employees by the laws and regulations of the receiving State concerning the employment of foreign labour.

Commentary

(1) Under article 24 of this draft, the arrival of members of the consulate, and of members of their families forming part of their households, and of their private staff, must be notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry. In accordance with the practice of numerous countries, it seemed necessary to exempt these persons from the obligation which the law of the receiving State imposes on them to register as aliens and to apply for a residence permit.

(2) In a great many States, the Ministry for Foreign Affairs issues to members of the consulate and to members of their families special cards to be used as documents of identity certifying their status as members of the consulate, or of the family of a member of the consulate. An obligation to issue such documents of identity is imposed by several consular conventions. Although the Commission considers that this practice should become general and should be accepted by all States, it did not think it necessary to include a provision to that effect in the draft in view of the largely technical character of the point involved.

(3) The extension of the said exemption to private staff is justified on practical grounds. It would in fact be difficult to require a member of the consulate who brings a member of his private staff with him from abroad to comply with the obligations in question in respect of a person belonging to his household, if he and the members of his family are themselves exempt from those obligations.

(4) The exemption from the obligations in the matter of work permits which is provided for in paragraph 2 applies only to cases where the members of a consulate wish to employ in their service a person who has the nationality of the sending State or of a third State. In some countries the legislation concerning the employment of foreign labour requires the employer or the employee to obtain a work permit. The purpose of paragraph 2 of this article is to exempt members of the consulate and members of the private staff from the obligations which the law of the receiving State might impose on them in such a case.

(5) The appointment of the consular staff to a consulate in the receiving State is governed by article 19 of the present draft. The exemption laid down in paragraph 2 cannot therefore in any case apply to the employment of these persons in the consulate. For this purpose no work permit may be demanded.

(6) By its very nature the exemption can apply to aliens only, since only they could be contemplated by legislation of the receiving State concerning the registration of aliens, and residence and work permits. The exemption in question can accordingly have no application to members of the consulate or to members of their family who are nationals of the receiving State.

(7) There is no article corresponding to this provision in the 1961 Vienna Convention on Diplomatic Relations. The Commission considered that because of the existence of diplomatic privileges and immunities and, more particularly, of the very broad immunity from jurisdiction which the diplomatic draft accords, not only to diplomatic agents and to members of their family who form part of their households but also to members of the administrative and technical staff of the diplomatic mission and to members of their family who form part of their households, such a provision could not have the same importance in the sphere of diplomatic intercourse and immunities as it has for consular intercourse and immunities.

Article 47

Social security exemption

1. Subject to the provisions of paragraph 3 of this article, the members of the consulate shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consulate, on condition:

(*a*) That they are not nationals of or permanently resident in the receiving State; and

(*b*) That they are covered by the social security provisions which are in force in the sending State or a third State.

3. Members of the consulate who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State.

Commentary

(1) This exemption from social security regulations is justified on practical grounds. If whenever in the course of his career a member of the consulate is posted to consulates in different countries he ceased to be subject to the social security legislation of the sending State (health insurance, old age insurance, disability insurance, etc.), and if on each such occasion he were expected to comply with the provisions of legislation different from that of the sending State, considerable difficulties would result for the official or employee concerned. It is thus in the interests of all States to grant the exemption specified in this article, in order that the members of the consulate may continue to be subject to their national social security laws without any break in continuity.

(2) The provisions of this article do not apply to members of the consulate who are nationals of the receiving State (article 69 of the present draft).

(3) While members of the consulate in their capacity as persons employed in the service of the sending State are exempt from the local social security system, this exemption does not apply to them as employers of any persons who are subject to the social security system of the receiving State. In the latter case they are subject to the obligations imposed by the social security laws on employers and must pay their contributions to the social insurance system.

(4) At its present session the Commission amended the text of paragraph 1 of this article by introducing, in keeping with article 33 of the 1961 Vienna Convention on Diplomatic Relations, the words "with respect to services rendered for the sending State". As a consequence, members of the consulate who have a private occupation outside the consulate or who carry on private gainful activities and employ staff necessary for that purpose are excluded by this provision from the benefit of this article. The introduction of the words in question made it superfluous to mention the members of the family of a member of the consulate in paragraph 1.

(5) The reasons which justify exemption from the social security system in the case of members of the consulate also justify the exemption of members of the private staff who are in the sole employ of members of the consular staff. But since those persons may be recruited from among the nationals of the sending State permanently resident in the receiving State, or from among foreign nationals who may not be covered by any social security laws, provision has had to be made for these contingencies in paragraph 2 of the article in order that members of the private staff should have the benefit of the social security system in cases where they are not eligible for the benefit of such a system in their countries of origin.

(6) Different rules from the above can obviously be laid down in bilateral conventions. Since, however, the draft provides in article 71 for the maintenance in force of previous conventions relating to consular intercourse and immunities, there is no need for a special provision to this effect in article 47.

(7) It should be noted that this article does not apply to members of the consulate who are nationals of the receiving State (article 69).

Article 48

Exemption from taxation

1. Members of the consulate, with the exception of the service staff, and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save:

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

(*b*) Dues and taxes on private immovable property situated in the territory of the receiving State, unless held by a member of the consulate on behalf of the sending State for the purposes of the consulate;

(*c*) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 50 concerning the succession of a member of the consulate or of a member of his family;

(*d*) Dues and taxes on private income having its source in the receiving State and capital taxes relating to investments made by them in commercial or financial undertakings in the receiving State;

(*e*) Charges levied for specific services rendered;

(*f*) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 31.

2. Members of the service staff and members of the private staff who are in the sole employ of members of the consulate shall be exempt from dues and taxes on the wages which they receive for their services.

Commentary

(1) Exemption from taxation is often accorded to consular officials by consular conventions or other bilateral agreements concluded between the receiving State and the sending State. In the absence of treaty provisions, this matter is governed by the law of the receiving State, which always makes exemption from taxation conditional upon the grant of reciprocal treatment to the consular officials of the receiving State in the sending State. The extent of the exemption from taxation varies greatly from one legal system to another. The Commission considered that members of the consulate should ordinarily enjoy the same exemption from taxation as is enjoyed by the members of diplomatic missions (Vienna Convention, article 34 in conjunction with article 37). For that reason, article 48 repeats, with some changes, article 34 of the Vienna Convention.

(2) Under sub-paragraph (*c*), not only estate, succession and inheritance duties, but also duties on transfers are excluded from the exemption provided for in this article. The exclusion of duties on transfers is justified on the same grounds as the exclusion of estate, succession and inheritance duties.

(3) The Commission has retained in the French text of this article and of others in the present draft the expression *"vivant à leur foyer"*, which it had introduced at its preceding session in order to specify those members of the family of a member of the consulate who are to enjoy the privileges and immunities conferred by these articles. It considered that these words more correctly express what it wished to convey by the words *"faisant partie de leur ménage"*, or similar words, in its Draft Articles on Diplomatic Intercourse and Immunities. (The English text is not affected.)

(4) The following persons are excluded from the benefit of this article:

(*a*) By virtue of articles 56 and 63, members of the consulate and members of their families who carry on a gainful private occupation;

(*b*) By virtue of article 69 of the present draft, members of the consulate and members of their families who are nationals of the receiving State;

(*c*) By virtue of article 63 honorary consular officials.

(5) Bilateral consular conventions usually make the grant of exemption from taxation conditional on reciprocity. If there is to be a condition of this kind, enabling a party to grant limited exemption from taxation where the other party acts likewise, any provision for exemption from taxation becomes a matter for individual settlement between countries. The Commission did not think it necessary to include such a reciprocity clause in a draft multilateral convention, for it considers that reciprocity will be achieved by reason of the fact that the provision in question will be binding on all the contracting parties. It was of the opinion that the purpose which a multilateral convention should seek to achieve, i.e., the unification of the practice of States in this matter, will be more rapidly attained if no reservation regarding reciprocity is included.

(6) Since the consular premises enjoy exemption from taxation under article 31 of this draft, it was necessary to include in paragraph 1(*f*) a reservation referring back to that article, in order to cover cases in which it is the consul or a member of the consulate who owns or leases the consular premises for the purposes of the consulate, and who, by reason of article 31, would in such case not be liable to pay the fees or duties specified in sub-paragraph (*f*). Unlike the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations, sub-paragraph (*f*) does not contain the words "with respect to immovable property", because the Commission considered that in view of the difference between the respective situations of consuls and of diplomatic agents, these words should not be included.

Article 49

Exemption from customs duties

1. The receiving State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

(*a*) Articles for the official use of the consulate;

(*b*) Articles for the personal use of a consular official or members of his family forming part of his household, including articles intended for his establishment.

2. Consular employees, except those belonging to the service staff, shall enjoy the immunities specified in the previous paragraph in respect of articles imported at the time of first installation.

Commentary

(1) According to a very widespread practice, articles intended for the use of a consulate are exempt from customs duties, and this practice may be regarded as evidence of an international custom in this particular sphere. By "articles for the official use of the consulate"

is meant coats-of-arms, flags, signboards, seals and stamps, books, official printed matter for the service of the consulate, and also furniture, office equipment and supplies (files, typewriters, calculating machines, stationery, etc.), and all other articles for the official use of the consulate.

(2) While the members of the consulate do not enjoy exemption from customs duties under general international law, they are being given an increasingly wide measure of exemption from customs duties under numerous individual agreements, and there is a tendency to extend to members of the consulate advantages similar to those enjoyed by members of diplomatic missions. The Commission therefore decided to reproduce in this article the text of paragraph 1 of article 36 of the Vienna Convention and to add a paragraph 2 stipulating, for consular employees, with the exception of service staff, exemptions from customs duties similar to those accorded by article 37 to the administrative and technical staff of diplomatic missions.

(3) Since States determine by domestic regulations the conditions and procedures under which exemption from customs duties is granted, and in particular the period within which articles intended for the establishment must be imported, the period during which the imported articles must not be sold, and the annual quotas for consumer goods, it was necessary to include in the article the expression "in accordance with such laws and regulations as it may adopt". Such regulations are not incompatible with the obligation to grant exemption from customs duties, provided that they are general in character. They must not be directed only to an individual case.

(4) The present article does not apply:

(*a*) To members of the consulate who carry on a private gainful occupation (article 56);

(*b*) To members of the consulate who are nationals of the receiving State (article 69);

(*c*) To honorary consular officials (article 57).

(5) It should be noted that only articles intended for the personal use of the said members of the consulate and members of their families, forming part of their households, enjoy exemption from customs duties. Articles imported by a member of the consulate in order to be sold clearly do not qualify for exemption.

Article 50

Estate of a member of the consulate or of a member of his family

In the event of the death of a member of the consulate or of a member of his family forming part of his household, the receiving State:

(*a*) Shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the country the export of which was prohibited at the time of his death;

(*b*) Shall not levy estate, succession or inheritance duties on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consulate or as a member of the family of a member of the consulate.

Commentary

As in the case of a member of a diplomatic mission, the exemption of the movable property of a member of the consulate or a member of his family forming part of his household from estate, succession or inheritance duties is fully justified, because the persons in question came to the receiving State to discharge a public function in the interests of the sending State. For the same reason, the free export of the movable property of the deceased, with the exception of any such property which was acquired in the country and the export of which was prohibited at the time of his death, is justified. At the present session the text of this was brought into line with the text of article 39, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

Article 51

Exemption from personal services and contributions

The receiving State shall exempt members of the consulate, other than the service staff, and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) The exemptions afforded by this article cover military service, service in the militia, the functions of juryman or lay judge, and personal labour ordered by a local authority on highways or in connexion with a public disaster, etc.

(2) The exemptions provided for in this article should be regarded as constituting a part of customary international law.

(3) By virtue of article 69 of this draft, the present article applies to members of the consulate, members of their families forming part of their households, only in so far as they are not nationals of the receiving State.

(4) This article corresponds to article 35 of the 1961 Vienna Convention on Diplomatic Relations.

(5) The Commission would prefer to use in the French text an expression other than "*tout service public*" which has a special meaning in many legal systems, but it decided eventually to retain the form of words used in article 35 of the Vienna Convention on Diplomatic Relations. (The English text is not affected.)

Article 52

Question of the acquisition of the nationality of the receiving State

Members of the consulate and members of their families forming part of their households shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Commentary

(1) This article closely follows the text of article II of the Optional Protocol concerning acquisition of nationality signed at Vienna on 18 April 1961. Its primary purpose is to prevent:

(*a*) The automatic acquisition of the nationality of the receiving State:

(i) By the child of parents who are members of the consulate and who are not nationals of the receiving State, if the child is born in the territory of a State whose nationality law is based on the *jus soli;*

(ii) By a woman who is a member of the consulate at the time when she marries a national of the receiving State;

(*b*) The reinstatement of a member of the consulate or of a member of his family forming part of his household in his nationality of origin, for example, in cases where, under the law of the receiving State, this reinstatement is the consequence of the more or less prolonged residence in its territory of a person who previously had the nationality of that State.

(2) The present article does not apply if the daughter of a member of the consulate who is not a national of the receiving State marries a national of that State, for by the act of marrying she ceases to be part of the household of the member of the consulate.

(3) In view of the Convention of 20 February 1957 on the Nationality of Married Women, concluded under the auspices of the United Nations, the rule expressed in this article loses a good deal of its importance so far as concerns the acquisition of the nationality of the receiving State by a woman member of the consulate of the sending State through her marriage with a national of the receiving State.

Article 53

Beginning and end of consular privileges and immunities

1. Every member of the consulate shall enjoy the privileges and immunities provided in the present articles from the moment he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry.

2. Members of the family of a member of the consulate, forming part of his household, and members of his private staff shall enjoy their privileges and immunities from the moment they enter the territory of the receiving State. If they are in the territory of the receiving State at the time of joining the household or entering the service of a member of the consulate, privileges and immunities shall be enjoyed from the moment when the name of the person concerned is notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry.

3. When the functions of a member of the consulate have come to an end, his privileges and immunities together with those of the persons referred to in paragraph 2 of this article shall normally cease at the moment when the persons in question leave the country, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The same provision shall apply to the persons referred to in paragraph 2 above, if they cease to belong to the household or to be in the service of a member of the consulate.

4. However, with respect to acts performed by a member of the consulate in the exercise of his functions, his personal inviolability and immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consulate, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them, until the expiry of a reasonable period enabling them to leave the territory of the receiving State.

Commentary

(1) In substance, this article is modelled on the provisions applicable to persons entitled to diplomatic privileges and immunities by virtue of article 39 of the 1961 Vienna Convention on Diplomatic Relations. In the opinion of the Commission, it is important that the date when consular privileges and immunities begin, and the date on which they come to an end, should be fixed.

(2) As regards the drafting of this article, the Commission preferred to retain the text adopted at its previous session; in its opinion, that text has the advantage of clarity, in that it draws a distinction between the position of members of the consulate on the one hand and that of members of their family and of the private staff on the other.

(3) The Commission considered that consular privileges and immunities should be accorded to members of the consulate even after their functions have come to an end. Privileges and immunities do not cease until the beneficiaries leave the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

(4) The vexatious measures to which consular officials and employees have often been subjected when an armed conflict had broken out between the sending State and the receiving State justify the inclusion of the words "even in case of armed conflict" in the text of the article.

(5) Paragraph 5 of this article is intended to ensure that members of the family of a deceased member of the consulate enjoy for a reasonable period after his death the privileges and immunities to which they are entitled. This paragraph reproduces the text of article 39, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations.

Article 54

Obligations of third States

1. If a consular official passes through or is in the territory of a third State, which has granted him a visa if a visa was required while proceeding to take up or return to his post or when returning to his own country, the third State shall accord to him the personal inviolability and such other immunities provided for by these articles as may be required to ensure his transit or return. The same shall apply in the case of any members of his family enjoying privileges and immunities who are accompanying the consular official or travelling separately to join him or to return to their country.

2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit through their territory of other members of the consulate or of members of their families.

3. Third States shall accord to correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving State. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord.

4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*.

Commentary

(1) This article does not settle the question whether a third State should grant passage through its territory to consular officials, employees and their families. It merely specifies the obligations of third States during the actual course of the passage of such persons through their territory.

(2) The obligations of the third State under the terms of this article relate only to consular officials:

(*a*) Who pass through its territory, or

(*b*) Who are in its territory in order to

(i) Proceed to take up their posts, or

(ii) Return to their posts, or

(iii) Return to their own country.

(3) The Commission proposes that consular officials should be accorded the personal inviolability which they enjoy by virtue of article 41 of this draft, and such of the immunities provided for by these articles as are necessary for their passage or return. The Commission considers that these prerogatives should not in any case exceed those accorded to the officials in question in the receiving State.

(4) With regard to the members of the families of consular officials forming part of their households, this article imposes on third States the duty to accord the immunities provided by this draft and the facilities necessary for their transit. As regards the employees of the consulate and the members of their families, third States have a duty not to hinder their passage.

(5) The provisions of paragraph 3 of the article, which guarantee to correspondence and to other official communications in transit the same freedom and protection in third States as in the receiving State, are in keeping with the interest that all States have in the smooth and unimpeded development of consular relations.

(6) Paragraph 4 of this article reproduces *mutatis mutandis* the provisions of article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

Article 55

Respect for the laws and regulations of the receiving State

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

2. The consular premises must not be used in any manner incompatible with the consular functions as laid down in the present articles or by other rules of international law.

3. The rule laid down in the preceding paragraph shall not exclude the possibility of offices or other institutions or agencies being installed in the consular building or premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of these articles, be deemed to form part of the consular premises.

Commentary

(1) Paragraph 1 of this article lays down the fundamental rule that it is the duty of any person who enjoys consular privileges and immunities to respect the laws and regulations of the receiving State, save in so far as he is exempted from their application by an express provision of this draft or of some other relevant international agreement. Thus for example, the laws imposing a personal contribution, and the social security laws, are not applicable to members of the consulate who are not nationals of the receiving State.

(2) The clause in the second sentence of paragraph 1 which prohibits interference in the internal affairs of the receiving State should not be interpreted as preventing members of the consulate from making representations, within the scope of their functions, for the purpose of protecting and defending the interests of their country or of its nationals, in conformity with international law.

(3) Paragraph 2 reproduces *mutatis mutandis* the rule contained in article 41, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. This provision means that the consular premises must not be used for purposes incompatible with the consular functions. A breach of this obligation does not render inoperative the provisions of article 30 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities. Opinions were divided in the Commission on whether the article should state this particular consequence of the rule laid down in its paragraph 2. Some members favoured the insertion of words to this effect; others, however, thought it would be sufficient to mention the matter in the commentary on the article, and pointed out in support of their view that there is no corresponding provision in the 1961 Vienna Convention on Diplomatic Relations. Moreover, certain members would have preferred to replace the text adopted at the previous session by a more restrictive form of words. After an exchange of views, the Commission decided to retain the text adopted at its previous session, which repeats the rule laid down in article 40, paragraph 3, of the Draft Articles on Diplomatic Intercourse and Immunities, now article 41, paragraph 3, of the Vienna Convention.

(4) Paragraph 3 refers to cases, which occur with some frequency in practice, where the offices of other institutions or agencies are installed in the building of the consulate or on the consular premises.

Article 56

Special provisions applicable to career consular officials who carry on a private gainful occupation

The provisions applicable to career consular officials who carry on a private gainful occupation in the receiving State shall, so far as facilities, privileges and immunities are concerned, be the same as those applicable to honorary consular officials.

Commentary

(1) A study of consular regulations has shown, and the comments of Governments have confirmed, that some States permit their career consular officials to carry on a private gainful occupation. If the practice of States is examined, it will be seen that, in the matter of privileges and immunities, States are not prepared to accord to this category of consular official the same treatment as to other career consular officials who are employed full-time in the exercise of their functions. This is understandable, for these consular officials, although belonging to the regular consular service, are in fact in a position analogous to that of honorary consuls, who, at least in the great majority of cases, also carry on a private gainful occupation. In the matter of consular privileges and immunities, the officials in question are mostly assimilated to honorary consuls by municipal law. It was in the light of this practice that the Commission, at its present session, adopted this article, which is intended to regulate the legal status of this category of consular official.

(2) In consequence of the adoption of this article it was possible to delete in certain articles of the draft, e.g., article 48 (Exemption from taxation) and 49 (Exemption from customs duties), the clause stipulating that members of the consulate who carry on a gainful private activity should not enjoy the advantages and immunities provided for by these articles.

(3) The expression "private gainful occupation" means commercial, professional or other activities carried on for pecuniary gain. The expression does not, for example, mean occasional activities or activities not mainly intended for pecuniary gain (courses given at a university, editing a learned publication and the like).

CHAPTER III. FACILITIES, PRIVILEGES AND IMMUNITIES OF HONORARY CONSULAR OFFICIALS

INTRODUCTION

(1) The term "honorary consul" is not used in the same sense in the laws of all countries. In some, the decisive criterion is considered to be the fact that the official in question is not paid for his consular work. Other laws expressly recognize that career consuls may be either paid or unpaid, and base the distinction between career and honorary consuls on the fact that the former are sent abroad and the latter recruited locally. Under the terms of certain other consular regulations, the term "honorary consul" means an agent who is not a national of the sending State and who, in addition to his official functions, is authorized to carry on a gainful occupation in the receiving State, whether he does in fact carry on such an occupation or not. For the purpose of granting consular immunities, some States regard as honorary consuls any representatives of whatever nationality, who, in addition to their official functions, carry on a gainful occupation or profession in the receiving State. Lastly, many States regard as honorary consuls all consuls who are not career consuls.

(2) At its eleventh session, the Commission provisionally adopted the following decisions:

"A consul may be:

"(i) A 'career consul', if he is a government official of the sending State, receiving a salary and not exercising in the receiving State any professional activity other than that arising from his consular function;

"(ii) An 'honorary consul', if he does not receive any regular salary from the sending State and is authorized to engage in commerce or other gainful occupation in the receiving State."

(3) However, in view of the practice of States in this sphere and the considerable differences in national laws with regard to the definition of honorary consul, the Commission decided, at its twelfth session, to omit any definition of honorary consul from the present draft, and merely to provide in article 1, paragraph 2, that consuls may be either career consuls or honorary consuls, leaving States free to define the latter category.

(4) Some (though not very many) States allow their career consular officials, even though members of the regular consular service, to carry on a private gainful occupation in the receiving State. And there are in fact career consular officials who, on the strength of this permission, engage in commerce or carry on some other gainful occupation outside their consular functions. The Commission considered that, so long as this category of official exists, their legal status ought to be settled in this draft. In the light of the practice of States, the Commission decided that, so far as consular privileges and immunities are concerned, these persons should be placed on the same footing as honorary consuls (article 56).

Article 57

Regime applicable to honorary consular officials

1. Articles 28, 29, 33, 34, 35, 36, 37, 38, 39, 41, paragraph 3, articles 42, 43, 44, paragraph 3, articles 45, 49, with the exception of paragraph 1 (*b*), and article 53 of chapter II concerning the facilities, privileges and immunities of career consular officials and consular employees shall likewise apply to honorary consular officials.

2. In addition, the facilities, privileges and immunities of honorary consular officials shall be governed by the subsequent articles of this chapter.

Commentary

(1) The Commission reviewed all the articles concerning the privileges and immunities of career consuls and decided that certain of these articles are also applicable to honorary consuls. These articles are listed in paragraph 1 of the present article.

(2) Special attention should be drawn to article 69 of the draft, which is also applicable to honorary consuls. Consequently, honorary consuls who are nationals of the receiving State do not, under the terms of this draft, enjoy any consular immunities other than immunity from jurisdiction in respect of official acts performed in the exercise of their functions and the privilege conferred by article 44, paragraph 3.

(3) As regards the other articles of chapter II which are not enumerated in paragraph 1 of this article, the Commission was of the opinion that they cannot apply in full to honorary consuls. However, it acknowledged that some of the rights accorded in these articles to career consuls should also be granted to honorary consuls. The privileges and immunities which should be granted to honorary consuls are defined in the succeeding articles.

Article 58

Inviolability of the consular premises

The premises of a consulate headed by an honorary consul shall be inviolable, provided that they are used exclusively for the exercise of consular functions. In this case, the agents of the receiving State may not enter the premises except with the consent of the head of post.

Commentary

At its previous session, the Commission decided to defer its decision as to whether article 31 of the 1960 draft concerning the inviolability of consular premises is applicable to the premises of a consulate headed by an honorary consul, and it asked Governments for information on the question. In the light of the information obtained, the Commission has decided to supplement the draft by this article, under which the premises of a consulate headed by an honorary consul are inviolable provided that they are used exclusively for the exercise of consular functions. The reason for this condition, as also for that laid down in article 60, is that in most instances honorary consular officials carry on a private gainful occupation in the receiving State.

Article 59

Exemption from taxation of consular premises

1. The sending State and the head of post shall be exempt from all national, regional or municipal dues and taxes whatsoever in respect of consular premises used exclusively for the exercise of consular functions, whether the premises are owned or leased by them, except in the case of dues or taxes representing payment for specific services rendered.

2. The exemption from taxation provided for in paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving State, they are payable by the person who contracted with the sending State or with the head of the consular post.

Commentary

(1) Consular premises owned or leased by the sending State or by an honorary consular official are exempt from all dues and taxes in the same way as the premises of a consulate headed by a career consular official, if they are used exclusively for the exercise of consular functions.

(2) The Commission considered that the exemption provided for in this article is justified.

(3) It should be noted that by article 69 the present article does not apply to honorary consular officials who are nationals of the receiving State.

Article 60

Inviolability of consular archives and documents

The consular archives and documents of a consulate headed by an honorary consul shall be inviolable at any time and wherever they may be, provided that they are kept separate from the private correspondence of the head of post and of any person working with him, and also from the materials, books or documents relating to their profession or trade.

Commentary

The consular archives and documents of a consulate headed by an honorary consul enjoy inviolability provided that they are kept separate from the private correspondence of the honorary consul and of persons working with him, from the goods which may be in his possession and from the books and documents relating to the profession or trade which he may carry on. This last condition is necessary, because honorary consular officials very often carry on a private gainful occupation.

Article 61

Special protection

The receiving State is under a duty to accord to an honorary consular official special protection by reason of his official position.

Commentary

As in article 40, so in this context the expression "special protection" means a protection greater than that enjoyed by foreign residents in the territory of the receiving State. It comprises above all the obligation for the receiving State to provide for the personal safety of the honorary consular official, particularly in the event of tension between the receiving State and the sending State when his dignity or life may be threatened by reason of his official functions.

Article 62

Exemption from obligations in the matter of registration of aliens and residence permits

Honorary consular officials, with the exception of those who carry on a gainful private occupation, shall be exempt from all obligations imposed by the laws and regulations of the receiving State in the matter of registration of aliens and residence permits.

Commentary

(1) This article does not apply to honorary consuls who carry on a gainful private occupation outside the consulate. Unlike article 46 this article does not apply to the members of the family of an honorary consular official.

(2) It should be noted that by article 69 this article does not apply to honorary consular officials who are nationals of the receiving State.

Article 63

Exemption from taxation

An honorary consular official shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions.

Commentary

The majority of the members of the Commission considered that the provision contained in this article, though it goes beyond the general practice of States, should be included so as to avoid the difficulties which would be raised by the taxation of income derived from a foreign State, and because the remuneration and emoluments in question are paid by a foreign State. Nevertheless, it should be noted that by article 69 this provi-

sion does not apply to honorary consular officials who are nationals of the receiving State.

Article 64

Exemption from personal services and contributions

The receiving State shall exempt honorary consular officials from all personal services and from all public services of any kind and also from military obligations such as those connected with requisitioning, military contributions and billeting.

Commentary

(1) The text of this article as adopted at the twelfth session tended to confer the exemption laid down in this article on consular officials and members of their families. As some of the Governments urged that the scope of this article should be restricted, the Commission redrafted the text so as to make it applicable solely to consular officials.

(2) It should be noted that by article 69 this article does not apply to honorary consular officials who are nationals of the receiving State.

Article 65

Obligations of third States

Third States shall accord to the correspondence and other official communications of consulates headed by honorary consular officials the same freedom and protection as are accorded to them by the receiving State.

Commentary

At its twelfth session the Commission included article 52 respecting the obligations of third States among the articles which are applicable to honorary consular officials. As certain Governments expressed doubt concerning the application of that article in full to honorary consular officials, the Commission decided to insert in the draft a special article specifying that the obligations of third States are limited to according to the correspondence and other official communications the same freedom and protection as are accorded to them by the receiving State.

Article 66

Respect for the laws and regulations of the receiving State

Without prejudice to their privileges and immunities, it is the duty of honorary consular officials to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State and not to misuse their official position for the purpose of securing advantages in any private activities in which they may engage.

Commentary

(1) Honorary consular officials, like career consular officials, are under a duty to respect the laws and regulations of the receiving State. They have also the duty not to interfere in the internal affairs of that State. With regard to honorary consular officials who are nationals of the receiving State, this duty means that they must not use their official position for purposes of internal politics.

(2) By reason of the fact that most honorary consuls are engaged in a private occupation for purposes of gain, it was found necessary to add the further obligation that they must not use their official position to secure advantages in their private gainful activities, if any.

Article 67

Optional character of the institution of honorary consular officials

Each State is free to decide whether it will appoint or receive honorary consular officials.

Commentary

This article, taking into consideration the practice of those States which neither appoint nor accept honorary consular officials, confirms the rule that each State is free to decide whether it will appoint or receive honorary consular officials.

CHAPTER IV. GENERAL PROVISIONS

Article 68

Exercise of consular functions by diplomatic missions

1. The provisions of articles 5, 7, 36, 37 and 39 of the present articles apply also to the exercise of consular functions by a diplomatic mission.

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State.

3. In the exercise of consular functions a diplomatic mission may address authorities in the receiving State other than the Ministry for Foreign Affairs only if the local law and usages so permit.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 shall continue to be governed by the rules of international law concerning diplomatic relations.

Commentary

(1) As is stated in article 3 of this draft, consular functions are exercised not only by consulates but also by diplomatic missions. Accordingly, it is necessary to make provision in this draft for the exercise of the consular functions by a diplomatic mission.

(2) The expression "otherwise charged with the exercise of the consular functions" in paragraph 2 relates principally to the case where the diplomatic mission has no consular section but where one or more members of the mission are responsible for exercising both consular and diplomatic functions.

(3) Paragraph 3 of this article corresponds to article 41, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, under which all official business with the receiving State which is entrusted to the diplomatic mission is to be conducted with or through that State's Ministry for Foreign Affairs or such other Ministry as may be agreed. Paragraph 3 admits the possibility of direct communication in consular matters with authorities other than the Ministry for Foreign

Affairs in those cases only where the local law or usages so permit.

(4) The members of the mission who are responsible for the exercise of consular functions continue, as is expressly stated in paragraph 4 of this article, to enjoy the benefit of diplomatic privileges and immunities.

Article 69

Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State

1. Except in so far as additional privileges and immunities may be granted by the receiving State, consular officials who are nationals of the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided for in article 44, paragraph 3, of these articles. So far as these officials are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42.

2. Other members of the consulate, members of their families and members of the private staff who are nationals of the receiving State shall enjoy privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over these persons in such a way as not to hinder unduly the performance of the functions of the consulate.

Commentary

(1) The present draft recognizes that the sending State may appoint consular officials and employees of the consulate from among the nationals of the receiving State. In the case of consular officials, it may do so only with the consent of the receiving State (article 22). The Commission had therefore to define the legal status of the members of the consulate who are nationals of the receiving State.

(2) In addition, as the present draft accords certain immunities also to members of the private staff in the employ of members of the consulate, it was necessary to specify whether members of the private staff who are nationals of the receiving State enjoy these immunities.

(3) As regards consular officials who are nationals of the receiving State, the present article, following the solution given to a similar problem which arose with respect to diplomatic immunities (see article 38 of the Vienna Convention) grants to such officials immunity from jurisdiction and inviolability solely in respect of official acts performed in the exercise of their functions, and the privilege to decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto (article 44, paragraph 3). The receiving State is also under the obligation, stipulated in the present article, to inform the sending State if a member of the consulate who is a national of the receiving State is placed under arrest or in custody pending trial, or if criminal proceedings are instituted against him. The difference as compared with the text of article 38 of the Vienna Convention is explained by the difference in the legal status of consular officials and employees as compared with that of members of diplomatic missions.

(4) Since the present article applies to the nationals of the receiving State, it uses, unlike article 43, the expression "official acts", the scope of which is more restricted than the expression used in article 43: "acts performed in the exercise of consular functions".

(5) The grant of this immunity from jurisdiction to consular officials who are nationals of the receiving State can be justified on two grounds. First, the official acts performed by officials in the exercise of their functions are acts of the sending State. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular official, but rather an immunity attaching to the foreign State as such. Secondly, as the consent of the receiving State is required for the appointment of a national of that State as a consular official (article 22), it can be argued that the receiving State's consent implies consent to the official in question having the minimum immunity he needs in order to be able to exercise his functions. That minimum is the immunity from jurisdiction granted in respect of official acts. The receiving State may, of course, of its own accord grant the consular officials in question any other privileges and immunities.

(6) As regards the other members of the consulate, members of the private staff and members of families of members of the consulate, these persons enjoy only such privileges and immunities as may be granted to them by the receiving State. Nevertheless, the receiving State, under paragraph 2 of the present article, has the duty to exercise its jurisdiction over these persons in such a manner as not to hamper unduly the performance of the functions of the consulate.

Article 70

Non-discrimination

1. In the application of the present articles, the receiving State shall not discriminate as between the States parties to this convention.

2. However, discrimination shall not be regarded as taking place where the receiving State, on a basis of reciprocity, grants privileges and immunities more extensive than those provided for in the present articles.

Commentary

(1) Paragraph 1 sets forth a general rule inherent in the sovereign equality of States.

(2) Paragraph 2 relates to the case where the receiving State grants privileges and immunities more extensive than those provided for in the present articles. The receiving State is, of course, free to grant such greater advantages on the basis of reciprocity.

(3) The Commission decided to retain this article in the form in which it had been adopted at the previous session and which differs from the text proposed earlier in its Draft Articles on Diplomatic Intercourse and Immunities (article 44, which has since become article 47 of the Vienna Convention), for it considered that the reasons which had caused it to change its view still remained valid.

Article 71

Relationship between the present articles and conventions or other international agreements

The provisions of the present articles shall not affect conventions or other international agreements in force as between States parties to them.

Commentary

(1) The purpose of this article is to specify that the convention shall not affect international conventions or other agreements concluded between the contracting parties on the subject of consular relations and immunities. It is evident that in that case the multilateral convention will apply solely to questions which are not governed by pre-existing conventions or agreements concluded between the parties.

(2) The Commission hopes that the Draft Articles on Consular Relations will also provide a basis for any particular conventions on consular relations and immunities which States may see fit to conclude.

Chapter III

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

I. Law of treaties

38. The Commission decided to take up the subject of the law of treaties at its fourteenth session.

39. At its 597th meeting the Commission appointed Sir Humphrey Waldock to succeed Sir Gerald Fitzmaurice as Special Rapporteur for the Law of Treaties. With a view to giving the new Special Rapporteur guidance for his work, the Commission, at its 620th and 621st meetings, held a debate of a general character on the subject. At the conclusion of the debate the Commission decided:

(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years.

II. Planning of the future work of the Commission

40. The Commission had before it a note (A/CN.4/138) submitted by the Secretariat containing the text of General Assembly resolution 1505 (XV) of 12 December 1960 by which the General Assembly decided to place an item entitled "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law. By the same resolution, the General Assembly invited Member States to submit any views or suggestions they might have on this question.

41. Although it had not been requested to submit its views on the matter, the Commission considered that it would be desirable for its members to place their opinions on record for the use of the Sixth Committee of the General Assembly. The records of the discussions held in the Sixth Committee on the subject at the fifteenth session of the General Assembly were available to the members of the Commission. A general discussion of the matter was accordingly held at the 614th, 615th and 616th meetings. Attention is invited to the summary records of the Commission containing the full discussion on this question.

III. Co-operation with other bodies

42. The Asian African Legal Consultative Committee was represented at the session by Mr. H. Sabek, who, at the 605th meeting, made a statement on behalf of the Committee.

43. The Commission's observer to the fourth session of the Committee, Mr. F. V. García Amador, at the 621st meeting, presented his report (A/CN.4/139) and the Commission took note of it.

44. At its 621st meeting, the Commission further decided to request its Chairman to act as its observer at the fifth session of the Asian African Legal Consultative Committee to be held at Rangoon, Burma, in the beginning of 1962, or, if he should be unable to attend, to appoint another member of the Commission, or its Secretary, to represent the Commission at that meeting.

45. The Inter-American Juridical Committee was represented at the session by Mr. J. J. Caicedo Castilla, who, on behalf of the Committee, addressed the Commission at the 597th meeting.

46. The Commission, at the 613th meeting, heard a statement by Professor Louis B. Sohn of the Harvard Law School on the draft convention on the international responsibility of States for injury to aliens, prepared as part of the programme of international studies of the Law School.

IV. Date and place of the next session

47. The Commission decided to hold its next (fourteenth) session in Geneva for ten weeks from 24 April until 29 June 1962.

V. Representation at the sixteenth session of the General Assembly

48. The Commission decided that it should be represented at the next (sixteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Grigory I. Tunkin.

ANNEXES

ANNEX I

Comments by Governments[a] on the Draft Articles concerning consular intercourse and immunities adopted by the International Law Commission at its twelfth session in 1960 [b]

CONTENTS

1. Belgium

Transmitted by a letter dated 11 April 1961 from the Permanent Representative of Belgium to the United Nations

[*Original: French*]

INTRODUCTION

The Belgian Government has studied with interest the draft articles prepared by the International Law Commission and is able to express its agreement with them in principle.

In view of the development of international relations, it seems desirable to unify a branch of public international law which is of increasing interest to Governments.

Nevertheless, it appears indispensable to the Belgian Government to specify expressly, in a manner to be considered by the Commission, that the proposed convention codifies only rules unanimously accepted by the States concerned and that, accordingly, the convention does not represent an exhaustive regulation of consular law.

Thus, as regards the problems not settled by the draft in question, it will be impossible to rule out reliance, first, on the general principles of international law and on the rules of international usage, and, secondly, on the provisions of municipal law.

The provisions of the draft are on the whole in conformity with the law in force and with the usages observed in Belgium.

However, the Belgian Government has the following comments to make on particular articles.

Article 1

1. Sub-paragraph (*f*) provides that "The term 'consul', except in article 8, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized . . .".

In Belgium, consular agents are appointed not by the sending State but by their administrative superiors.

On this subject, article 48, paragraphs 2 and 3, of the Royal Order of 15 July 1920 provides:

"Consular agents shall be appointed by the consuls and vice-consuls who are heads of post, and for this purpose the heads of post must first request and obtain, through the regular channels, the authorization of the Minister for Foreign Affairs.

"The form of the certificates to be conferred upon consular agents shall be specified by a Ministerial Order."

2. The Belgian Government does not regard the present wording of sub-paragraphs (*h*) to (*k*) as very satisfactory.

The plethora of definitions in sub-paragraphs (*f*) to (*k*) will be a source of difficulty in the application of this instrument and for this reason the definitions ought to be simplified.

The Belgian Government accordingly suggests:

(*a*) That sub-paragraphs (*h*) and (*i*) should be deleted;

(*b*) That the present sub-paragraph (*j*) should be replaced by the following text:

"(*j*) The expression 'employee of the consulate' means any person working in a consulate who:

1. Not being a consul, performs executive, administrative or technical functions; or

2. Performs the functions of messenger, driver, caretaker or any other like function;"

(*c*) That sub-paragraph (*k*) should be replaced by the following text:

"(*k*) The expression 'members of the consulate' means the consuls and the employees of the consulate;".

By means of these amendments all the categories of persons involved would be defined, while the definitions would not be unnecessarily numerous.

The new definitions would be more in keeping with the later articles concerning the privileges and immunities to be granted to members of consulates.

3. The Belgian Government considers that article 1 should begin with definitions of "sending State" and "receiving State", which might be worded as follows:

"The expression 'sending State' means the Contracting Party which appoints the consul;"

[a] Originally circulated as documents A/CN.4/136 and Add.1-11.

[b] *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9* (A/4425), para. 28.

"The expression 'receiving State' means the Contracting Party in whose territory the consul exercises his functions:".

4. Lastly, the Belgian Government proposes that the sub-paragraphs of this article should be rearranged as follows:

(*a*) The expression "sending State" means . . .

(*b*) The expression "receiving State" means . . .

(*c*) The term "consulate" means . . .

(*d*) The expression "consular district" means . . .

(*e*) The expression "consular premises" means . . .

(*f*) The expression "consular archives" means . . .

(*g*) The term "consul" means . . .

(*h*) The term "exequatur" means . . .

(*i*) The expression "head of consular post" means . . .

(*j*) The expression "employee of the consulate" means . . .

(*k*) The expression "members of the consulate" means . . .

(*l*) The expression "private staff" means . . .

5. Accordingly, the Belgian Government considers that article 1 should read as follows:

Article 1: Definitions

For the purposes of this draft:

(*a*) The expression "sending State" means the Contracting Party which appoints the consul;

(*b*) The expression "receiving State" means the Contracting Party in whose territory the consul exercises his functions;

(*c*) The term "consulate" means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

(*d*) The expression "consular district" means the area within which the competence of the consulate is exercised in relation to the receiving State;

(*e*) The expression "consular premises" means any building or part of a building used for the purposes of a consulate;

(*f*) The expression "consular archives" means all the chancery papers, as well as any article of furniture intended for their protection or safe keeping;

(*g*) The term "consul", except in article 8, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise those functions in conformity with articles 13 or 14 of this draft; a consul may be a career consul or an honorary consul;

(*h*) The term "exequatur" means the final authorization granted by the receiving State to a foreign consul to exercise consular functions on the territory of the receiving State, whatever the form of such authorization;

(*i*) The expression "head of consular post" means any person appointed by the sending State to take charge of a consulate;

(*j*) The expression "employee of the consulate" means any person working in a consulate who

1. Not being a consul, performs executive, administrative or technical functions; or

2. Performs the functions of messenger, driver, caretaker or any other like function;

(*k*) The expression "members of the consulate" means the consuls and the employees of the consulate;

(*l*) The expression "private staff" means the persons employed in the private service of members of the consulate.

6. The Belgian Government considers that if the article as so amended is adopted, the other articles of the convention in which the expressions "consular official" and "member of the consular staff" occur should be brought into line with this redraft.

Article 2

The Belgian Government is in favour of the Special Rapporteur's proposal, reproduced in paragraph (3) of the commentary, that consular relations are deemed to have been established in cases where diplomatic relations already exist.

Article 3

In paragraph 4, the introductory phrase "Save as otherwise agreed" seems superfluous, since this proviso is covered by the condition, laid down at the end of the same clause, that the consent of the receiving State is required in each specific case.

Article 4

1. The Belgian Government would like paragraph 1 of the article to be replaced by paragraph 1 of the alternative text reproduced in paragraph (11) of the commentary. The first sentence should end with the words "relevant international agreements in force".

A second sentence might be added to specify expressly that consuls may exercise all the functions entrusted to them by the sending State, subject only to the proviso that the exercise of those functions must not involve any conflict with the law of the receiving State or that the receiving State has no objection to the exercise of those functions.

The new text would consequently read as follows:

"1. The task of consuls is to defend, within the limits of their consular districts, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant international agreements in force.

"In addition they have the task of exercising the functions entrusted to them by the sending State, provided that those functions do not involve any conflict with the law of the receiving State and that this State has no objection to the exercise of those functions."

2. Paragraph 2 of this article would consist of an enumeration of some of the functions exercised by consuls; and the present sub-paragraphs (*a*) and (*b*) would be omitted, since they are already reproduced in the new paragraph 1.

The new paragraph 2 would be worded as follows:

"2. Without prejudice to the consular functions deriving from the preceding paragraph, consuls may perform the undermentioned functions:

(*a*) To act as notaries and as registrars of births, marriages and deaths, and to exercise other functions of an administrative nature;

(*b*) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State;

(*c*) To further trade and promote the development of commercial and cultural relations between the sending State and the receiving State;

(*d*) To acquaint themselves with the economic, commercial and cultural life of their district, to report to the Government of the sending State, and to give information to any interested persons."

3. The present paragraph 2 would then become paragraph 3.

4. Paragraph (12) of the commentary on article 4 refers to an additional article proposed by the Special Rapporteur concerning the consul's right to represent nationals of the sending State.

The Belgian Government is in favour of such an additional article. Indeed, a provision to this effect appears in all the bilateral consular conventions concluded by Belgium.

Article 5

Sub-paragraph (*a*) of this article deals with the subject of the estate of a deceased national of the sending State, but not with the question of the consul's intervention in the case of the death of a national of the receiving State who leaves an estate in which a national of the sending State has an interest.

Provision should be made for this case also, and the Belgian Government proposes that for this purpose a new sub-paragraph (*b*) should be inserted in the following terms:

"(*b*) To inform the competent consulate without delay of the existence within the consular district of assets forming part of an estate in respect of which a consul may be entitled to intervene;".

If this proposal should be accepted, the present sub-paragraphs (*b*) and (*c*) would become sub-paragraphs (*c*) and (*d*).

Article 6

In the opinion of the Belgian Government, paragraph 1 (*c*), of this article should provide for the consul's right to address correspondence to nationals of the sending State who are in custody or imprisoned.

Furthermore, the second sentence of paragraph 1 (*c*) should be somewhat amended.

Paragraph 1 (*c*) should, then, read as follows:

"(*c*) The consul shall be permitted to visit a national of the sending State who is in custody or imprisoned, to converse and communicate with him and to arrange for his legal representation. The consul shall have the same rights with respect to any national of the sending State who is imprisoned in his district in pursuance of a judgement."

Article 8

In response to the request made in paragraph (4) of the commentary on this article, the Belgian Government gives below some particulars regarding the appointment and powers of consular agents:

1. *Appointment*

Article 48, paragraph 2 of the Royal Order of 15 July 1920 governing the organization of the consular corps, and article 29, paragraph 4, of the Royal Order of 14 January 1954 on the organization and operation of the Ministry of Foreign Affairs and External Trade contain the following provision:

"Consular agents shall be appointed by the consuls and vice-consuls who are heads of post, and for this purpose the heads of post must first request and obtain, through the regular channels, the authorization of the Minister for Foreign Affairs."

In addition, article 48, paragraph 3, of the Royal Order of 15 July 1920 governing the organization of the consular corps further provides:

"The form of the certificates to be conferred upon consular agents shall be specified by a Ministerial Order."

Consular agents, who are in all cases honorary agents, are furnished with a certificate signed by the head of post concerned and are themselves regarded as heads of post, though working under the direction of the agent by whom they were appointed.

2. *Powers*

Consular agents have only limited powers.

On this subject, article 71 of the Royal Order of 15 July 1920 governing the organization of the consular corps provides as follows:

"Consular agents act under the responsibility of the appointing consul. They may not discharge the functions of registrar of births, marriages and deaths, notary or magistrate except by virtue of powers expressly delegated in respect of each document by, and under the responsibility of, their immediate superior; the documents which such an agent receives, in his capacity of registrar or notary, by virtue of a delegation of powers by the appointing consul must contain a reference to this delegation of powers and mention the reason for the delegation. The consular agent may in no case delegate these powers himself. He is competent to legalize signatures, carry out the usual clearance formalities for merchant ships and act as arbitrator in the cases specified in articles 17 and 18 of the Act of 31 December 1851. With regard to all matters arising in connexion with his functions, he shall apply to the consul on whose behalf he is acting."

Articles 17 and 18 of the Consuls and Consular Jurisdiction Act of 31 December 1851 contain the following provisions:

"*Article 17*

"The consul shall arbitrate disputes arising between Belgians in his district if such disputes are referred to him.

"*Article 18*

"He shall also arbitrate disputes which are referred to him regarding:

1. The wages of seamen who are members of the crews of his country's merchant vessels,

2. The performance of obligations entered into between the seamen, the master and other ship's officers and between them and the passengers, in cases where no third party is involved."

The competence of the consular agents is confined to the area in which the consular agency has its office. The consular agents are useful in places remote from the consulate where the presence of a consular official is desirable but where the establishment of a larger post is not justified.

In recent years the institution of consular agencies in the strict sense has tended to play a dwindling part in Belgium's consular representation abroad.

Article 9

The language used at the end of this article departs from that employed consistently in the other articles of the convention. The expression "receiving State" should be used.

Article 10

1. The matters dealt with in article 10 may conceivably be governed not only by the internal law of the States, but also by custom and usage.

The closing passage of paragraph 1 should therefore read:

". . . is governed by the internal law and usages of the sending State".

2. Since the problems to which article 10 relates are also dealt with in articles 12 *et seq.*, the text of paragraph 2 should be amended to read:

"2. Competence to grant recognition to consuls, and, except as otherwise provided by the present articles, the form of such recognition, are governed by . . .".

Article 11

The rule stated in this article is unknown in Belgium.

Accordingly, the Belgian Government would prefer a more elastic formula to express the idea underlying the article.

The new text should therefore read:

"The appointment of consuls from amongst the nationals of the receiving State may be declared by that State to be subject to its express consent."

Article 12

1. The heads of consular post referred to in paragraph 1 are not all furnished with full powers in the form of a consular commission or similar document.

Consular agents who are in charge of a consular agency are also heads of post and, at least under Belgian law, are not furnished with full powers in the form of a consular commission or similar instrument.

2. As pointed out above with reference to article 9, the same expressions should be used to express the same ideas in all articles of the draft.

In paragraph 1, therefore, the expression "the State appointing them" should be replaced by "the sending State", which is the accepted expression in consular law.

3. Paragraph 1 says that heads of consular posts shall be furnished "with full powers".

This phrase is not quite accurate, since the consul exercises only the functions conferred upon him by the sending State within the limits of internal law, treaty law and public international law.

4. In paragraph 2, the expression "the State appointing a consul" should be replaced by the expression "the sending State"; and the expression "the State on whose territory the consul is to exercise his functions" by the expression "the receiving State".

5. Paragraph 2 should provide for the communication to the Government of the receiving State not only of the consular commission but also of the "similar instrument".

6. In the French text of paragraph 2, the present tense and not the future should be used.

In the light of these comments, paragraph 2 should be amended to read:

"2. The sending State shall communicate the commission or similar instrument through the diplomatic or other appropriate channel to the Government of the receiving State."

7. The Belgian Government is of the opinion that paragraph 3 of this article might be amended to read as follows:

"3. If the receiving State so agrees, the commission or other similar instrument may be replaced . . .".

8. In paragraph (3) of the commentary, the Commission asks for information as to whether a consul appointed to another post must be furnished with a new commission, even if the new post is in the territory of the same State.

The Belgian Government wishes to report that this is the policy followed in Belgium.

Furthermore, under the provisions of Belgian law, a head of consular post is furnished with a new commission:

(*a*) If he is promoted to a higher grade and the rank of the post is raised at the same time, or

(*b*) If his consular district is modified, or

(*c*) If the head office of the consulate is transferred.

Article 13

For the sake of terminological consistency, the phrase "of the State in which they are to exercise them" should be replaced by the phrase "of the receiving State".

Article 15

The Belgian Government considers that, in the French text, it would be more accurate to say "*s'acquitter des devoirs de sa charge*" than ". . . *du devoir de sa charge*".

Article 16

1. In the French text, the expression "*chef de consulat*" (head of consulate) is used in paragraph 1 because it would be difficult, in the context of this article, to use the expression mentioned in article 1.

Nevertheless, the Belgian Government proposes that, for the sake of consistency, the following wording, which uses the expression mentioned in article 1 of the draft, should be adopted:

"1. If the head of consular post is unable to carry out his functions, or if the position is vacant, the direction of the consulate . . ."

This wording keeps strictly to the expression "head of consular post" included in the definitions given in article 1.

2. The Belgian Government has no objections to the first part of paragraph 2, but must make some reservations regarding the second part.

Under Belgian internal law, the acting head of post is not entitled to the tax privileges mentioned in articles 45, 46 and 47 of the draft if he does not fulfil the conditions laid down in those articles.

Article 17

1. The rule stated in paragraph 2 does not exist in Belgian internal law. The only deciding factor in this connexion is the granting of the *exequatur*.

2. The words "*leurs lettres de provision*" at the end of paragraph 3 in the French text should be corrected to "*leur lettre de provision*".

3. The rule in paragraph 3 does not take into account the position of consuls who are not heads of posts, in whose case, since they are not, under Belgian internal law at any rate, furnished with a commission or similar instrument, a simple notice of appointment is sufficient.

The Belgian Government therefore suggests that the end of paragraph 3 should be amended to read as follows: "the order of precedence as between them shall be determined according to the date on which their commission or similar instrument was presented or on which notice was given of their appointment."

The idea of the notice of appointment having thus been introduced, the text of the paragraph will cover the possibility mentioned in article 12, paragraph 3.

4. The Belgian Government considers that the rule laid down in paragraph 4 should be applicable even where there is a difference of class.

The present text should, therefore, be amended to read:

"Heads of post, whatever their class, have precedence . . ."

Article 19

The Belgian Government is opposed to the provisions of this article and is afraid that a new category of consuls with a hybrid status might be established.

The introduction of this complication seems the less justified since it is only very rarely that cases of the kind envisaged occur in practice.

If, however, there were to be a majority in favour of this article, the Belgian Government would be prepared to accept such a provision in a spirit of compromise, provided that no new rank of consul-general-*chargé d'affaires* is created. It would like the second half of the article to be amended as follows: "in which case he shall enjoy diplomatic privileges and immunities".

Article 21

1. For the sake of conformity with the amendments proposed to article 1, the Belgian Government suggests the following wording for article 21:

"Subject to the provisions of articles 11, 22 and 23, the sending State may freely appoint consuls who are not heads of post and the employees of the consulate."

The Belgian Government further considers that employees of the consulate may make use of this title only if they are authorized by the receiving State to exercise their functions. The following clause should therefore be added to the text: ". . . and employees of the consulate, who, on notification of their appointment, are authorized to exercise their functions".

Article 22

The Belgian Government would like this article to be deleted.

The question with which it deals is governed exclusively by the internal law of States and should be settled by bilateral agreement between the States concerned in a spirit of mutual understanding.

Article 25

1. To concord with the definitions given in article 1, the beginning of paragraph 1 of this article should read as follows:

"1. The functions of the head of consular post shall be . . .".

2. The Belgian Government considers that two fairly frequent causes of cessation—resignation and death—should be added to the modes of termination.

The new paragraph might therefore be worded as follows:

"1. The functions of the head of consular post shall be terminated in the following events, amongst others:

"(*a*) His resignation or death;

"(*b*) His recall or discharge;

"(*c*) The withdrawal of his *exequatur*; and

"(*d*) The severance of consular relations."

3. In view of the amendments to paragraph 1, the first sentence of paragraph 2 should read:

"2. Except in the case referred to in paragraph 1 (*c*) of this article, the functions of consuls other than heads of post shall be terminated on the same grounds. In addition . . .".

Article 27

1. The Belgian Government considers that the expression "as soon as they are ready to leave" used in paragraph 2 does not altogether serve the purpose described in paragraph (2) of the commentary.

The text would probably be more adequate if the paragraph were amended to read:

"2. The receiving State shall grant to all the persons referred to in paragraph 1 of this article the necessary

facilities for leaving its territory, and shall protect them up to the moment of their departure, which shall take place within a reasonable period. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects."

2. The Belgian Government believes that paragraph 3 might be amended to read as follows:

"3. The provisions of paragraph 2 of this article shall not apply where a member of the consulate who has been locally appointed or engaged by the sending State is discharged."

Article 29

It should be mentioned in paragraph 1 of this article that it is the coat-of-arms of the sending State which is meant.

Article 31

1. The Belgian Government considers that a provision relating to expropriation might usefully be included in article 31.

A new paragraph might stipulate that:

"The consular premises may be expropriated only for reasons of national defence or public utility and in return for adequate compensation."

2. This article should also cover the case where inviolability is claimed for purposes unconnected with the exercise of the consular functions.

A paragraph worded as follows might therefore be included:

"If documents and articles relating to a gainful private activity carried on by a consul or by a member of the consulate, or the goods which are the object of that activity, are deposited in the consular premises, the consul or member of the consulate shall take the necessary steps to ensure that the application of the laws in force in the receiving State relating to such gainful private activity is in no way hindered by the operation of the provisions of the present article."

Article 32

1. In Belgium, exemption from the land tax and from the related national emergency tax is subject to the condition that the premises belong to a foreign State. This condition may be deemed to be fulfilled if a building is acquired by a head of post who is recognized as acting on behalf of the sending State, which thus becomes the owner. The principle is, therefore, that the exemption may be granted only to the foreign State.

Furthermore, article 45, paragraph 1 (*b*), seems to deal satisfactorily with cases in which immovable property used for the purposes of the consulate has been acquired in the name of the head of post but on behalf of the sending State.

Lastly, an exemption from the taxes chargeable on the acquisition of immovable property cannot possibly be granted in cases where the property belongs to an individual, whoever he may be. In such cases also, the head of post should be acting on behalf of the sending State.

2. The words "or the countervalue of local public improvements" should be added at the end of this article.

This expression would cover, for example, the improvement of the street, of public lighting, the installation of water mains, sewerage, etc.

3. The Belgian Government suggests that a similar tax exemption might be provided in respect of the furnishings of the consular premises, to which reference is also made in article 31, paragraph 3.

A paragraph 2 on this subject might read as follows:

"The sending State shall enjoy a similar exemption in respect of the ownership or possession of the furnishings of the consular premises."

Article 36

1. In paragraph (6) of the commentary, the Commission indicates that it has insufficient information concerning the practice of States in the matter of communications.

On this subject, the Belgian Government wishes to say that under Belgian law neither consuls nor diplomatic missions enjoy preferential rates for the sending of correspondence or telegrams or the use of telephones.

2. The Belgian Government feels it should draw attention to the fact that the principle expressed in paragraph 2 of this article is not absolute.

According to usage, the authorities of the receiving State may open the consular bags if they have serious reasons for their action, but they must do so in the presence of an authorized representative of the sending State.

The Belgian Government would like this usage to be mentioned in the commentary on article 36, as was done in the case of article 25 of the draft articles on diplomatic intercourse and immunities.

Article 37

1. The Belgian Government considers that the well-established principle of international law referred to in paragraph (1) of the commentary—that consuls, in the exercise of their functions, may apply only to the local authorities, i.e., to the authorities of their consular district—should be repeated in the body of the article.

The Belgian Government wishes to point out in this connexion that under Belgian consular law consuls are never entitled to approach either the central authorities or local authorities outside their consular district, except in the case referred to in paragraph 2 of the article.

2. The Belgian Government considers that the procedure to be observed by consuls in communicating with the authorities of the receiving State, referred to in paragraph 3, is a matter within the exclusive jurisdiction of the receiving State and does not come under international law.

This paragraph should therefore be deleted.

Article 38

In response to the request for information made in paragraph (4) of the commentary on this article, the Belgian Government wishes to say that only instruments executed at the consulate between private persons and intended to produce effects in the receiving State are liable to the taxes and dues provided for by the legislation of the receiving State.

Article 40

1. In paragraph 1, the expression "pending trial" applies both to "arrest" and to "detention", so as to exclude administrative arrest (maximum 24 hours), to which even consuls are liable if the circumstances arise.

2. The Belgian Government prefers the text of paragraph 1 as it stands to the alternative given in square brackets.

3. It should be explained that the expression "an offence punishable by a maximum sentence of not less than five years' imprisonment" in paragraph 1 includes offences punishable by a maximum term of five years' imprisonment but referred to a correctional court (and hence punishable by a shorter term).

4. The Belgian Government would like the words "at least two years" in paragraph 2 to be deleted. The two-year limit is unknown in Belgian law, and the execution of a final sentence is always possible.

The Belgian Government further suggests that the end of this paragraph should be amended slightly to read: "... save in execution of a final sentence of 'principal' imprisonment".

In this way the eventualities mentioned in paragraph (14 (*c*)) of the commentary on this article are ruled out, and in particular arrest for the purpose of executing a sentence of "subsidiary" imprisonment imposed for failure to obey an order to pay damages, especially in traffic cases.

5. The Belgian Government thinks the expression "any other restriction upon their personal freedom" used in paragraph 2 may rule out custody and protection in case of insanity. It must not be made impossible to adopt such measures in the case of consular officials.

Article 42

The Belgian Government considers that the word "office" at the end of paragraph 2 of this article should be replaced by the accepted expression "the consulate".

Article 43

1. The Belgian Government is prepared to agree to the provisions of this article, provided, howeve .hat the exemption in question is granted only to those .mbers of the families of members of the consulate who do not carry on any gainful private activity.

2. The Belgian Government would add that in Belgium the only private persons who qualify for the exemption referred to in the present article are those employed exclusively in the service of consuls.

Article 45

1. I the suggestions made in the Belgian Government's comments on article 32 are adopted, the phrase "subject to the provisions of article 32" should be deleted in paragraph 1 (*f*).

2. The words "or as the countervalue of local public improvements" should be added at the end of paragraph 1 (*e*).

3. The Belgian Government considers that provision should be made in this article for the case in which a member of the consulate carries on a gainful private activity and at the same time works in the consulate. The phraseology employed in article 58 might usefully be taken as a model for a paragraph worded as follows:

> "Even if they carry on a gainful private activity, members of the consulate shall be exempt from taxes and dues on the remuneration and emoluments which they receive from the sending State in payment of the work they perform in the exercise of their consular functions."

Article 47

The Belgian Government wishes to point out that sub-paragraph (*a*) of this article conflicts with a provision of Belgian law under which money and securities passing to heirs resident abroad may not, in principle, be transferred before a deposit has been made to guarantee payment of the duties payable in Belgium on the estate of a person who had the status of inhabitant of the Kingdom.

Article 48

The Belgian Government is prepared to accept sub-paragraph (*a*), although in consequence it will have to modify its practice so far as members of the families of members of the consulate are concerned.

It cannot go beyond that, however, and would like members of the private staff to be excluded from the benefit of this article.

Article 50

1. The Belgian Government considers that paragraph 1 ought to provide that all the members of the consulate should enjoy immunity from jurisdiction in respect of official acts performed in the exercise of their functions.

In practice, the consular functions are exercised in part by subordinate staff, as for example when an administrative document is drawn up.

Paragraph 1 should therefore read as follows:

> "1. Members of the consulate who are nationals of the receiving State..."

This is the more important since in most cases it will be exceptional for consuls, apart from honorary consuls, to be nationals of the receiving State, whereas the subordinate staff will often be recruited locally.

2. Provision should also be made in paragraph 1 for the immunity provided for in article 42, i.e., the immunity from liability to give evidence.

The following should therefore be added to the first sentence of paragraph 1: "...the exercise of their functions, and they may refuse to give evidence on matters connected with the exercise of their functions and to produce the correspondence and official documents relating thereto".

3. The amendments proposed in 1 and 2 above would involve the deletion of the first words of paragraph 2, which would then begin with the words: "Members of the families of members of the consulate, members of the private staff,...".

Article 51

1. The Belgian Government wishes to point out that the provision appearing at the end of paragraph 1 is not in keeping with the practice followed in Belgium. In this country the commencement of the consular privileges and immunities of a member of a consulate who is already in the territory dates not from the time when notice of his appointment is given to the Ministry of Foreign Affairs or a similar authority, but from the time of recognition by the receiving State.

It seems logical that the receiving State should first have to signify its agreement, since the persons concerned are in many cases nationals of that State.

2. In paragraph 3, provision should be made for the cessation of privileges and immunities in the case of persons who remain in the territory of the receiving State.

For this purpose the following sentence might be added after the first sentence of paragraph 3:

> "If such persons remain in the territory of the receiving State, their privileges and immunities shall cease at the same time as their functions as members of the consulate."

Article 53

Paragraph 2 refers to consular functions. Since, however, this convention deals only with consular immunities and relations, it was rightly considered that the expression "consular functions" should not be defined.

It would therefore be preferable to amend this paragraph slightly so as to make it read as follows:

> "2. The consular premises shall be used exclusively for the purposes of the exercise of the consular functions as specified in the present articles or in other rules of international law."

Article 54

1. The Belgian Government suggests that article 45, paragraph 3, should be added to the list of references in paragraph 2, as was proposed in the comments on that article, and deleted from the list of references in article 54, paragraph 3.

In consequence of this amendment article 58 would become superflous.

2. In reply to the question asked in paragraph (5) of the commentary on article 54, the Belgian Government wishes to state that the consular premises of a career consulate and those of an honorary consulate are treated in exactly the same way.

In the case of an honorary consulate, however, a house search is permitted if ordered by the court and authorized by the Ministry of Foreign Affairs of the receiving State.

Article 55

1. The Belgian Government wishes to point out that the article seems to ignore the fact that in an honorary consulate there are, in addition to the honorary consul himself, members of the consulate working on the same terms, i.e. without salary.

Accordingly a formula should be worked out which provides that the private correspondence, not only of the honorary consul but also of all other members of the consulate, including, for example, the consulate's secretary, should be kept separate from the consular archives.

2. Similarly, it might be useful to mention not only the books and documents relating to a gainful private activity, but also the goods involved.

The clause might therefore read as follows:

> "...and from the books, documents and goods connected with any gainful private activity . . ."

Article 57

The Belgian Government wishes to make the same comments as on article 43.

Furthermore, it is not sure that the phrase "outside the consulate", which occurs here for the first time ought to be used.

Under Belgian law, if a member of the family of the honorary consul, or of the consular staff of the honorary consulate, carries on a gainful private activity, even at the consulate

(e.g., as private chauffeur of the honorary consul), he will be treated in the same way as any member of the private staff and will not be eligible for the exemptions provided for in article 57.

Article 58

The Belgian Government considers that this article might be omitted, provided, however, that the amendments suggested *ad* article 54 are accepted.

Article 59

1. There are no provisions of Belgian law corresponding to the terms of sub-paragraph (*a*).

Only the honorary consuls themselves are entitled to the exemption referred to in this sub-paragraph, and it should be pointed out that in Belgium even members of the families of career consuls do not enjoy the exemption in question.

2. The comments in 1 above apply also to the exemption referred to in sub-paragraph (*b*).

3. As regards requisitioning more particularly, Belgian law provides that only those honorary consuls are exempt who fulfil the following conditions:

(*a*) They must be nationals of the sending State, and

(*b*) They must not carry on a gainful private activity.

Article 60

The Belgian Government considers that the provisions of this article do not add anything to the stipulations of article 42.

Moreover, since the article does not mention members of the consulate who carry on a gainful private activity, persons in this category might claim the benefit of the provisions of article 42 and in that way would secure better treatment than the honorary consuls themselves.

Perhaps article 60 should be deleted and article 42 amended accordingly.

In fact, on a careful reading the provisions of paragraphs 1 and 2 of article 42 seem to be applicable both to honorary consuls and career consuls.

All that would be necessary would be to add a short passage to paragraph 1:

". . . no coercive measure may be applied with respect to them unless they carry on a gainful private activity".

Article 42 would then have to be included, without distinguishing between the paragraphs, among the references given in article 54, paragraph 2, and deleted from the list given in article 54, paragraph 3.

Article 61

In the opinion of the Belgian Government, a study of this article seems to indicate that article 53, paragraphs 2 and 3, should be applicable to honorary consuls and should therefore be included in the list of references given in article 54, paragraph 2, leaving paragraph 1 of article 53 in the list of references given in article 54, paragraph 3. Article 61 itself would remain unchanged.

Article 62

The Belgian Government is of the opinion that this article should not be mentioned among those enumerated in article 54, paragraph 3, since the subject with which it deals is governed by chapter I of the draft convention referred to in article 54, paragraph 1.

Article 54, paragraph 3, would then have to be amended as follows: ". . . articles 55 to 61 shall apply to honorary consuls".

Article 65

The Belgian Government expresses its preference for the second text and considers that a statement should be included either in the preamble or in the convention itself to the effect that the convention reproduces only the fundamental and universally accepted principles of international consular law which are applicable in the absence of any regional or bilateral agreement.

2. Chile

Transmitted by a note verbale *dated 25 April 1961 from the Permanent Mission of Chile to the United Nations*

[*Original: Spanish*]

In general, the provisional draft articles on consular intercourse and immunities prepared by the United Nations International Law Commission is in keeping with the practice of the Chilean Government and with the case-law of Chile's courts. The draft satisfies needs arising from the general development of international relations by giving not only the rules generally recognized by international law, but also many new provisions intended to settle questions or problems not provided for in existing conventions or agreements. These new rules are skilfully conceived, are based on much research, and reflect the lessons of past experience.

With regard to this second point, the comments given below follow the sequence of the Commission's report, or simply the "report", as it is called in the report of the International Law Commission on the work of its twelfth session (document A/CN.4/132, of 7 July 1960). (The second point mentioned in this paragraph is concerned with the question whether the articles are in keeping with the Chilean Government's views and practice in consular matters).

"Article 2: Establishment of consular relations

"The establishment of consular relations takes place by mutual consent of the States concerned."

The Special Rapporteur had proposed, as stated in paragraph (3) of the commentary on the article that a second paragraph reading as follows should be added: "The establishment of diplomatic relations includes the establishment of consular relations".

The Government of Chile considers that there would be no advantage in accepting the proposed addition, and no disadvantage in rejecting it. Accordingly, it seems advisable that States should retain complete freedom to maintain diplomatic and consular relations simultaneously or either diplomatic or consular relations separately, as their political or economic interests may indicate.

"Article 4: Consular functions

"1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are:

"(*a*) To protect the interests of the nationals of the sending State, and the interests of the sending State itself;

"(*b*) To help and assist nationals of the sending State;

"(*c*) To act as notary and civil registrar and to exercise other functions of an administrative nature;

"(*d*) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State;

"(*e*) To further trade and promote the development of commercial and cultural relations between the sending State and the receiving State;

"(*f*) To acquaint himself with the economic, commercial and cultural life of his district, to report to the Government of the sending State, and to give information to any interested persons.

"2. Subject to the exceptions specially provided for by the present articles or by the relevant agreements in force, a consul in the exercise of his functions may deal only with the local authorities."

During the discussion of this article, the Commission considered at length whether a general definition of the consular functions should be adopted or whether it would be preferable to replace the definition by an enumeration of the various consular functions (Report, commentary to article 4). The Government of Chile considers that a general definition would be preferable to an enumeration of functions which could hardly be complete.

"*Article 11: Appointment of nationals of the receiving State*

"Consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State."

In the Spanish text, the expression *más que* in the phrase *más que con el consentimiento expreso de éste* should be replaced by *salvo*.

"*Article 23: Persons deemed unacceptable*

"1. The receiving State may at any time notify the sending State that a members of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, recall the person concerned or terminate his functions within the consulate.

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

The words "not acceptable" in paragraph 1 should be replaced by the words *persona non grata*, which is the phrase generally used in international law.

"*Article 24: Notification of the arrival and departure of members of the consulate, members of their families and members of the private staff*

"1. The Ministry of Foreign Affairs of the receiving State, or the authority designated by that Ministry, shall be notified of:

(*a*) The arrival of members of the consulate after their appointment to the consulate, and their final departure or the termination of their functions with the consulate;

(*b*) The arrival and final departure of a person belonging to the family of a member of the consulate and, where appropriate, the fact that a person joins the family or leaves the household of a member of the consulate;

(*c*) The arrival and final departure of members of the private staff in the employ of persons referred to in subparagraph (*a*) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons.

"2. A similar notification shall be given whenever members of the consular staff are locally engaged or discharged."

The Chilean Government would like some explanation of the expression *después de su destinación al consulado* ("after their appointment to the consulate") in paragraph 1(*a*). As it stands, it is meaningless. Unless, therefore, some explanation is given to justify its use, the expression should be deleted.

"*Article 25: Modes of termination*

"1. The functions of the head of post shall be terminated in the following events, amongst others:

(*a*) His recall or discharge by the sending State;

(*b*) The withdrawal of his *exequatur*;

(*c*) The severance of consular relations.

"2. Except in the case referred to in paragraph 1 (*b*), the functions of consular officials other than the head of post shall be terminated on the same grounds. In addition, their functions shall cease if the receiving State gives notice under article 23 that it considers them to be terminated."

The words "or discharge" in paragraph 1 (*a*) should be deleted, since for international purposes "recall" is sufficient, whatever may be the reason for it (discharge, retirement, transfer, etc.). Discharge is an administrative penalty the effects of which are governed by the internal law of each State, and there is no point in giving it international effects which would tend to displace the effects of recall.

"*Article 27: Right to leave the territory of the receiving State and facilitation of departure*

"1. Subject to the application of the provisions of article 40, the receiving State shall allow the members of the consulate whose functions have terminated, the members of their families and the private staff in their sole employ, to leave its territory even in case of armed conflict.

"2. The receiving State shall grant to all the persons referred to in paragraph 1 of this article the necessary facilities for their departure as soon as they are ready to leave. It shall protect them up to the moment when they leave its territory. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects.

"3. The provisions of paragraph 2 of this article shall not apply where a member of the consulate is discharged locally by the sending State."

For the reasons given in the comments on article 25, it would be advisable to delete article 27, paragraph 3, which imposes an international penalty on an official who has been discharged. There seems to be no reason in justice why an official who is discharged should suffer—besides the penalties to which he is liable under the administrative regulations of his country—this additional penalty, which affects, moreover, the members of his family, who are in no way responsible for the acts of the culpable official.

"*Article 32: Exemption from taxation in respect of the consular premises*

"The sending State and the head of post shall be exempt from all taxes and dues levied by the receiving State or by any territorial or local authority in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered."

The text reproduced above is not consistent with paragraph (2) of the commentary on the article. The article says textually that "*The sending State and the head of post* shall be exempt from all taxes and dues . . . in respect of the consular premises, whether owned or leased . . .".

Paragraph (2) of the commentary, on the other hand, says that the exemption affects "*the actual building* acquired or leased by the sending State" or by the head of consular post, for otherwise the owner could charge the tax to the sending State or to the head of post under the contract of sale or lease.

If this interpretation is correct, the text of article 32 should be amended so as to bring it into line with paragraph (2) of the commentary. For this purpose, the article might be redrafted to read: "Consular premises owned or leased by the sending State or by the head of post shall be exempt from all taxes levied by the receiving State or by any territorial or local authority, other than taxes or dues which represent payment for specific services rendered".

"*Article 37: Communication with the authorities of the receiving State*

"1. In the exercise of the functions specified in article 4, consuls may address the authorities which are competent under the law of the receiving State.

"2. Nevertheless, consuls may not address the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.

"3. The procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the laws and usages of the receiving State."

Paragraph 1 provides that in the exercise of their functions consuls may address the authorities which are competent under the law of the receiving State.

Paragraph 2 prohibits consuls from addressing the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.

It may, however, happen that in the receiving State the Ministry of Foreign Affairs is the competent authority to which paragraph 1 refers, and, as such, may be approached by the consul. The Government of Chile considers that if the decisive criterion is to be what the local law provides, then the provisions of that law ought to govern the consul's relations with the authorities of the receiving State; consequently, paragraph 2 of the article should be deleted.

"*Article 40: Personal inviolability*

"1. Consular officials who are not nationals of the receiving State and do not carry on any gainful private activity shall not be liable to arrest or detention pending trial, except in the case of an offence punishable by a maximum sentence

of not less than five years' imprisonment [alternatively: "except in the case of a grave offence]."

"2. Except in the case specified in paragraph 1 of this article, the officials referred to in that paragraph shall not be committed to prison or subjected to any other restriction upon their personal freedom save in execution of a final sentence of at least two years' imprisonment.

"3. In the event of criminal proceedings being instituted against a consular official of the sending State, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case referred to in paragraph 1 of this article, in a manner which will hamper the exercise of the consular function as little as possible.

"4. In the event of the arrest or detention, pending trial, of a member of the consular staff or of criminal proceedings being instituted against him, the receiving State shall notify the head of the consular post accordingly. Should the latter be himself the object of the said measures, the receiving State shall notify the diplomatic representative of the sending State."

The Chilean Government considers that the text of paragraph 1 should be accepted as it stands, and that the alternative, "except in the case of a grave offence", should be deleted. The phrase "grave offence" is vague and open to conflicting interpretations, whereas the definition of the penalty in terms of years of imprisonment provides an objective and stable basis for the application of the rule which the paragraph contains.

The rest of the article does not call for comment.

"*Article 42: Liability to give evidence*

"1. Members of the consulate are liable to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if they should decline to do so, no coercive measure may be applied with respect to them.

"2. The authority requiring the evidence of a consular official shall take all reasonable steps to avoid interference with the performance of his official duties and shall, where possible and permissible, arrange for the taking of such testimony at his residence or office.

"3. Members of the consulate may decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto. In this case also, the authority requiring the evidence shall refrain from taking any coercive measures with respect to them".

According to the generally accepted principles regarding the immunity of consular officials from jurisdiction, the immunity is applicable only in respect of the exercise of the consular functions. Article 41 of the draft also accepts this principle.

Consequently, in matters not related to the exercise of his functions, a consular official is subject to the ordinary jurisdiction of the receiving State. Hence there is no reason why a consular official should be able to decline to give evidence in an ordinary matter that is unconnected with the exercise of the consular functions. Furthermore, since the authorities of the receiving State are under the obligation to facilitate and not to hamper the exercise of the consular functions, they will in each case, according to the circumstances, take such action as the law permits to comply with this obligation by arranging for the evidence to be given in a way that does not interfere with the consular functions.

The Chilean Government therefore considers that paragraphs 1 and 2 should be deleted, since they conflict with the principle that, except in respect of acts forming part of their functions, consular officials should be subject to the ordinary jurisdiction of the receiving State.

The provisions of paragraph 3, on the other hand, are acceptable, for they follow logically from the immunity by which the acts of consular officials are protected.

The last sentence of paragraph 3 should be deleted, for if, in declining to give evidence in the case in question, the official exercises a right, he cannot of course be penalized or subjected to coercive action in any way on account of the decision he has taken.

"*Article 45: Exemption from taxation*

"1. Members of the consulate and members of their families, provided they do not carry on any gainful private activity, shall be exempt from all taxes and dues, personal or real, levied by the State or by any territorial or local authority, save

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

(*b*) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consulate on behalf of his government for the purposes of the consulate;

(*c*) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 47 concerning the succession of a member of the consulate or of a member of his family;

(*d*) Taxes and dues on private income having its source in the receiving State;

(*e*) Charges levied for specific services furnished by the receiving State or by the public services;

(*f*) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 32.

"2. Members of the private staff who are in the sole employ of members of the consulate shall be exempt from taxes and dues on the wages they receive for their services."

Paragraph 1 (*a*) provides that officials must pay indirect taxes "incorporated in the price of goods or services".

The indirect tax may be included in the price of goods or services so as to form a total, or the total price may be shown as consisting of the price of the goods or services plus the amount of the tax. Whether the tax is included in the price or is shown separately, it is still an indirect tax and, as such, is payable by whoever buys the goods or requests the services.

The Chilean Government therefore considers that the concluding phrase "incorporated in the price of goods or services" should be deleted.

In paragraph 1 (*b*), the word *"private"* in the expression "private immovable property" is unnecessary. The drafting of the Spanish text might be improved if the expression *que radiquen* were replaced by the word *situados*.

The following sentence should be added at the end of paragraph 2: "This provision shall not apply to persons who are nationals of the receiving State". This sentence, which appears in the paragraph (5) of the commentary on this article, would undoubtedly be worth including in the text, so as to remove all doubt.

"*Article 49: Question of the acquisition of the nationality of the receiving State*

"Members of the consulate and members of their families belonging to their households shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State."

In order to avoid any possible conflict between this provision and the provisions of the Chilean Constitution regarding nationality, a reservation would have to be made to the effect that Chile will apply this article without prejudice to the provisions of article 3 of its Political Constitution.

"*Article 51: Beginning and end of consular privileges and immunities*

"1. Each member of the consulate shall enjoy the privileges and immunities provided by the present articles as soon as he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory, as soon as his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

"2. The privileges and immunities of persons belonging to the household of a member of the consulate shall be enjoyed as soon as such persons enter the territory of the receiving State, whether they are accompanying the member of the consulate or proceeding independently. If such a person

is in the territory of the receiving State at the moment of joining the household of the member of the consulate, privileges and immunities shall be enjoyed as soon as the name of the person concerned is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

"3. When the functions of a member of the Consulate come to an end, his privileges and immunities, and those of the members of his household, shall normally cease at the moment when the persons in question leave the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The privileges and immunities of a member of the consulate who is discharged by the sending State shall come to an end on the date on which the discharge takes effec However, in respect of acts performed by members of tl consulate in the exercise of their functions, immunity from jurisdiction shall continue to subsist without limitation of time."

In paragraphs 1 and 2 of the Spanish text, the expression *en cuanto penetra al territorio* should be replaced by the expression *desde que entran en el territorio*. The idea usually conveyed by the word *penetrar* is that of one body entering another by force or violence, and the word *entrar* should therefore be used instead.

In paragraph 3, the Chilean Government suggests that the penultimate sentence, relating to the cessation of the privileges and immunities of officials who have been discharged, should be deleted. As has already been pointed out in connexion with article 25, discharge is a purely administrative penalty, which is applied differently under the law of different countries. There seems to be no strictly legal reason why the effects of this penalty should be internationalized.

In international law, discharge is the penalty which the State concerned has considered adequate for the act or omission in question; and since the act or omission is thereby punished according to law, the addition of another penalty hardly seems equitable. Furthermore, this administrative penalty does not necessarily or generally imply that an offence under the ordinary law has been committed; and hence it does not seem necessary to treat the consular officials involved with such severity. Lastly, it should be pointed out that the draft convention on diplomatic intercourse and immunities, now being discussed at Vienna, contains no similar provision applicable to diplomatic officials who have suffered the administrative penalty of discharge.

"*Article 58: Exemption from taxation*

"An honorary consul shall be exempt from taxes and dues on the remuneration and emoluments which he receives from the sending State in his capacity as honorary consul."

The Chilean Government suggests that the following sentence be added to this article: "This provision shall not apply to honorary consuls who are nationals of the receiving State". This clarification is given in the commentary, but it could usefully be included in the body of the article itself.

"*Article 59: Exemption from personal services and contributions*

"The receiving State shall

"(*a*) Exempt honorary consuls, other honorary consul officials and the members of their families, from all personal services, and from all public services of any kind whatever;

"(*b*) Exempt persons referred to in sub-paragraph (*a*) of this article from such military obligations as those connected with requisitioning, taxation and billeting."

For the reason given in the comments on article 58, the Chilean Government suggests that the following sentence be added to this provision also: "This article shall not apply to persons who are nationals of the receiving State".

"*Article 60: Liability to give evidence*

"In any case in which he is requested to do so in connexion with matters relating to the exercise of his consular functions, an honorary consul may decline to give evidence in the course of judicial or administrative proceedings or to produce official correspondence and documents in his possession. In such event, the authority requiring the evidence shall refrain from taking any coercive measures with respect to him."

The Chilean Government suggests that this article should be redrafted to read: "An honorary consul may decline to give evidence, and to produce official correspondence and documents, in the course of judicial or administrative proceedings which relate to matters connected with the exercise of his functions".

The last sentence in the text of the draft is deleted because, if the consul is exercising a right given to him by law, he cannot be liable to any penalty for exercising a right which the law itself has granted.

"*Article 65: Relationship between the present articles and bilateral conventions*"

First text:

"Acceptance of the present articles shall not rule out the possibility of the maintenance in force by the Parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or the conclusion of such conventions in the future."

Second text:

"The provisions of the present articles shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the Contracting Parties, and shall not prevent the conclusion of such conventions in the future."

The Chilean Government prefers the first text, for it abrogates previous bilateral conventions unless the Parties thereto specifically agree to maintain them in force.

The second text, on the other hand, leaves the existing bilateral conventions in force.

3. China

Transmitted by a letter dated 22 March 1961 from the Director of the Office of the Permanent Mission of China to the United Nations

[*Original: English*]

Article 3

It seems advisable to add the word "prior" before the word "consent" in paragraphs 1, 3, 4 and 5.

Article 4

The additional article (a consul's power of representation) proposed by the Special Rapporteur in paragraph 12 of the commentary should be inserted in this article.

Article 22

It is proposed that this article be deleted.

Article 35

The article should be amended to read as follows:

"The receiving State shall ensure to all members of the consulate, freedom of movement and travel in its territory.

"Nevertheless, the receiving State may, for reasons of national security, issue laws and regulations prohibiting or regulating entry into specifically indicated places, provided that this indication be not so extensive as to render freedom of movement and travel illusory."

Article 36

The words "and the official seal", should be inserted between the words "of their character" and the words "may only contain" in paragraph 3.

Article 42

It is proposed to add the following additional paragraph to this article:

"A member of the consulate shall not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths, nor shall he decline to produce the documents relating thereto."

Article 60

The following new paragraph should be added to this article:

"The honorary consul shall not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths, nor shall he decline to produce documents relating thereto."

Article 65.4

An article should be added to the draft providing for the settlement of disputes arising out of the interpretation or application of the convention.

4. Czechoslovakia

Transmitted by a note verbale dated 9 March 1961 from the Permanent Mission of Czechoslovakia to the United Nations

[*Original: English*]

1. The Czechoslovak Government is of the opinion that the draft articles should contain provisions to the effect that any State has the right to maintain consular relations with other States.

2. For the purpose of completeness the Czechoslovak Government recommends the inclusion in the draft of a provision which would expressly state that the establishment of diplomatic relations involves also the establishment of consular intercourse.

3. The Czechoslovak Government is of the opinion that in drawing up the final text of article 4 the International Law Commission should, in addition to a general definition, incorporate in this article also a detailed list of examples of consular functions.

4. The powers of the consul to protect the interests of the nationals of the sending State are in general terms regulated by the provisions on consular functions. This regulation is sufficient in the view of the Czechoslovak Government. Detailed regulation of questions referred to in article 6 of the draft is a matter falling within the exclusive competence of the internal legislation of the receiving State and, consequently, the Czechoslovak Government proposes that the provisions of article 6 be omitted from the draft.

5. The Czechoslovak Government proposes to include in article 13 of the draft the provision contained in the Commission's commentary that the grant of the *exequatur* to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility.

6. As regards the provisions of paragraphs 1 and 2 of article 40, the Czechoslovak Government considers the criterion based on the amount of punishment for criminal offences and on the length of the sentence as unsuitable, because it differs in penal legislations of individual States and, in addition to it, it is subject to changes. Therefore, the Czechoslovak Government is in favour of the adoption of the second alternative of paragraph 1 of article 40 and for amending accordingly paragraph 2 of the same article.

7. The Czechoslovak Government proposes to include in the draft a provision under which a member of the diplomatic mission when assigned to a consulate of such State shall retain his diplomatic privileges and immunities.

8. The Czechoslovak Government considers as acceptable the second text of article 65 concerning the relation of the proposed articles to bilateral conventions, according to which the provisions of the draft shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the Contracting Parties and shall not prevent the conclusion of such conventions in the future.

9. As regards chapter III of the draft (articles 54-63) the Czechoslovak Government does not wish to comment on it as it considers the institution of honorary consuls as unsatisfactory from the point of view of the present level of contacts between States, and consequently does not send or receive honorary consuls.

5. Denmark

Transmitted by a letter dated 17 March 1961 from the Deputy Permanent Representative of Denmark to the United Nations

[*Original: English*]

Article 4

The Danish Government is of the opinion that it will be difficult to visualize the consequences of so far reaching a regulation as in article 4, paragraph 1 "such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State" and the corresponding rule in the variant prepared by the Special Rapporteur.

Article 4: Variant drafted by the Special Rapporteur I 2: Assistance to ships

The Danish Government assumes that the rule is only applicable to civil cases (point (*e*) in the commentary). It furthermore assumes that the authorities of the receiving State are only under obligation to give the master of a ship an opportunity to inform the consul and to do this early enough to enable the consul to be present on board the ship, unless this is impossible due to the urgent nature of the legal action (point (*h*) in the commentary. Finally it is assumed that the Convention is not to result in curtailment of the powers which the legislation of the receiving State endows upon its authorities as regards the direction of salvage operations within its territory (point (*j*) of the commentary).

II, 6: Guardianship, etc.

It is presumed that the rules do not imply that special obligations towards the consuls of foreign countries are to be imposed upon guardians who are under the supervision of the authorities of the receiving State.

II, 7

The Danish Government would regard it as preferable that the right of consuls to represent an heir or legatee during the settlement of an estate in the receiving State, without producing a power of attorney, be expressly limited to cases in which the said heir or legatee is not a resident of the receiving State, nor staying there at the time of the settlement of the estate.

III, 9

Denmark only recognizes the validity of marriages solemnized before foreign consuls in Denmark if an agreement has been concluded thereon with the consul's home country.

III, 10

The Danish Government is of the opinion that a general rule on the functions of consuls as regards the serving of judicial documents and taking of evidence should not be included in a universal convention on consular functions, since the question is closely related with other matters concerning international legal assistance in court cases, and should therefore not be settled in a uniform manner in respect to all countries. Particular consideration should be given to whether the judicial authorities of the receiving State are empowered to grant legal assistance, or excluded therefrom, to the authorities of other countries. In all circumstances the functions of a consul in this respect ought hardly to include criminal cases.

IV, 11 and 12

The Danish Government presumes that the functions do not imply that the authorities of the receiving State are under obligation to recognize the validity of documents drawn up or attested by the consul, beyond what is due according to the usual rules.

The Special Rapporteur's additional article

The Danish Government would not be prepared to approve such a rule, which would authorize a consul to appear in special cases before the courts and other authorities on behalf of absent nationals without producing a power of attorney.

Article 6

The Danish Government understands the proviso in paragraph 2 to mean that it can authorize the receiving State to restrict the consul's freedom to converse with the prisoner

when considerations of national security or relations with foreign powers or special consideration for same might otherwise require it.

Article 32

The Danish Government feels compelled to make a reservation as regards exemption from taxation if the consular premises are not owned by, but only leased by, the sending State. Similarly the sending State is exempted from dues chargeable on the purchase of real property but not when it is only a question of a lease contract.

Article 36, paragraph 1

The Danish Government would prefer that the freedom of communication for consulates be restricted so that, besides maintaining contact with the Government of the sending State and that State's diplomatic missions accredited to the receiving State, they shall only be free to communicate with consulates of the sending State situated in the same receiving State.

Article 36, paragraph 3

The Danish Government would consider it desirable if a rule could be added to paragraph 3 along the following lines:

In special cases, however, the authorities of the receiving State may request that a sealed courier bag should be opened by a consular official in their presence so as to ensure that it contains nothing but official correspondence or articles intended for official use.

Article 40, paragraph 2 and article 42, paragraph 1, point 2

The Danish Government does not consider that there are sufficient grounds for the inclusion of such rules in the Convention.

Article 41

The Danish Government would consider it desirable if in connexion with the rule on immunity from the jurisdiction of the receiving State a rule could be inserted on the liability to pay compensation by the driver of motor vehicles, etc., along the following lines:

All motor vehicles, vessels and aircraft, owned by members of the consulate, shall be insured by policies against third party risks. Such insurance shall be made in conformity with any requirements that may be imposed by the law of the receiving State.

The preceding provisions shall not be deemed to preclude members of the consulate from being held liable in a civil action by a third party claiming damages in respect of injury sustained as a result of an accident involving a motor vehicle, vessel or aircraft under his control. In connexion with such an action members of the consulate shall not be entitled to refuse to produce any document or to give evidence.

Article 45

The Danish Government is of the opinion that for persons who are not nationals of the receiving State, but who at the time of their engagement on the consular staff were fully taxable in the receiving State, exemption from taxation should only cover the salary receivable from the consulate.

Article 46

It is the opinion of the Danish Government, furthermore, that exemption from customs duties should only be enjoyed by career consuls (consuls-general, consuls and vice-consuls) who are not nationals of the receiving State and who are not carrying on a gainful private activity there. Exemption from customs duties shall apply to articles imported personally or purchased from an importer who has declared the articles with the customs.

Articles 54 and 57

The Danish Government finds it unsatisfactory to allow the rule in article 31 on the inviolability of consular premises to be applicable to honorary consuls. Similarly, it would consider it desirable if article 57 on the exemption from obligations in the matter of registration of aliens and residents and work permits for honorary consuls be omitted from the Convention.

6. Finland

Transmitted by a letter dated 26 January 1961 from the Permanent Representative of Finland to the United Nations

[*Original: English*]

The Government of Finland have noted with satisfaction that the Draft on consular intercourse and immunities, prepared by the International Law Commission, is both a codification and a development of the law concerning consuls. The Government consider the Draft to be a valuable basis for the preparation of a convention on the subject.

With regard to particular articles the Government of Finland make the following observations:

Article 3, paragraph 5, provides that the consent of the receiving State is necessary in order that a consul might at the same time exercise consular functions in another State. Although a similar restriction relating to the accrediting of the head of a diplomatic mission to several States is contained in the Draft Articles on Diplomatic Intercourse and Immunities, serious doubt might be raised as to its desirability with regard to diplomatic representatives and, with even greater cause, to consuls. This is a matter with which the sending State is most closely, or even exclusively concerned. A great number of States do not find it possible to maintain consular representatives in every country and they may find it necessary to entrust a consul with functions in several States. If the carrying out of consular tasks suffers from an arrangement of this kind, it is mainly the interests of the sending State and its citizens, and not the receiving State, which have to suffer from it.

Article 4, paragraph 1, contains an extremely broad provision concerning consular functions to the effect that a consul may exercise any functions entrusted to him by the sending State so long as these can be exercised without breach of the law of the receiving State. Although according to article 18 and 19 of the Draft a consul may only perform diplomatic functions to the extent permitted by the receiving State or in accordance with a special agreement, some further general restrictions would seem desirable. The Government notes with satisfaction, however, that the Draft refrains from enumerating all possible tasks of a consul, and limits itself to his principal functions.

In paragraph 12 of the commentary to article 4 the International Law Commission requests the comments of Governments on the proposal of the Special Rapporteur that an additional article be included in the Draft concerning the right of a consul to appear, without a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals of the sending State who are absent or for any other reason unable to defend their rights and interests in due time. It is no doubt necessary to entrust consuls with powers of representation but the Government of Finland consider it eminently desirable to restrict these powers to a right of representation for the exclusive purpose of preserving rights and interests.

In paragraph 4 of the commentary to article 8 the International Law Commission requests Governments for information concerning consular agents. The Government of Finland do not appoint consular agents and are therefore not in a position to give any comments on this matter.

In paragraph 3 of the commentary to article 12 the Commission requests information on prevailing practice concerning the making out of consular commissions in respect of each appointment. According to the practice in Finland, a consular commission must be made out for each post separately.

Article 13 provides that only heads of consular posts require an *exequatur*. Paragraph 7 of the commentary to that article contains the statement that nothing prevents the sending State from requesting in addition an *exequatur* for other consular officials with the rank of consul. The question arises whether such consuls may enter upon their duties without having obtained final recognition of the receiving State by way of an *exequatur*. Many countries seem to require a personal *exequatur*. Paragraph 9 of the commentary rightly states that Governments should not be obliged to communicate the reasons for their refusal of *exequaturs* to the Government concerned. This case

may be compared with the question of granting *agrément* to heads of mission.

Article 16 grants an acting head of post the same rights as the head of the consulate, and a mere notification to the competent authorities of the receiving State is sufficient to grant him those rights. If the provision of article 13 that only the regular head of post requires an *exequatur* is accepted, it would seem desirable to give the receiving State the right to refuse to accept somebody considered unacceptable as acting head of post, particularly as the provision on unacceptable persons contained in article 23 is exclusively concerned with those belonging to the consular staff, with respect to whom the receiving State is rightly given the power to notify the sending State that a member of the consular staff is not acceptable.

According to article 20, paragraph 1, an *exequatur* may be withdrawn only where the conduct of a consul gives serious grounds for complaint. It is undoubtedly true that, as mentioned in paragraph 3 of the commentary to this article, an arbitrary withdrawal of an *exequatur* might cause serious prejudice to the sending State. Nevertheless, considering that the maintaining of consular relations is founded on a voluntary basis and since it is normally unlikely that an *exequatur* is withdrawn without valid reason, the Government of Finland submit for consideration whether this should be broadened so as to give wider discretion to the receiving State. If that State abuses its right to withdraw an *exequatur*, the sending State might consider withdrawing *exequaturs* granted to consuls of the former State as a retaliatory measure. In its present drafting the article requires that the reasons of withdrawal be stated, in which case discussion might ensue on whether those reasons have been of sufficient weight to justify withdrawal of the *exequatur*.

In paragraph 4 of the commentary to article 38 the International Law Commission requests Governments to supply information on the levying of taxes and dues by the receiving State on acts executed at a consulate situated in that State. In Finland, such taxes or dues may only be levied if documents drawn up at consulates are presented to Finnish authorities for the purpose of producing legal effect in Finland. If, however, legal acts are performed at a consulate with the intention to employ the documents outside Finland, no such dues may be levied.

The extensive and important section III of chapter II, dealing with the personal privileges and immunities of consuls, contains certain articles which the Government of Finland consider should be given further examination.

The provision of article 40, paragraph 1, on the exemption of consuls from arrest or detention pending trial is founded, according to paragraphs 4 and 11 of the commentary to that article, on State practice as evidenced in consular conventions. It is, however, evident that a great many States, including Finland, have not made this extension of the personal inviolability of consuls. In the opinion of the Government of Finland the personal inviolability of consuls in this respect should not extend beyond relatively insignificant acts, and for this reason the alternative suggested by the International Law Commission in article 40, paragraph 1, is preferable to the present draft article.

For these reasons the Government further consider that paragraph 2 of article 40 grants too wide inviolability and should be narrowed down substantially. This observation applies with even greater strength to article 52, paragraph 1, concerning obligations of third States.

The Government of Finland give their entire support to the principle embodied in article 41 that members of a consulate shall be exempt from the jurisdiction of the receiving State in respect of acts performed in the exercise of their functions.

The provision of article 43 exempting members of a consulate, members of their families and their private staff from work permits should be limited to work performed in the consulate instead of extending it to every type of work.

With respect to article 54 on the legal status of honorary consuls the Government consider it appropriate to leave out the reference to article 42, paragraph 1, since it is evident from article 60 that the exemption of consuls from the liability to give evidence is limited to the case mentioned in article 42, paragraph 3.

In paragraph 5 of the commentary to article 54 the International Law Commission requests Governments to supply information concerning the granting of the privilege of inviolability of consular premises to honorary consuls. A somewhat restricted practice in Finland on this matter tends to extend inviolability to the actual office premises of the consulate.

In the commentary to article 62 on precedence information is requested on State practice in this respect. In Finland the rules proposed by the International Law Commission are observed.

7. Guatemala

Transmitted by a letter dated 26 January 1961 from the Acting Permanent Representative of Guatemala to the United Nations

[*Original: Spanish*]

The aforesaid draft contains 65 articles, with commentaries by the International Law Commission, embodying the best practices developed by States in the matter of consular intercourse and immunities.

The draft has been very carefully edited and does not conflict with the generally accepted principles of international law on the subject.

Provided that there is no question of introducing substantial changes in the course of the conference, the draft, as prepared by the International Law Commission, would be acceptable to Guatemala.

8. Indonesia

Transmitted by a letter dated 28 April 1961 from the Permanent Representative of the Republic of Indonesia to the United Nations

[*Original: English*]

I have the honour to inform you that the Government of Indonesia welcomes the efforts made by the United Nations and, in particular, the International Law Commission to codify customary rules and provisions that have been generally recognized and applied to consular relations between States.

However, the Government of the Republic of Indonesia deems it necessary to present its observations on the draft articles on Consular Intercourse and Immunities in view of the fact that some of the articles are not entirely in conformity with changes in the constitutional and political development of Indonesia, as well as the development of its foreign relations.

The observations that the Indonesian Government wishes to make are as follows:

Article 4: In conformity with Indonesian legislation, the Indonesian Government interprets the term "nationals" in this article as comprising both persons and bodies corporate.

Article 8: The Indonesian Government would like to make a reservation on this article to the effect that it does not recognize "consular agents" as "heads of post" since the former classification is not known in the Indonesian Foreign Service. Furthermore, there is apparently no identical and universal interpretation of the designation "consular agents".

Article 11: To prevent the appointment as consular officials of nationals of "third States" not acceptable to the receiving States, the Indonesian Government wishes to see included the additional restriction that not only "nationals of the receiving State" but also "nationals of a third State" may be appointed as consular officials only with the "express consent of the receiving State".

Article 14: Considering that "the benefits of the present articles and of the relevant agreements in force" are merely consequences of the provisional recognition, it is deemed necessary to reaffirm that fact by inserting the words "in pursuance thereof" after the conjunction "and" and before the preposition "to".

Article 53: Considering that up to now the development of international law generally, and for its greater part, has been and still is determined by developments in the Western world, although contemporary international political conditions in the light of the development of the newly independent Asian and African countries can no longer justify this fact, the Indonesian Government wishes to reserve its right in respect to the interpretation of the "other rules of international law" envisaged in paragraph (*2*) of this article.

9. JAPAN

Transmitted by a note verbale *dated 28 April 1961 from the Permanent Mission of Japan to the United Nations*

[*Original: English*]

I. *General observations*

The Government of Japan is deeply appreciative of the contribution made by the International Law Commission in drawing up the draft articles concerning consular intercourse and immunities.

The Government wishes to reserve its position, however, with regard to whether these draft articles should be adopted as another multilateral convention similar, in character, to the Vienna Convention on Diplomatic Relations or as a model rule for a consular convention between two countries to be concluded in the future.

II. *Article by article observations*

1. *Article 1*

It is suggested that the words "and the land ancillary thereto" be inserted before "used . . ." in paragraph (*b*) of this article.

2. *Article 3*

It is proposed that the following new paragraph be added in this article:

"The sending State may establish and maintain consulates in the receiving State at any place where any third State maintains a consulate."

It is suggested that the provision of commentary (3) be included as a new paragraph in this article.

3. *Article 4*

It is suggested that the word "boat" appearing in paragraph 1, (*d*) of this article be deleted as the word "vessel" in the same paragraph contains the meaning of "boat".

4. *Article 5*

It is suggested that the words "to send a copy of the death certificate to" be replaced by "to inform of his death" in paragraph (*a*) of this article.

5. *Article 6*

It is suggested that paragraph 1 (*b*) of this article be modified as follows:

"If a national of the sending State is committed to custody pending trial or to prison, the competent authorities shall, at his request, inform the competent consul of that State without undue delay."

6. *Article 8*

As regards the commentary (4) to this article, the Government of Japan has not adopted the system of a consular agent.

7. *Article 16*

It is suggested that paragraph 1 of this article be modified as follows:

"1. If the position of head of post is vacant, or if the head of post is unable to carry on his functions, an acting head of post shall act provisionally as head of post.

"The name of the acting head of post shall be notified, either by the head of post or, in case he is unable to do so, by the sending State to the receiving State. In cases where no consular official is present at the post, a member of the administrative or technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the post."

8. *Article 31*

It is proposed that the following provision be added at the end of paragraph 1 of this article:

"or, if such consent cannot be obtained, pursuant to appropriate writ or process and with the consent of the Minister for Foreign Affairs or any other Minister concerned of the receiving State.

"The consent of the head of post may, however, be assumed in the event of fire or other disaster or if the police or other authorities concerned have reasonable cause to believe that a crime involving violence to persons or property is about to be, or is being, or has been, committed in the consular premises."

9. *Article 36*

It is proposed that the words "all *appropriate* means" be replaced by "all *public* means" in paragraph 1 and that paragraph 2 be modified as follows:

"2. The bags, when they are certified by the responsible officer of the sending State as containing official correspondence only, shall not be opened or detained."

10. *Article 40*

It is suggested that paragraphs 1 and 2 be deleted and, instead, the following new paragraph be adopted as paragraph 1.

"1. Consular officials shall not be liable to arrest, detention pending trial or prosecution, except in the case of an offence punishable by a maximum sentence of not less than one year's imprisonment."

11. *Article 43*

It is proposed that the words "private staff" be deleted.

12. *Article 45*

It is proposed that paragraph 1 be modified as follows:

"1. Consular officials, and members of administrative or technical staff who are nationals of the sending State and not of the receiving State, provided they...".

It is desirable that paragraph 1(*a*) be replaced by "excise taxes including sales taxes".

Paragraph 2 should be deleted.

13. *Article 46*

It is suggested that the present article be named paragraph 1 and that the words "members of the consulate" in the former part of this article and "members of the consulate" in paragraph (*b*) be replaced respectively by "consular officials".

It is also suggested that a new paragraph be added as follows:

"2. Members of the administrative or technical staff who are nationals of the sending State and not of the receiving State, provided they do not carry on any gainful activity, shall enjoy the privileges specified in paragraph 1 of this article, in respect of articles imported at the time of first installation."

14. *Article 47*

It is suggested that the former part of this article be modified as follows:

"In the event of the death of a consular official or a member of the administrative or technical staff who was a national of the sending State and not of the receiving State and did not carry on..."

It is desirable to have paragraph (*b*) modified as follows:

"(*b*) Shall not levy estate, succession or inheritance duties on movable property situated in its territory and held by him in connection with the exercise of his function as a member of the consulate."

15. *Article 48*

It is proposed that the words "are nationals of the sending State and" be inserted after "private staff who" in paragraph (*a*) of this article.

16. *Article 56*

It is proposed that the following words be added at the end of this article:

"in cases where the life or dignity of an honorary consul was jeopardized by reason of his exercising an official function on behalf of the sending State."

17. *Article 57*

This article is undesirable.

18. *Article 59*

It is proposed that the contents of the commentary (2) to this article be included in this article.

19. *Article 65*

The Government of Japan wishes to reserve its position with regard to this article.

10. Netherlands

Transmitted by a note verbale *dated 13 April 1961 from the Permanent Mission of the Netherlands to the United Nations*

[*Original: English*]

A. *Introductory remarks*

There is great similarity between this topic and that of diplomatic intercourse and immunities. The results of the United Nations Conference on Diplomatic Intercourse and Immunities, now in session in Vienna, will no doubt affect the drafting of some of the articles on consular intercourse and immunities. Consequently on a number of questions in the consular draft no definite opinion can be stated until the results of the Vienna conference are known.

The Netherlands Government, like the International Law Commission itself, assumes that the draft articles will form the basis of a convention. The ILC's commentary on the draft articles will of course not be included in the final text of a convention. However, the commentary occasionally contains principles that, in the Netherlands Government's view, should be transferred to the draft itself and eventually be incorporated in the convention. The following comments therefore contain a number of suggestions to that effect. Also, incidental comments are made on the commentary.

B. *Articles*

Article 1: Definitions

Paragraph (b). Buildings or parts of buildings used for consular purposes should be granted inviolability and exemption from taxation only when there is strict separation between consular and non-consular offices as envisaged in article 53 (3). It is therefore suggested that "consular premises" in paragraph (*b*) be defined as "any building or part of a building used exclusively for the official services of a consulate". It is recalled that the consular archives already enjoy protection under other provisions (article 1 (*e*) in conjunction with articles 33 and 55).

Paragraph (e). The definition of consular archives would seem to be too narrow. The following text is proposed: "the term 'consular archives' shall be deemed to include correspondence, documents, papers, books, records, registers, cash, stamps, seals, filing cabinets, safes and cipher equipment".

Paragraph (f). The definition is not clear. If the head of a consulate is meant, as seems likely in view of article 9 and in view of the reference to articles 13 and 14 which are concerned with the heads of consular posts, the definition is at variance with the one contained in paragraph (*g*). If, on the other hand, the meaning is "anyone appointed to do consular work" it would seem to be superfluous in view of paragraph (*i*). It is therefore proposed that paragraph (*f*) be deleted and that the term "consul" be used only as an indication of the rank, just as the classification in article 13 of the draft on diplomatic intercourse and immunities solely indicates the rank (e.g., Ambassador, Envoy, etc.). Throughout the following comments it is assumed that the definition will be omitted. Whenever necessary, it will be suggested that the term "consul" be replaced by another term.

Paragraph (i). After deletion of paragraph (*f*) this paragraph should read as follows: "The expression 'consular official' means any person, including the head of post, duly appointed by the sending State to exercise consular functions in the receiving State and authorized by the receiving State to exercise those functions. A consular official may be a career consular official or an honorary consular official".

The articles should also be applicable to diplomatic personnel who concurrently exercise consular functions.

The ILC has correctly drawn a distinction between diplomatic and consular functions by not assuming that a diplomatic official would be entitled to perform consular duties and thereby possess consular status without having been properly appointed and recognized.

Paragraph (j). The commentaries on the articles being eliminated from the final text, paragraph (*j*) could be deleted, since the expression "employee of the consulate" does not occur in the articles except in article 1.

Paragraph (k). If paragraph (*j*) were deleted, paragraph (*k*) would have to read as follows: "The expression 'members of the consular staff' means the consular officials (other than the head of post) and all persons performing administrative or technical work in a consulate or belonging to the service staff".

The definitions contained in paragraphs (7) and (8) of the commentary on article 3 should be added to the definitions of article 1.

Article 2: Establishment of consular relations

Contrary to the Special Rapporteur's proposal that diplomatic relations should include consular relations, it is suggested that under prevailing international law the establishment of diplomatic relations does not automatically include the establishment of consular relations. Neither does the establishment of diplomatic relations involve the consent of the receiving State with regard to the exercise, by diplomatic officials, of such consular functions as do not fall within the traditional scope of diplomatic activities.

Article 3: Establishment of a consulate

In paragraph 2 the term "mutual consent" should be used instead of "mutual agreement", following the terminology used in article 2.

In paragraph 4 and paragraph 5 "a consular official" should be substituted for "a consul" and "the consul". Following the suggestion made in paragraph (3) of the commentary a new paragraph should be added to article 3 along these lines: "6. The consent of the receiving State is also required if a consulate desires to open an office in a town other than that in which it is itself established."

Arguing that the agreement for the establishment of consular relations "is in a broad sense an international treaty" paragraph (4) of the commentary states that for the termination of consular relations the same rules apply as for the termination of a treaty. Since it is customary that consular relations, unlike treaties, may under particular circumstances be unilaterally terminated, the comparison would seem incorrect.

Article 4: Consular functions

Article 4 should mention the general functions which will be exercised by consular officials, unless the parties agree otherwise. The parties must be free both to limit and to extend these functions. The following text is suggested: "To the extent to which they are vested in him by the sending State a consular official exercises the following functions unless the sending State and the receiving State have agreed otherwise".

After paragraph (*c*) a new paragraph should be inserted along the following lines: "To serve judicial documents or to take evidence on behalf of courts of the sending State".

In paragraph (*d*), the words "and boats" should be deleted. The term "vessels" covers all nautical craft.

Paragraph 2 of article 4 seems superfluous in view of article 37.

In the commentary on this article it should be stated that "agree" means both a formal agreement and an informal arrangement between two States.

Article 5: Obligations of the receiving State in certain special cases

Articles 5 and 6 are somewhat out of context and would be better placed together with articles 34 *et seq.*

Paragraph (*c*) should be supplemented by a corresponding arrangement for aircraft.

Article 6: Communication and contact with nationals of the sending State

The expression "without undue delay" in paragraph 1(*b*) is too vague and should be supplemented by the words "and in any case within one month". Furthermore, the words "committed to custody pending trial or to prison" in the same paragraph are not sufficiently comprehensive, since they do not cover persons doing forced labour or committed to a lunatic asylum. Better wording would be: "committed to any form of arrest or detention". In the following sentence there should be a consequential amendment to the same effect. On this point the commentary should explain that every form of deprivation of liberty by the authorities is intended.

As a consequence of the suggested amendment to article 1 the following further amendments are proposed:

Paragraph 1 (a): "access to the competent consul, and the consul..." should be replaced by "access to the competent consulate, and the officials of that consulate...".

Paragraph 1 (b): "consul" should be twice replaced by "consulate"; his "district" by "its district".

Paragraph 1 (c): "The consul" should be replaced by "A consular official".

Article 7: Carrying out of consular functions on behalf of a third State

"Consul" should be replaced by "consular official", even in case the definition of "consul" in article 1 is maintained.

Article 8: Classes of heads of consular posts

The information on consular agents, requested in paragraph (4) of the commentary, is attached [as an Annex to these observations].

Article 9: Acquisition of consular status

This article should be replaced by the following:

"1. A head of a consular post must be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent;

"2. He must be recognized in that capacity by the Government of the State in whose territory he is to carry out his functions."

The present text gives a definition which one would expect to find in article 1. Moreover, it would not be correct if throughout the draft articles the word "consul" would mean somebody who has already been recognized in that capacity by the receiving State. In article 10, for instance, this is obviously not the case.

Article 10: Competence to appoint and recognize consuls

Because articles 21 and 22 govern the appointment of consular staff the word "consuls" should be replaced by "heads of consular posts". Furthermore, the expression "internal law" should be replaced by "municipal law".

Article 11: Appointment of nationals of the receiving State

The following new wording is proposed:

"The receiving State may require that the appointment of consular officials from its own nationals be subject to its prior consent".

Article 12: The consular commission

Paragraph 1: the opening words should be replaced by "The head of a consular post". In the fifth line "the full name of the consul" should be replaced by "his full name".

Paragraph 2: "consul" should be replaced in the first line by "head of consular post" and in the fourth line by "he". Instead of "the State on whose territory the consul (he) is to exercise his functions", the words "the receiving State" may be used.

Paragraph 3: "consul" should read "head of consular post".

Article 14: Provisional recognition

The words: "the head of a consular post" should be replaced by "a consular official".

Article 15: Obligation to notify the authorities of the consular district

"Consul" in this article is no doubt intended to mean the head of a consular post. The provision should, however, apply to all consular officials. It is therefore suggested that "consul" be replaced by "consular official".

Article 16: Acting head of post

The appointment of acting heads of post may be difficult due to lack of personnel (one man posts) or to the inconvenience of temporarily transferring personnel from other posts. The sending State may therefore prefer to close the consulate temporarily. Thus the words "shall be temporarily assumed" in the third line of the article should read: "*may* be temporarily assumed".

"Consular post" should be replaced by "consulate".

Article 17: Precedence

"Consuls" should be replaced by "consular officials".

Articles 18 and 19

"A consul" should be replaced by "the head of a consular post".

Article 20 (Withdrawal of exequatur*)*

The following new text is suggested:

"The receiving State may withdraw an *exequatur* if for grave reasons a consular official ceases to be an acceptable person. For such reasons it may revoke the admission of members of the consular staff other than consular officials, whether accorded tacitly or by express authorization.

"The receiving State shall, however, take such a decision only if the sending State does not comply within a reasonable time with a request to terminate the appointment of the consular official concerned".

It does not seem necessary to require that an explanation be given for the withdrawal of an *exequatur*.

Article 22: Size of the staff

The words "and normal" should be omitted. The point is whether or not the size is "reasonable". The word "normal" might introduce an element of comparison with other posts, or with the size of the same post in the past.

The proposition made in paragraph (3) of the commentary of first trying to reach an agreement could be incorporated into the article itself.

Article 23: Persons deemed unacceptable

This article may be omitted if the suggestion regarding article 20 is followed.

Article 24: Notification of the arrival and departure

Since under article 51 the receiving State is obliged to grant privileges and immunities from the moment of entry into the country it is recommended to state clearly that the sending State must inform the receiving State prior to the arrival of the consular official.

Article 27: Right to leave the territory of the receiving State

Paragraph 3: the words "discharged locally" need further explanation.

Article 30: Accommodation

"Internal law" should be replaced by the usual expression "municipal law".

Article 33: Inviolability of the consular archives

The words "the documents" seem superfluous, since the documents are covered by "archives". If for the definition of "consular archives" the text were to be followed as proposed above for article 1 (e), the words "documents" and "official correspondence of the consulate" would have to be omitted since they would be covered by the words "consular archives".

From the use of the word "documents" in article 36, paragraph 3, it moreover becomes clear that the definition of "documents" in paragraph (3) of the commentary may lead to confusion.

Article 37: Communication with the authorities of the receiving State

"Consuls" should read: "consular officials".

Article 39: Special protection and respect due to consuls

"Consuls" should read "consular officials".

The first sentence of paragraph (3) of the commentary on this article should be deleted. This sentence creates the impression that the receiving State must grant protection against press campaigns by preventive measures. This is often constitutionally impossible, and would moreover not seem desirable. With regard to the press, preventive measures should not be required.

Article 40: Personal inviolability

The alternative version of paragraph 1 is preferable. Maximum sentences vary so greatly in the various legislations that the first alternative text must lead to an unfair system. It is true that, in the second alternative, there will also be a difference of opinion regarding what must be understood by a "grave crime". But in this case consultation between the States concerned and if necessary appeal to a third party are possible to answer the question whether a crime is serious or not.

"Gainful private activity" should read "private commercial or professional activity". Restriction of the immunity is necessary only where those activities are concerned.

The system embodied in paragraph 2 of article 40 is not entirely satisfactory. In so far as this provision does not admit the execution of a sentence providing for imprisonment for a term of less than two years it has the disadvantage of taking away—in respect of the persons enjoying the inviolability—a great deal of the effective force of several types of regulations such as traffic regulations which do not envisage penal sanctions of such magnitude. On the other hand, modern views on penology and rehabilitation have resulted in a tendency to deal with foreign offenders in such a way that long prison sentences can be served in the state of origin. It is therefore suggested that paragraph 2 of article 40 could perhaps better be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official. In such consultation allowance could be made for the interest of the consulate and—with respect to sentences of less than two years imprisonment—for the possibility that the sending State may prevent the execution by recalling the consular official concerned, for the purpose of trying him before its own courts or of taking other measures against him.

Article 42: Liability to give evidence

The rule formulated in the last sentence of paragraph (3) of the commentary should be added to paragraph 3 of the article. In some countries it may be desirable for the users of consular deeds that a consular official testifies to the authenticity of deeds executed by him. It should be made clear, however, that this does not mean that the consular official is liable to give further details of the background of the instruments or to divulge information which has come to his knowledge in the course of executing the deeds.

Article 43: Exemption from obligations in the matter of registration of aliens and residence and work permits

This article is intended to provide that no work permit is required for the performance of the official work. Under the present wording of the article, however, the exemption would also apply to the exercise of non-consular activities.

Article 44: Social security exemption

It would seem preferable to substitute the words "social security measures" for "social security system". Some States, in particular federal States, have more than one social security system.

Article 47: Estate of a member of the consulate or of a member of his family

In this article again "gainful private activity" should read "private commercial or professional activity".

Article 48: Exemption from personal services and contributions

There is no ground for the difference between this article and the corresponding article 33 of the draft convention on diplomatic intercourse and immunities. The argument that a consulate might suffer if a member of the private staff were subject to the obligations mentioned in the article is equally valid for an embassy, particularly since there are many small embassies and large consulates. It is therefore proposed that the words "and members of the private staff who are in the sole employ of the consulate" be deleted.

Article 50: Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

The article should state that nationals of the receiving State are entitled to refuse to give evidence, in so far as official acts of the consulate are concerned. The text of the first sentence of the first paragraph of the article could be amended as follows: "The personal privileges and immunities provided for in Section III of Chapter II and in Chapter III shall not apply to members of the consulate who are nationals of the receiving State. However, such members of the consulate shall enjoy immunity from jurisdiction and from liability to give evidence in respect of acts performed in the exercise of their functions".

Article 52: Obligations of third States

The significance of this article is greatly reduced by the first paragraph of the commentary. Eventually it should be decided whether or not a third State is obliged to grant passage. The rule to be adopted in the convention on diplomatic intercourse and immunities may serve as an example.

Article 53: Respect for the laws and regulations of the receiving State

If the definition of consular premises in article 1 is amended as suggested above, there should be a consequential change in the third paragraph of this article to be read as follows:

> "3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in the same building as the consular premises, provided that the premises of such offices are separate from those used by the consulate".

Article 54: Legal status of honorary consuls

The draft does not contain a definition of "honorary consul". As usage varies greatly in the different countries, the ILC considered it difficult to give such a definition and it preferred to leave the question of whether or not a consular official is honorary to the decision of the States concerned. While this view would seem to be agreeable the following is pointed out. Junior career consuls may be placed under an honorary consul-general while honorary officials may work under a career consul. The function of honorary and non-honorary consuls is identical and the significance of their official acts is the same for the States concerned. Even though an honorary consul may exercise important private activities, this does not alter the nature of his consular work. The status of honorary or non-honorary must therefore be regarded as a personal quality of the consular official, which does not affect the status of his official actions and still less that of the consulate.

Chapter III should therefore be confined to special rules for honorary consular officials. Articles 31 and 33 deal with the consulate as such and should therefore apply equally to

consulates under an honorary official. If the proposal made above under article 1 were accepted both "consular premises" and "consular archives" would refer to those used exclusively for the consulate. Rooms belonging to consular officials (whether honorary or not) but used for other purposes are consequently excluded.

The words "honorary consular officials" should be substituted for "honorary consul(s)" in the title and in the article.

Article 55: Inviolability of the consular archives

This article may be omitted if, on the strength of the comments made above under article 54, article 33 were to be mentioned in paragraph 2 of article 54 instead of in paragraph 3.

Article 56: Special protection

The English text: "In keeping with his official position" is less clear than the French: "*requise par sa position officielle*".

"Honorary consular official" should be substituted for "honorary consul".

Articles 57 and 58

"Honorary consul" should read "honorary consular official".

Article 59: Exemption from personal services and contributions

The words "honorary consuls, other" and the comma after "officials" should be omitted.

Article 60: Liability to give evidence

"Honorary consul" should read "honorary consular official".

Article 61: Respect for the laws and regulations of the receiving State

The question may be asked whether the prohibition contained in this article does not go too far. An honorary consular official will not always be able to avoid advantages accruing to him in his business as a result of his official position. What should be forbidden is the abuse of consular status to acquire personal advantages. This can be effected by putting the word "unjust" or "unreasonable" before "advantages". "Honorary consul" should read "honorary consular official".

Article 62: Precedence

"Honorary consuls" should read "honorary consular officials"; "career consuls" should read "career consular officials".

Article 63: Optional character of the institution of honorary consuls

Both in the article and in the title "honorary consular officials" should be substituted for "honorary consuls".

Article 64: Non-discrimination

To avoid the impression that the rules are also applicable to consular staff of States that are not parties to the convention the last word of the first paragraph ("States") should be replaced by "the Parties to the present Convention".

Article 65: Relationship between the present articles and bilateral conventions

The second text is preferred for the following reasons:

(*a*) The conclusion of a special agreement between the Parties presumed in the first text may lead to a postponement of ratification of the convention;

(*b*) As long as it is uncertain whether the other party to a bilateral convention also wishes to become a party to the convention it may be difficult to open negotiations for a special agreement. If the other party nevertheless does become a party to the convention it may perhaps be too late for the State that has become a party earlier to save the bilateral convenion;

(*c*) Bilateral conventions often regulate more than the question dealt with in the draft convention.

The principle stated in paragraph (2) of the commentary, correct though it may be in theory, cannot be realized in practice.

Instead of "bilateral", the words "bilateral and multi-lateral" should be used in the article, to ensure the continued existence of regional conventions.

ANNEX

Information as requested in paragraph 4 of the commentary on article 8:

Consular agents in the Kingdom of the Netherlands

Consular agents from the following countries are residing in The Netherlands, Surinam and The Netherlands Antilles:

Cuba: An honorary consular agent on the Island of Aruba (Netherlands Antilles);

France: Consular agents in Arnhem, Dordrecht, Groningen, Haarlem, 's-Hertogenbosch, Maastricht, Nijmegen, Terneuzen, Utrecht, Vlissingen, Ijmuiden (Netherlands), Paramaribo (Surinam) and Willemstad (Netherlands Antilles); with the exception of the consular agent in Utrecht all are honorary officials; the consular agent in Paramaribo is serving under a career consul;

India: A consular agent in The Hague who is a career official and head of the Consular Section of the Indian Embassy;

Italy: A consular agent on the Island of Aruba (Netherlands Antilles) who is a career official;

Switzerland: A consular agent on the Island of Aruba (Netherlands Antilles), who is a career official with the personal title of vice-consul.

These consular agents are all admitted and recognized either on a provisional or on a permanent basis. According to generally applied rules this admission and recognition are granted in the form of a Royal Decree if the commission is issued by the Head of the State; in other cases the admission and recognition are based on a Royal Authorization.

The commissions of these consular agents contain no restrictions with respect to the exercise of their consular powers.

11. Norway

Transmitted by a letter dated 30 January 1961 from the Deputy Permanent Representative of Norway to the United Nations

[*Original: English*]

The Norwegian comments are stated below in relation to the respective articles of the draft which are most immediately concerned. Where comments relate to more than one article suitable cross-references are made.

Article 1

The Norwegian Government would like to make the following suggestions:

Ad (f): The meaning given to the term "consul" seems unnaturally restricted. In common parlance the term encompasses all consular officials and it might easily lead to misconstructions and confusion if the term were to be used in a different sense.

It also seems of particularly doubtful utility to introduce a special term denoting a head of consular post who has been recognized, finally or provisionally (in conformity with articles 13 or 14) by the receiving State. The use of such highly technical terms does not facilitate the reading and interpretation of the document.

Attention is also called to the fact that the adopted terminological system is not consistently followed in the draft itself. If the definition given of the term "consul" is to be maintained, terminological consistency would seem to require that the word "consuls" be replaced by the expression "heads of consular posts" in article 10.

The last sentence of the sub-paragraph should be deleted. It does not seem to have any real terminological import. The extent to which provisions relating to "consuls" also apply to "honorary consuls" is, or should be made, sufficiently clear in article 54.

Reference is also made to the Norwegian comments made below in regard to article 9.

Ad (i): The last line, reading "and who is not a member of a diplomatic mission", seems unnecessary.

Article 2

In the opinion of the Norwegian Goverment it is unnecessary to complicate the text of the proposed convention by the introduction of the term "consular relations". The term seems to be something in the nature of a convenient figure of speech without precise meaning in international law. Legal consequences follow from unilateral or mutual consent to establish one or more specific consulates and not from mutual consent to establish "consular relations".

The Norwegian Government is therefore of the opinion that the provision in article 2 of the draft should be deleted. The necessary consequential changes should be made in the following articles which use the term "consular relations".

Article 4

In view of the fact that there are important differences between the functions of the various consulates, particularly as between consulates which do and such as do not include sea-ports within their consular districts, and that these functions are constantly being developed and extended, it seems desirable that the consular functions should not be too restrictively defined in the draft.

On the basis of these general considerations the Norwegian Government is inclined to prefer the draft submitted by the Commission to the more detailed, enumerative definition submitted by the Special Rapporteur. The latter draft could easily on many points lend itself to unfortunate antithetical interpretations. It would seem, however, that the Commission's definition would gain by being amended so as to make sure that it covers the customary consular functions which are specified in the other draft and also some such functions which are mentioned only in the commentary to that draft.

The Norwegian Government would like to propose the following amendments:

It would seem natural to extend the group of persons to which a consulate is entitled to give protection, help and assistance so as to cover not only "nationals of the sending State" (see paragraph 1, (*a*) and (*b*)), but also stateless persons who have their domicile in the sending State.

To paragraph 1, (*d*) should be added the words "and to their crews". The purpose of this proposal would be to take due account of the fact that it is customary for consuls to give assistance to members of the crews of vessels, boats, and aircraft of the sending State irrespective of such persons' nationality.

Apart from this specific proposal concerning sub-paragraph (*d*), it also seems to the Norwegian Government that this provision is formulated in too vague and general terms. Reference is made in this connexion to the commentary to the corresponding provision (I,2) of the Rapporteur's alternative text. It would seem to the Norwegian Government that many of the customary consular functions mentioned in this commentary are so important that it ought to be made perfectly clear that they are covered by the article. This applies particularly to sub-paragraphs (*b*), (*d*) and (*e*) of that commentary.

The Norwegian Government would further propose that there be added a sub-paragraph, drafted along the lines of paragraph II, 7, of the Rapporteur's alternative text, which would give consuls the function of representing heirs and legatees who are nationals of the sending State in decedents' estates within the receiving State. This representational function ought also to be regulated by a separate article of the draft. Reference is made in this connexion to paragraph (12) of the Commission's commentary. The Norwegian Government does not believe, however, that it would be advisable to extend this representational right beyond the field of decedents' estates.

In the opinion of the Norwegian Government there should also be added a sub-paragraph drafted along the lines of paragraph III, 10 of the Rapporteur's alternative text, in order to affirm the customary right of consuls to serve judicial documents and take evidence on behalf of the courts of the sending State.

The Norwegian Government would finally like to suggest that the following sub-paragraph should be added at the end of paragraph 1:

> "A consul may also perform other functions, provided that their performance is not prohibited by the laws of the receiving State."

This sub-paragraph is modelled upon paragraph V, 17 in the more detailed text prepared by the Rapporteur.

Article 6

The provisions of this very important article do not seem to be satisfactorily drafted.

The "freedoms" provided for in paragraph 1 of the article are too extensive, inasmuch as they fail to take proper account of the many situations in which the police authorities of the receiving State have legitimate reasons for preventing free communications between a prisoner and the outside world.

It seems, on the other hand, that these "freedoms" are made illusory by the important and ill-defined reservations in paragraph 2.

In the opinion of the Norwegian Government it would be impossible to determine, on the basis of the present formulation of article 6, in what situations and on what conditions a consul has a *right* to communicate with or to visit imprisoned nationals. It is therefore suggested that the article should be re-drafted with a view to establishing clear and binding norms.

It is also suggested for consideration that it might be advisable to extend the application of the rule relating to detained persons in order to make it applicable in all cases of forced detention (quarantine, mental institutions etc.). This would seem particularly appropriate in regard to the members of the crews of vessels flying the flag of the sending State and the rule should, in this case, perhaps apply irrespective of the crew member's nationality.

Article 8

In reply to the question raised in paragraph (4) of the Commission's commentary the Norwegian Government wishes to state that it does not employ "consular agents" in the Norwegian service, and that it has no rules governing the method of their appointment. Norway does not, as a receiving State, differentiate between "consular agents" and other groups of consular officials.

Article 9

The Norwegian Government is not convinced by the reasons given in paragraph (2) of the commentary that it is necessary to include this provision in the draft. The purpose stated would seem to be adequately achieved by the definition given under paragraph (*f*) in article 1. Two different definitions of one and the same term can only lead to doubt and confusion.

Reference is made to the Norwegian comments to article 1 (*f*).

Article 10

The Norwegian Government sees no compelling reason for including these provisions in the draft. The stated principles seem clearly implicit in the use throughout the draft of the terms "the sending State" and "the receiving State". The functioning and acting of States are normally governed by their internal laws and it would seem unwise to give the contracting parties any mutual *droit de regard* in this respect.

Article 12

In reply to the question raised in paragraph (3) of the Commission's commentary, the Norwegian Government wishes to state that it agrees that a new consular commission must be made out if a consul is appointed to another post within the same State. The Norwegian Government believes, but is unable to affirm, that this rule is in accordance with the prevailing practice. The question has not arisen in regard to foreign consuls in Norway or in regard to Norwegian consuls abroad.

Article 18

This provision seems wholly unnecessary and the formulation of the rule is, at all events, open to serious objections. Provided the receiving State gives its permission, there seems to be no reason why the consul should not be at liberty to perform diplomatic acts irrespective of whether or not the sending State has a diplomatic mission in the country. Nor is there any reason why such acts should only be allowed on "an occasional basis". It must be the concern of the sending State to see to it that its consuls do not unduly encroach upon the domain of its diplomatic missions.

The correct rule would seem to flow naturally from the juridical character of the draft which is made clear in article 65.

Article 19

In the opinion of the Norwegian Government atypical borderline cases where a mission partakes both of a consular mission and of a diplomatic mission will, at all events, have to be regulated by *ad hoc* agreement between the sending and the receiving States, and there does not seem to be any utility in trying to regulate such cases by the provisions of a multilateral convention.

Article 25

This article seems inadequately drafted and it is difficult to understand why it should be necessary to include a general provision of the proposed kind. The modes of termination which apply to the functions of heads of consular posts and of other consular officials would seem to be quite adequately set forth in the preceding articles.

As far as paragraph 1 (*c*) is concerned, reference is made to the Norwegian Government's comments to article 2. In this case the use of the term "consular relations" is particularly unfortunate. It is the termination of the consular mission at which the consular officials in question are employed which is the sole relevant fact in this context. Such a termination might easily occur without any "severance of consular relations". The present formulation of the article leaves out of account the fact that in the consular relationship between two States one or more consulates are often abolished while others are maintained.

Article 26

The Norwegian Government sees no reason for including a provision to the proposed effect. It does not seem necessary to state that the severance of diplomatic relations has no automatic effect in regard to such consular missions as the two States involved may have established within each other's countries. As far as the use of the term "consular relations" is concerned, reference is made to the Norwegian comments in regard to article 2.

Article 27

Paragraph 3 is not clear. The expression "discharged locally" would have to be clarified in order to make it possible to comment upon the substance of this paragraph.

Article 28

In accordance with the view stated under article 2, the Norwegian Government would like to propose that article 28 be redrafted in such a way that the use of the ill-defined term "consular relations" could be avoided.

Article 29

If it is the intention to provide for a right to use a consular flag beside, or instead of, the national flag, this ought to be made clear in the text of the article and not only in the commentary. No reasonable interpretation of the term "national flag" could be made to include a consular flag.

Article 30

The legal import of the expression: "has the right to procure" in the first sentence of this article is difficult to understand. The sentence as a whole does not seem to create any clearly ascertainable right and might as well be deleted. The provision in the second sentence should, in the opinion of the Norwegian Government, be made applicable also to the head of the consular post and to the employees of the consulate.

Article 31

The second sentence of paragraph 1 seems far too categorically drafted. In its present formulation this provision would preclude even a courtesy call by an agent of the receiving State.

Appropriate exceptions should also be included to provide for cases of fires or other disasters and for cases where the local authorities have reasonable cause to believe that a crime of violence has been, or is about to be, committed in the consular premises.

In cases where the consent of the head of the consular post is refused, or cannot be obtained, the agents of the receiving State should nevertheless be entitled to enter the premises pursuant to appropriate writ or process provided they have secured prior authorization from the Minister for Foreign Affairs of the receiving State.

Article 32

In paragraph (2) of the Commission's commentary it is stated that the exemption provided for in this article is an exemption *in rem* affecting the actual building acquired or leased by the sending State. This interpretation does not seem to be warranted by the wording of the article.

Attention is called in this connexion to the corresponding article (21) of the Commission's draft on diplomatic intercourse and immunities with commentary. It will be seen that article 32 of the present draft is closely modelled on, and in all relevant respects identical with, article 21 of the previous draft. In the Commission's commentary to article 21 of the previous draft, however, it is stated: "The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission."

It is very difficult to understand how two texts, which are in all material respects identical, could be given completely different interpretations.

As far as the question of substance is concerned, the Norwegian Government is opposed to giving the exemption provided for in article 32 the effect *in rem* which is suggested in the Commission's commentary.

Article 38

Under paragraph (4) of the commentary the Commission requests information from Governments concerning their law and practice in regard to the levying of taxes and dues on "acts performed at consulates between private persons". The Norwegian Government, for its part, has some difficulty in complying with this request inasmuch as it is not clear to it exactly what kind of "acts" the Commission envisages. It would seem natural, however, to grant exemption from taxes and dues in regard to such of the acts performed at consulates between private persons *which it is customary to perform at consulates,* and which are not intended to produce legal effects within the receiving State.

Article 40

The provision proposed in paragraph 2 is not warranted by the generally accepted rules of international law and the Norwegian Government would not deem it necessary or desirable from the point of view of the progressive development of international law. It seems to accord a far too liberal immunity to consular officials. The Norwegian Government would therefore prefer to see it deleted.

Paragraph 3 is unfortunately drafted. The words "except in the case referred to in paragraph 1 of this article" seem to relieve the receiving State of any obligation not to "hamper the exercise of the consular function" in cases where a consular official is prosecuted for an offence "punishable by a maximum sentence of not less than five years' imprisonment".

Under paragraph (17) of the commentary to paragraph 3 it is stated in relation to the words "must appear before the competent authorities", that "the consular official is not required to appear in person and may be represented by his attorney". This interpretation has no basis in the relevant words of the paragraph itself and the Norwegian Government sees no reason why the consular official should be given such a choice. The granting of such a privilege in connexion with criminal proceedings would hardly accord with the corresponding rule in article 42,2 of the draft.

There ought to be incorporated into the draft a provision enabling the proper authorities of the sending State to waive the immunities dealt with in this article. The same also applies to the immunities provided for in articles 41 and 42. Reference is made in this connexion to article 30 of the Commission's draft on diplomatic intercourse and immunities. It would seem just as necessary to have clear rules on this point in regard to consulates as in regard to diplomatic missions.

Article 41

The expression "in respect of acts performed in the exercise of their functions" is not sufficiently clear.

The similar provision of article 50 uses the expression "in respect of *official* acts performed in the exercise of their functions" and it is stated in paragraph (3) of the commentary to this article that "the present article, unlike article 41, uses the expression 'official acts', the scope of which is more restricted than that of the expression used in article 41". Paragraph (2) of the commentary to article 41, however, seems to indicate that the expression used in that article is synonymous with "official acts". The terminology used in these two articles seems too abstruse to permit ready and easy interpretation of the texts and should be revised.

Reference is made to the last paragraph of the Norwegian comments to article 40.

Article 42

The Norwegian Government sees no reason for including the provisions of paragraph 1.

The rule stated in the first sentence would seem to follow *e contrario* from the other articles in this section of the draft. The rule stated in the second sentence is not warranted by generally accepted principles of international law or by reasonable considerations having to do with the progressive development of international law. The requirements of juridical stringency and precision would seem to exclude the possibility of introducing a "liability" with which the persons concerned could freely and without risk decline to comply.

Reference is made to the last paragraph of the Norwegian comments to article 40.

Article 43

The exemptions proposed in this article should, in the opinion of the Norwegian Government, be granted only to members of the consulate and their families. There does not seem to be sufficient reason to extend these exemptions to their private staff.

It is also suggested that the exemption in regard to work permits should not apply to such members of the consulate and their families who carry on a gainful private activity outside the consulate (see in this connexion article 57 of the Commission's draft).

Article 45

In the opinion of the Norwegian Government the tax exemptions provided for in this article go too far.

Contrary to what is said in the Commission's commentary, they even extend farther than the corresponding exemptions in the draft on diplomatic intercourse and immunities. According to article 36,2 of that draft the tax exemption granted to "members of the service staff" only applies to "the emoluments they receive by reason of their employment". Paragraph (*h*) of article 1 in the present draft, read in conjunction with paragraphs (*k*) and (*j*), makes it clear that the term "members of the consulate" includes "the service staff".

It is submitted that "members of the consulate" other than "consular officials" should be accorded exemption only from dues and taxes on the wages they receive for their services.

The provision of paragraph 1, sub-paragraph (*b*) should be drafted so as to cover all kinds of property, not only *immovable* property. There does not seem to be any valid reason why a consular official should be exempt from capital tax on private assets such as shares of stock and bonds, which have their *status* in the receiving State.

Article 46

In the opinion of the Norwegian Government the exemption from customs duties which is proposed in this article extends too far.

Here again (see the Norwegian comments under article 45) the Commission has been more generous in its proposal regarding consulates than it was in its previous draft on diplomatic intercourse and immunities. In article 34, 1 (*b*) of that draft the exemption from customs duties is limited to "diplomatic agents or members of their families belonging to their households". In the present article the exemption is extended to "*members of the consulate* and members of their families belonging to their households". The latter expression, according to the definitions given in article 1, includes the "service staff", while the corresponding group falls outside the term "diplomatic agents" in the previous draft.

The Norwegian Government is opposed to the extension of the exemption provided for in article 46, (*b*) to other members of the consulate than "consular officials".

Article 50

It would make it easier to read and apply the document if the provisions which are affected by the exemptions in article 50 had appropriate references to this article.

In the opinion of the Norwegian Government the privileges and immunities which are proposed to be granted to members of the consulate who are nationals of the receiving State are somewhat too restricted. It seems for instance that such members of the consulate should at least be excused from producing official correspondence and documents relating to the exercise of their functions, see article 42, 3.

In the corresponding article of the Commission's draft on diplomatic intercourse and immunities, article 37, the following provision is added:

> "However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission."

A similar provision ought to be added to article 50 of the present draft.

In regard to the expression "official acts" reference is made to the second paragraph of the Norwegian comments to article 41.

As far as "honorary consuls" are concerned, reference is made to the third paragraph of the Norwegian comments to article 54.

Article 52

In the opinion of the Norwegian Government, the draft ought to settle in an affirmative sense the question of whether or not a third State is under a duty to grant free passage through its territory to consular officials, employees and their families in transit between the sending and receiving countries.

In its present form paragraph 3 of the article seems to have settled this question in an affirmative sense as far as "other members of the consulate or of members of their families" are concerned. This is hardly the intention, but the words "shall not hinder the transit through their territories" are at least open to this construction.

Article 54

Chapter III, concerning honorary consuls, is very important from the point of view of the Norwegian Government. It is very difficult to comment upon its various provisions, however, in view of the fact that the Commission has so far given no definition of the term honorary consul.

In the opinion of the Norwegian Government the determining criterion for the distinction between "consuls" and "honorary consuls" ought to be that the latter are authorized to engage in commerce or other gainful occupation in the receiving State. If this criterion is adopted it would become unnecessary to make applicable to "consular officials" the proviso in articles 40, 45,1, 46 and 47 in regard to members of the consulate who carry on a "gainful private activity".

The Norwegian Government is further of the opinion that there is no reason, where "honorary consuls" are concerned, to discriminate in the field of privileges and immunities between honorary consuls who are and such as are not nationals of the receiving State.

The system adopted in article 54 seems very unsatisfactory. It would seem far better, even if it leads to extensive repetition of provisions contained in the preceding articles relating to consuls, to spell out clearly in chapter III all the provisions which apply to honorary consuls. The system of references and cross references will inevitably lead to difficulties of interpretation. This applies particularly to article 54,3.

In regard to article 54,2 it is suggested that article 32 should not be made applicable to the premises of honorary consulates.

In reply to the question raised in paragraph 5 of the Commission's comments to article 54, the Norwegian Government wishes to state that in Norway the premises used by an honorary consul for the purposes of exercising consular functions are not vested with inviolability.

Article 62

In reply to the question raised in the Commission's commentary to this article, the Norwegian Government wishes to state that the rule of precedence which is proposed in this article is in conformity with the prevailing practice in Norway.

Article 64

It is difficult to see any valid reasons for including the provisions of this article. They seem, at best, superfluous and might give rise to misconstructions.

When the two paragraphs of the article are read in conjunction, it appears clearly that discrimination *per se* is unobjectionable. The less favoured State can only object if the privileges and immunities accorded to its consuls are less extensive than those laid down in the preceding articles. In this case, however, it is the non-compliance with these articles, not the discrimination, which affords the basis for a complaint.

Article 65

This article raises important problems having to do with the juridical character of the document.

It is stated in paragraph 24 of the Commission's "General Considerations" that the draft is prepared "on the assumption that it would form the basis of a convention". This assumption is restated in paragraph 1 (*a*) of the Commission's commentary to article 65. The Norwegian Government agrees with this assumption and has based its comments upon it.

If this premise is accepted, the problem dealt with in article 65 is reduced to the question which arises when two or more (but less than all) the parties to a convention agree to, or have previously agreed to, undertakings *inter se* which are inconsistent with the convention.

It becomes necessary, however, to assess still more precisely the juridical character of the draft. Is it the intention that the convention should have such a character (*a*) that two or more of the parties may not agree to depart from its provisions without the consent of all the remaining parties, (*b*) that it only imposes a *minimum* standard which none of the parties is at liberty to disregard without the consent of all the remaining parties, or (*c*) that it merely imposes rules which will apply to the extent that other rules are not agreed to as between two or more of the parties?

The Norwegian Government agrees with the majority of the Commission that the third proposal would be most appropriate and sees no reason why any of the two other possibilities should be seriously considered.

As far as the choice between the first and the second text is concerned, the Norwegian Government prefers the latter. A very difficult task would be imposed upon the contracting parties if, before the conclusion of the proposed convention they had to go through their pre-existing agreements with the same parties in order to determine which of their inconsistent provisions they wanted to maintain in force by special agreement. There would be a serious risk that some such provisions might be overlooked and that they would consequently be abrogated by inadvertence.

Both of the alternative texts proposed by the Commission speak of other "bilateral conventions concerning consular intercourse and immunities . . . between the Contracting Parties". The Norwegian Government, for its part, sees no reason why the provision should be made applicable only to *bilateral* conventions. The same general considerations would seem to apply equally to *multilateral* conventions and agreements whatever the name. It would also seem that problems arise only in regard to other conventions which contain provisions at variance with those of the present draft and not in regard to all other conventions "concerning consular intercourse and immunities".

12. Philippines

Transmitted by a letter dated 1 February 1961 from the Deputy Permanent Representative of the Philippines to the United Nations

[*Original: English*]

General Observations:

The Committee [which was established to study the draft articles] found the draft generally acceptable. The individual assessment of each office may be summarized thus:

Administration: "The provisions of the Draft Articles affecting Administration have been found to be properly predicated on the generally accepted international principles and practices and the body of rules usually incorporated in consular conventions like those which the Philippines has with the United States of America, Spain and Greece."

Consular Affairs: "I believe the provisions of this draft of consular intercourse and immunities are acceptable to us."

Economic Affairs: "The commentaries . . . are clear and to the point and this Office finds no necessity for further comments."

Political Affairs: "In the main, however, the above-mentioned articles are not inconsistent with, nor do they contravene, any existing policy of the Government *vis-à-vis* the political relations of the Philippines with other countries or affecting our national security and dignity. The articles, furthermore, reflect adherence to the principles of customary international law and usage on the points treated, and are in substantial conformity with Philippine consular regulations and practice as evolved during the almost decade and a half of independent national existence."

Comments:

The Committee, however, would like to invite the Secretary's attention to its comments on the following Articles: Art. 1 (para. (*i*)); Art. 4; Art. 5 (para. (*b*)); Art. 41; Art. 42 (para. 1); Art. 50; Art. 52; Art. 54; Art. 60; and Art. 65.

Article 1, paragraph (i): *Definitions*

Article 1 supplies the definitions and states that for purposes of the draft,

> "(*i*) The expression 'consular official' means any person, including the head of post, who exercises consular functions in the receiving State and who is not a member of a diplomatic mission;"

The members of the Committee entertained certain doubts on the definition of "consular official", particularly in relation to situations where persons are attached to a diplomatic mission but who perform consular functions. The query was whether, in situations of this sort, the distinguishing factor is official attachment to the post or the nature of the function performed. This is particularly important when viewed in relation to the enjoyment by such official of immunities and privileges, i.e., tax exemption, immunity from arrest, liability, generally exemption from local jurisdiction, where the enjoyment or non-enjoyment of the afore-mentioned may depend on whether said official is a consular or diplomatic official.

Article 4: Consular functions

> "1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are: (enumeration)"

It is to be noted that, apart from what are provided for in (*a*) bilateral agreements and (*b*) the powers conferred by the sending State exercisable without breach of the laws of the receiving State, Article 4 confers no other authority. Specifically, it is the view of the Committee members that the phrase "the principal functions ordinarily exercised by consuls are:" is no more than just a statement or a declaration and cannot, in situations where countries have no bilateral agreements or have domestic laws which do not touch on consular functions, be a source of consular power invocable under this Convention.

It is, therefore, suggested that some sort of a rewording be made in the language of Article 4 in order that it may actually confer consular powers apart from those exercisable thereunder.

Article 5, Paragraph (b)

Obligations of the receiving State in certain special cases

> "The receiving State shall have the duty
>
> "(*a*) . . .
>
> "(*b*) To inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity, and who is a national of the sending State;
>
> "(*c*) . . ."

Paragraph (*b*) needs clarification particularly on whether the duty contemplated thereunder is permissive or mandatory. This is particularly significant in relation to situations where, in a guardianship or similar action brought before a court in a foreign State, guardianship papers have been released and effected without notice being given to the appropriate consular

officer one of whose nationals is a party interested. The pertinent question is: Are the proceedings valid, voidable, or impugnable in the absence of said notice?

Article 41: Immunity from jurisdiction

"Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of their functions."

The Committee members envisioned certain difficulties which may arise in the application of Article 41, such as:

(1) As the very basis for non-amenability to local jurisdiction is non-interference with consular functions, the question that arises is: *Who* or *which* determines "acts performed in the exercise of these functions"?

(2) Assuming that by agreement the *who* and *which* may be located, what will be the criteria which may serve as their bases in determining whether an act is one that is "performed in the exercise of consular functions" or otherwise?

The difficulty under the second hypothesis becomes the more apparent when considered in the light of Article 4 which includes under the heading of "consular functions" even those of an administrative nature.

It is also noted in the commentaries appearing under Article 41 that nationals of the receiving States are excluded from the term "members of the consulate". Considered again in relation with Article 4, is it not very probable that one who is appointed a member of the consulate but who is a national of the receiving State may perform functions even of an administrative nature?

Article 42, paragraph 1: Liability to give evidence

"1. Members of the consulate are liable to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if they should decline to do so, no coercive measure may be applied with respect to them."

While the Committee members have no substantial objection over said provision, this observation is nevertheless being made by way of suggesting a change in mere phraseology. Specifically, it is the Committee members' view that the word "liable" appearing in the first sentence of paragraph 1, is negated by the phrase "no coercive measure may be applied" appearing in the second sentence of the same paragraph.

Article 50: Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

"1. Consular officials who are nationals of the receiving State shall enjoy immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. They may in addition enjoy any privileges and immunities granted to them by the receiving State.

"2. Other members of the consulate, members of their families, and members of the private staff, who are nationals of the receiving State, shall enjoy only the privileges and immunities granted to them by the receiving State."

The Committee members are of the impression that Article 50 paragraph 1, seems to insinuate that only consular officials may perform consular functions and that members of the consulate, under paragraph 2, perform non-consular functions. It is also their impression that the immunity from jurisdiction under Article 50 attaches by reason of the performance of consular functions, irrespective of the nationality of the consular official performing said function.

It is their view that Article 50 seems untenable when viewed in the light of Article 1, which defines consular officials to include even members of the consulate, corroborated by the provisions of Article 4 regarding consular functions of an administrative character performable by members of the consulate but are of the nature of consular functions. So also, as is the difficulty under Article 41, the problem arises as to *who* or *which* may determine consular functions and assuming the *who* and *which* to have been located, the criteria upon which they may base their determinations of whether an act is a consular function or otherwise.

Article 52: Obligations of third States

"1. If a consular official passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord to him the personal inviolability provided for by article 40, and such other immunities as may be required to ensure his transit or return.

"2. . . .

"3. In the circumstances specified in paragraph 1 of this article, third States shall not hinder the transit through their territories of other members of the consulate or of members of their families.

"4. . . ."

It is to be noted under Article 52 that a distinction has been made between a consular official under paragraph 1 and a mere member of the consulate under paragraph 3, suggesting that while personal inviolability attaches to the former, the latter enjoys no more than a mere privilege of not being hindered while in the territory of another country in the course of transit.

The same observations made under Articles 41 and 50 would seem to apply with as much weight to paragraphs 1 and 3 under this Article. In view of the definition of consular official under Article 1 in relation with the enumeration of consular functions under Article 4, both Articles considered, confusion is lent to the distinction.

Article 54: Legal status of honorary consuls

"1. The provisions of chapter I of the present articles shall apply to honorary consuls.

"2. In chapters II and IV, articles 29, 30, 32, 34, 35, 36, 37, 38, 40 (paragraphs 3 and 4) 41, 42 (paragraph 2), 46 (except sub-paragraph (*b*)), 50, 51, 52 and 64 shall likewise be applicable to honorary consuls.

It is noted that Article 41 similarly applies to honorary consuls. The same objections raised under Article 41 in connexion with career consuls are similarly raised under Article 54 in relation to honorary consuls.

Indeed, the reasons for the distinction between a consular and non-consular act become the more compelling under Article 54 since generally honorary consuls engage in private gainful occupation.

While it is appreciated that with respect to career consuls under Article 41, there is reason to presume that when a career consul acts, his acts are to be taken as consular acts unless otherwise shown, the fact that honorary consuls engage generally in gainful occupation give grounds for the non-application of the same presumption to that effect.

Article 60: Liability to give evidence

"In any case in which he is requested to do so in connexion with matters relating to the exercise of his consular functions, an honorary consul may decline to give evidence in the course of judicial or administrative proceedings or to produce official correspondence and documents in his possession. In such event, the authority requiring the evidence shall refrain from taking any coercive measures with respect to him."

The Committee members have the same reservation under Article 60 as they had under Articles 41, 50 and 52. Specifically, what functions are to be classified as consular, and otherwise? *Who* and *which* may determine the question?

Article 65: Relationship between the present articles and bilateral conventions

"[First text]

"Acceptance of the present articles shall not rule out the possibility of the maintenance in force by the Parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or the conclusion of such conventions in the future.

"[Second text]

"The provisions of the present articles shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the Contracting Parties, and shall not prevent the conclusion of such conventions in the future."

It is noted that Article 65 contains two variants. It is the feeling of the Committee members that whether the Philippine Government shall prefer one variant to the other will depend on whether the observations made under present draft Articles are accepted or not. In other words, if the reservations made are accepted, it is suggested that the Philippine Government adopt that variant which subordinates bilateral agreements to this Convention; *a fortiori*, the adoption of the other variant otherwise.

13. Poland

Transmitted by a letter dated 6 April 1961 from the Permanent Representative of Poland to the United Nations

[*Original: English*]

The Government of the Polish People's Republic is of the opinion that the Draft Articles on consular intercourse and immunities prepared by the International Law Commission contribute a great deal to the progressive development of international law and its codification. Most of the provisions contained in the Draft Articles having been universally accepted in the practice followed by States, their codification is both feasible and desirable.

The general idea of the Draft and the majority of the articles contained therein give rise to no objections; however, it would be advisable to introduce some modifications into a few of the articles.

It is of fundamental importance to determine what are the basic principles of the Draft Articles on Consular Intercourse and Immunities in their entirety. Since the intention of the Draft is to establish a basis for a multilateral convention, such a convention would have to contain a detailed definition of the functions of a consul. Therefore, it is preferable to accept the second variant of Article 4 which includes a more exhaustive enumeration of these functions.

Article 4 ought to be somewhat altered and supplemented; in particular, under paragraph 1 it should also invest the consul with the right of judicatory action (court summons) process serving inheritance cases. Neither is it exact to regard the actions of a notary as being of an administrative nature, which is implied under Article 4, sub-paragraph 1 (*c*).

There are also some objections as to paragraph 2 of Article 4. Considering that the relations between a consulate and the authorities of the receiving State are defined under Article 37 of the Draft, the said paragraph 2 of Article 4 seems to be redundant. Moreover, it unnecessarily introduces a clause which, contrary to the generally accepted practice, restricts the possibilities of a consul communicating with any authorities of the receiving State located outside his district.

The Government of the Polish People's Republic deems it necessary to insert under Article 4 the additional paragraph as proposed by the Special Rapporteur in section (12) of the commentary. Its terms are the logical consequence of the essential function of a consul—to wit, to protect *ex officio* the interests of the nationals of the sending State in the territory of the receiving State (Article 4, sub-paragraph 1(*a*)). Such provisions are usually contained in most of the existing bilateral consular conventions.

As it has become an increasingly frequent practice to vest the exercise of consular functions in special sections of the respective diplomatic missions, the Government of the Polish People's Republic considers it necessary to insert, after Article 1, a new article which might read as follows:

> "The provisions concerning the rights and duties of a consul shall accordingly apply to the official of a diplomatic mission who exercises consular functions, provided that the respective authorities of the receiving State have been duly notified. Such persons shall exercise consular functions without prejudice to their diplomatic privileges and immunities".

As the International Law Commission has asked, in section (4) of the commentary to Article 8, for information on appointment of consular agents, the Government of the Polish People's Republic informs the Commission that the institution of consular agents or consular agencies is disappearing from the consular practice of Poland.

As regards Article 13, under Polish Law the *exequatur* can be granted only to the head of a consular post (Law of June 17, 1959, regulating certain consular matters: the Official Gazette *Dziennik Ustaw* for 1959, No. 36, Pos. 225, and Decision of the Council of State of 9 September 1959, concerning the authorization of the Minister of Foreign Affairs to issue the consular commission and to grant the *exequatur: Monitor Polski* for 1959, No. 90, Pos. 485).

The stipulation of Article 22 of the Draft, which authorizes the receiving State to set unilateral limitations on the size of the consular staff, is unsubstantiated. In fact, it enables the authorities of the receiving State to interfere with the work of the consulate of the sending State and to narrow it down at will, which runs counter to the prevailing practice.

Article 27 should explicity stipulate that the provisions relating to the right to leave the territory of the receiving State in case of an international crisis do not apply to the employees of the consulate who are nationals of the receiving State. It seems that Article 50 of the Draft, mentioned under section (4) of the commentary to Article 27, pertains solely to Chapter II of the Draft.

The Draft says nothing about exempting the consulate from any payments in kind levied by the receiving State. A relevant stipulation might be inserted in Article 32 or thereunder. Such an exemption would be in line with the existing practice and with the obligation of the receiving State to ensure the consulate the best possible conditions of work. Similar stipulations ought to be introduced also in Article 48 of the Draft.

The provisions of Article 33 should be amended to apply as well to the correspondence addressed to the consulate by private persons, Section (4) of the commentary to Article 33 fails to mention such correspondence.

It is hard to agree with the view expressed in section (2) of the commentary to Article 43 that the practice of issuing special cards to members of a consulate is of a "purely technical character". The importance of the matter is borne out by the fact that the issuance of documents certifying the status of members of the consulate and of their families, is stipulated in a number of consular conventions concluded recently. As revealed by the practice of States the absence of such special cards may expose the members of a consulate to unforseen obstacles in the exercise of their duties on the part of local authorities of the receiving State.

The Government of the Polish People's Republic prefers the second text of Article 65. It is more acceptable in case a multilateral convention is concluded since it does not infringe upon the existing bilateral consular conventions which so often reflect the specific relationship between different countries.

14. Spain

Transmitted by a note verbale *dated 28 April 1961 from the Permanent Mission of Spain to the United Nations*

[*Original: Spanish*]

This report will deal only with those articles of the draft which depart from the rules that Spain considers it possible and appropriate to accept; it will not mention the other articles to which the Spanish Government has no objection.

In accordance with the practice commonly observed in the consular conventions concluded since the Second World War, article 1 of the draft is devoted to definitions. The Spanish Government has the following comments to make on some of them:

(i) In sub-paragraph (*b*), the word "official" should be inserted before the word "purposes", since only premises used for the official purposes of the consulate should be regarded as the consular premises.

(ii) In sub-paragraph (*d*), the word "foreign" before "consul" should be deleted since in many countries the *exequatur* is granted to honorary consuls who are nationals of the receiving State.

(iii) The definition of "employee of the consulate" given in sub-paragraph (*j*) is too broad, and the expression should in our opinion be applied only to those employees of the consulate who perform technical or administrative tasks. The definition might be worded as follows: "The expression 'employee of the consulate' means any person who, not being a consul, performs auxiliary duties at a consulate, provided that his name has been notified to the appropriate authorities of the receiving State. This expression shall not, however, mean drivers or other persons employed exclusively on domestic tasks or on maintenance work at the consulate".

If the definition of "employee of the consulate" is amended and restricted in this way, the definitions of "members of the consulate" and "members of the consular staff" given in article 1 will also have to be adjusted, since employees of the consulate are included in these categories.

(iv) The definition of "private staff" in sub-paragraph (*l*) should also be restricted so as to mean only staff in the private and exclusive service of a career consul.

(v) It would have been useful to include definitions of various other expressions, such as "sending State", "receiving State", "grave offence", "vessel", etc. etc.

(vi) There is one expression which, though it does not occur in the consular conventions recently concluded, Spain has been trying to introduce into the draft agreements which it is negotiating on this subject with various European countries. This expression, which we believe to be of positive value, is, in Spanish, *oficial de cancilleria*. It might be rendered in English by "consular officer" and in French by *Agent de chancellerie*.

If we inquire into the matter thoroughly, we shall see that, even if it excludes personnel employed on purely domestic tasks, the expression "employee of the consulate" as used in the draft under discussion is, as we pointed out above, excessively broad because, side by side with employees of the consulate who are nationals of the receiving State and who are in no way debarred from engaging in other gainful activities different from those on which they are employed at the consulate, there will obviously be, at the same time, another category of employees at the consulate who are nationals of the sending State, from which they receive a regular salary, and who are not free to engage in any gainful professional activity other than the official tasks they perform at the consulate.

Employees in the first of these two groups might be called "employees of the consulate" and those in the second "consular officers". Employees of the consulate in this sense are not usually granted any advantage or privilege, whereas "consular officers" are granted privileges and immunities very similar to those granted to the consul himself.

To distinguish and define these two classes of employees would be of undoubted advantage and would help to clarify these problems of consular law by improving the system of classification.

We suggest that the following definition should be considered:

"The expression 'consular officer' means any employee of the consulate who fulfils the following conditions, that is to say:

"(1) He must be a national of the sending State;

"(2) He must not be authorized to carry on a gainful private activity in the receiving State; and

"(3) He must be in receipt of a regular remuneration from the sending State."

Article 2 does not call for comment. It should, however, be pointed out that the additional paragraph 2 proposed by the Special Rapporteur, which provides that the establishment of diplomatic relations includes the establishment of consular relations, is unnecessary; there is little point in a clause having this implication.

For article 4, two texts are presented, one comprehensive and the other shorter and consequently more general. The general definition is considered preferable in Spain, for, by appearing to be exhaustive, the other definition might give rise to doubts concerning particular consular functions found to have been omitted from the definition.

Article 5 contains a series of heterogeneous, though acceptable, provisions. It might be desirable to present them in more systematic form.

Article 12 provides that heads of consular posts shall be furnished by the sending State with "full powers". This statement is, of course, exaggerated, since what the consuls receive are the powers necessary for the performance of their functions. There is no objection to the rest of the article, provided that the language is rectified in this respect.

The provisions of article 16 on the acting head of consular post are altogether acceptable, but it should be pointed out that, as in the conventions which Spain is negotiating with various countries, the general principle that the acting head of post enjoys the same status as the consul whom he replaces should be subject to the condition that the acting head of post may not enjoy the rights, privileges and immunities the enjoyment of which is subject to specific conditions which he does not satisfy (as for example, where the acting head of post is a national of the receiving State, whereas the consul was a national of the sending State).

An article should be added recognizing the now common practice whereby, with the consent of the receiving State, the sending State appoints one or more members of its diplomatic mission to discharge consular, as well as diplomatic, functions in the capital.

Article 20 might include a reference to article 51, which guarantees that the consul's rights and privileges will be respected until he leaves the country, a question which, in article 20, is at present dealt with only in the commentary.

In article 24, the term "family" should be clearly defined so as to avoid the conflicts and ambiguities of interpretation of all kinds to which this and other articles of the draft might otherwise give rise.

In this connexion it might be suggested that the "family" should be understood as consisting of the wife and the minor children who are dependent on the head of the family. Similarly, it would be necessary to provide that the private staff whose arrival and final departure have to be notified under paragraph 1(*c*) of the article includes only those members of the private staff who are not nationals of the receiving State and who are employed exclusively in the service of career consuls.

As is rightly stated in paragraph (4) of the commentary, and in accordance with the provisions of article 50 of the draft, article 27 does not, of course, apply to persons who are nationals of the receiving State, although, for the sake of greater clarity—and we stress this point not only in the present context but in relation to many other parts of the draft—we would prefer this reference to article 50, which affects so many provisions of the draft, to be made, not in the commentary, but in the text itself.

And, of course, our observations on the definitions of "employee of the consulate" and "private staff" given in article 1 should be taken into account; these expressions should be used in the restricted sense attached to them in our comments.

Likewise, the "rights" given to the "private staff" by article 27 clearly can only be granted to persons who, besides being employed exclusively in the service of the career consul, are not nationals of the receiving State.

The terms of article 28 are excessively broad, since, especially in the case of the severance of relations, the obligation of the receiving State should be confined to respect for the consular archives.

Similarly, the inviolability granted to the consular premises by article 31 is too broad. It would be advisable to add that, even without the consent of the head of post, the local authorities may, in exceptional cases, enter the consular premises, provided that they produce for this purpose the appropriate court order together with the authorization of the Ministry of Foreign Affairs of the receiving State.

Article 36 raises the problem of the freedom of communication of foreign consulates.

The draft extends this freedom to the consulate's communications, by means including the use of consular bags and cipher, not only with its Government and the embassy and other consulates of its country established in the territory of the receiving State, but also with its country's diplomatic and consular missions anywhere. This extension of the right of communication is at variance with the principle of the treaties to which Spain is a Party, and which provide that direct and secret communication of this kind is allowed, in principle, only with the Government of the sending State and with its diplomatic mission and consulates in the territory of the receiving State.

A provision might be added under which it would be possible to verify that the consular bags contain only official correspondence and documents, e.g. permission to open the bags, in cases of serious suspicion, in the presence of a duly authorized official of the consulate.

In article 40, paragraph 1, we prefer the formula, suggested by the text itself: "Except in the case of an offence punishable by a heavy penalty".

We have no objections to articles 41, 42 and 43, provided that the stipulations of article 50 of the draft are taken into account generally and provided that the narrower definitions of "employee of the consulate" and "private staff" suggested in the comments on article 1 are accepted. The privilege of giving evidence at his own residence, to which article 42, paragraph 2, refers, should, it seems, be granted to career consuls only.

Article 45 (Exemption from taxation) should apply only to career consuls and to those employees of the consulate (according to our suggestion, they would be called "consular officers") who, under the direction of a consul, carry out an administrative, technical or similar task at a consulate of the sending State and who, being nationals of the sending State, do not carry on in the receiving State any gainful activity other than their official duties, for which they receive a regular salary. The words "and members of their families" in paragraph 1 should be deleted. The whole of paragraph 2 should also be deleted.

Article 46 (Exemption from customs duties) is acceptable, even in its present broad and vague wording, with the limitation and safeguard embodied in the text, which provides that "the receiving State shall, *in accordance with the provisions of its legislation,* grant . . ."

Furthermore, the article stipulates that the exemption is to be granted to members of the consulate "who do not carry on any gainful private activity". It is noted that paragraph (4) (*b*), of the commentary on this article states that, by virtue of article 50, the exemption from customs duties does not apply to members of the consulate who are nationals of the receiving State. In effect, therefore, article 46 applies only to the persons mentioned in this Government's comments on article 45.

Article 48 should apply to the persons mentioned in this Government's comments on article 45.

Article 49 affects the persons mentioned in article 45 and their wives and minor children.

Article 50, which is fully acceptable and to which it is necessary to refer so often in the other articles of the draft, is very important.

Article 50 ought to be cited and referred to frequently in the provisions of the draft; this Government does not agree with the practice of citing the article in the commentaries.

Article 51 is consistent with present international practice, except for the last sentence of paragraph 3, which provides that, in respect of acts performed by members of the consulate in the exercise of their functions, immunity from jurisdiction continues to subsist without limitation of time. This statement conflicts with present customary law, not only in consular but also in diplomatic relations. It is well known that if a person returns to a country without the diplomatic status which he had enjoyed during his former residence there, proceedings may be instituted against him which at that time were barred by the privilege of immunity from jurisdiction.

Article 52 represents an innovation rather than a codification. At the present stage of development of the international community, the rule laid down in this article is perhaps rather premature and actually open to objection on political grounds.

There is no objection to paragraphs 1 and 2 of article 53. Paragraph 3, on the other hand, is somewhat confusing. It says that offices of other institutions or agencies may be installed in the consular premises, provided that the premises assigned to such offices are separate from those used by the consulate; in that event the said offices are deemed not to form part of the consular premises.

As at present drafted, this provision is absolutely incompatible and at variance with the definition of "consular premises" given in article 1 (*b*). Perhaps what is meant is that the offices of such institutions or agencies may be situated in the same building or, using the word in a general sense, premises, as the consular premises; but they cannot, of course, be situated in the consular premises in the technical and precise sense given to that expression in article 1. The wording of paragraph 3 of this article should therefore be revised.

It seems advisable to enter a reservation regarding paragraph 2 of article 54. This paragraph enumerates the articles of chapters II and IV of the draft which are applicable to honorary consuls. The reservation concerns the application of articles 32, 42 paragraph 2, and 52 to honorary consuls.

There is no objection to article 55, which provides for the inviolability of the archives, documents and official correspondence of a consulate headed by an honorary consul, provided that they are kept properly separated from the honorary consul's private correspondence, books and documents.

There is no objection to article 57 (Exemption from obligations in the matter of registration of aliens and residence and work permits), provided that the exemption is confined, as stated in the commentary, to honorary consuls and members of their families who do not carry on a gainful private activity outside the consulate.

Similarly, the provisions of article 58 are acceptable, if the honorary consul is not a national of the receiving State.

Article 59 would be acceptable if confined to honorary consuls who are not nationals of the receiving State and if its benefits did not extend to members of the families of honorary consuls.

Lastly, two texts are offered for article 65, concerning the relationship between the draft and bilateral conventions. The first text is based on the idea that existing bilateral conventions would be abrogated by the entry into force of the multilateral consular convention.

The second text, on the other hand, would leave the previously concluded bilateral conventions in force.

Since a convention based on these articles would necessarily be of a general nature, it seems advisable to give the preference to the second text, under which the more detailed regulation of consular matters in existing bilateral conventions would not be affected by the inevitably more restrictive provisions of a multilateral convention.

15. Sweden

Transmitted by a letter dated 14 March 1961 from the Acting Deputy Head of the Legal Department of the Royal Ministry for Foreign Affairs

[*Original: English*]

The Swedish Government has studied with interest the draft articles now presented by the Commission and has found that they form a suitable basis for the codification and the development of international law on the subject of consular intercourse and immunities. It is generally left to the future parties to the convention to decide whether they shall establish consular relations and to agree on the seat and the district of their consulates and, to a considerable extent, on the status, rights and privileges of the consuls and their functions. It can therefore be said that the main value of a future convention in this field lies in the fact that it offers a model text for bilateral consular conventions and at the same time subsidiary provisions where consular relations exist between States which have not concluded a formal convention to this effect or which have a convention not containing more detailed provisions.

On the whole, the Swedish Government can approve the draft articles of the Commission but must naturally reserve any final position with regard to their contents. Proposals for minor changes in the drafting of the various articles would, it is felt, preferably be advanced at a later stage of the preparatory work on the draft Convention, and the Swedish Government will at this juncture limit itself to submitting the following observations in relation to the below-mentioned articles:

Article 4: Consular functions

The purpose of a convention on consular intercourse and immunities should apparently be to create rights for the sending State and its consular officials and to determine the corresponding obligations for the receiving State. Thus it follows that there should be no place in such a convention for articles solely containing desiderata, recommendations or advice of a general nature.

In addition, the functions of consular officials are set forth in instructions and regulations promulgated by the sending State; the extent to which the consular official is able to carry out these functions is dependent upon the relevant legislation and practice of the receiving State and the additional contractual obligations accepted by it. Looking at these facts from another angle, it can be said that the receiving State must not—by referring to the internal instructions of the sending State—require a consular official of the latter State to exercise certain functions or otherwise take steps to a certain end, for instance on the pretext of the consular official's duty to help and assist his own nationals, to refuse public assistance or medical care to a destitute or sick alien.

The wording of article 4 of the draft Convention in either version does not always meet the two requirements just mentioned.

When weighing the two variants of article 4 against each other, it can be maintained that long experience has shown substantial difficulties to exist when hammering out the text of articles on consular functions for insertion in bilateral consular conventions. Evidently, it must be far more complicated, or sometimes even quite impossible, for a body of more than ninety States to reach agreement in this sphere on texts that will be of a practical value and not only contain highly watered-down texts or recommendations in general terms. If, on the other hand, elaborate clear-cut definitions are inserted in the Convention, numerous reservations can be expected, thus depriving the articles of their inherent significance. These considerations lead the Swedish Government to the conclusion that the only realistic approach in this field is to abandon all attempts at producing texts on the consular functions copied from the corresponding texts of bilateral conventions and to be contented with a broad definition on the lines of article 4, paragraph 1, the second variant:

"The task of consuls is to defend, within the limits of their consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant international agreements in force or entrusted to them by the sending State, the exercise of which is compatible with the laws of the receiving State."

Article 8: Classes of heads of consular posts

The class of "Consular Agents" is in principle not recognized by the Swedish Foreign Service. However, for some time past consular agents have in a few exceptional cases been appointed by Sweden. Their position is very similar to the status of an honorary vice consul, but the essential difference lies in the fact that they merely represent a consul at a place other than the seat of the consulate but within the same consular district. They are appointed not by the consul but in exactly the same manner as vice-consuls. There is no desire on the part of Sweden for the retention of consular agents as a special class, and reference to this expression could therefore advantageously be omitted in the Convention.

Article 12: The consular Commission

A consular commission is made out by Sweden for each appointment of a consul, even in the case that the new appointment only signifies a change in the consular district within the receiving State.

Article 40: Personal inviolability

According to paragraph 2 of this article a consular official shall not be committed to prison save in the execution of a final sentence of at least two years' imprisonment. In the commentary to this rule the exemption from imposition of punishment is based upon two considerations, to wit (i) the functioning of the consulate should not be interrupted, and (ii) in many countries a suspended sentence may be awarded. These two reasons for the exemption here referred to may be questioned because, in the first place, it is unlikely that a person who has been sentenced to imprisonment in the receiving State is retained by the sending State in his position as consul, and, secondly, that a suspended sentence can in certain circumstances be revoked and another sanction imposed, while it can be inferred from the commentary that the punishment should be entirely cancelled.

Article 41: Immunity from jurisdiction

Section (2) of the commentary points out that the immunity from jurisdiction is granted consuls not as a personal immunity for them but as an immunity that the sending State possesses and consequently is limited to official acts. This being so, there is no real reason for establishing any discrimination between official acts performed by consuls who are nationals of the receiving State and consuls who are not such nationals, a distinction that seems to have been made in articles 41 and 50. Article 50 dealing with the former category of consuls uses the expression "*official acts* performed in the exercise of their functions", whereas the word "*official*" does not figure in article 41, although the commentary indicates that the immunity set forth in this article exclusively comprises official acts.

Article 45: Exemption from taxation

As is the case with the corresponding article of the draft Convention on Diplomatic Intercourse and Immunities, this article on tax exemption contains no limitations of the expression "members of their families". Under Swedish legislation on this point tax exemption is accorded the wife of a consular official and his children under the age of eighteen years, provided that the children live with him and are not Swedish nationals. A corresponding definition in this article seems desirable in order to avoid too extensive an interpretation of the expression "members of their families".

Article 46: Exemption from customs duties

Section (2) of the commentary to this article states that the Commission decided to include in this article provisions on exemption from customs duties for members of a consulate identical to the provisions suggested in the draft articles on Diplomatic Intercourse and Immunities. As drafted, article 46 accords, however, exemption from customs duties also to employees of the consulate, whereas the corresponding category is excluded from this privilege in the draft articles on Diplomatic Intercourse and Immunities. In the opinion of the Swedish Government, members of a consulate should never enjoy more extensive privileges than members of a diplomatic mission.

16. SWITZERLAND

Transmitted by a letter dated 29 May 1961 from the Permanent Observer of Switzerland to the United Nations

[*Original: French*]

The competent authorities of the Swiss Confederation have carefully studied the draft articles on consular intercourse and immunities prepared by the United Nations International Law Commission and are happy to have this opportunity to state their views on the draft. In view of the importance which Switzerland attaches to its consular relations with other States, the Swiss authorities follow with the greatest interest the work of the United Nations in codifying the law of nations. They hope that the preparation of a final convention will be entrusted to a diplomatic conference of plenipotentiaries in which Switzerland will be able to take part.

The Swiss authorities consider that the principal purpose of the present codification of the law of consular intercourse should be to formulate, in satisfactory terms, the rules at present applicable, the law being allowed to evolve in bilateral and multilateral relations. Accordingly, the convention should confine itself to laying down a minimum of rights and duties,

leaving the States concerned free to stipulate *inter se* other rights and duties by means of international conventions.

The draft articles are largely in keeping with this idea. In the opinion of the Swiss authorities, they represent a useful basis for the preparation of a general convention on consular intercourse. Some provisions of the text, however, depart greatly from Swiss practice; in so far as they affect questions of principle, these provisions are therefore hardly acceptable to the Swiss authorities.

Unlike other States, Switzerland has not concluded any bilateral consular treaties in recent years. Apart from general provisions contained in treaties of friendship, establishment and commerce, Swiss practice is based mainly on customary law, which in turn is based on the principle of reciprocity. For this reason the Swiss authorities consider that the future convention should contain a general provision stipulating that questions not expressly settled by the convention continue to be governed by customary law.

Article 1

(*a*): The draft uses the terms "consulate" and "consul" in two different senses. Such definitions, which might lead to misunderstandings should be avoided. It would be advisable to introduce here the expression "consular post", which might also be used in other articles.

In Swiss practice, consular agencies are not consular posts in the full sense of the term. They are not in direct contact with the government of the sending State; they are merely organs intended to assist consular posts in the discharge of their duties. They have no consular district of their own; the scope of their activities is limited to a part only of the district of the consular post to which they are subordinate. Consequently, consular agents are not heads of consular posts. The functions they exercise are limited, and they enjoy no privileges. No consular commissions are issued to them and they are not granted the *exequatur* of the receiving State. Consular agencies should therefore not be referred to in the convention, and the States concerned should be left to settle the admission of consular agencies and agents and the definition of their legal status by bilateral conventions.

(*f*) and (*g*): To avoid the difficulties which may arise out of the double meaning of the term "consul", as used in the draft articles, the expression "head of consular post" should be defined at the outset in (*f*); this definition might be worded as follows:

> "(*f*) The expression 'head of consular post' means any person appointed by the sending State to be in charge of a consular post as consul-general, consul or vice-consul and authorized to exercise those functions in conformity with articles 13 or 14 of this draft".

This definition would be more accurate than the present text, for articles 13 and 14 concerning the *exequatur* and provisional recognition to which this definition refers, apply merely to heads of posts (see paragraph (7) of the commentary on article 13).

(*i*): The expression "senior consular officials" which is current in the practice of many States, including Switzerland, should be introduced after the definition of head of post; it denotes the members of consular posts who, though not heads of posts, exercise consular functions and have a consular title. Senior consular officials might be defined as follows:

> "The expression 'senior consular official' means any person, other than a head of post, who is duly appointed by the sending State to exercise consular functions in the receiving State and who bears a consular title such as deputy consul-general, consul, deputy consul or vice-consul".

Article 2

In conformity with the Special Rapporteur's proposal reproduced in paragraph (3) of the commentary, a second paragraph of article 2 should provide that the establishment of diplomatic relations includes the establishment of consular relations. Such a provision would be in keeping with general practice, under which diplomatic missions may exercise consular functions in cases where the sending State has no consular posts in the receiving State or where the districts of existing consular posts do not cover the whole of the receiving State's territory. This would not, however, settle the question whether the head of the diplomatic mission or the number of the mission who heads the consular section of that mission requires an *exequatur*. Under Swiss practice an *exequatur* is not necessary in such cases.

Article 4

In view of the very great diversity of State practice, it seems impossible to enumerate, in a general convention, all consular functions in detail. Hence, only a restrictive enumeration of broad categories of functions can be considered. The text of paragraph 1 is accordingly preferable to the detailed variant reproduced in paragraph 11 of the commentary.

(*a*): The reference to the protection of the interests of the sending State may lead to misunderstandings, for this is more properly one of the diplomatic functions. It is self-evident that the consul always acts in the interests of the sending State. This reference should therefore be deleted or spelt out in restrictive terms.

(*c*): The consul's function as registrar is permissible only if registries of births, marriages and deaths do not exist in the receiving State or if that State permits the exercise of such functions by consuls even though it has its own registries. The condition that there must be no conflict between consular functions and the law of the receiving State applies in this case, too. (In this connexion, see, in paragraph 9 of the detailed list of consular functions, the express proviso concerning the consul's right to solemnize marriages). The exercise of other administrative functions should also be subject to this condition. (For the details, see the comments below on the list of consular functions).

(*f*): Like his other functions, the consul's function of acquainting himself with the economic, commercial and cultural life of his district can be exercised only subject to the law of the receiving State, in particular, to the provisions of the penal code regarding the protection of the security of the State.

Detailed list of consular functions (paragraph (11) of the commentary): Apart from the general reservation set forth above, the following observations are relevant to this definition.

Clause 6: In connexion with the appointment of guardians or trustees for nationals of the sending State, the consul is not qualified to submit nominations to the court for the office of guardian or trustee; at most he may recommend such persons to the judge. Nor should the consul have the power to supervise the guardianship or trusteeship. Such supervision would constitute interference in the domestic affairs of the receiving State. In the case of Switzerland, such a provision is the more superfluous as Swiss law gives the authorities of the country of origin of foreign nationals the possibility (subject to reciprocity) to exercise the guardianship or trusteeship.

Clause 7: The right to represent heirs and legatees in cases connected with succession without production of a power of attorney can be recognized only on condition that such representation is in accordance with the wishes of the persons concerned.

Clause 10: Under Swiss law, acts relating to judicial assistance are official acts which can be performed only by the competent authorities of the receiving State. For this reason Switzerland has not concluded any agreement granting such powers to consuls. A provision under which consuls may perform acts of judicial assistance would be acceptable to Switzerland only if subject to the condition that the express consent of the receiving State is necessary.

Clause 13: The consul's right to receive for safe custody articles and documents belonging to nationals of the sending State does not apply in the case of articles and documents which have played a part in the commission of criminal offences. Should such a provision be inserted in the convention, it would have to be qualified by a specific proviso, unless it is clearly laid down that the general saving clause regarding respect for the law of the receiving State covers this point.

Clause 14: The consul's competence to further the cultural interests of the sending State should be defined restrictively, in order to avoid improper interference in the domestic affairs of the receiving State.

Clause 16: See the observation above under (f) concerning the protection of the security of the State.

Clause 17: This general provision goes too far. To empower the consul to perform any additional functions the performance of which is not prohibited by the laws of the receiving State would invite malpractices. It would be more correct to refer merely, as in clause 1, to the functions the exercise of which is compatible with the laws of the receiving State.

Additional article to be inserted after article 4 (Proposal by the Special Rapporteur in paragraph 12 of the commentary): This provision, under which the consul may provisionally represent nationals of the sending State before the courts and other authorities of the receiving State until the persons in question have appointed an attorney or have themselves assumed their defence, should perhaps, be supplemented by a provision stating that the consul's participation in proceedings in such circumstances does not *per se* satisfy the condition that both sides must have had an opportunity to present their case.

Article 4

Paragraph 2: The final passage of this provision should be redrafted to read more clearly: ". . . a consul . . . may deal only with the *regional* and local authorities". In Switzerland consuls deal mainly with the cantonal authorities.

Article 5

(*b*) The duty of the receiving State to notify the consul of cases where the appointment of a guardian or trustee appears to be in the interests of a national of the sending State appears acceptable, provided that the notification does not prejudge the competence of the receiving State as regards the execution of such measures.

(*c*) It would be advisable to provide that the receiving State must notify the consular post not only where a vessel of the sending State is wrecked or runs aground, but also in case of any accident involving aircraft registered in the sending State (see article 4, paragraph 1(*d*)).

Article 6

(*a*): This provision should state clearly that the consul's right of access to the nationals of the sending State may not be exercised against the freely expressed wishes of the persons concerned.

(*b*): Cases where it is necessary to hold a person *incomunicado* for a certain period for the purposes of the criminal investigation should be expressly referred to in the provision itself and not in the commentary (paragraph 7), as is now the case. Moreover, the duty of the receiving State to inform the consul of the arrest or imprisonment of a national of the sending State should be limited to cases where the person arrested or imprisoned expressly desires such a communication to be made.

(*c*): The consul's right to visit a national of the sending State who is detained or imprisoned should be limited, as suggested under (*a*) above, by a clause providing that such right may not be exercised against the freely expressed wishes of the person concerned. Moreover, as regards persons detained for the purposes of a criminal investigation, the right of the examining magistrate to authorize visits in the light of the requirements of the investigation should be referred to in the text of the convention itself and not in the commentary (paragraph 5). The general reservation in paragraph 2, *viz.* that the freedoms referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State, is too heavily qualified by the proviso immediately thereafter, *viz.*, that the said laws and regulations must not nullify these freedoms.

Article 8

As indicated above in connexion with article 1, Swiss practice does not regard consular agents as heads of consular posts. Under this practice, consular agents are appointed by the competent authorities of the sending State. They are merely recognized by the Federal Political Department; a federal *exequatur* is not issued to them. They have no jurisdiction of their own and are the representatives, in the district in which they discharge their functions, of the authority which appointed them. As a rule, they enjoy no privileges.

Article 9

This provision is not very clear because, as mentioned earlier in connexion with article 1, no clear distinction is drawn between the head of a consular post and a consular official who, though not head of a post, has a consular title.

Article 12

The three paragraphs of this article clearly relate to heads of consular posts, for none but heads of posts are furnished with consular commissions. This point is not made sufficiently clear in the text, the word "consul" being used in different senses in the draft articles.

In Swiss practice, heads of consular posts are furnished with a new consular commission and a new *exequatur* whenever a change is made in the consular district; the same applies whenever a change occurs in the rank of the head of post.

Article 13

This article regulates the recognition of the head of the consular post only. An express provision relating to the recognition of consular officials other than heads of posts is missing. The commentary (paragraph 7) merely points out that these officials do not require an *exequatur* and that notification by the head of post is sufficient in their case. This point should be dealt with in a special provision. It should also be made clear that officials other than heads of posts do not enjoy privileges and immunities until the receiving State has recognized them after due notification (see the comments on articles 23 and 51).

Article 14

It is not correct to say (as does the commentary, paragraph 4) that the provisional recognition of the head of a consular post imposes on the receiving State the duty to accord all the privileges and immunities provided for in the draft articles. Such a statement might lead to difficulties if the *exequatur* should be refused; this would happen particularly where exemption from customs duties has been granted provisionally. It would therefore be sufficient to say:

> "Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions In that case, he will enjoy the customary immunities in respect of acts connected with his functions."

Article 16

Paragraph 1: This article should mention the authorities competent to appoint the acting head of a consular post.

Paragraph 2: Inasmuch as the acting head discharges his functions on a temporary basis, there appears to be no justification for according to him all the privileges of the titular head of post.

Article 17

Paragraph 2: The date of provisional recognition should not automatically determine the precedence of the head of post. The receiving State should be left free to determine the order of precedence of heads of consular posts either in accordance with the date of provisional recognition or with that of the grant of the *exequatur*.

Paragraph 3: Since the commission is frequently presented after the grant of the *exequatur*, the date of such presentation should not be used to determine the order of precedence; it would be better to provide as follows:

> "If several heads of posts obtained the *exequatur* or provisional recognition on the same date, the order of precedence as between them shall be determined according to the date of the application for the *exequatur*."

Paragraph 5: Acting heads of posts should, like acting *chargé d'affaires*, rank, as between themselves, not according to the order of precedence of the titular head of post, but according to the date of the notification of their entry on duty as acting heads of posts.

Article 19

Where the head of a consular post bears the title of consul-general-*chargé d'affaires*, each State should be free to make the grant of diplomatic status to such a head of post subject to the condition that he resides at the place where the seat of the government is established (as is the case for heads of diplomatic missions).

Article 23

It should be expressly provided that if the receiving State regards a consular official as not acceptable, it shall not be required to state the reasons for its decision.

It is not sufficient to say—as does paragraph (2) of the commentary—that a member of the staff of a consular post may be declared not acceptable before his arrival in the receiving State, since the person in question may enter the territory of the receiving State or take up his duties at the moment of notification. A provision should therefore be included to the effect that consular officials do not enjoy privileges and immunities until the receiving State has approved their appointment after due notification (see the comments on articles 13 and 61).

Article 27

Private staff should be excluded from the benefit of paragraphs 1 and 2. Such staff enjoy no privileges in Switzerland.

Article 29

The right of the consulate to fly the national flag should be limited in view of the difficulties which the receiving State may experience in carrying out its obligation to protect the flag.

Paragraph 1 should accordingly be qualified as follows:

"The consulate shall have the right to fly the national flag *in conformity with the usage of the receiving State* and to display . . ."

Paragraph 2 should be deleted; the right to fly the national flag on personal means of transport should be limited to heads of diplomatic missions.

Articles 30 and 31

Like article 22 covering the size of the consular staff, the articles on accommodation and the inviolability of consular premises should contain a provision for an appropriate limitation as regards the premises having regard to circumstances and conditions in the consular district and to the needs of the consulate.

Article 35

The convention should stipulate freedom of movement for members of consular posts in respect of the consular district only. This freedom may be extended to cover the rest of the territory of the receiving State, subject to reciprocity.

Article 36

To accord to consular posts an unlimited right to use the diplomatic bag and diplomatic couriers seems unjustified. If the sending State has a diplomatic mission in the receiving State, the official correspondence of consular posts should be routed through that mission. At the very least, the use of the diplomatic bag and of diplomatic couriers should be subject to reciprocity.

Article 40

Swiss practice does not recognise the personal inviolability of consuls. However, such inviolability might be admitted in principle for heads of consular posts and conceivably also for consular officials who, though not heads of posts, have a consular title. But the system provided for by the convention is extremely complicated and may lead to glaring inequalities of treatment according to the national laws concerned.

Paragraph 1: This provision denies the benefit of personal inviolability in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment. An itemised provision appears preferable to the variant referring to "a grave crime". However, in view of the diversity of criminal law, the expression "sentence of imprisonment" should be replaced by a more general expression such as "sentence involving deprivation of liberty".

Under Swiss criminal law, many offences which constitute "grave crimes" are punishable by imprisonment (the maximum term of which is three years) and not by rigorous confinement (*réclusion**). In the light of the principles of Swiss law, the decisive criterion should be a sentence of three, not of five, years' imprisonment. If such a change cannot be made, the Swiss authorities would prefer the variant: "except in the case of a grave crime".

Article 42

Paragraph 1: Only heads of consular posts and consular officials who, though not heads of posts, have a consular title should be exempt from coercive measures if they decline to attend as witnesses.

Paragraph 2: Provision should be made for the possibility of written testimony, subject of course to the proviso that such testimony is permitted by the law of the receiving State.

Article 43

With regard to exemption from obligations in the matter of the registration of aliens, residence and work permits, the circle of members of the family should be limited. In addition, it would be desirable to specify in what circumstances the members of the family are deemed to form part of the household.

Furthermore, private staff should be excluded from the exemption granted under this article.

Article 45

The general tax exemption granted by this article should not be accorded to employees of the consulate who perform only administrative and technical duties.

The commentary should explain that the tax exemption may also be accorded in the form of reimbursement.

The circle of members of the family benefiting from tax exemption should be limited to the spouse and the children under age and, in exceptional cases, to other relatives forming part of the official's household. This remark also applies to all the other articles which accord privileges and immunities to members of the family.

(*a*) This provision is too restrictive; it should cover all indirect taxes, whether they are incorporated in the price of goods or services or added to that price.

Article 46

(*b*) The exemption from customs duties should be limited to heads of consular posts and to consular officials who, though not heads of posts, have a consular title.

As regards the members of the family, see article 45.

Article 47

As regards the members of the family, see article 45.

Article 48

As regards the members of the family, see article 45. The domestic staff should be excluded from the benefit of this article.

Article 49

In so far as this article relates to the case of a woman member of the consulate who marries a national of the receiving State, it conflicts with the Swiss constitutional principle of the unity of the family (article 54 of the Federal Constitution), under which a foreign woman who marries a Swiss national acquires her husband's nationality by her marriage. The Swiss authorities therefore propose that the words "except in the case of marriage" should be inserted in article 49.

Article 51

Paragraphs 1 and 2 should be amplified by a provision to the effect that new members of the consulate should in all

* *Réclusion* may be ordered for a term of five to ten years (translator's note).

cases, whether they arrive in the receiving State or are already in that State, enjoy privileges and immunities from the time when the receiving State has approved their appointment and not from the time their appointment was notified to that State (see comments on articles 13 and 23).

Article 52

The obligations of third States with regard to consular officials passing through their territory on their way to their duty station or on returning to their country should be limited to cases of direct transit by the shortest route.

Article 54 et seq.

The regulations set forth in chapter III on honorary consuls appear acceptable in their essentials. They are not, however, adequate in so far as they do not differentiate clearly between the personal position of honorary heads of consular posts and other honorary consular officials who, though not heads of posts, have a consular title, on the one hand, and the position of a consular post headed by an honorary consul, on the other.

In Swiss practice, the legal status of a consular post, in all matters relating to the exercise of functions, does not depend on whether the head of the post is a career consul or an honorary consul. This distinction is important only from the personal point of view, as the draft articles very properly provide.

Article 54

In conformity with the above comment, this article should more properly be entitled: "Legal status of honorary consuls *and of consulates in the charge of honorary consuls*".

Article 31 relating to the inviolability of consular premises and article 53, paragraphs 2 and 3, which prohibit the improper use of consular premises, should be included among the provisions referred to in article 54. Article 54, paragraphs 2 and 3, which clearly lay down the limits within which consular premises may be used, are most important in the case of honorary consuls who carry on a gainful private activity. Inasmuch as it is possible to take account of this particular situation under article 31, read in conjunction with article 53, there would be no need, if these two provisions were made applicable by article 54, for a special article on the inviolability of the premises of a consulate headed by an honorary consul on the lines of article 55 concerning the inviolability of archives.

Article 55

To cover the case where the honorary consul does not occupy premises used exclusively for consular purposes, this provision should be amplified in the following manner:

"The consular archives, the documents and the official correspondence, *and also any articles intended for the official use* of a consulate headed by an honorary consul shall be inviolable . . ."

Article 57

In Switzerland, honorary consuls must comply with the obligations in the matter of registration of aliens, residence permits, and work permits. These obligations can hardly be waived in the case of honorary consuls.

Article 58

This provision should specify more clearly that the tax exemption of honorary consuls applies only to the appropriate reimbursement of expenses incurred but not to any salary which may be paid by the sending State, for this salary can only with difficulty be distinguished, for taxation purposes, from income derived from a private gainful activity.

In any case, as the commentary points out, honorary consuls who are nationals of the receiving State should not be exempt from taxation.

Article 62

In Switzerland, no distinction is made between career consuls and honorary consuls in the matter of precedence. The system provided for by the convention, however, appears to be preferable.

Article 65

The Swiss authorities prefer the second text, which, while leaving the parties free to conclude further bilateral conventions concerning consular intercourse and immunities, automatically maintains in force the existing bilateral consular conventions.

17. Union of Soviet Socialist Republics

Transmitted by a note verbale *dated 24 March 1961 from the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations*

[*Original: Russian*]

The competent USSR authorities have the following comments to make on the draft articles on consular intercourse and immunities prepared by the International Law Commission at its twelfth session:

1. Article 1, in which the terms and expressions used in the draft are defined, needs to be made more specific. In particular, sub-paragraph (*e*) should be worded as follows:

"The expression 'consular archives' means all documents, official correspondence and the consulate library, as well as any article of furniture intended for their protection or safe-keeping."

2. Article 2 states that the establishment of consular relations takes place by mutual consent of the States concerned. The article should state, further, that the establishment of diplomatic relations includes the establishment of consular relations.

3. Article 3 (5) states that the consent of the receiving State is required if the consul is at the same time to exercise consular functions in another State.

This paragraph should be excluded from the draft.

4. The Special Rapporteur proposed an additional article on the right of a consul to appear *ex officio* on behalf of nationals and bodies corporate of the sending State before the courts and other authorities of the receiving State until the persons or bodies in quesion have appointed an attorney or have themselves assumed the defence of their rights and interests.

This article should be included in the draft.

5. Article 5 (*c*) states that the receiving State shall have the duty to inform the consulate if a vessel flying the flag of the sending State is wrecked or runs aground. This paragraph should be extended, *mutatis mutandis,* to cover aircraft.

6. Of the two variants of article 65, which deals with the relationship between these articles and bilateral conventions, the second is preferred.

7. A new article should be included in the draft in the following terms:

"1. The provisions of these articles regarding the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions and of whose appointment the Ministry of Foreign Affairs of the receiving State has been notified by the diplomatic mission concerned.

"2. The diplomatic privileges and immunities to which any such persons may be entitled shall not be affected by their carrying out consular functions."

8. The above comments on the draft articles on consular intercourse and immunities are not exhaustive. The competent USSR authorities reserve the right to put forward additional comments and suggestions at an appropriate time.

18. United States of America

Transmitted by a note verbale *dated 6 April 1961 from the Permanent Representative of the United States of America to the United Nations*

[*Original: English*]

General

The Government of the United States is of the opinion that the International Law Commission should be commended for its work on the subject of consular intercourse and immunities,

as reflected in Chapter III of the Report covering the work of its Twelfth Session (A/4425). The draft Articles, with commentary, formulated by the Commission indicate generally the areas in which the practice of governments is sufficiently uniform to warrant its codification or incorporation in a treaty, and also the areas in which, while present practice varies, it is desirable that uniform rules be formulated.

Governments have long recognized the value of treaty provisions as a means of regulating the conduct of consular relations and the status of consular personnel. A general multilateral convention containing provisions on the most important matters, and on which governments generally agree, would be desirable.

The United States offers the following general observations on the Draft Articles on Consular Intercourse and Immunities:

1. Many provisions correspond to provisions in the Draft Articles on Diplomatic Intercourse and Immunities adopted by the Commission at its Tenth Session (A/3859), to be considered by the Conference of Vienna convened March 2-April 15, 1961. It is assumed that the Commission will be guided by the decisions of the Conference, to the extent that such decisions may be applicable. In particular, language agreed to at Vienna should be incorporated in corresponding consular provisions, except where changes appear warranted by the differences in status and duties of diplomatic and consular officers. In no case should the revised draft Articles grant to consular officers or employees personal privileges, exemptions and immunities in excess of those accorded diplomatic officers and employees.

2. The Draft Articles should cover only those matters essential to the effective functioning of a consular establishment and the comfort and security of its personnel. Differences between governments which involve domestic law and local practice applicable to the rights and duties of consular officers usually may be resolved more easily in bilateral agreements than in multilateral agreements.

3. The Draft Articles appear to place too much emphasis on "heads of consular posts". The phrase might be replaced by "officers of consular posts" or "consular officers", except when it is necessary to single out the principal officer. The position of head of a consular post is not really comparable with that of head of a diplomatic mission. An American ambassador, minister or *chargé* is the official representative of his government and members of the mission merely assist him in the performance of his functions. In contrast, the head of a consular post, at least under American law, possesses no more authority in certain substantive matters than subordinate consular officers on his staff. American consular officers are individually responsible for the proper performance of their statutory duties. The Secretary of State, the chief of the diplomatic mission, and the principal officer at the consular post may advise an American consular officer, but they may not direct or require him to perform or omit to perform certain acts.

The post of principal officer at a consular establishment thus has significance only with respect to matters of precedence and rank, and the exercise of supervisory responsibilities. Matters of precedence and rank are believed best left for regulation in accordance with local custom. Their supervisory responsibilities are essentially a matter of internal administration.

4. The Draft Articles should not distinguish the status of permanent residents from that of nationals of the receiving State. Persons in the receiving State as immigrants or stateless persons recruited locally should enjoy no more favourable status than nationals of the receiving State in which they reside.

5. The Commission's proposals as to exemption of consular officers from territorial jurisdiction are interesting, and merit consideration. It is pointed out, however, that the activities of consular officers affect private rights to a degree not usually permitted in the case of diplomatic officers. Moreover, consular officers often reside in remote places where they are beyond the watchful eyes of the chief of their diplomatic mission and the foreign office of the receiving State, and where the local authorities and the press may be ignorant of the standards of conduct to be expected of them. The fact that they are generally subject to local jurisdiction has perhaps contributed to their general good behaviour.

The Commission might also undertake to suggest a more precise rule as to the categories of persons exempt from territorial jurisdiction, and the circumstances under which such persons are to be exempt. If the exemption is for the benefit of the sending State, e.g., protection of archives, neither rank nor nationality nor place of residence should be a factor.

6. Immunity on the grounds that the action involves "official acts" should be limited to cases where the sending State assumes responsibility for the act, with provision for waiver of immunity, or lack of immunity in other cases. A consul who may embezzle money entrusted to him in his official capacity by private persons or by courts for transmission to his absent countryman, should be subject to a civil suit for recovery. Perhaps, if the sending State is unwilling to assume responsibility for his act, he should be subject to criminal prosecution in certain cases.

7. The Draft Articles show overlapping problems of sovereign immunity and consular immunity. Are all consular acts to be considered "governmental" in nature? What about consular officers from state-trading countries who engage in commercial transactions of the sort which would normally be litigated in the courts? May receiving States adhering to the restrictive theory of sovereign immunity determine on a case-to-case basis whether a given function of a consular establishment was a private rather than a public activity of a foreign sovereign—thus making the immunity from jurisdiction illusory?

8. The commentary contains much material which, if intended to have binding effect, should be embodied in the substance of the articles to which it relates.

The United States offers the following additional comments with respect to certain specific provisions:

Article 1

(*a*) It is suggested that "or" be deleted, and a comma inserted therefor, and that the words "or other consular establishment" be added after "agency". This will allow for the variations in nomenclature which inevitably develop over the years.

(*d*) The term "exequatur" has not been used by the United States as "the act whereby the receiving State grants to the foreign consul final recognition", but has been limited to apply only to documents of recognition bearing the signature of the head of the receiving State which have been issued to foreign consular officers on the basis of a commission of appointment signed by the head of the sending State. Certificates of recognition bearing the signature of the Secretary of State are issued on the basis of other documentary evidence of appointment. Nevertheless, there may be merit in defining *exequatur* as final authorization, whatever the form, to exercise consular functions, and eliminating the necessity of heads of state having personally to sign commissions of officers granted *exequaturs*.

(*f*) The United States would prefer omission of the hyphens.

(*g*) In lieu of "consulate" insert "consulate establishment". The head of the post must have been accorded recognition by the receiving State as a consular officer.

(*h*) This paragraph might be combined with paragraphs (*j*) and (*k*), with clarifications, as there seems to be some overlapping.

(*i*) The United States objects to this provision. Most governments now accord dual accreditation to certain persons as members of diplomatic missions and also as consular officers. The United States also recognizes in a consular capacity a few members of permanent delegations to the United Nations, where the total representation in the United States of the government concerned is small, and denial of dual accreditation, under the circumstances, would result in undue hardship.

The term "consular officer" may appropriately be used in a generic sense.

Article 2

The United States agrees that consular relations may be established (or maintained) between States which do not maintain diplomatic relations. It disagrees, however, with any statement to the effect that the establishment of diplomatic

relations automatically includes establishment of consular relations.

Article 3

The seat of the consular post and the limits of the district should be determined by mutual agreement. The agreement as to the seat and the initial district should probably be express. Agreement as to subsequent changes in limits of the district might be through notification from the sending State, to be considered final in the absence of objection by the receiving State.

Paragraph 3, read literally, provides that a sending State may not close a consular post without the agreement of the receiving State. As no such result is intended, the paragraph should be revised.

The proposal, in paragraph 4, that a consul may exercise functions elsewhere than within the district covered by his commission and *exequatur* would seem to merit further consideration. When a consular officer performs occasional diplomatic functions, he acts on an intergovernmental level. Therefore the limitations of his consular district are not pertinent.

Paragraphs (7) and (8) of the commentary are of a substantive nature, and should be a part of Article 3 or of another article.

Article 4

The functions of consular officers should be limited not only to those which can be exercised without breach of the laws of the receiving State, but also to those on which the law is silent, and to which the receiving State does not object.

Add to "a" the words "and of third states of which it is agreed he may accord protection". See Article 7.

The functions of a "notary" in the United States are not comparable to those of a notary in certain other countries. The words "civil register" are not easily identifiable in United States law. "Administrative" is a rather ambiguous word, not really descriptive of functions to be performed.

The text of the more detailed or enumerative definition reproduced in paragraph (11) of the Commentary and the proposed additional article reproduced in paragraph (12) described various consular functions not now permissible in the United States and in some respects unacceptable. Considering the present case of communications, it seems unnecessary for the consul to undertake to represent his absent countryman in court proceedings, to direct salvage operations, or represent him in other matters without first obtaining a power of attorney and appropriate instructions. In many situations the consul need be notified only when it has not been possible to notify the parties in interest in order that he may contact them, and thereafter render such assistance as they may request.

Article 5

In the United States, vital statistics records are maintained by State and municipal authorities rather than by the Federal Government. Except in the case of travellers, the authorities often do not know that a deceased person was not a national until the fact develops in the course of administration of his estate and search for his next of kin. It is desirable, of course, when a deceased person is found to be of foreign nationality, that the consular officer of the foreign country be apprised as promptly as possible of the death and have access to public records, if necessary, to obtain the information required for the preparation of a consular report of death, and further, at the request of the next of kin or if there are no next of kin, and if permissible under local law, be permitted to arrange for the burial or shipment of the body. These are matters, however, with respect to which the drafting of provisions requires careful consideration, having in mind such factors as the Federal-State system in the United States.

When minors or incompetents are in difficulties, it would seem enough for local authorities to seek out next of kin, who may, if they wish, seek the assistance of the consul concerned. The important thing is that the consul be assured access to public records.

Article 6

In some cases persons arrested and imprisoned may not wish their consul to be notified. The United States believes it is enough to assure that a person arrested or imprisoned may, upon request, communicate at once with his consular officer, and that in such case the consul be given immediate access to him, and have the opportunity to arrange for his legal representation, and to visit him if convicted and serving a term of imprisonment.

The United States would object to inclusion of a provision which appears to give validity to arrest procedures whereby a person may be held *incomunicado*. The domestic law of the United States would not support the proposition that it is necessary to hold a person *incomunicado* in order to conduct properly a criminal investigation. In certain countries, the *incomunicado* measure may be required by law. In such a case a maximum of 48 or 72 hours might be agreed upon.

Article 8

American consular agents are appointed by the Secretary of State. They are not necessarily full-time Government employees, and sometimes engage in outside business activities.

The advisability of formulating a rule which would codify the titles of heads of consular posts is questioned.

Article 10

This article seems both unnecessary and redundant. It is one of a number of articles which should either be deleted or their substance incorporated in another article.

Article 12

It is the practice of the United States to require a new consular commission of appointment or assignment whenever a consular officer is transferred from one post to another in the United States. If a United States consular officer is detailed to another consular district, he is provided with an assignment commission to the post where he is to perform his functions temporarily; he nevertheless holds his commission to his regular post. Thus, when his detail terminates, he resumes his functions at his regular post without need of a new assignment commission and a new recognition.

The United States does not accept the informal method of notification of a "consul's posting" unless at the same time a written request is made for some kind of consular recognition at the new post. It should be practicable to prescribe the limitations of consular districts by simple notification to the Foreign Office, the latter's acceptance without objection, and subsequent publication.

Article 13

As previously stated in lieu of "heads of consular posts" the phrase "officers of consular posts" should be used.

Article 14

Provisional recognition granted by an exchange of diplomatic notes frequently is the "final" recognition of a consular officer, particularly when consular recognition is required for secondary consular officers who are not commissioned. In the United States, provisional recognition is never granted by oral communication only.

Article 15

The United States notifies only the authorities of those States which have requested such notifications. Any obligation with respect to notification which governments can practicably accept should be one which can be complied with by publication in an official gazette. The consul can carry a copy of such publication with him to introduce himself, and, if need be, to buttress his authority. His predecessor, his office staff, and the dean of the consular corps can smooth the way for him, until he has learned to find his way around.

Article 16

Under the present practice all consular officers at a post request and obtain recognition. When the principal officer is

absent or incapacitated, another officer of his staff replaces him, and if there is no other officer at his post, his government usually will provide a replacement. The head of a consular post must be a person recognized by the receiving State in a consular capacity. Other than this, the matter seems solely one of internal administration, of principal interest to the sending State.

Article 17

The United States would be agreeable either to inclusion of an Article along these lines, or to its deletion, thereby leaving the precedence of consular officers to be determined in accordance with local custom.

Article 18

This might be deleted. Its meaning is uncertain, and it appears unnecessary.

Article 19

A consular officer performing functions of a diplomatic character due to the non-existence of diplomatic relations between his government and the government of the country of his assignment remains a consular officer. He is not thereby entitled to enjoy diplomatic privileges and immunities, and needs no special title.

Article 20

The receiving State's withdrawal of an *exequatur* should be effective immediately, but a request for recall need not be.

Article 21

The United States considers that consular officers are those of a consular establishment who have some form of consular recognition, and that consular employees are those members whose presence has been notified to the Department of State as members of the staff, but who have no consular recognition.

Article 22

This article should be deleted.

Article 23

Any person deemed unacceptable to the receiving State should upon its notification to the diplomatic mission of the sending State cease forthwith to be entitled to perform consular functions.

Article 24

The receiving State needs to be notified of arrivals and departures of all persons claiming privileges and immunities by virtue of their connexion with a consular post.

Article 26

It seems unnecessary to state the generally accepted proposition that the severance of diplomatic relations does not *ipso facto* terminate consular relations.

Article 28

The United States agrees that consular officers and employees and members of their families should be permitted to depart as soon as possible after their functions have been terminated, even in event of armed conflict. The details of the Article should, however, be considered in the light of the practice of governments. Their immediate departure may necessarily be delayed pending negotiation of arrangements for an exchange of persons, the obtaining of safe conducts, availability of means of transport, etc., and the extent to which general regulations relating to departure of aliens may apply in particular cases. The matter is further complicated by the possible need to provide special protective facilities pending their departure, and the application of currency control regulations, restrictions on transfer of foreign assets, etc.

The receiving State should not be obligated to assume a bailee responsibility with respect to the sending State's property in case of severance of diplomatic and consular relations.

Article 30

This article might be revised to read as follows:

"The sending State has the right to procure on the territory of the receiving State, in accordance with the internal law of the latter, the premises (*including residences*) necessary for its consulates. The receiving State is bound to facilitate, as far as possible, the procuring of suitable *office* premises for such consulates."

Article 31

Consular premises often consist only of space in an office building, or of a building adjoined to other buildings. Such premises should be inviolable, but with a right of entry reserved in case of fire or other *force majeure*, or crime in progress. Since Consular Agents usually establish their office in a local business enterprise, perhaps Article 31 and Article 33, out of an abundance of precaution, should be so worded that the premises and archives will be held inviolable, notwithstanding the fact that the Consular Agency is headed by a local businessman and usually located on his local business premises, both being otherwise subject to local jurisdiction.

Article 32

This Article may be intended to eliminate any differentiation in treatment as between property leased by a sending State and property owned by it. While the objective is clear, this would involve establishment of a new concept in the administration of property taxes. Generally no distinction is drawn in the application of property taxes on the basis of who the lessee may be. Thus, property leased by the United States Federal Government from private owners is generally subject to property tax although property owned by it is exempt. The practice which the draft would introduce would, moreover, fail to benefit the sending State in some cases and provide a windfall to the property owner. This would be likely to occur where a long term rental agreement is in existence which does not reflect the tax exemption status of the property, or where a sending State leases only a small part of a property, i.e., space in an office building.

Finally, it may be noted that this Article, in conjunction with the definition of consular premises, might exempt from tax property owned by a sending State even if only a small part were used for consular purposes and the balance rented out. This would be undesirable.

Article 33

In the United States domestic mail service, only first class mail is not subject to inspection. Relevant provisions of postal conventions should be considered.

Article 34

This Article might well be deleted.

Article 35

The United States is opposed in principle to the imposition of travel restrictions. In any event, if the consul cannot go to his nationals in a restricted zone, his nationals should be permitted to come to him.

Article 36

This Article corresponds to Article 25 of the Draft Articles on Diplomatic Intercourse and Immunities to be considered at the Vienna Conference. The Commission will presumably take due account of the Conference's decisions in the matter to the extent applicable. The United States believes that a diplomatic bag may be refused entry by the receiving State if it has reason to believe it contains articles other than correspondence, and the sending State is unwilling to open it for cursory inspection. The United States believes also that considerations which might warrant permitting diplomatic missions to operate their own radio transmitters do not necessarily exist with respect to consulate posts.

It is assumed that the Article is not intended to exempt consular officers from payment of postage.

Article 37

Consuls should have access to public records, and should be permitted to address local authorities—the term meaning authorities of branches of government other than the central government.

Article 39

The United States Federal Government is without authority to "protect" a foreign consular officer from what he or his Government may well consider a "slanderous" press campaign. Freedom of press is guaranteed by the United States Constitution.

Articles 40, 41 and 42

The basic principles of customary international law as presently understood are (1) that consuls do not enjoy a diplomatic character, and (2) that the jurisdiction of the territorial sovereign is presumed. The Draft Articles 40 and 41 attempt to bring about a change in this area by providing for a general inviolability of consuls and immunity from jurisdiction. The various theories which have developed on the subject are outlined in the commentary.

It is noted, however, that Article 40 (1) would waive the personal inviolability of consuls in cases of offences "punishable by a maximum sentence of not less than five years' imprisonment" or, alternatively, "in the case of a grave crime". The wording seems unsatisfactory, considering the practice of certain States to impose severe criminal sanctions for so-called "political crimes". An analogy can be drawn here with extradition treaties (see, e.g., the multilateral Montevideo Treaty of 1933, 49 Stat. 3111), which provides that the act for which extradition is sought must constitute "a crime and (be) punishable under the laws of the demanding and surrendering State with a minimum penalty of imprisonment for one year". Similarly, Article 40 might be reworded to provide criminal jurisdiction over consular officers in case of grave crimes *only* where such offences constitute such a crime under both the laws of the sending and the receiving State.

The test as to whether a function is official is whether the sending State assumes responsibility for it. The officer concerned is not the person to decide.

Further consideration should be given to the matter of requiring a consular officer or employee to give evidence or permitting him to decline to give evidence, and to his taking an oath with the possibility of liability for perjury or contempt of court.

Article 43

United States immigration laws impose no requirements regarding residence and work permits.

Article 45

The grant of exemption from taxation to members of a consulate and their families is conditioned on their not carrying on "any gainful private activity". It is not clear whether the quoted phrase is consistent with the intent of the Article. If an individual were to make investments in the United States, it would constitute "gainful private activity". Under this circumstance, none of the exemptions accorded by Article 45 would apply to such an individual. It does not seem to be the intended result.

The commentary points out that under Article 50 there are excluded from the scope of the exemption members of a consulate and their families who are nationals of the receiving State. This exclusion is desirable as far as it goes, but it does not go far enough. The principle incorporated in Article 44 seems highly appropriate in connexion with this Article, so that not merely nationals but also persons who are permanently resident in the receiving State would fall outside the scope of the exemption. There is a large and growing body of persons in the United States, and presumably elsewhere, whose employment is largely with various foreign missions and who are permanent residents of the host country. There seems to be no sound reason why they should be tax-exempt or why their tax liability should vary from time to time depending upon whether their employment is with a foreign mission. In this connexion, it may be noted that the imposition of a tax on the remuneration of employees is not a tax on a foreign government, and there would seem to be no legal objection to this levy. Moreover, the mechanism by which wages and salaries are commonly determined in these cases is generally such that the taxable or exempt status of the employee is an irrelevant factor. Consequently not even an indirect burden may be said to be imposed on the foreign government. In any event, these individuals are beneficiaries of the services of the receiving government and should not be absolved from sharing its costs.

The Article grants to members of a consulate and their families exemption from certain taxes other than "indirect taxes incorporated in the price of goods or services". The meaning of this language is ambiguous. It is not clear whether this refers only to those taxes which normally are not stated separately, or whether it refers to taxes which cannot ordinarily be separated out of the price. The former interpretation would be more restrictive than the latter. Thus, the manufacturer's excise tax on automobiles is not usually quoted separately from the price, but it is readily ascertainable. Either interpretation would depart significantly from existing United States practices and would not be desirable. Under existing law, consular officers of foreign governments are exempt from Federal excise taxes, the legal incidence of which would fall upon them in connexion with transactions arising in the performance of their official duties. The exemption thus applies to such taxes as those on transportation, admissions and dues, and communications. It does not apply to the various excise taxes imposed either at the manufacturer's or retailer's level.

Articles 46-53

These articles are among those which should be considered in the light of the results of the Vienna Conference.

Articles 54-63, Chapter III, "Honorary Consuls"

The United States suggests that this chapter may be unnecessary. While the United States does not now appoint honorary consuls, it does appoint consular agents, who are often resident in the country, and engaged in business. The United States accords consular recognition to honorary consuls in the United States appointed by other governments, but does not accord them personal privileges and immunities. The United States refuses to recognize in a consular capacity, other than "honorary", any person who is a national or permanent resident of the United States.

Consular agents and honorary consular officers, who are nationals or residents of the receiving State, should be entitled, in the performance of their official functions and the custody of the archives of the consular post, to whatever rights and privileges other consular officers of the sending State would enjoy in those respects. Except for that, their status and that of their families and households in the receiving State should be the same as any other national or permanent resident.

The United States observes also that while the provisions on nationality adopted at the Vienna Conference should be considered, the language adopted at Vienna may not be entirely suitable for incorporation in a proposed convention relating to consular personnel. The United States Constitution provides that all persons born "subject to the jurisdiction thereof" automatically acquire United States nationality at birth. Since a consular officer's child is not immune from United States jurisdiction, it automatically acquires United States citizenship if born in the United States. The child of a diplomatic officer, in contrast, is immune from jurisdiction, and therefore does not acquire United States citizenship automatically.

Article 65

The first text is not acceptable. It is considered unnecessary and undesirable to require, either explicitly or impliedly, that the contracting parties enter into special agreements for the purpose of retaining in force bilateral conventions between them. As to a bilateral convention in force at the time of the entry into force of the multilateral convention, it is understood that the normal rule would apply that, to the extent that there is any real conflict between the provisions of the two conventions, the one later in time will prevail, and that other provisions of both will continue in effect according to their tenor. It is to be expected that, after entry into force of the multilateral convention, if two of the contracting parties negotiate a bilateral convention they will give adequate consideration to the terms of the multilateral convention and consider to what extent, if any, they wish to amplify the scope of provisions on

consular intercourse and immunities or include in the bilateral convention provisions having the effect of modifying as between themselves the multilateral convention.

The second text for Article 65 is closer to a statement of the situation, but the question may be raised whether the expression "shall not affect" is in accordance with the actual intent. If it were intended that, even as to provisions where there is a real conflict, the multilateral convention shall not affect the prior bilateral convention, then the second text would accomplish that purpose. Ordinarily, as indicated above, it would be expected that, in any case of real conflict between the provisions, the multilateral, being later in time, would prevail. However, if it were the consensus of opinion that the prior bilateral convention should be left unaffected by anything in the multilateral convention, the United States would be prepared to acquiesce in a decision to that effect. As indicated in the commentary, the multilateral convention would then apply only to matters not covered by the bilateral convention. So far as a later bilateral convention is concerned, the second text would leave the way open for such later convention to have the effect, as between the parties thereto, of modifying or limiting the application of certain provisions of the multilateral convention. This would be the normal application of the later-in-time rule.

19. Yugoslavia

Transmitted by a note verbale *dated 28 February 1961 from the Permanent Representative of Yugoslavia to the United Nations*

[*Original: French*]

The draft articles on consular intercourse and immunities adopted at the twelfth session of the International Law Commission contain the principles of contemporary international law and generally recognized practice, and are in principle acceptable to the Government of the Federal People's Republic of Yugoslavia.

With regard to certain articles of the draft the Government of the Federal People's Republic of Yugoslavia considers it desirable to point out a few details where the text can be somewhat improved at its second reading in the International Law Commission, and requests the Secretary-General to transmit the comments made hereunder to the Commission.

Article 1. It would be desirable to state whether the consular agent referred to in section (*f*) of this article enjoys the same consular privileges and immunities as a consul.

A proper definition of the terms "sending State" and "receiving State", as set forth in article 3, commentary, paragraphs 7 and 8, could, for the sake of completeness, be inserted in the text of article 1.

Article 4. The Government of the Federal People's Republic of Yugoslavia prefers the first variant of this article, which comprises a general definition of consular functions, since it is in fact impossible to include all the aspects of such functions in one definition. Any enumeration of these functions, however detailed, would be incomplete.

It should be noted that, as a result of the internal distribution of powers in the receiving State, the consul is often unable to deal with the local authorities in the exercise of many of his functions. For this reason it would be desirable to add at the end of paragraph 2 of article 4 of the first variant, after the expression "with the local authorities", the following phrase: "or with the central authorities in connexion with consular matters which in the first instance normally fall within their competence".

Should the Commission consider it more desirable to adopt the second variant, the Government of the Federal People's Republic of Yugoslavia will not oppose this—in spite of the views expressed above—but in that case the provisions proposed therein, i.e., the enumeration of consular functions, should be the subject of more detailed study. Such a review is necessary because the Commission has not discussed the text of the second variant in detail. The Government of the Federal People's Republic of Yugoslavia requests the Commission to take the following observations into consideration:

(*a*) First of all, it is desirable to insert a general provision stipulating that consular functions are exercised within the limits of the legislation of the receiving State. When the second variant is discussed, consideration might be given to the following:

I

Functions concerning trade and shipping

Paragraph 2 (*a*). It might be added that the consul is competent to deliver and renew the validity of ship's papers and renew passports of the crew.

Paragraph 2 (*c*). The consul does not draw up the manifests but may certify them, particularly in the case of manifests of ships of any flag carrying cargo consigned to the sending State.

Paragraph 2 (*e*). The authorization for the consul to settle all disputes between masters, officers and seamen, even disputes unconnected with employment, is too comprehensive.

Paragraph 2 (*g*). A consul cannot be permitted to act as the agent of a shipping company.

Paragraph 2 (*h*). It should be decided whether the consul should be informed of searches conducted on ships when his residence is not at the port and for how long he should be awaited in his absence. There is no provision for this in international law except with regard to criminal matters (article 19 of the Convention on the Territorial Sea, 1958).

Paragraph 2 (*j*). Salvage operations are a matter of the public policy (*ordre publique*) of each State and the consul cannot be permitted to direct such operations. It is, however, within his competence to ensure, on behalf of the party concerned, that the appropriate salvage measures be taken.

Paragraph 3 (*d*). It would be wrong to authorize the consul to supervise compliance with international conventions. He is not empowered to make representations with regard to violations of international agreements since this falls within the competence of the diplomatic mission.

A distinction should be made between civil, public and military aircraft, since each has a different status and receives different treatment. Furthermore, paragraph 4 distinguishes between "vessels" and warships.

The Government of the Federal People's Republic of Yugoslavia considers that warships, since they are ex-territorial, do not come within the competence of consuls.

II

Functions concerning the protection of nationals of the sending State

Paragraph 7. The Government of the Federal People's Republic of Yugoslavia agrees that the consul may represent, without producing a power of attorney, the nationals of his country in all cases connected with succession, provided that the parties concerned are not opposed to this and do not appear themselves before the authorities in question.

III

Administrative functions

Paragraph 8. With respect to the delivery of acts of civil registration, the State of residence normally reserves the sole right to deliver death certificates (in view of the possibility of criminal proceedings) and birth certificates. Marriage certificates are governed by the procedure agreed upon by the two States concerned.

Paragraph 8 (*g*). The stipulation according to which the consul would transmit benefits, pensions or compensations to persons entitled to such payments in the foreign territory, in particular to the nationals of the receiving country, seems somewhat difficult to accept.

Paragraph 11. The consul may neither receive nor draw up statements in the receiving State which could violate its public policy (*ordre publique*).

Paragraph 13. The consul cannot be authorized to receive for safe custody articles which it is prohibited to export.

Paragraph 17. The Government of the Federal People's Republic of Yugoslavia agrees that, in given conditions, the consul may exercise additional functions.

Article 5. It is desirable to make provision in section (*c*) for the consul to be informed not only in the case of accidents involving ships but also of those involving aircraft.

Article 8. A point to be clarified is whether agents belong to the same class as consuls or to a special category of consular officials.

Article 15. The Government of the Federal People's Republic of Yugoslavia believes that paragraph 2 of the commentary should be inserted in the text of the provisions (presentation of the consular commission and *exequatur* by the consul himself, should the Government of the receiving State omit to fulfil these obligations).

Article 16. It would be desirable for the Commmission to consider whether, and in what cases, provisional recognition is required for the acting head of post, even in cases where the acting head of a consular post serves in that capacity for a long period. Unless this is clarified, the institution of the delivery of the *exequatur* might be jeopardized.

Article 18. The occasional performance of diplomatic acts by the consul should, in the opinion of the Government of the Federal People's Republic of Yugoslavia, be subject to the articles on Diplomatic Intercourse and Immunities and not to those on consular intercourse.

The Government of the Federal People's Republic of Yugoslavia considers that this article should be omitted.

Article 22. The receiving State should decide on the number of consular staff it is willing to receive in its territory. In case of dispute, the Government of the Federal People's Republic of Yugoslavia considers that the matter should be referred to arbitration on the understanding that the decision of the receiving State shall remain in force until the award.

Article 23. The Government of the Federal People's Republic of Yugoslavia considers that it would not be desirable to stipulate that the sending State must be informed whenever a member of the consulate is deemed unacceptable.

Information of this kind could be more detrimental to good relations between the States than the absence of such information.

Article 26. It is desirable to stress that upon severance of diplomatic relations there is no interruption of consular relations and that the consular sections of diplomatic missions then continue to function as consulates.

In such cases, it is necessary to make contact possible between consulates and the representatives of the protecting Power.

Article 29. It would be desirable to decide in the Commission whether the head of the consular post has the right to fly the national flag on his personal means of transport, since this does not necessarily follow from paragraph 2 of this article.

Article 31. The Government of the Federal People's Republic of Yugoslavia considers that it would be useful to make provision for authorization to be granted, either by the head of the consular post or some other person authorized for this purpose, to representatives of the authorities of the receiving State to enter the consular premises in case of fire or similar emergency.

Article 33. This article would be more complete if the definitions of inviolable articles were incorporated separately in the body of the provision.

Article 35. With regard to this article, the Government of the Federal People's Republic of Yugoslavia considers that it should be stated clearly that the consul may be prevented from entering prohibited zones even if they are situated within his consular district and his intention to enter them is based on the need to exercise his consular functions.

Article 37. Paragraph 2 of this article, which deals with the question of the consul's communication with the central authorities, could be completed as follows: "or such communication is indispensable in connexion with consular functions and relates to the competence of the central authorities to rule in the first instance on the scope of the consular activity".

Article 40. In the opinion of the Government of the Federal People's Republic of Yugoslavia, it should be explicitly stated that it is possible for the sending State to waive the immunity referred to in this article and also that it must waive the same in the case of an offence committed by a consular official whenever the sending State has no justifiable interest in preventing legal proceedings from being taken. Provision should also be made to cover the obligation of the sending State to try any official who could not be tried, or to whom the penalty could not be applied, in the receiving State because of his immunity.

With regard to the variants in paragraph 1 of article 40, the Government of the Federal People's Republic of Yugoslavia considers that it would be desirable to state that the consul may not be imprisoned except in a case where he has committed an offence punishable by a minimum sentence of five years' imprisonment.

Article 41. It would be desirable, in order to make the text clearer, to add at the end of the article, which refers to the immunity from jurisdiction of consular officials, the term "consular" before the word "functions".

Article 42. The Government of the Federal People's Republic of Yugoslavia considers it desirable to provide, in the interests of establishing the truth in a dispute at law, that the consul may, instead of giving evidence at his office or residence, submit a written declaration.

The effect of this could be that consular officials would less frequently refuse to give evidence.

Finally, in the opinion of the Government of the Federal People's Republic of Yugoslavia it would be desirable to insert in article 42 a rule stipulating that, in a case where a consular official refuses to give evidence or claims that the evidence is connected with the exercise of his functions, official correspondence or documents, the receiving State may request the sending State through the legal diplomatic channel either to instruct the consul to give evidence or to release him from official secrecy whenever the sending State does not consider this secrecy to be of essential importance to its interests. This is suggested in view of the fact that exemption from the duty to give evidence cannot be considered a personal privilege of the consul; such exemption is an immunity granted in the interests of the service, and it is for the sending State to judge whether this interest really exists.

It would also be desirable to provide that the consul has the right to demand exemption from the requirement of testifying under oath.

Article 45. In the opinion of the Government of the Federal People's Republic of Yugoslavia, it should be stated that the consul is liable to taxation on capital invested for gainful purposes or deposited in commercial banks.

Article 46. It would be desirable to add at the end of paragraph (*b*) of this article the words "and foreign motor vehicles". It should also be specified that the "articles intended for their establishments" must have been actually received.

If such objects, after being imported by the consul free from customs duties, are sold, it should be specified that customs duties must be paid or that the sale of such articles may only take place in conformity with the customs regulations of the receiving State.

Article 47. The exemption from succession duties on the movable property of the consul and members of his family could be restricted to property intended for direct personal use, or for the household of the person inheriting the property.

Article 50. The Government of the Federal People's Republic of Yugoslavia considers that it should be specified which persons are to be considered members of the consul's family.

Article 52. In the opinion of the Government of the Federal People's Republic of Yugoslavia, this article does not apply to a consul's private visits to third States.

Article 53. It is indispensable to insert in this article a provision to the effect that consuls have no right to provide asylum.

Article 54. In the opinion of the Government of the Federal People's Republic of Yugoslavia, the provisions of article 31 of the draft on the inviolability of consular premises can only apply, in the case of honorary consuls, to premises intended solely for the exercise of consular functions.

Article 59. Paragraph 2 of the commentary, which stresses that this article does not apply to nationals of the receiving State, should be inserted in the body of this article as paragraph (*c*).

Article 65. With respect to the relationship between the present articles and bilateral conventions, the Government of the Federal People's Republic of Yugoslavia considers that the first text is more acceptable, and that it could terminate with the following phrase: "provided that the minimum guarantees offered by this Convention are at all times extended". Alternatively, it could be stressed that future conventions may be concluded provided that they are not, at least, contrary to the basic principles of this Convention.

Table of references indicating the correspondence between the numbers allocated to the articles of the final draft on consular relations adopted by the International Law Commission and those allocated to the articles of the various preliminary proposals and drafts

	A *Draft provisional articles prepared by the Special Rapporteur 9th session of ILC, 1957 (A/CN.4/108)*	*B* *Texts of draft articles 1–19 adopted by ILC, 11th session, 1959 (A/4169)*	*C* *Additional articles proposed by the Special Rapporteur, 12th session of ILC, 1960 (A/CN.4/131)*	*D* *Draft provisional articles submitted by the Special Rapporteur, 12th session of ILC, 1960 (A/CN.4/L.86)*[a]	*E* *Draft articles adopted by ILC, 12th session, 1960 (A/4425)*	*F* *New proposals submitted by the Special Rapporteur in the light of the comments of Governments, 13th session, 1961 (A/CN.4/137)*[b]	*G* *Draft final articles adopted by ILC, 13th session, 1961 (A/4843)*
Preamble	—	—	—	—	—	—	[c]
Definitions	[d] and art. 35 (para. 1)	art. 1	—	art. 1 and 54	art. 1	art. 1 and 45	art. 1
Chapter I:							
Consular relations in general	—	—	—	—	—	—	—
Section I:							
Establishment and conduct of consular relations	—	—	—	—	—	—	—
Establishment of consular relations	art. 1 and 19	art. 2[e]	—	art. 2[e] and 50	art. 2[e] and 26	art. 2 and 26	art. 2
Exercise of consular functions	—	—	—	—	—	—	art. 3
Establishment of a consulate	art. 2	art. 3 (paras. 1–4)	—	art. 3 (paras. 1–4)	art. 3 (paras. 1–4)	—	art. 4
Consular functions	art. 13[f]	art. 15[g]	—	art. 4[g]	art. 4[g]	art. 4 and addit. article 4a	art. 5
Exercise of consular functions in a third State	—	art. 3 (para. 5)	—	art. 3 (para. 5)	art. 3 (para. 5)	art. 3 (para. 5)	art. 6
Exercise of consular functions on behalf of a third State	art. 16	art. 4	—	art. 5	art. 7	—	art. 7
Appointment and admission of heads of consular posts	art. 5	art. 7	—	art. 8	art. 10	—	art. 8
Classes of heads of consular posts	art. 3 (para. 1)	art. 5	—	art. 6	art. 8	—	art. 9
The consular commission	art. 6	art. 9	—	art. 10	art. 12	—	art. 10
The *exequatur*	art. 7 and 8	art. 10	—	art. 11	art. 13	art. 13	art. 11
Formalities of appointment and admission	art. 4	art. 6	—	art. 7	art. 9	—	art. 12
Provisional admission	art. 9	art. 11	—	art. 12	art. 14	—	art. 13
Obligation to notify the authorities of the consular district	art. 10	art. 12	—	art. 13	art. 15	art. 15	art. 14
Temporary exercise of the functions of head of a consular post	art. 11	art. 13	—	art. 14	art. 16	—	art. 15
Precedence	art. 3 (para. 2)	art. 14	—	art. 15 and 57	art. 17 and 62	—	art. 16
Performance of diplomatic acts by the head of a consular post	art. 14 and 15	art. 16 and 17	—	art. 16 and 17	art. 18 and 19	—	art. 17
Appointment of the same person by two or more States as head of a consular post	—	—	—	—	—	—	art. 18
Appointment of the consular staff	—	—	art. I	art. 19	art. 21	—	art. 19
Size of the staff	—	—	—	—	art. 22	—	art. 20
Order of precedence as between the officials of a consulate	—	—	—	—	—	—	art. 21
Appointment of nationals of the receiving State	—	art. 8	—	art. 9	art. 11	—	art. 22
Withdrawal of *exequatur*							
Persons deemed unacceptable	art. 17	art. 18	art. II	art. 18 and 20	art. 20 and 23	—	art. 23
Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff	—	—	art. IV	art. 21	art. 24	—	art. 24
Section II:							
End of consular functions	—	—	—	—	—	—	—
Modes of termination of the functions of a member of the consulate	art. 18	—	—	art. 49	art. 25	art. 25	art. 25
Right to leave the territory of the receiving State and facilitation of departure	—	—	art. XI	art. 51	art. 27	—	art. 26
Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances	—	—	art. XII	art. 52	art. 28	—	art. 27

Chapter II:							
Facilities, privileges and immunities of career consular officials and consular employees	—	—	—	—	—	—	—
Section I:							
Facilities, privileges and immunities relating to a consulate	—	—	—	—	—	—	—
Use of the national flag and of the State coat-of-arms	art. 21 and 22	—	—	art. 22 and 23	art. 29	art. 29	art. 28
Accommodation	—	art. 19	—	art. 24	art. 30	art. 30	art. 29
Inviolability of the consular premises	art. 25	—	—	art. 25	art. 31	—	art. 30
Exemption from taxation of consular premises	—	—	—	art. 26	art. 32	—	art. 31
Inviolability of the consular archives and documents	art. 25	—	—	art. 27	art. 33	art. 33	art. 32
Facilities for the work of the consulate	—	—	—	art. 28	art. 34	—	art. 33
Freedom of movement	—	—	—	—	art. 35	—	art. 34
Freedom of communication	art. 23 and 25	—	—	art. 29	art. 33 and 36.	—	art. 35
Communication and contact with nationals of the sending State	—	—	—	—	art. 6	—	art. 36
Obligations of the receiving State	art. 34	—	—	art. 48	art. 5	art. 5	art. 37
Communication with the authorities of the receiving State	art. 24	—	—	art. 30	art. 37	—	art. 3
Levying of fees and charges and exemption of such fees and charges from dues and taxes	art. 26	—	—	art. 31	art. 38	art. 38	art. 39
Section II:							
Facilities, privileges and immunities regarding consular officials and employees	—	—	—	—	—	—	—
Special protection and respect due to consular officials	art. 20	—	—	art. 32	art. 39	—	art. 40
Personal inviolability of consular officials	—	—	special article (paras. 1–3)	art. 33 (paras. 1–3)	art. 40 (paras. 1–3)	art. 40 (paras. 1–3)	art. 41
Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings	—	—	special article (para. 4)	art. 33 (para. 4)	art. 40 (para. 4)	art. 40 (para. 4)	art. 42
Immunity from jurisdiction	art. 27 and 33	—	—	art. 34 and 47	art. 41	art. 41	art. 43
Liability to give evidence	art. 32	—	—	art. 40	art. 42	art. 42	art. 44
Waiver of immunities	—	—	—	—	—	additional article 50a	art. 45
Exemption from obligations in the matter of registration of aliens and residence and work permits	—	—	art. III	art. 35	art. 43	art. 43	art. 46
Social security exemption	art. 31	—	—	art. 36	art. 44	—	art. 47
Exemption from taxation	art. 28	—	—	art. 37	art. 45	art. 45	art. 48
Exemption from customs duties	art. 29	—	—	art. 38	art. 46	art. 46	art. 49
Estate of a member of the consulate or of a member of his family	—	—	art. VIII	art. 44	art. 47	—	art. 50
Exemption from personal services and contributions	art. 30	—	—	art. 39	art. 48	—	art. 51
Question of the acquisition of the nationality of the receiving State	—	—	art. V	art. 41	art. 49	—	art. 52
Beginning and end of consular privileges and immunities	—	—	art. VII	art. 43	art. 51	—	art. 53
Obligations of third States	—	—	art. IX	art. 45	art. 52	art. 52	art. 54
Respect for the laws and regulations of the receiving State	—	—	art. X	art. 46	art. 53	art. 53	art. 55
Special provisions applicable to career consular officials who carry on a private gainful occupation	art. 35 (para. 2)	—	—	art. 58	—	—	art. 56

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Chapter III:							
Facilities, privileges and immunities of honorary consular officials	—	—	—	—	—	—	—
Regime applicable to honorary consular officials	art. 36 and 37 (paras. 1 and 3)	—	—	art. 55 and 56 (paras. 1 and 3)	art. 54 and 60	art. 54	art. 57
Inviolability of the consular premises	—	—	—	—	—	—	art. 58
Exemption from taxation of consular premises	—	—	—	—	—	—	art. 59
Inviolability of consular archives and documents	art. 37 (para. 2)	—	—	art. 56 (para. 2)	art. 55	—	art. 60
Special protection	—	—	—	—	art. 56	—	art. 61
Exemption from obligations in the matter of registration of aliens and residence permits	—	—	—	—	art. 57	—	art. 62
Exemption from taxation	—	—	—	—	art. 58	—	art. 63
Exemption from personal services and contributions	—	—	—	—	art. 59	—	art. 64
Obligations of third States	—	—	—	—	—	—	art. 65
Respect for the laws and regulations of the receiving State	—	—	—	—	art. 61	—	art. 66
Optional character of the institution of honorary consular officials	—	—	—	—	art. 63	—	art. 67
Chapter IV:							
General provisions							
Exercise of consular functions by diplomatic missions	—	—	—	—	—	additional article 52a	art. 68
Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State	—	—	art. VI	art. 42	art. 50	art. 50	art. 69
Non-discrimination	—	—	art. XIII	art. 53	art. 64	—	art. 70
Relationship between the present articles and conventions or other international agreements	art. 38	—	—	art. 59	art. 65	art. 65	art. 71

[a] Prepared by the Special Rapporteur for the convenience of the members of ILC, this text comprised the articles already adopted at the eleventh session of ILC (A/4169), the texts contained in the first report of the Special Rapporteur to the ninth session (A/CN.4/108) and the additional articles contained in the second report of the Special Rapporteur to the twelfth session of ILC (A/CN.4/131), and was amended and supplemented to bring it into line with the draft articles on diplomatic intercourse and immunities.

[b] The articles listed comprise only those for which the Special Rapporteur had proposed an amended text.

[c] The Commission decided that the text proposed for the preamble would be inserted in the commentary introducing the draft convention (A/CN.4/141, para. 36).

[d] "Questions of terminology", part one, chapter VI of the report.

[e] The Commission reserved its decision on the second paragraph proposed by the Special Rapporteur.

[f] The Special Rapporteur presented two variants.

[g] The Commission adopted two types of definition—one general and the other detailed and enumerative. It also submitted the two types of definition to Governments for their comments. The general definition was included in the draft whereas the detailed definition was reproduced in the commentary.