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CONSULAR RELATIONS

Comments by Governments on the draft articles on consular relations
adopted by the International Law Commission at its thirteenth
session in 1961

Addendum

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19. AUSTRIA

Transmitted by a note verbale of 28 August 1962 from the
Permanent Representative to the United Nations

[Original: English]

Austria welcomes the present draft as a valuable basis for the elaboration of a Convention on Consular Relations. The Austrian Government has the honour to submit the following comments for the preparation of the conference:

Article 1

At the end of paragraph 2 the term "honorary consular officials" should be changed into "honorary officials".

Motivation

In paragraph 2 the two terms "honorary consular officials" and "honorary officials" are used together; the use of one formulation would be advisable.

Article 5 (f)

It should be added "if the law of the receiving State does not provide for the opposite".

Motivation

The execution of the said function by consular officials is not known in the Austrian law. However, the necessity of this provision for States which have a different organization with regard to the legal status of persons is to be recognized in principle.

The Ministry of Foreign Affairs is of the opinion that the functions enumerated in (f) should explicitly be limited to the sending State because the receiving State should not be obliged to attribute any legal character to such documents and acts in its internal sphere.

Article 5 (k)

With regard to inland vessels instead of "having the nationality of the sending State" the wording "being listed in the register of the sending State or are otherwise entitled to show the flag of the sending State" should be used.

Motivation

With regard to inland vessels it seems to be more appropriate to speak rather of the listing in the register of a country than of a nationality.

At the end of this article, two new letters should be added:

"(m) Remittance of payments which are due to the entitled persons on the basis of the internal legal provisions or of international agreements, especially on the basis of the legal provisions concerning the social security;

"(n) Acceptance of social security revenues, pensions or compensations, to which the citizens of the sending State are entitled, in case the recipient does not stay in the receiving State."

Motivation

The execution of functions which are connected with the protection of the social security of individuals should also belong to the tasks of a consul.

Article 12

Here a formulation would be preferred which clearly states according to whose law and practice the appointment of the head of a consulate (sending State) and on the other hand the admission of the head of the consulate (receiving State) are to be arranged.

Article 30, paragraph 1

Here should be added: "... head of office or his superior office".

Motivation

As regards the permission for entering the consular premises, the consent of the head of the diplomatic mission of the sending State in the receiving State or, if need be, the consent of the Ministry for Foreign Affairs of the receiving State should be sufficient.

After paragraph 3 a new paragraph 4 should be added which provides that the consular premises must not be used as asylum.

Article 32

The words "and documents" should be deleted.

Motivation

According to paragraph 2 of the commentary to this article, the expression "consular archives" includes already "papers, documents, correspondence, books ...". In this connexion see also article 1, paragraph 1 (k).

It would be advisable to provide for an analagous provision to article 60 which obliges the consulates to separate official documents from others. The immunity should be limited to the official documents. See also the regulations of article 60.

Article 35

Here a clarification seems to be necessary which defines whether the correspondence leaving the consulate is also inviolable at the recipient and whether the correspondence addressed to the consulate is already inviolable before its arrival there.

Paragraph 5: A clarification of the term of the personal inviolability would seem opportune.

Article 37 (c)

With regard to the vessels for a more precise definition again the following formulation should be used: "which are listed in the register of the sending State or are otherwise entitled to show the flag of the sending State".

Motivation

See article 5 (k).

Article 41, paragraph 2

The beginning of this paragraph should be formulated in more general terms, such as: "Furthermore (or: Therefore) consular officials shall not be committed to prison ...".

Motivation

One cannot exclude the exceptional case of paragraph 1.

Article 42

The cases "pending trial" and "the institution of criminal proceedings" should be mentioned in reverse sequence in order to achieve more clarity.

Article 43

This article should be placed as the first of the articles concerning the immunity (articles 41-45).

Article 44, paragraph 2

The second sentence of this paragraph should start with the words "It shall ..." instead of "In particular it shall, where possible, ...".

Motivation

Taking a testimony in the residence of the consular official or at the consulate as well as the acceptance of a statement in writing should be exceptions.

Article 45, paragraph 3

An additional clause at the end seems to be necessary, saying "but subject to the provisions of article 44, paragraph 3".

Motivation

The obligation to secrecy must not be impaired even in these cases.

Article 46, paragraph 2

The preliminary words which give a definition of the persons concerned should be replaced by the words: "Members of the consulate shall be exempt ...".

Motivation

According to the valid Austrian legal provisions only the head and the members of a consular office admitted in Austria which is headed by a career official are exempt from obligations with regard to work permits imposed on employers and employees concerning the employment of foreign labour.

Article 47

For this article a complete new formulation may be suggested:

"1. Subject to the provisions of paragraphs 3 and 4 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: members of the consulate who are nationals of the sending State and have their permanent residence in the receiving State, as long as they are not public civil servants, shall, within three months after the beginning of their occupation - here could be added 'and later on in intervals of one year' (in order to avoid hardship) - have the choice between the inclusion into the compulsory system of social security for employees of the sending State and the inclusion into the system of the receiving State.

"2. The regulation provided in paragraph 1 shall apply also to members of the private staff who are in the sole employ of members of the consulate, are citizens of the sending State and have their residence in the receiving 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.

"5. The provisions of this article shall not prejudice bilateral or multilateral agreements previously concluded on social security and shall not hinder the conclusion of such agreements in the future."

The motivation will be given orally in the course of the Conference.

Article 54, paragraph 1

In addition to the foreseen cases of "proceeding to take up or return to his post or when returning to his own country" as a fourth possibility should be generally provided: "on official duty".

Motivation

This insertion should cover all cases whenever a part of a consular district may be reached quicker or easier from the residence of the consul because of better traffic connexions in transit through a third State.

Article 56

After the words "career consular officials" in line 1 "and the members of their family" should be inserted.

Motivation

(a) It should be clarified that members of the families of career consular officials who carry on a private gainful occupation should not be favoured above the officials themselves.

(b) The term "gainful occupation" should be more specific and read as follows: "permanent (or continuous) private gainful occupation."

Motivation

Occasional gainful occupations, i.e. of journalistic nature, should not represent a sufficient reason for general levelling with honorary officials.

Article 58

The second sentence should be supplemented as follows: "In this case the provisions of article 30 should be applied accordingly".

Article 60

In the first line the words "... and documents" should be deleted. Furthermore, the second sentence would have to be formulated authoritatively, i.e. the term "provided that" should be replaced by an authoritative version.

Motivation

See article 32.

Article 68, paragraph 3

The last part, "if the local law and usages so permit", should better be replaced by "if the laws and regulations so permit" or "only in accordance with the laws and regulations of the receiving State".

Motivation

Here legal provisions should represent the criterion.

Article 69

In order to achieve greater clarity the wording should be changed as follows: "... shall enjoy immunity from jurisdiction and personal inviolability only in respect ...". Furthermore, it should be considered whether the articles concerning immunity to which it could be referred should be mentioned here explicitly.

Article 71

For the prevailing final article the following formulation is suggested:
"The provision of these articles shall not affect bilateral agreements previously concluded between the two parties on consular relations and immunities and shall not hinder the conclusion of such agreements in the future."

20. BURMA

Transmitted by a note verbale of 6 September 1962 from the
Permanent Representative to the United Nations

[Original: English]

The Revolutionary Government of the Union of Burma deeply appreciates the efforts made by the United Nations and the International Law Commission to codify customary rules and provisions that have been generally recognized and applied to consular relations between States.

The draft articles form a suitable basis for the codification and development of international law on the subject of consular privileges and immunities, and the Revolutionary Government of the Union of Burma finds the draft articles generally acceptable, subject to the following comments and reservations.

1. As the commentaries on the draft articles contain many principles, the commentaries should be incorporated in the convention on consular relations.
2. Questions not expressly or impliedly settled by the convention should continue to be governed by customary law based on the principle of reciprocity.
3. The Revolutionary Government of the Union of Burma reserves its final position with regard to the contents of the articles pending detailed examination and discussion at the conference of plenipotentiaries.

21. INDONESIA

Transmitted by a note verbale of 27 August 1962 from the
Permanent Representative to the United Nations

/Original: English/

As one of the founding members of the Asian-African Legal Consultative Committee, the Government of Indonesia is keenly interested in the codification of international law and its progressive development as an important means to promote peaceful relations among States.

The Government of Indonesia, therefore, welcomes the initiative of the International Law Commission at its seventh session to take up the codification and progressive development of customary rules of consular relations.

Upon the success of the efforts of the International Law Commission to draw up final draft articles on consular intercourse and immunities, the Government of Indonesia would like to extend once more its congratulations to the Special Rapporteur and the International Law Commission, especially at its third session, and to express its confidence that these final draft articles will form a valuable basis for drawing up conventions on consular relations.

The Indonesian Government has studied the final draft articles carefully and is able to express its agreement with them in general. Meanwhile, however, the Indonesian Government wishes to make the following observations and comments on particular articles:

Article 1, paragraph 1(f)

Based upon document A/4843 (Report of the International Law Commission covering the work of its thirteenth session, 1 May-7 July 1961) the definition given to this paragraph 1(f) is identical to that given to paragraph 1(e), in the sense that the definition of paragraph 1(f) is the pluralistic form of the definition of paragraph 1(e) and contradictory in terms with paragraph 4 of the commentary. Consequently the definition of paragraph 1(f) should be amended to make it concur with the commentary concerned (paragraph 4) and read as follows:

"(f) 'Members of the consulate' means all the consular officials and consular employees in a consulate."

Article 5 (a)

Behind the words "... permitted by international law" should be added the words: "and not contrary to the law of the receiving State", so that the whole paragraph reads as follows:

"(a) Protecting in the receiving State the interests of the sending State and its nationals, both individuals and bodies corporate, within the limits permitted by international law and not contrary to the law of the receiving State."

Article 15, paragraph 1

It is the opinion of the Government of Indonesia, that members of the administrative and technical staff can be appointed as acting head of post only if they are not nationals of the receiving State and with the consent of the receiving State, taking especially into consideration the possibility of their exercising diplomatic acts as referred to in article 17, which is at the discretion of the receiving State. Consequently, behind the words "... members of the administrative and technical staff" should be added the words "other than nationals of the receiving State, with the consent of the receiving State", so that the last sentence of paragraph 1 reads as follows:

"In the exceptional cases where no such officials are available to assume this position, the acting head of post may be chosen from the members of the administrative and technical staff, other than nationals of the receiving State, with the consent of the receiving State."

Article 24, paragraph 1(d)

It could be concluded from the provision of this paragraph that persons resident in the receiving State could be recruited as consular officials, but Indonesian consular practice allows local recruitment of persons resident in the receiving State as consular employees only.

Article 26

To prevent misunderstanding about the words "persons enjoying privileges and immunities", as it is still dubious which persons are entitled to enjoy privileges and immunities, this article should be amended to bring it in conformity with the commentary concerned and would then read as follows:

"The receiving State must, in case of armed conflict, grant facilities in order to enable members of the consulate and their private staff, other than nationals of the receiving State, and members of their families, irrespective of their nationality, to leave at the earliest possible moment. It must, in particular in case of need, place at their disposal the necessary means of transport for themselves and their property."

Article 30, paragraph 3

(a) The Indonesian Government is of the opinion that the immunities laid down in this paragraph should not be interpreted as absolute and that under special circumstances exceptions could be made. Therefore, the word "any" behind the words "immune from" and before the words "search, requisition, etc." should be deleted.

(b) Because of the scarcity of means of transport owned by Indonesian consulates abroad, Indonesian consular officials in most Indonesian consulates use their privately owned cars in carrying out their official functions. It is therefore the opinion of the Indonesian Government that also upon such means of transport, immunities as referred to in this paragraph should be conferred.

(c) The Government of Indonesia is further of the opinion that the immunities mentioned in paragraph 3 should likewise be conferred upon the residence and properties of the consular officials.

Article 35, paragraph 3

Consular bags should be used solely for the dispatch of official correspondence and of documents and articles intended for official use. In case, however, of serious suspicion a consular bag can, without prejudice to the immunities of consular archives and documents mentioned in article 32 and paragraph 3 of article 35, be opened in the presence of consular officials and officials of the receiving State. Consequently, paragraph 3 of article 35 should be deleted completely and instead read as follows:

"3. In principle, the consular bag shall not be opened or detained. However, in case of serious suspicion the consular bag may, with due regard to the provisions of article 32 and paragraph 2 of article 35, be opened in the presence of consular officials and officials of the receiving State."

Article 49, paragraph 2

In regard to this matter the Indonesian Government wishes to suggest that a reasonable time-limit should be fixed for determining the meaning of the words "at the time of first installation", as otherwise this article would completely lose its purpose.

22. SWEDEN

Transmitted by a note verbale of 29 August 1962 from the
Acting Permanent Representative to the United Nations

[Original: English]

By a letter of 14 March 1961, the Swedish Government transmitted comments on the draft articles concerning consular intercourse and immunities as adopted by the International Law Commission at its twelfth session. These observations have partly been taken into consideration by the Commission at its thirteenth session. In addition to the remarks thus already dealt with, the Swedish Government wishes to present the following observations.

These comments are submitted subject to the general qualification that prior to the Conference to be held at Vienna in March 1963, the Swedish Government will have to study further a number of the draft articles. Its final position to them will thus have to be reserved until the forthcoming Vienna Conference.

General observations

In the opinion of the Swedish Government the present draft articles form a good basis for the preparation of a universal convention on consular relations. Like the Vienna Convention on Diplomatic Relations, a future consular convention will have to deal mostly and primarily with questions concerning the status of consulates and their personnel, whereas questions concerning consular functions will have to be covered more summarily and not in an exhaustive way. Although a most commendable attempt has been made by the Commission to enumerate the more important functions of a consulate, the Swedish Government, in view of the complexities of this particular subject, still favours a more economic and broader definition along the lines suggested in its previous comments.

As regards the question of consular status an important feature of the Commission's draft is the tendency to equalize not only consulates with diplomatic missions, but also consular officials with diplomatic agents in respect of some privileges and immunities. The Commission is no doubt aware of the fact that its proposals in these respects go beyond what is regarded as general customary law. It may be added that the scope of the provisions also

surpasses the privileges and immunities accorded in the bilateral consular agreements which Sweden has concluded in recent years. Without taking any definite position to that tendency at this stage, the Swedish Government would think it advisable to proceed with great cautiousness along the suggested lines.

Special Observations

Article 30

The provisions concerning the inviolability of consular premises ought to be worded in a way permitting local authorities to enter such premises in case of fire, disaster or public health emergencies or when a crime has been or is about to be committed there.

Article 41

The provisions on personal inviolability should be formulated in such a way that they do not conflict with quarantine regulations or other provisions concerning public health or prevent action in cases of mental illness.

Article 50

Permanent residents of the receiving State should be excluded from the privileges enumerated in sub-paragraph. (b).
