

# **United Nations Conference on Consular Relations**

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**Draft articles on consular relations adopted by the  
International Law Commission at its thirteenth session**

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## 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 officials and 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 sub-paragraph, 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, especially 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.<sup>1</sup>

(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

<sup>1</sup> *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.*

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.<sup>2</sup>

(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.<sup>3</sup> 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 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.

<sup>2</sup> 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.*

<sup>3</sup> A/CN.4/137, pp. 15, *et seq.*

(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 national 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 conventions 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, *chancelliers*, consular secretaries, pupil *chancelliers*, 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 commission 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 of 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 1), 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; 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 of 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 explicitly 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 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.

*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 I. 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 consulate 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, paragraph 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 commu-

nications 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 *incomunicado* 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 1 (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 receipt 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 subject 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 appoint-

ment 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 it 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 court 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 "serious 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 inviolability 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 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 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 function, 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 provision 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 re-drafted 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 international 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 benefits 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 bases 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.