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A/CN.4/131

Second Report on Consular intercourse and immunities by Mr. Jaroslav Žourek, Special Rapporteur

Topic:
Consular intercourse and immunities

Extract from the Yearbook of the International Law Commission:-
1960 , vol. II

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CONSULAR INTERCOURSE AND IMMUNITIES

[Agenda item 2]

DOCUMENT A/CN.4/131

Second report by Jaroslav Zourek, Special Rapporteur

[Original text: French]
[30 March 1960]

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PART I

Question of the personal inviolability of consuls and their immunity from criminal jurisdiction

SECTION I: HISTORICAL INTRODUCTION

1. *Development of custom*

1. At the time when they were regarded as public ministers and were invested with judicial and diplomatic functions,¹ consuls enjoyed complete immunity from the jurisdiction of the receiving State. Their legal status in no way differed from that of the diplomatic agents of the present time.¹

2. At that time, an act of violence committed against a consul was regarded as a breach of international law, as is evidenced by a number of cases well known in diplomatic history. For example, Wicquefort (1606-1682 reports that the States-General of the United Provinces, whose consul at Cadiz had suffered an affront and had been detained for six or eight months by the Governor of Cadiz, made representations to the Court of Madrid, complaining of a breach of the *Droit des gens (jus gentium)*.²

3. In 1634, the Republic of Venice severed relations with Pope Urban VIII by reason of the offensive conduct of the Governor of Ancona towards the Venetian consul, Michele Oberti. The Governor, who suspected consul Oberti of having advised the Republic of Venice to send some galleys for the purpose of seizing a few vessels from Ragusa for non-payment of the duties

levied in the Gulf, instituted proceedings against the consul and, when the latter went to Venice to complain to the Senate, sent soldiers to his house and ordered the removal therefrom of the furniture and papers, even those relating to the exercise of the consular function. The Venetian Senate protested vehemently, and, to prevent an open breach with the Pope, the French ambassador interposed with a view to settling the dispute. But before a settlement could be reached, the Governor obtained a sentence of banishment against the consul *in contumacia*, on the ground that the consul had unloaded goods at a time of epidemic. After a further intervention by the French Ambassador, this incident was settled on the terms that the Governor would rescind the ban and agree to consul Oberti's reinstatement and that the consul would then be replaced by the Venetian Senate. The consul having died in the meantime, he was replaced by his brother, whom the Governor imprisoned and refused to release until he had given his word to leave the town and not to return. Outraged by these proceedings, the Venetian Senate expressed its indignation by refusing to give audience to the Pope's envoys and by forbidding its ambassador to enter the Pope's presence until the Governor of Ancona had been forced to give satisfaction.³

4. Wicquefort reports that the United Provinces wished to have their Consul at Genoa recognized as minister. But the Senate of Genoa answered that it did not recognize him as a public minister and that Genoa could not be expected to agree to more than the peaceful enjoyment of the rights and privileges attaching by custom to that type of office.⁴ And Wicquefort adds a sentence which indicates the profound change in the conception of the consular function that occurred in the second half of the seventeenth century—a change of which he himself was one of the main initiators:

“The *Consuls* are but merchants who, though responsible for adjudicating disputes which may arise between the nationals of their country, nevertheless

¹ See the Special Rapporteur's first report, in *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), pp. 74 and 75 and Special Rapporteur's article entitled *Histoire des relations consulaires*, in *Revue de Droit International pour le Moyen-Orient*, Sixth Year, No. 2 (December 1957), pp. 193-194.

² *L'Ambassadeur et ses fonctions*, latest edition, Cologne, 1715, Part I (the first edition was published in 1681), Book I, Section V, p. 76; cf. also E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, vol. I, reproduction of books I and II of 1758 edition (Washington, D.C., Carnegie Institution of Washington, 1916), Book II, chapter II, section 34, p. 282.

³ Wicquefort, *op. cit.*, pp. 76 and 77; see also Vattel, *loc. cit.*

⁴ Wicquefort, *op. cit.*, p. 76.

engage in business and are subject to the jurisdiction of the courts, both civil and criminal, of their place of residence. In this respect, therefore, their position is incompatible with the status of Public Minister.”⁵

5. In his *Mémoires touchant les ambassadeurs et ministres publics*, published in 1676-1679, Wicquefort cites the case of Gerbrant Sas, a lawyer at The Hague, who, in 1659, received a commission from George Downing, resident representative of the Protector of England, “to serve, to the exclusion of others, the English merchants in the conduct of their private business”. Wicquefort adds that Sas was authorized to exercise this function on the express condition that he could not claim any other rights or prerogatives than those enjoyed by the other lawyers. Believing that his status as a public minister made him immune from judicial proceedings, Sas wounded in the street a man by whom he thought he had been insulted. The Court of Justice ordered his arrest and imprisonment, and, despite the representations of the English envoy, sentenced Sas to a fine of a thousand pounds, to six years’ banishment, to payment of the costs of the trial and to imprisonment until payment was effected. A few days later, the States of Holland, acting under pressure by the States-General, declared that the sentence would not be executed and Sas was released. Wicquefort adds that Sas could in no case be regarded as a public minister, for he was not furnished with credentials for the States, did not negotiate with them and was employed only at the Court of Justice in the private business of the English merchants.⁶

6. The profound transformation which occurred in the consular institution in the countries of Europe after the second half of the seventeenth century in consequence of the change in international economic relations produced a change in the legal status of consuls. As permanent diplomatic missions became increasingly general in the seventeenth century, the consuls lost certain powers which were henceforth regarded as diplomatic functions. They ceased to be public ministers and hence were no longer entitled to claim the privileges and immunities they had enjoyed at a time when they were the only official representatives of States abroad. It would be wrong, however, to think that this transformation of the consular institution meant that the consuls lost all their immunities. The fact that the consuls ceased to be public ministers and to enjoy the privileges and immunities attaching to public ministers, in no way implies that they ceased to enjoy any privileges or immunities whatsoever. The lessening in the extent and importance of the consular functions was not so great as to reduce the consuls, so far as privileges and immunities are concerned, to the level of private individuals. Nevertheless, some learned authorities did go as far as to assert precisely that. A current of opinion hostile to the consuls emerged, and Wicque-

fort set himself up as the spokesman of this school of thought. He says that the princes who employ consuls “protect them as persons who are in their service and as any good master protects his servant and domestic; but not as Public Ministers”.⁷ It is really surprising that Wicquefort puts consuls, the official envoys of the sovereign, on the same level as servants, or the private staff. The hostile movement of opinion towards the consuls may be accounted for in several ways. First of all, the new methods of production radically transformed the trade which was an essential part of the new industrial relations, and gave rise to an imperative need for establishing the broad national market required for the new economy. With the support of the new class claiming political power, the monarchical State issued victorious from the centuries-old struggles with feudal particularism, affirmed its sovereignty and claimed exclusive jurisdiction in its territory. The jurisdiction previously exercised by the consuls, in both civil and criminal cases, became absolutely incompatible with the sovereign power of the territorial State and was bound to be frowned upon by governments. Another, closely related, reason for the change of opinion on the status of consuls is the fact that in the seventeenth century the consuls were usually merchants who were themselves engaged in commerce. It is very understandable that neither authors nor governments were disposed to concede privileges to merchant-consuls, especially since at that time, under the influence of mercantilist ideas, foreigners in general and foreign trade in particular were regarded with frank hostility. Lastly, the establishment of diplomatic missions and of the diplomatic profession, which was placed in the centre of political life and attended by a much greater degree of ceremony, caused the consular institution to be relegated to the background in a manner which was not perhaps entirely free of a certain amount of professional jealousy.

6A. An expression of this hostility towards the consuls is to be found in the late seventeenth and early eighteenth centuries in the provisions inserted in the treaties concluded between France and the Netherlands at Ryswick in 1697 (art. 30), Utrecht in 1713 (art. 38) and Versailles in 1739 (art. 40), which stipulate that in future consuls would not be admitted by either of the two Parties and that, if one of them should decide to send residents, agents or commissioners, these could choose as their place of residence only the habitual residence of the Court.⁸

7. Wicquefort, himself a diplomat, did not realize the exact nature of the transformation of the consular institution which was occurring in the second half of his life and could not correctly appreciate the status of the consuls in international life. He was wrong to base his opinion on old incidents such as the arrest of the consuls of the United Provinces at Cadiz and the offensive conduct of the Governor of Ancona towards the

⁵ *Ibid.*

⁶ *Mémoires touchant les ambassadeurs et les ministres publics*, by L.M.P. (Le Ministre prisonnier), Cologne, 1676-1679, vol. I, pp. 57-60.

⁷ Wicquefort, *L'Ambassadeur et ses fonctions*, vol. I, p. 63.

⁸ Fauchille, *Traité de droit international public*, 8th ed. (Paris, Arthur Rousseau, 1926), vol. I, part III, p. 115.

Venetian consul (see above, paras. 2 and 3). In both these cases, which occurred at a time when the consuls, as public ministers, still enjoyed inviolability and full immunity from jurisdiction, a violation of international law was involved, and these two cases cannot be regarded as providing the basis for a new international custom. It is not surprising, therefore, that Vattel should have seized on this weak point and observed that the examples quoted were contrary to the convictions of Wicquefort,⁹ who elsewhere resolutely defended the privileges and immunities of public ministers. Nevertheless, Wicquefort's ideas found a favourable echo in doctrine and practice.

8. Among the authors of the seventeenth century, Bynkershoek (1673-1743) firmly supported Wicquefort's viewpoint in his comments on the Decree of 13 October 1679 in which the States-General replied to a widow who had asked where she could bring an action against a consul of the States-General at Lisbon who had previously been domiciled at Rotterdam. The Decree stipulates that "in this country, she should bring the action in the court in which he could be sued if he were still living at Rotterdam". Bynkershoek, stressing the words "in this country" (*hier te Lande*), concludes that the consul may be sued or prosecuted in the country where he discharges his functions as well as in his country of domicile.¹⁰ He expresses the following opinion on the subject of consuls:

"And in truth, these consuls are but the defenders of their country's merchants, and sometimes also their judges; moreover, they are usually merchants themselves, sent out not to represent their prince in the country of another prince, but to protect their prince's subjects in matters concerning trade and often to administer justice between them in commercial disputes."¹¹

Basing himself on the opinions expressed by Wicquefort in his *Mémoires sur les ambassadeurs* and *Traité sur les ambassadeurs*, Bynkershoek criticizes the practice of the States of United Belgium, which sometime granted to consuls "the privileges of the *jus gentium*".¹²

9. Vattel reacted against the opinions of Wicquefort and Bynkershoek and, basing himself on the examples cited by Wicquefort, defended a correct view in his treatise published in 1758, which made him famous. After admitting that a consul is not a public minister and cannot lay claim to the latter's prerogatives, he adds:

"Since, however, he is entrusted with a commission by his Sovereign and is received in that capacity by

the Sovereign in whose territory he resides, he should, to a certain extent, enjoy the protection of the *jus gentium*. The Sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary for the proper performance of his functions; for otherwise the admission of the consul would be nugatory and delusive."¹³

He goes on to say that the functions of the consul "even seem to require that the consul should be independent of the ordinary criminal justice of the place where he resides, so that he cannot be molested, or imprisoned, unless he himself violates the law of nations by some enormous crime".¹⁴ He ended his polemic with Wicquefort with the correct judgement that, in the absence of treaties, custom should serve as the rule on these occasions, for the person who receives a consul is considered to do so on the footing established by usage.¹⁵

10. But though Vattel held the correct view, it was the opinions of Wicquefort which long influenced the case-law as reflected in judicial decisions.

2. Case-law

Barbuit's case (1737)

11. Mr. Barbuit, a tallow-chandler established in Great Britain, received in 1717 from the King of Prussia a commission as agent of commerce expressed in the terms of a consular commission, addressed not to the King of England, but to "all whom it may concern". In the King's absence, the commission was accepted by the Lords-Justices. In 1725, an action was brought against Barbuit for non-payment of debts and, ten years later, when a warrant for his arrest was issued, he claimed immunity on the grounds that he was a public minister. In a decision which has become famous and which is regarded as a leading case, Lord Talbot, the Lord Chancellor, after analysing Barbuit's functions according to the terms of the commission, reached the conclusion that he could not regard him otherwise than as a consul and in 1737, relying on the authority of Barbeyrac, Bynkershoek, Grotius and Wicquefort, refused to recognize his immunity.¹⁶

Triquet v. Bath (1761)

12. The decision in this case follows that in Barbuit's case.¹⁷

Heathfield v. Chilton (1767)

13. It was decided in this case that the law of the nations does not take in consuls, or agents of commerce, though received as such by the courts to which they

⁹ Vattel, *loc. cit.*

¹⁰ He cites by analogy the passage concerning a senator in *Digest*, I. IX 11, *De senatoribus* (Bynkershoek), *De Foro Legatorum tam in causa civili, quam criminali Liber Singularis*, 1721, cap. X, Collection *The Classics of International Law* (Oxford University Press, 1946), vol. 21, p. 482.

¹¹ "Et si verum amamus, Consules illi non sunt nisi Mercatorum Nationis suae defensores et quandoque etiam iudices, quin fere ipsi Mercatores, non missi, ut Principem suum repraesentent apud alium Principem, sed ut Principis sui subditos tueantur in iis, quae ad mercaturam pertinent, saepe et ut de iis inter eos jus dicant." (*loc. cit.*)

¹² *Ibid.*

¹³ Vattel, *loc. cit.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Cases in Equity under Lord Talbot*, p. 281; Robert Phillimore, *Commentaries upon International Law*, vol. II. Third ed. 1882 (London, Butterworths), pp. 329-332.

¹⁷ 1 Taunton 107; Phillimore, *op. cit.* p. 332; Ellery C. Stowell, *Consular Cases and Opinions*, Washington, 1909, pp. 375 and 376.

are employed. Barbut's case was again referred to in this decision.¹⁸

Clarke v. Cretico (1808)

14. In this case, Sir James Mansfield, C.J., likewise held that the consul was not a public minister. Counsel for the defence argued that his client was immune from arrest on the ground that he was consul-general of the Sublime Porte, and cited Vattel in support of his argument. Relying on an affidavit produced during the trial, to the effect that the defendant's appointment had been revoked in December 1806, the court rejected the argument for the defence without ruling on the substance.¹⁹

Viveash v. Becker (1814)

15. In 1814, a merchant named Becker, resident in Great Britain, was appointed consul of the Duke of Oldenburg. In an action brought against him for debt, he claimed immunity from arrest. After a detailed analysis, in which reference was again made to Barbut's case, the judge held that consuls were not public ministers and that international law does not confer such immunity upon consuls. He rejected the defence.²⁰

The arrest of consul Croxal (1834)

16. In 1834, Mr. Croxal, United States Consul at Marseilles, was charged with doing grievous bodily harm to a maidservant who, on being dismissed, refused to leave the accused's service; Croxal was remanded in custody for thirteen days before the trial and was not allowed bail. He was acquitted on the criminal charge, but was ordered in the civil proceedings to pay 2,000 francs damages to the plaintiff, and costs.²¹

Arrest of the British consul Pritchard (1843)

17. When France, by the treaty imposed upon the sovereign of the Tahiti Islands on 9 September 1842, established its protectorate over these islands, Mr. Pritchard, British consul on Tahiti, was arrested and expelled by the French authorities, who accused him of trying, by word and deed, to oppose the establishment of the authority of France. He was released on the intervention of the captain of the warship *Cormorant*, on condition that he did not return to the Tahiti Islands. The French Government later paid damages to Mr. Pritchard.²²

¹⁸ 4 Burrows 2016; Phillimore, *op. cit.*, pp. 332-333; Stowell, *op. cit.*, p. 187.

¹⁹ 3 Burrows 1481; Phillimore, *op. cit.*, pp. 334 and 335; Stowell, *op. cit.*, pp. 105-107.

²⁰ 3 Maule and Selwyn 297; Phillimore, *op. cit.*, pp. 334 and 335; Stowell, *op. cit.*, pp. 423-432; cf. Karl Strupp, *Wörterbuch des Völkerrechts und der Diplomatie*, vol. III, p. 167.

²¹ Article "Consul" by Camille Jordan in *Répertoire de droit international* (La Pradelle-Niboyet), vol. V, p. 59.

²² Phillimore, *op. cit.*, pp. 247 and 275.

Arrest of the Papal consul at Naples in 1863

18. In 1863, the Papal consul at Naples was imprisoned and expelled.²³

Arrest of the consul-general Carlier D'Abaunza in Paris (1840)

19. When in 1840 the consul-general of the Republic of Uruguay was arrested in Paris on the suit of a creditor even before he had obtained the exequatur, he claimed immunity from jurisdiction, but the courts rejected his claim.²⁴

20. In France, before the Act of 22 July 1867 which abolished imprisonment for debt in civil and commercial cases and in cases involving aliens, consuls who carried on business were subject to the jurisdiction of the French courts in respect of undertakings entered into by reason of their trade and could be imprisoned in default of payment. They could not claim immunity. Thus, in 1787, Barclay, the consul of the United States of America at Bordeaux, was arrested for debt by the Parliament, i.e., the court, of Bordeaux. On being released some days later, he tried, through Thomas Jefferson, to obtain a safe-conduct which would protect him in Paris. For this purpose, the consent of the creditors was necessary.²⁵

3. International conventions

21. Patently, the practice of the local courts of ruling that consuls were subject to the ordinary law was very unsatisfactory, especially at a time when, in most cases, the consuls engaged in commerce and when, in consequence, there was no lack of occasion for suing them or even imprisoning them for debt. The imprisonment of a consul, however, prevented him from discharging a function entrusted to him by a sovereign State and was, furthermore, regarded as an affront to the Government which had appointed him. Reacting against part of the doctrine which was unfavourable to consuls, and with the object of safeguarding themselves against the practice of certain local courts, the States sought to secure personal immunity for the consuls by treaty or convention.

22. The first instance of a personal immunity clause is apparently that contained in the Convention of Pardo, signed on 13 March 1769 between France and Spain. Article II of this Convention provides:

"Les Consuls étant Sujets des Princes qui les nomment, jouiront des immunités personnelles, de sorte qu'ils ne pourront être arrêtés, ni mis en prison, excepté pour des crimes atroces, ou en cas que lesdits Consuls fussent Négociants, car alors cette immunité personnelle doit s'entendre de ce qui regarde des dettes, ou d'autres causes civiles, qui ne sont pas criminelles, ou quasi criminelles ou qui ne proviennent

²³ De Louter, *Le droit international public positif*, vol. II, 1920, p. 77, referring to Calvo, vol. I, para. 464.

²⁴ Phillimore, *op. cit.*, p. 262.

²⁵ Camille Jordan, *Les consuls dans les pays faisant partie de la communauté internationale*. *Revue de droit international privé*. 1906 pp. 500 and 501.

pas du commerce, qu'eux-mêmes, ou leurs dépendants exercent; mais ils ne doivent pas manquer aux attentions dues aux gouverneurs et aux autres personnes qui représentent le Roi et la Magistrature."²⁶

The Consular Convention of Pardo was partially amended by the Convention of 7 January 1862.²⁷

23. A similar clause occurs in the Consular Convention between the United States of America and France, of 23 February 1853. Article II contains the following stipulation:

"The Consuls-General, Consuls, Vice-Consuls or Consular Agents of the United States and France shall enjoy in the two countries the privileges usually accorded to their offices, such as personal immunity, except in the case of crime, exemption from military billettings, from service in the militia or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, state or municipal. If, however, the said Consuls-General, Consuls, Vice-Consuls or Consular Agents are citizens of the country in which they reside; if they are, or become, owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and with the reservation of the treatment granted to Commercial Agents, to the same jurisdiction, as other citizens of the country who are owners of property, or merchants."²⁸

24. Article 12 of the Consular Convention of 7 January 1862 between France and Spain repeats almost literally the text of article II of the Convention of Pardo of 13 March 1769, the text being changed in two respects only: the word *atrocés* is omitted, and the words *qui ne sont pas criminelles, ou quasi criminelles* are replaced by the words *n'impliquant pas de délit ou l'idée de délit*.²⁹

25. The Consular Convention between France and Venezuela of 24 October 1856 (denounced in 1876) contained a very explicit personal immunity clause in article 2, paragraph 2:

"Ces agents jouiront dans tous les cas de l'immunité personnelle; ils ne pourront être arrêtés, traduits

*en jugement, ou mis en prison, excepté dans le cas de crime atroce."*³⁰

26. The inclusion of a personal immunity clause rapidly became a general practice, as is shown by the numerous instances in which such a clause was inserted in consular conventions entered into by France, e.g., those concluded with Italy on 26 July 1862 (art. 2, para. 2), with Portugal on 11 July 1866 (art. 2), with Austria-Hungary on 19 December 1866 (art. 2), with Russia on 1 April 1874 (art. 2, para. 2), with Greece on 7 January 1876 (art. 8), with the Dominican Republic on 25 October 1882 (art. 8), with El Salvador on 5 June 1878 (art. 8) and with Bolivia on 5 August 1897 (art. 8).

27. Other European and American States by their conventions made provision for the "personal immunity" of their consuls. Examples are the Consular Conventions concluded by Germany with Spain on 12 January 1872 (art. 4), with Costa Rica on 18 May 1875 (art. XXVII, para. 4), with Italy on 18 May 1875 (art. 3), with Brazil on 10 January 1882 (art. 4) and with the Dominican Republic on 30 January 1885 (art. 21, para. 3).³¹

28. Some conventions of the same period use a much more precise formula, giving consuls immunity only from detention pending trial. An example of such a clause is article 7 of the Consular Convention of 27 (15) November 1880 between Greece and Italy.³²

29. Other consular conventions, on the other hand, give a wider personal immunity, stipulating that consuls shall neither be arrested nor imprisoned except for acts which are defined as crimes and are punishable as such under the legislation of the country of residence. Examples are the Conventions concluded between Germany and Greece on 26 November 1881 (art. II), between Germany and Serbia on 6 January 1883 (art. II, para. 2) and between Germany and the Republic of South Africa on 22 January 1885 (art. 9, para. 3).

30. The ambiguity of the expression "personal immunity" and the controversies to which it gave rise (see paras. 34-36 below) probably explain why in later conventions the personal immunity clause is drafted in more precise language which restricts its application to the case of detention pending trial. For example, the Consular Convention of 21 August 1911 between Belgium and Bolivia contains the following provision in article 3:

*"Les consuls ne pourront être arrêtés préventivement que dans le cas de crime qualifié et puni comme tel par la législation locale."*³³

²⁶ De Martens, *Recueil des traités*, second edition, vol. I, p. 630. (Translation: "As the Subjects of the Princes who appoint them, the Consuls shall enjoy personal immunity, so that they may not be arrested or imprisoned, except for atrocious crimes, or in cases where the consuls are merchants, for in such cases personal immunity should be understood to apply in respect of debts or other civil causes which are not of a criminal, or quasi-criminal, nature and which do not arise from any commerce in which they themselves, or their dependants, are engaged; but they must not fail in the attentions due to the Governors and other Persons who represent the King and the Judiciary.")

²⁷ Niboyet-Goulé, *Recueil de textes usuels de droit international*, vol. I, p. 450 ff.

²⁸ William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers* (Washington, 1910), vol. I, p. 529.

²⁹ *British and Foreign State Papers*, vol. 52 (1861-1862), p. 143.

³⁰ De Clercq, *Recueil des traités de la France*, vol. VIII, p. 378. (Translation: "These agents shall in all cases enjoy personal immunity, they may not be arrested, tried or imprisoned, except in the case of atrocious crime.")

³¹ Jordan, *Revue de droit international privé*, 1906, p. 721.

³² De Martens, *Nouveau Recueil général de traités*, second series, vol. VIII, p. 624.

³³ *Répertoire de droit international*, vol. VII, p. 64. (Translation: "Consuls may not be detained pending trial except for acts which are defined and punishable as crimes under the local legislation.")

31. There are, however, some nineteenth-century conventions which do not contain any personal immunity clause. Thus, after confirming the inviolability of consular offices and the papers therein contained to which consuls, vice-consuls and their chancellors and secretaries are entitled, the Consular Convention of 14 November 1788 between France and the United States provides (art. II) that the consuls are exempt from all personal service, from soldiers' billets, militia, watch, guard, guardianship, trusteeship, as well as from all duties, taxes, impositions and charges whatsoever, except on the estate real and personal of which they may be the proprietors or possessors, and except for those to which they may be liable as merchants. In all other respects, the article says, they are subject to the laws of the land as the natives are.³⁴

32. Article IV of the Commercial Convention concluded on 3 July 1815 between the United States of America and Great Britain provides that "in case of illegal or improper conduct towards the laws or Government of the country to which he is sent, such consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended Government assigning to the other the reasons for the same."³⁵

33. In many consular conventions the place of the personal immunity clause is taken by the most-favoured-nation clause, which became current in the nineteenth century (see part II of this report). Thus, the Consular Convention of 15 September 1846 between France and Chile stipulates simply that it is the duty of consuls to comply in all respects with the laws of the respective countries; but it contains the most-favoured-nation clause (art. 20, *in fine*).³⁶ As a consequence, the personal immunity conceded by either of the two contracting States to a third State automatically became applicable to the consuls of the other contracting party.

4. Scope of the so-called personal immunity clause

34. The scope of the personal immunity clause was for long the subject of much controversy. Some authors regarded it as conferring virtual exemption from civil and criminal jurisdiction (though not exemption from jurisdiction in the case of crimes).³⁷ Others, on the contrary, interpreted it as conferring exemption from arrest and detention pending trial (unless the act charged constitutes a crime) and as immunity from imprisonment for debt in civil cases.³⁸

35. Nor is the expression "personal immunity" interpreted uniformly in the caselaw of national courts. For example, the Paris Court of Appeal, in its judgement of 2 March 1868 given in the case of *G. versus G.*, consul-general of Italy at Lyons, declined to admit that

the personal immunity clause contained in article 2, paragraph 2, of the Franco-Italian Consular Convention of 26 July 1862 constituted a provision recognizing immunity from jurisdiction.³⁹ In a judgement given on 8 January 1866 in the case of *Syndic Cercle Taitbout versus d'Oliveira*, vice-consul of Portugal at Paris, the same Court of Appeal, overruling a judgement of the commercial court of the Seine department of 2 May 1883, affirmed its competence to deal with the civil and criminal proceedings brought against Mr. d'Oliveira, who, to place himself beyond the reach of the French jurisdiction, had pleaded the terms of article 2, paragraph 3, of the Franco-Portuguese Consular Convention of 11 July 1886. This paragraph stipulated that consuls "*jouiront . . . de l'immunité personnelle, excepté pour les faits et actes que la législation pénale de chacun des deux pays qualifie de crimes et punis comme tels; et, s'ils sont négociants, la contrainte par corps ne pourra leur être appliquée que pour les seuls faits de commerce, et non pour causes civiles.*"⁴⁰ On the other hand, by a judgement rendered on 8 July 1890 in proceedings instituted against Manolopoulo, a Greek national who was *chancelier* at the consulate-general of Greece, for defamation and assault and battery, the correctional court of the Seine department ruled that it had no jurisdiction, construing the sentence "they may neither be arrested or imprisoned" in article 8 of the Consular Convention of 7 January 1876 between France and Greece as meaning that the consular officials referred to in the convention could not be sentenced to a penalty of imprisonment.⁴¹ In a judgement rendered on 10 July 1890 in the case of *Lafforgue versus del Pedroso*, the Toulouse court interpreted article 12 of the Franco-Spanish Consular Convention of 7 January 1862 as expressly conferring immunity from jurisdiction in cases of debt and other civil cases which did not at the same time involve a criminal offence or criminal intent.⁴²

36. If one studies the conventions providing for personal immunity as a whole, and in particular if, in construing the force of the word "personal" (qualifying "immunity"), one reads it in conjunction with the provision granting consuls engaged in commerce exemption from imprisonment for debt "in civil matters", one is driven to the inevitable conclusion that the conventions containing the personal immunity clause had as their sole object that of ensuring the personal inviolability of the consuls covered by these conventions, subject to a proviso relating to the exceptional cases (crimes, etc.) in which the clause was expressly declared not to be applicable. Correctly construed, the clause in no way means that consuls could not be tried, but simply that they could not be arrested or imprisoned; and it is unnecessary to

³⁹ Jordan, *loc. cit.*, pp. 503 and 504.

⁴⁰ *Journal du droit international privé*, 1886, p. 76. (Translation: "shall enjoy . . . personal immunity, except for acts which are defined and punishable as crimes under the criminal law of each of the two countries; and, if they are merchants, they shall not be liable to imprisonment for debt except by reason of acts performed in the course of their trade, not being so liable in civil cases.")

⁴¹ *Ibid.*, p. 667, *Snacos v. Manolopoulo*.

⁴² *Ibid.*, p. 908.

³⁴ William M. Malloy, *op. cit.*, vol. I, p. 491.

³⁵ *British and Foreign State Papers*, vol. 3, p. 81.

³⁶ De Clercq, *op. cit.*, vol. V (1843-1849), p. 465.

³⁷ Clunet, *Journal du droit international privé*, 1886, p. 76 (d'Oliveira case) and 1890, p. 667 (Manolopoulo case).

³⁸ Jordan, *loc. cit.*, p. 498. This author cites Renault, who is said to have expressed the same view.

differentiate between detention pending trial and imprisonment after conviction, unless of course the immunity in question is limited to detention pending trial by an express provision of the convention. For if, by this expression, the contracting Parties had wished to concede an exemption from jurisdiction, and hence an important derogation from their territorial sovereignty and a privilege at variance with the established custom, which denies consuls diplomatic status, they would surely have used the expression "immunity from jurisdiction" instead of "personal immunity". Besides, if there should be any lingering doubt, the principle of the sovereignty of States demands a strict interpretation.

5. Doctrine and practice

37. From quite early times, the majority of learned authors declined to recognize that consuls possessed diplomatic immunities, including immunity from jurisdiction. In particular, this was the opinion of Wicquefort, Bynkershoek, Vattel, Klüber, Holtzendorff, de Martens, Geffcken and others.⁴³ But most authors, influenced by Vattel, recognized that in principle consuls had personal immunity except in case of crime (serious offences). Vattel's opinion was often cited in the courts, and the opinions of the authors were reinforced by the conclusion of numerous conventions providing that consuls enjoyed personal immunity, an expression which, on the strength of the analogous usage in the law relating to diplomatic intercourse, could be interpreted as meaning exemption from ordinary jurisdiction.⁴⁴ Thus, G. F. de Martens recognizes that, though subject to the civil and criminal jurisdiction of the country in which they reside, consuls may not be arrested and imprisoned except for a crime.⁴⁵ This opinion is shared by Bulmerincq.⁴⁶

38. An unfavourable attitude towards consular privileges was adopted in the Anglo-Saxon countries in the 18th and 19th centuries. In Great Britain, for example, the law officers of the Crown expressed the opinion that consuls were not entitled to any privilege. This point of view is well illustrated by Mr. Harding's report of 13 November 1856, in which he advanced the opinion that foreign consuls in Great Britain and its colonies could not claim any privilege as of right, other than privileges accorded to them by treaty.⁴⁷ According to the same report, advantages are granted to consuls by the executive or local authorities at their discretion, or else by usage and courtesy. English law regards con-

suls as subject to the civil and criminal jurisdiction and does not grant them any *de jure* privilege whatsoever.⁴⁸

39. The position of the United States is defined in the reply of Secretary of State Lansing, dated 15 July 1915, to a question put by the United States Minister Plenipotentiary to Venezuela. The reply says that in the absence of treaty provisions between the United States and Venezuela defining the rights, privileges and immunities of consular officers, such officers would be entitled only to those rights, privileges and immunities necessarily incident to the proper performance of their duties or supported by long-established custom or the particular laws of the place, and that otherwise they are subject to the laws of the land precisely as other persons, irrespective of the question of their nationality.⁴⁹ This point of view is in keeping with the earlier case-law of the United States courts.⁵⁰

40. Certain learned authors, however, ignoring the profound transformation which had occurred in the consular functions, continued for a long time to maintain that the consuls were public ministers and that they formed a class of diplomatic representatives of the State. This diversity of opinion on the question of consular immunities, and in particular on the question of the inviolability of consuls, derived from the disagreement as to the very nature of the consular institution and the status of consuls, and it explains the division of opinion among writers on international law on the subject dealt with in this study which persisted until the end of the nineteenth century. De Cussy maintains that by virtue of their functions consuls are public ministers and that they should participate with other public ministers of higher rank in the immunities accorded to public ministers by international law.⁵¹ Engelhardt submitted, at the session of the Institute of International Law held at Hamburg in 1891, a set of draft regulations under which consuls (who, he had suggested, should be described as "commercial agents") would have the status of public ministers and as such enjoy diplomatic privileges and immunities (art. 2), but would be subject to the territorial laws for all acts unconnected with their public functions (art. 4).⁵² At the Venice session in 1896, however, he proposed that a provision should be inserted whereby consuls could not be arrested or detained except for acts defined as crimes by the legislation of the country in which they reside.⁵³

6. Draft codes

41. It is interesting to note that the opinion favourable to personal immunity, defended by eminent authors and confirmed in numerous consular conventions, found

⁴³ *Op. cit.*, p. 126.

⁴⁴ See on this subject Jordan, *loc. cit.*, p. 505.

⁴⁵ *Le Guide diplomatique*, 4th edition (Paris-Leipzig, 1854), vol. 1, p. 250.

⁴⁶ *Das Völkerrecht oder das internationale Recht* (Freiburg im Breisgau, and Tübingen, 1884), p. 321.

⁴⁷ "Apart from the privileges, if any, which may be secured to them by any existing treaty with the power whose agents they are (. . .), I am not aware of any privileges to which foreign consuls are strictly or legally entitled, as a right, in Great Britain or in any of her colonies." Lord McNair, *International Law Opinions*, selected and annotated (Cambridge, 1956), vol. I, p. 221

⁴⁸ *Ibid.*

⁴⁹ Hackworth, *Digest of International Law*, vol. IV, p. 699.

⁵⁰ Cf. the opinion of Attorney-General Cushing dated 9 August 1855. Kent, *Commentaries*, vol. I, p. 44.

⁵¹ *Dictionnaire du diplomate et du consul* (Leipzig, 1846), p. 193.

⁵² *Annuaire of the Institute of International Law*, vol. XI (1889-1892), p. 382. New abridged edition, 1928, vol. II, p. 1136.

⁵³ *Ibid.*, vol. XV, p. 287. New abridged edition, 1928, vol. III, p. 934.

its expression both in the draft codes prepared by particular authors and in those prepared by learned societies. Bluntschli allows the arrest of a consul, but only in case of necessity (*Notfall*). He observes that in such a case the position of the sending State must be taken into account to the extent required by the interests of the consular office and the dignity of that State.⁵⁴

42. Dudley Field, in his draft code (sect. IV, art. 181, para. 4), is rather reserved on this point and proposes immunity from arrest in civil cases only. He points out in the commentary that arrest in criminal cases is generally sanctioned by the authorities, and that there seems to be good reason for allowing it, notwithstanding the interruption of the consular functions thereby caused. He attaches importance to the question whether arrest should be allowed only for offences which are crimes under the local law or even also for *délits*.⁵⁵

43. In the first edition of his draft code,⁵⁶ Fiore, after correctly noting (art. 801) that consuls are not diplomatic agents and do not represent the State in its international political relations, states (art. 802) that consuls are placed under the protection of international law in the exercise of the functions vested in them by the international conventions. He adds that it is always the particular treaties authorizing the establishment of these functions which must be consulted on all points concerning the exercise thereof, and with respect to the rights and prerogatives of which the enjoyment may be claimed.⁵⁷

But in the fourth edition of his work, Fiore endorses the opinion which upholds the inviolability of consuls and maintains that consuls cannot be arrested or detained except for offences involving severe punishment (art. 518).⁵⁸

The regulations concerning consular immunities adopted on 26 September 1896 by the Institute of International Law on Mr. Engelhardt's report (see above) contains, in article 5, a provision conferring exemption for acts performed by consuls in their official capacity and within the limits of their powers. Article 6 provides that, except as specified in article 5, consuls are amenable to the courts of the country in which they exercise their functions, as regards both civil and criminal mat-

ters. This article stipulates, however, that every proceeding directed against a consul is suspended until his Government, duly notified through the diplomatic channel, has been able to confer with the Government of the receiving State on a fitting settlement of the incident. The article provides, however, that this notice is not necessary:

(a) In case of a flagrant offence or of a crime ;

(b) In suits *in rem*, including suits for possession, whether relating to personal property or to real estate situated in the country ;

(c) When the consul himself has begun the litigation or accepted suit in the local courts.

Lastly, article 7 provides for the inviolability of consuls in the following terms:

"In no case may consuls be arrested or detained, except for grave infractions of the law."⁵⁹

SECTION II: THE EXISTING LAW

1. Official acts

44. It was established in the Rapporteur's first report that, under general international law, consuls and the members of the consular staff are outside the jurisdiction of the judicial and administrative authorities of the receiving State in respect of acts performed in the exercise of their functions (official acts).⁶⁰ The immunity accorded to consuls in respect of official acts is not *stricto sensu* a personal immunity of the consul, but an immunity on the part of the sending State in respect of the official acts of a sovereign State. These acts are entirely outside the jurisdiction, whether *civil*, *criminal* or *administrative*, of the receiving State. So far as this point is concerned, the conclusion reached on the subject of the juridical status of consuls by the Sub-Committee set up by the Committee of Experts for the Progressive Codification of International Law does not seem to go far enough. Whereas the Sub-Committee's report concedes that consuls enjoy immunity from civil jurisdiction "in connexion with the exercise of their function", it states in categorical terms that consuls do not possess immunity from criminal jurisdiction, and it recognizes no exception for official acts.⁶¹ If consuls are immune from the civil jurisdiction in respect of official acts, then, *a fortiori*, they should be immune from the criminal jurisdiction in respect of those same acts. For the basis of the immunity is the same in both cases: the respect due to the sovereignty of a foreign State.

⁵⁴ *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt*. Nördlingen, 1868, p. 160, art. 268. See also the French translation by M. C. Lardy, *Le droit international codifié*, fifth ed., Paris, 1895. English text of section IV (consuls) in *Research in International Law*, under the auspices of the Harvard Law School, Cambridge, Mass., 1932, II. Legal Position and Functions of Consuls, p. 403. (This compilation is hereinafter cited as "*Harvard Law Research*".)

⁵⁵ David Dudley Field, *Outlines of an International Code* (New York, 1872), vol. 1, pp. 73 and 74.

⁵⁶ French translation from the Italian by A. Chrétien, *Le droit international codifié et sa sanction juridique* (Paris, 1890), p. 272.

⁵⁷ *Ibid.*

⁵⁸ French translation from the Italian by Ch. Antoine, *Le droit international codifié et sa sanction juridique*, Paris, 1911, pp. 293 and 294. Cf. also English translation, from the fifth Italian edition, by Edwin M. Borchard, *International Law Codified*, New York, 1818, pp. 249-258 (art. 523).

⁵⁹ *Annuaire* of the Institute of International Law, vol. 11, p. 305; *Tableau général des résolutions de l'Institut de droit international* (1873-1956), published by Hans Wehberg (Bâle, 1957), p. 29. For English translation, see J. B. Scott (ed.), *Resolutions of the Institute of International Law* (New York, 1916), from which extracts are quoted in *Harvard Law Research* II, pp. 393-396.

⁶⁰ See article 27 of the draft, and commentary, in *Yearbook of the International Law Commission*, 1957, vol. II (United Nations publication, Sales No.: 57. V. 5. Vol. II), pp. 99 *et seq.*

⁶¹ League of Nations publication, Committee of Experts for the Progressive Codification of International Law, *Second Report to the Council of the League of Nations*, League of Nations publication, V. Legal, 1928. V. 4, p. 44.

45. The opinion which prevailed in the League's Committee of Experts will perhaps help to explain why some authors hesitate on this point. For example, the early editions of Oppenheim's well-known treatise noted that the numerous conventions on the subject limit criminal jurisdiction, so far as consuls are concerned, to crimes of a more serious nature,⁶² whereas the later editions, referring to the general practice, seem to hesitate on this point.⁶³

2. Acts other than those performed in the exercise of the consular function

46. As regards acts which are not performed in the exercise of the consular function, it is nowadays almost universally admitted that, except as otherwise provided by treaty, consuls are subject to both the civil and the criminal jurisdiction of the receiving State.⁶⁴

47. While it is today almost universally recognized that consuls are subject to the jurisdiction of the receiving State in respect of acts not performed in their official capacity, there is at the same time, both in the doctrine and in the practice of States, a strong body of opinion which recognizes the personal inviolability of consuls. Unlike the inviolability of diplomatic representatives, the inviolability of consuls is not absolute, but confined to minor offences. The thesis of consular inviolability is supported by many writers on international law,⁶⁵ most of them being in general agreement that exceptions should be made in the case of a particularly serious crime or offence committed by a consul. On this point their views are in agreement also with the language used in a large number of consular conventions.

⁶² Cf. for example the first edition, 1905, vol. I, para. 435; 4th edition (by A. D. McNair), 1928, vol. I, p. 665; 5th edition (by H. Lauterpacht), 1937, vol. I, p. 657.

⁶³ "... according to the generally accepted practice, they (consuls) are not liable in civil nor, perhaps, in criminal proceedings in respect of acts which they perform in their official capacity on behalf of their States and which fall within the scope of consular functions as recognised by International Law." (6th, 7th and 8th editions, 1947, 1948 and 1958.)

⁶⁴ This is the view held by: Liszt, *Das Völkerrecht systematisch dargestellt*, 10th edition (Berlin, 1915), p. 142; Bonfils, *Manuel de droit international public (Droit des Gens)*, 3rd edition by Paul Fauchille (Paris, 1901), p. 421; Jordan, *Revue de Droit international privé*, 1906, p. 509; Strupp, *Eléments du droit international public*, vol. I (Paris, 1930), p. 229; Hershey, *The Essentials of International Public Law and Organization*, revised edition (New York, 1927), p. 423; Stewart, *Consular Privileges and Immunities*, New York, 1926, p. 156; Verdross, *Völkerrecht*, 3rd edition (Vienna, 1955), p. 270; Puente, *The Foreign Consul: his Juridical Status in the United States* (Chicago, 1926), p. 123; Graham Stuart, *American Diplomatic and Consular Practice*, 2nd edition (New York, 1952), p. 388; V. L. Sanchov, *Uchebnik konsul'skogo prava* (Moscow-Leningrad, 2nd edition, 1926), pp. 38 and 39; Fenwick, *International Law*, 3rd edition, 1934, p. 485; François, *Handboek van het volkenrecht*, vol. I, 1949, p. 777; Guggenheim, *Traité de droit international public*, vol. I (Geneva, 1953), p. 514; Sibert, *Traité de droit international public*, vol. II (Paris, 1951), p. 58; Lawrence, *The Principles of International Law*, 7th edition (London, 1930), p. 297; Hyde, *International Law chiefly as Interpreted and Applied by the United States*, 2nd edition (Boston, 1947), vol. II, 475, p. 1342; Rousseau, *Droit international public* (Paris, 1953), p. 354; Hackworth, *Digest of International Law*, vol. IV, p. 699, p. 726 ff. and p. 736 ff.; A. V. Sabanin, *Posolskoe i konsul'skoe pravo* (Diplomatic and Consular Law) (Moscow, G9Z, 1930).

48. The opinion in favour of inviolability has likewise found expression in the more recent draft codes. For example, while article 19 of the draft prepared by the Inter-American Commission of Jurists in 1927 provides that consuls are subject, in respect of non-official acts, to the courts of the State in which they exercise their functions, article 16 provides that they are subject to imprisonment or arrest for serious crime.⁶⁶ It follows therefore that they may not be imprisoned or arrested for offences which cannot be described as serious crimes. A similar formula is to be found in article 20 of the Harvard draft, which provides that the receiving State shall exempt a consul from arrest, except for a serious offence.⁶⁷ The commentary on this article explains that the exemption from arrest for minor offences is so generally recognized in national regulations, treaties and diplomatic practice that it has been said to constitute a rule of general international law.⁶⁸

(a) The case-law of local courts

49. Although, strictly speaking, it cannot be regarded as constituting the practice of States, the case-law of local courts on points of international law nevertheless offers interesting evidence of the interpretation placed by the courts on international conventions and on the rules of international law in matters where there is no well-established state practice. In addition, it provides some useful guidance in questions with regard to which international law is not sufficiently developed in the practice of States or is the subject of controversy. In this connexion, it is interesting to note that the case-law of the local courts interprets the expression "personal immunity", used in many of the consular conventions concluded in the last century, as meaning personal inviolability and not immunity from jurisdiction.

50. It is true that in the late nineteenth century several French courts, in construing consular conventions, ruled in favour of the immunity of consuls from the jurisdiction of the receiving State. Examples of such rulings are provided by the case (cited earlier) of Mr. Manolopoulos, *chancelier* of the consulate-general of Greece in Paris in 1890⁶⁹ and by the proceedings against Lee Jortin, British vice-consul at Dieppe, in 1900.⁷⁰ Already, however, in the proceedings instituted against Mr. King, United States consul in France, in the cor-

⁶⁵ See in particular the following: Hershey, *op. cit.*, p. 423; Scelle, *Manuel de droit international public*, p. 554; Guggenheim, *Traité de droit international public*, vol. I (Geneva, 1953), p. 515; the treatise *Mezhdunarodnoye Pravo* (International Law), published under the editorship of Durdenevsky and Krylov (Moscow, 1947), p. 328; Rousseau, *op. cit.*, p. 353; Bartos, *Medunarodno javno pravo* (Belgrade, 1956), vol. II, p. 552; Sanchov, *op. cit.*, p. 39; Sabanin, *op. cit.*, p. 305.

⁶⁶ International Conference of American States, International Commission of Jurists, 1927, Project No. VIII, Consuls, *American Journal of International Law*, vol. XXII, Spec. Supplement, p. 255.

⁶⁷ *Harvard Law Research* (Cambridge, Mass., 1932), p. 611.

⁶⁸ *Ibid.*, p. 612.

⁶⁹ *Journal du droit international* (Clunet), 1890, pp. 667 *et seq.* The ruling in this case was not challenged by appeal.

⁷⁰ *Ibid.*, 1900, pp. 130 and 858. These decisions, incidentally, are at variance with the case-law of other French courts (*Second Report of the Committee of Experts to the Council of the League of Nations*, p. 43).

rectional court of the Seine a change is discernible. This court, basing itself on the text of the Consular Convention of 23 February 1853 (art. 2), interpreted this article as meaning that United States consuls and consular agents cannot be prosecuted in the French courts, except for crime, and decided that the United States consul could not be summoned before the correctional court (judgement of 3 July 1911). The Paris Court of Appeal, relying on the circumstantial report of Judge Le Poittevin, upheld the judgement of the lower court (judgement of 14 December 1911). But the Court of Cassation quashed the judgement of the Court of Appeal by its order of 23 February 1912, principally on the strength of two communications from the Ministry of Foreign Affairs dated 15 November and 4 December 1911, which stated that the personal immunity clause, as interpreted by the two contracting Parties, should be held to confer not immunity from criminal jurisdiction but only immunity from arrest and detention pending trial.⁷¹ In 1926, this interpretation of the 1853 Convention was contested by the Department of State when Mr. Bigelow, Director of the Passport Section at the United States Consulate at Paris, was summoned before the correctional court of the Seine for defamation (alleged disclosure to a journalist of the reasons for refusing to *viser* a passport). In reply to the summons the consul challenged the court's jurisdiction and affirmed that, by reason of his personal immunity under article 2 of the Consular Convention of 23 January 1853, he could not validly be summoned in a French court. Secondly, he contended that, by virtue of the most-favoured-nation clause in article 12 of the said Convention, he enjoyed the personal immunity granted to Greek consuls in France by the Consular Convention of 7 January 1876 between France and Greece, which provided that "les consuls généraux, consuls, élèves-consuls, chanceliers et vice-consuls ou agents consulaires, citoyens de l'Etat qui les nomme, jouiront de l'immunité personnelle ; ils ne pourront être arrêtés ni emprisonnés excepté pour les faits et actes que la législation pénale du pays de leur résidence qualifie de crime et punit comme tels" (art. 8). And thirdly, the consul argued that the court had no jurisdiction under international law, on the grounds that consuls can never be proceeded against in the courts of the receiving country for acts committed in the discharge of their official duties or even for wrongs committed in the performance of those acts. In the course of this trial, a communication was produced to the court in which the Department of State contested the interpretation placed on the expression "personal immunity" by the French Ministry of Foreign Affairs in the King case in 1911. According to the State Department's communication, "the phrase in question was intended to insure to American consuls in France and French consuls in the United States immunity from arrest or imprisonment under the judgement of a court as well as preventive arrest or imprisonment".⁷² The court affirmed its competence to deal with the case. In setting out the

reasons for its ruling the court referred to the earlier decision in the King case and stated that although, unlike the 1853 Convention, the French-Greek Convention of 1876 expressly provided for immunity from arrest and imprisonment, it did not expressly exempt the consular officials of the two contracting countries from the jurisdiction of the local courts. So far as the acts complained of were concerned, the court held that, by disclosing to others the reasons for his refusal of a visa, consul Biglow had not remained within the limits of his functions.⁷³

51. In answer to proceedings for defamation instituted against him in the court of Graz in Austria, the Italian consul-general claimed that, under the consular convention signed on 15 May 1874 between the former Austro-Hungarian Empire and Italy, the court was not competent to deal with the case. The court of first instance dismissed the objection, but the Court of Appeal decided that no proceedings could be brought against the consul in question. The Austrian Supreme Court, overruling this decision, affirmed that personal immunity from jurisdiction is not identical with the total exclusion of the jurisdiction of national courts. It expressed the view that personal immunity consists only in the exclusion of execution and arrest, against the person of the consular official.⁷⁴

52. In Italy, the Yugoslav consul-general at Genoa was accused of fatally wounding a pedestrian with his motor vehicle in 1930 and was sentenced by the court of first instance to imprisonment for eight months and a fine. The Court of Appeal set aside the conviction on the ground that no prosecution could be undertaken against a foreign consul. The Court of Cassation, reversing the judgement of the Court of Appeal, held that the conviction must be restored. In stating the grounds for its decision, the Court of Cassation observed that the most-favoured-nation clause contained in the Consular Convention of 21 August 1924 between Italy and Yugoslavia should be interpreted by reference to the Franco-Italian Consular Convention of 26 July 1862, since in the opinion of the two Parties France was the most favoured nation. It also expressed the quite mistaken view that such immunity as was enjoyed covered only "procedural" arrest, e.g. for contempt of court.⁷⁵

53. In the United States in a civil suit brought against Tarcuanu, the Romanian consul, before the Southern District Court of New York on 5 February 1935, the consul pleaded the most-favoured-nation clause contained in article 2 of the Consular Convention of 17 June 1881 between the United States and Romania, and claimed immunity from civil jurisdiction under article 2 of the Consular Convention of 23 February 1853 between the United States and France. The Court, ruling against the defendant's argument, held that consuls were subject to the jurisdiction, civil and criminal, of the courts of the receiving country. It maintained

⁷¹ *Journal du droit international* (Clunet), 1913, pp. 183-207.

⁷² Hackworth, *Digest of International Law*, vol. IV, p. 743.

⁷³ *Journal du droit international* (Clunet), vol. 59 (1928), pp. 142-146.

⁷⁴ Lauterpacht, *Annual Digest*, 1927-1928, case No. 267, pp. 387 and 388.

⁷⁵ Lauterpacht, *op. cit.*, 1933-1934, case No. 171, p. 329.

that there was no reason for construing personal immunity as meaning more than immunity from arrest or imprisonment (except in case of crime).⁷⁶

54. In Argentina, in a case where a Chilean consul at Rio Gallegos was accused of a criminal offence, the court of first instance transmitted the case to the Supreme Court pursuant to Act No. 48, of which article 1, paragraph 1, vests jurisdiction in the Supreme Court to deal with cases affecting the privileges and immunities of foreign consuls and vice-consuls in connexion with their official duties. The Supreme Court, however, referred the case back to the court of first instance on the grounds that, under article 2 of the same Act, the provincial court was competent to deal with all cases relating to the private business of foreign consuls and vice-consuls (para. 3). In taking this action, the Supreme Court stated that among the actions which turn on the private affairs of consuls there must be considered to be included all those which, in criminal as well as in civil matters, originate in private acts of such functionaries, apart from the exercise of the proper functions of their office. It added that the circumstances that in criminal actions there may take place deprivation of liberty of the accused does not change the nature of these cases for the purposes of jurisdiction.⁷⁷

(b) *International treaties*

55. It is chiefly from the study of recent consular conventions and like instruments that one can learn the trend of modern State practice. This study provides the correct answer to the question whether States are prepared to grant foreign consuls virtual immunity from jurisdiction in respect of acts other than those performed in the exercise of their functions, or merely a personal inviolability, i.e. exemption from arrest and imprisonment, and, where applicable, from execution of judgement if the execution would involve a limitation of their personal liberty.

56. It is true that some of the recent treaties contain provisions granting consuls exemption not only from arrest but also from prosecution, except in cases where they had committed a crime. But such provisions are very rare nowadays. Thus, under the Convention of 12 January 1948 between the United States and Costa Rica (art. II), a consular officer who is a national of the sending State and not engaged in a private occupation for gain in the receiving State, is exempt from arrest or prosecution in the receiving State except when charged with the commission of a crime which, upon conviction, might subject the individual guilty thereof to a sentence of imprisonment for a period of one year or more.⁷⁸

57. The Havana Convention of 20 February 1928 regarding consuls [the Convention actually speaks of "consular agents"] stipulates that, in the absence of a special agreement between two nations, the consuls

[consular agents] who are nationals of the State appointing them shall neither be arrested nor prosecuted except in the cases when they are accused of committing an act classed as a crime (*délit, delito*) by local legislation (art. 14). The scope of this provision is not clear, for article 16 provides that consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority, and article 17 stipulates that in respect to unofficial acts consuls are subject, in civil as well as in criminal matters, to the jurisdiction of the State where they exercise their functions.⁷⁹

58. But the vast majority of recent or contemporary conventions go no further than to confer upon consuls exemption from arrest and detention and from all restrictions on their personal liberty, except in cases where they have committed an offence of a degree of seriousness which is usually defined in the conventions. This exception to personal inviolability is formulated in different terms in the various treaties relating to consuls, and it determines the extent of the inviolability, that privilege being enlarged or diminished according to whether the exceptions are expressed in restrictive or extensive terms.

59. Several methods are employed for the purpose of defining the exceptions in question:

The first method, which is very frequently used in the conventions, is to refer to the classification of the offence committed.

(a) Some of the conventions, while recognizing the personal immunity of consuls, make an exception in the case of "serious criminal offences". This is a very vague expression, open to very different interpretations. Such an expression occurs, for example, in the Treaty of Friendship, Commerce, Navigation and Consular Relations of 4 February 1896 between Germany and Nicaragua (art. 22, para. 4),⁸⁰ which was renewed by the Exchange of Notes of 11 January, 27 February and 6 March 1924.⁸¹

(b) Other conventions allow the arrest of consuls in those cases only where they are charged with offences defined and punished as crimes by the criminal law of the receiving country. Examples of these are the Consular Convention of 26 August 1909 between Belgium and Denmark (art. 3), the Convention of 23 September 1903 between Greece and Spain (art. XI, para. 2) and the Convention of 13 January 1934 between the United States and Finland (art. XX); and there are many others. Sometimes, the conventions specify that the offences must be offences which the local law defines as crimes as distinct from misdemeanours (*délits, faltas*). This formula is very common in the conventions concluded by the United States of America; it occurs, for example, in that country's conventions with Germany of 8 December 1923 (art. 18), with Cuba of 22 April 1926 (art. 5), with Honduras of 7

⁷⁶ Judgement of 5 February 1935. H. Lauterpacht, *op. cit.*, 1935-1937, case No. 186, pp. 397 and 398.

⁷⁷ *In re Gonzales*, H. Lauterpacht, *op. cit.*, 1943-1945, case No. 852, pp. 262 and 263.

⁷⁸ United Nations, *Treaty Series*, vol. 70, p. 58.

⁷⁹ League of Nations, *Treaty Series*, vol. CLV, p. 299.

⁸⁰ De Martens, *Nouveau Recueil général de traités*, second series vol. XXIII, p. 232.

⁸¹ League of Nations, *Treaty Series*, vol. XLI, p. 264

December 1927 (art. 17), with Austria of 19 June 1928 (art. 14) and with the Republic of the Philippines of 14 March 1947 (art. II).

(c) Other conventions restrict the inviolability of career consular officials by allowing their arrest in all cases in which they are charged before a court with an act which constitutes a crime or offence under the law of the receiving country, but not in the case of acts which are regarded as mere contraventions and dealt with administratively. This formula is used in the Consular Convention of 9 June 1928 between Mexico and Panama (art. V, para. 1); see also the Consular Treaty of 23 September 1926 between Spain and Greece (art. 8, para. 2), and the Treaty of 20 March 1948 on Civil Rights and Consular Prerogatives between Spain and the Philippines (art. VIII, para. 1; the English text of this Treaty uses the term "crime").

(d) Sometimes, the offences by reason of which the immunity from imprisonment is removed are defined by reference to the type of penalty applicable. Thus, the Consular Convention of 4 June 1929 between Germany and Bulgaria allowed imprisonment pending trial in cases of prosecution for an offence punishable by death or penal internment (art. 12, para. 1).

The method of using the classification of the offence as a criterion has serious disadvantages. In the first place, the gradation "crime", "lesser offence" (*délit*) and "contravention" is not known in many legal systems. Secondly, even in cases where this classification exists in the legislation of both contracting Parties, the same unlawful act may well not be classified in the same way in both legislations, with the consequence that there is inequality of treatment for consular officials.

60. One group of treaties, instead of distinguishing between crimes and misdemeanours on the one hand and contraventions on the other, uses as a criterion for determining the cases in which the arrest of consuls is permissible the term of the sentence prescribed for the offence committed.

(a) Under some of these conventions, consular officials who are nationals of the sending State are not liable to arrest or imprisonment pending trial unless they are prosecuted for offences punishable under the local law by a penalty involving deprivation of liberty for a term of one year or more. Examples of these are the Consular Conventions of 22 June 1926 between Albania and Yugoslavia (art. 10, para. 1), of 17 December 1929 between Poland and Romania (art. 6, para. 8), of 22 December 1934 between Belgium and Poland (art. 6, para. 6), of 22 December 1934 between Bulgaria and Poland (art. 12, para. 1), of 12 January 1928 between the United States of America and Costa Rica (art. II, para. 1) and of 24 April 1926 between Hungary and Poland (art. 11, para. 1).

(b) Other conventions, while applying this criterion (i.e. that the term of the sentence applicable must be one year or more), provide that consular officials can only be arrested or detained pending trial by the police or the agents of the Court if they are apprehended

flagrante delicto. See the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (art. 7, para. 1).

(c) There are some conventions which allow provisional arrest in cases of prosecution for an offence (*délit*) which, under the legislation of the receiving country, is punishable by imprisonment for a term of not less than three years. See the Consular Convention of 28 May 1929 between Germany and Turkey (art. 11, para. 2).

(d) Under other conventions, arrest pending trial is excluded in cases in which the consul is charged with an offence which under the local law is punishable by imprisonment for a term of less than five years. See among others the Consular Conventions of 5 February 1928 between Albania and France (art. 4, para. 3), of 30 December 1925 between France and Poland (art. 4, para. 3), of 31 December 1951 between the United Kingdom and France (art. 15) and of 20 March 1954 between the United Kingdom and Mexico (art. 4, para. 1, read in conjunction with art. 2, para. 9).

(e) Some recent consular conventions lay down different conditions for immunity from arrest and detention pending trial for each of the two contracting Parties. For example, article 14 of the Consular Convention of 14 March 1952 between the United Kingdom and Sweden provides that a consul shall not be subjected to detention in custody pending trial in respect of acts performed otherwise than in his official capacity, unless he is accused of a grave offence as defined in article 2, paragraph 9. Under the terms of this latter provision, "grave offence" means:

(i) in the case of the territory of the United Kingdom and the other territories for whose international relations Her Britannic Majesty's Government is responsible, an offence for which a sentence of imprisonment for five years or over may be awarded; and

(ii) in the case of the territory of Sweden, an offence for which a sentence of imprisonment for four years or over may be awarded.

The Convention of 17 April 1953 between the United Kingdom and Greece defines the scope of the exception to immunity by reference to the duration of the penalty (five years or more) as regards the territory of the United Kingdom and the other British territories to which the convention applies, and by reference to the classification of the crime under Greek law, so far as Greece is concerned.

(f) Apart from the provisional arrest allowed under certain conditions, immunity from imprisonment is excluded in several conventions in cases where the execution of a penalty imposed by the courts is involved. This formula is used in the Consular Conventions of 28 May 1929 between Germany and Turkey (art. 11, para. 2), of 4 June 1929 between Germany and Bulgaria (art. 12, para. 1), of 25 April 1958 between the USSR and the Federal Republic of Germany (art. 8, para. 2), and of 28 February 1959 between the USSR and Austria (art. 7, para. 2).

(g) Lastly, there is the enumerative method, which

has been used in isolated cases for the purpose of specifying the offences the prosecution of which might justify provisional arrest. See, for example, the Consular Convention of 12 October 1925 between the USSR and Germany (art. 11, para. 1), which provides another means of defining the cases in which the arrest of consular officials pending trial is allowed.

61. Patently, the conventions which allow the detention of consular officials in those cases only where they are charged with, or convicted of, an offence punishable by a term of imprisonment of a specified duration, exclude arrest as a measure of execution or security in civil and commercial cases, as well as arrest for contraventions and offences which can only be dealt with administratively, if the offence is punishable by imprisonment for a period less than that prescribed in the convention in question. In cases, however, where the convention merely allows consular officials immunity from arrest pending trial, the contracting Parties sometimes expressly specify what is the situation in the other circumstances mentioned above. For example, the Consular Convention of 24 April 1936 between Hungary and Poland provides that career consuls and consular officials may not be placed under arrest either as a preventive measure or as a measure of execution in civil and commercial cases or for a contravention, or as a punishment for offences for which only an administrative penalty is imposed (art. 11, para. 1). This provision is followed by the usual clause excluding arrest during the judicial proceedings, unless the offence is punishable by a penalty involving deprivation of liberty for a term of one year or more. Other conventions expressly exclude arrest in civil or commercial cases; see, for example, the Consular Conventions of 28 May 1929 between Germany and Turkey (art. 11, para. 1) and of 30 December 1925 between France and Poland (art. 4, para. 3).

62. It should be emphasized that many treaties which recognize immunity from arrest and imprisonment, restrict the scope of this immunity in two ways on grounds connected with the status or activities of the person concerned.

(a) These treaties usually deny the benefit of the immunity clause to consular officials who are nationals of the receiving State;

(b) In cases where they provide for immunity from imprisonment for debt, these treaties exclude consular officials who are merchants from the benefit of this provision so far as acts are concerned which are connected with their business.

63. Lastly, it should be noted that the consular conventions and the other applicable agreements contain different definitions of the persons entitled to inviolability. Some agreements deal only with consular officers, some also refer to other consular officials and some even apply to certain classes of consular employees (cf., for example, the Consular Convention of 3 June 1927 between France and Czechoslovakia, art. 5, para. 3, in conjunction with art. 4, para. 1).

64. It would be wrong, however, to think that all

consular conventions provide for personal inviolability. Many of them merely stipulate immunity from jurisdiction for acts performed in an official capacity; examples are the Consular Conventions of 9 September 1929 between Italy and Turkey (art. 11, para. 2), of 18 September 1957 between the USSR and Albania (art. 6), of 24 May 1957 between the German Democratic Republic and Czechoslovakia (art. 7), of 16 December 1957 between the USSR and the Democratic People's Republic of Korea (art. 6), of 24 August 1957 between the USSR and the Hungarian People's Republic (art. 5), of 5 October 1957 between the USSR and Czechoslovakia (art. 4), of 4 September 1957 between the USSR and the Romanian People's Republic (art. 6), of 12 December 1957 between the USSR and the People's Republic of Bulgaria (art. 6), between the USSR and the Mongolian People's Republic (art. 6), of 5 June 1959 between the USSR and the Democratic Republic of Viet-Nam (art. 6) and of 23 June 1959 between the USSR and the People's Republic of China (art. 6).

65. Many consular conventions provide that, in cases where the head of a consular mission or a consular official is prosecuted, arrested or charged with an offence, it is the duty of the Government in whose territory the person in question is prosecuted, arrested or charged to report the matter without delay, or even before action is taken, to the diplomatic representative of the State by which the consular official is employed. Such provisions occur in the Conventions of 21 August 1924 between Italy and Yugoslavia (art. 16), of 1 March 1924 between Italy and Czechoslovakia (art. 7, para. 2), of 30 December 1925 between France and Poland (art. 4, para. 3), of 12 June 1928 between Belgium and Poland (art. 6, para. 7) of 22 December 1934 between Bulgaria and Poland (art. 12, para. 2), of 23 June 1959 between the USSR and the Federal Republic of Germany (art. 8, para. 3), and of 28 February 1959 between the USSR and Austria (art. 7, para. 3).

66. Lastly, some conventions specify that in all matters not connected with the performance of their duties, consuls are subject to jurisdiction of the receiving State. This provision seems to exclude all inviolability except that which is implied in the immunity from jurisdiction enjoyed by consuls for acts performed in their official capacity. Thus, the Treaty of Friendship and Consular Relations of 18 July 1903 between Denmark and Paraguay provides that as regards their person and property, in all that does not relate to their official functions, consuls shall be subject to the laws of the country in which they reside, in the same manner as are other private individuals.⁸² A similar formula occurs in the Consular Convention of 9 September 1929 between Italy and Turkey (art. 11, para. 2).⁸³

⁸² *British and Foreign State Papers*, vol. XCVI, p. 573; also cited in *United Nations Legislative Series, Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (ST/LEG/SER. B/7) (United Nations publication, Sales No. 58.V.3), p. 430.

⁸³ League of Nations, *Treaty Series*, vol. CXXIX, p. 196; *United Nations Legislative Series, op. cit.*, p. 452.

(c) *National law and practice*

67. Provisions of great interest from the point of view of the subject with which this part of the report deals are also found in national law. These provisions may be divided into four groups. In the first place, there are provisions which recognize the inviolability of consuls subject to exceptions which are similar to those found in the consular conventions. In the second group are the provisions which make the institution of proceedings against consuls conditional of the previous consent of the executive authority, or which reserve jurisdiction over consuls to the higher courts. Then there are legislations which do not confer any inviolability on consuls and consular officials, but guarantee them certain advantages or facilities if they are arrested. Lastly, the fourth group includes the provisions of criminal law which are designed to protect the person of the consul.

68. Among the provisions which give consuls a broad inviolability, the Order of 14 January 1927 concerning the diplomatic and consular missions of foreign States in the territory of the Union of Soviet Socialist Republics should be cited first. This Order lays down the principle that the consular representatives of foreign States enjoy, subject to reciprocity, the rights and privileges attaching to their status under the rules of international law (art. 11). The article then goes on to enumerate, for purposes of illustration, the principal rights and privileges and, after recognizing immunity from jurisdiction in respect of offences committed by consuls in their official capacity (sub-para. (c)), stipulates that consuls are not liable to deprivation of liberty otherwise than in virtue of a final judicial decision. The "preventive detention" of consuls (i.e. detention pending trial) is permitted only by order of the competent organ of judicial investigation where judicial proceedings have been instituted against them in respect of an act falling within the jurisdiction of the Supreme Court of the USSR, the Supreme Courts of a Union Republic, a provincial (or equivalent) court or a military tribunal (art. 11, sub-para. (d)).⁸⁴ This Order is in force in all the republics of the Union.

69. Under article 84 of the Administrative Code of the Ukrainian Soviet Socialist Republic, organs of the police and the criminal investigation department are not entitled to detain the consular representative of foreign States.⁸⁵

70. In Norway, the Rescript of 8 April 1771 states that every consul is immune, as regards his own person while carrying on his consular business, from Norwegian jurisdiction. The Rescript is careful to provide that in cases where the consul possesses a house or other property in Norway he is under a duty to bear and be responsible for the charges attaching thereto. It adds that if he engages in trade or business, he is subject in respect thereof to the constitution and laws

of the country, and hence also to the local authority of the place where he is resident, on the same footing as other Norwegian subjects.⁸⁶

71. Article 26 of the Haitian Act of 27 August 1912 provides that, if equal treatment is accorded to Haitian consuls, the members of the foreign consular service who are citizens of the country which has appointed them and who exercise no commerce or industry may be arrested only in the case of an act defined and punished as a crime by Haitian law.⁸⁷

72. Under the Irish Consular Conventions Act of 1954, a consular officer who is a national of the sending State and not a citizen of Ireland and not engaged in private occupation for gain in the State is exempt from arrest or prosecution except when charged with the commission of a crime punishable by imprisonment for a period of one year or more of by penal servitude.⁸⁸

73. The Foreign Service Regulations published by the Republic of the Philippines include, among the immunities usually secured to consular officers in most countries, exemption from arrest except for crimes under local law (chapter III, sect. 2, note 2, para. (a)).⁸⁹

74. In some States whose legislation does not contain special provisions recognizing the inviolability of consuls, a practice favourable to inviolability has been evolved under government directives. For example, in France, exemption from arrest seems to be recognized, subject to strict reciprocity, to enable the consul to continue to safeguard the interests of his country and its nationals.⁹⁰

75. In Belgian practice, consuls enjoy certain consular immunities which are defined in the consular conventions concluded by Belgium or which are recognized by international usage. Consuls may not be arrested or imprisoned prior to trial, except for offences punishable by imprisonment for a term of at least one year or by a more severe penalty.⁹¹

76. In Finland, whose statute law does not contain any provisions concerning the inviolability of members of the consular staff, immunity from jurisdiction is accorded to career consuls and senior consular officials for minor offences.⁹²

77. The legislation of some States, while expressly making consuls amenable to the jurisdiction of the receiving State in civil and criminal matters, provides that the institution of proceedings against consuls is conditional on the consent of the Government or of another organ of the State, or reserves jurisdiction over consuls, in both civil and criminal matters, to the higher courts. Thus, the Brazilian Decree No. 855 of

⁸⁶ *Ibid.*, p. 224.

⁸⁷ A. H. Feller and Manley O. Hudson, *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington, D.C., Carnegie Endowment for International Peace, 1933), vol. I, p. 628.

⁸⁸ *United Nations Legislative Series, op. cit.*, p. 173.

⁸⁹ *Ibid.*, p. 238.

⁹⁰ *United Nations Legislative Series, op. cit.*, p. 122.

⁹¹ *Ibid.*, p. 24.

⁹² *Ibid.*, p. 114.

⁸⁴ *United Nations Legislative Series, op. cit.*, p. 339; Sabanin, *op. cit.*, p. 328.

⁸⁵ *United Nations Legislative Series, op. cit.*, p. 328.

8 November 1851 regulating the exemptions and attributions of foreign consular agents [i.e. consuls] provides that they are subject in civil matters and in individual offences committed by them to the Brazilian authorities (art. 17). It stipulates, however, that only in cases of offences committed as a merchant, or of such gravity as do not admit bail, may a consular officer be imprisoned without the authorization of the Brazilian Government. The Brazilian Government may authorize the competent court to try the consul in question or, for weighty motives, deliver him to the Government of the sending State or, if that is not sufficient, expel him from the country or deprive him of the exequatur.⁹³ The Japanese rules of 1923 relating to the duties of judiciary police fall within the same category of legislative provisions, for they provide that in case consuls and consular officers who are nationals of the country appointing them are suspect, no action may be taken against them unless the Public Prosecutor gives instructions for the purpose. This provision is not, however, applicable to cases where grave offences have been committed and no delay is permissible.⁹⁴

78. According to Swiss practice, senior consular officials enjoy immunity from jurisdiction in respect of those acts only which are performed in their official capacity, whether they are career or honorary consuls and whether they are of Swiss or of foreign nationality. Nevertheless, no civil or criminal proceedings may be instituted against the head of a consular post before the Political Department has expressed its views. Furthermore, according to Swiss practice, it is recommended, in keeping with international usage and courtesy, that the following rules should be observed with respect to senior consular officials:

(a) They should not be subjected to the local jurisdiction for offences of minor importance (punishable by fine);

(b) Notices of fines should be sent to their private address and printed forms should not be used for this purpose;

(c) They should not be required to give evidence in court, but should be invited to furnish it, in writing or orally, before the representative of a court.⁹⁵

79. Among the legislations which reserve jurisdiction over foreign consuls to the higher courts, reference should be made in the first place to the Constitution of Argentina, under which it is the Supreme Court which is competent to try any case concerning the privileges and immunities of foreign consuls and vice-consuls acting in their official capacity (Constitution, art. 100 and 101, and Act No. 48, art. 1), whereas their private business comes within the competence of the national district judges (Act No. 48, art. 2, para. 3).⁹⁶ In the United States of America, the federal district courts have original jurisdiction, exclusive of the courts of the

States of the Union, of all actions and proceedings against consuls or vice-consuls of foreign States (United States Code, 1952 edition, Title 28, sect. 1351).⁹⁷

80. Examples of provisions which, without granting any exemption from imprisonment or arrest, confer certain advantages or privileges on foreign consuls on arrest, occur in particular in the laws of the United States and Honduras.

81. According to the regulations of the United States foreign consular officers in the United States are subject, save as otherwise provided by international treaty, to process of local courts, except with respect to their official acts. With regard to arrest or prosecution for other acts, the regulations provide that consular officers and employees are entitled to be treated with courtesy and respect.⁹⁸ In Honduras, Act No. 109 of 14 March 1906 regarding foreign consular missions gives any consular official who is arrested the right to be escorted to the consular office and to be given sufficient time to put in order, seal and place in safekeeping the consulate's records and papers (art. 51 and 52).⁹⁹

82. Several legislations protect the consuls of a foreign State against assault or attack by third parties. Thus, under the Polish Penal Code of 1932 it is an offence punishable by imprisonment or detention for a term not exceeding two years to insult a foreign consul during the exercise of his functions (art. 132). Any person who commits an assault on the consul of a foreign State during or on account of the consul's exercise of his official functions is liable to imprisonment for a term not exceeding five years.¹⁰⁰

83. In Israel, under section 77 of the Criminal Code Ordinance of 1936, any person who publishes anything intended to be read, or any sign or visible representation tending to degrade, revile or expose to hatred or contempt any dignitary of a foreign State (an expression which includes the consul) is guilty of a misdemeanour and is liable to a fine of one hundred pounds. If such publication is likely or intended to disturb peace and friendship between Israel and any other State or territory, the person responsible is guilty of a misdemeanour.¹⁰¹

SECTION III: PROPOSED CODIFICATION

A

The question is: Should consular officials be recognized as exempt from arrest and imprisonment during the period preceding conviction only (subject, of course, to a proviso concerning particularly serious offences)? In other words, should the exemption have the effect

⁹³ Feller and Hudson, *op. cit.*, vol. I, p. 156.

⁹⁴ *Ibid.*, p. 729.

⁹⁵ *United Nations Legislative Series, op. cit.*, p. 311.

⁹⁶ For an English translation of these laws, see H. Lauterpacht, *Annual Digest, 1933-1934*, p. 394.

⁹⁷ *United Nations Legislative Series, op. cit.*, p. 384.

⁹⁸ *U.S. Foreign Service Manual*, vol. I, part I, section 232.1; *United Nations Legislative Series, op. cit.*, p. 375.

⁹⁹ *Ibid.*, p. 159.

¹⁰⁰ *Ibid.*, p. 245.

¹⁰¹ *Ibid.*, pp. 179 and 180. The legislation of the State of Israel, enacted in 1948, provides that as far as that State is concerned, the word "Israel" should replace the word "Palestine" used in the 1936 Ordinance.

of barring only arrest or imprisonment pending trial, or should it be accorded even in cases in which consular officials are convicted of minor offences? There seem to be cogent reasons for preferring the latter alternative. The imprisonment of a consul or consular official makes it impossible or at least extremely difficult for the consulate to carry on its day-to-day work, and this is particularly serious since the disposal of the manifold duties performed by the consulate must not suffer delay (issue of passports, visas and other travel documents, legalization of signatures, documents and commercial invoices, issue of certificates of origin, discharge of many functions connected with shipping). The imprisonment of such an official is detrimental not only to the sending State but also to the receiving State and seriously affects the consular relations between the two States concerned. It would be dangerous therefore to expose the work of a consulate to the risk of being stopped or seriously hampered at any time through the action taken by the local courts in connexion with the most trivial offence. By reason of the importance of the consular functions, the imprisonment of consular officials should not be allowed except in cases where they have been convicted of a crime. There do not seem to be any objections to this solution in principle. Nor can this solution be criticized on the ground that, because it would become impossible to enforce sentences in respect of minor offences, the conviction would be meaningless, and that the exemption barring the execution of a sentence imposed by a court would frustrate the exercise of the judicial power. In the first place, under the criminal law of many countries minor offences are punishable either by a fine alone or by a fine as an alternative to a penalty involving deprivation of liberty. Secondly, in many legal systems the offender may be eligible for a stay of execution, i.e., the suspension of the execution of the sentence, on condition that he does not commit another offence within the period specified by law. Lastly, a sentence for a minor offence, even if it cannot be enforced against the consular official for so long as he is exercising official functions in the receiving State, may still be used by the receiving State as grounds for requesting his recall if in the opinion of the Government of the receiving State the offence committed was sufficiently serious to require such action. Besides, the fact that this solution has been adopted in several consular conventions is the strongest argument in its favour. Its adoption, while leaving intact the exercise of the criminal jurisdiction of the receiving State *vis-à-vis* consular officials, would give the latter personal inviolability in all cases in which the advantages gained by the execution of the sentence would manifestly bear no relation to the prejudice which the execution would cause to the conduct of the consular functions and relations. The legitimate interests of the receiving State would be fully safeguarded, for the exemption in question would not be granted in cases of conviction of a particularly serious offence. For the reasons given it is also desirable to accord to consular officials exemption from any measure of execution that involves a curtailment of personal liberty (imprisonment for debt, imprisonment to compel the debtor

to perform an act which cannot be performed by a proxy, etc.), except in cases where they engage in trade or some other private gainful occupation.

B

A summary analysis of the consular conventions and other relevant agreements, of the opinions of authorities on international law, of the case-law of national courts and of the practice of States discloses a sufficiently wide area of agreement to justify the reasonable hope that a proposal based on the following conclusions may be acceptable to States:

1. The official acts of consuls and other members of the consular staff are immune from the jurisdiction of the receiving State in all respects, and consequently also from its criminal jurisdiction.

2. So far as acts other than official acts are concerned, consuls and other members of the consular staff are subject, save as otherwise provided by international treaty, to the jurisdiction of the receiving State.

3. Consular officials who are not nationals of the receiving State and who do not engage in any private activity for gain in the receiving State enjoy personal inviolability, except:

(a) for the purpose of serving a court sentence possessing the force of *res judicata*, for an offence punishable by a term of imprisonment for one year or more, or

(b) if the consular official is taken *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom.

4. If criminal proceedings are to be instituted against a consular official, the interests of the consular office and the respect due to the State to which the consular official in question belongs require that the proceedings should be conducted in a way which will not interfere with the work of the consulate and will not cause unnecessary prejudice to the interests to be protected by the consulate.

C

In the light of the foregoing considerations, the Special Rapporteur proposes that the following article be inserted in the provisional draft articles on consular intercourse and immunities:

Article ...

Personal inviolability

1. Consular officials who are not nationals of the receiving State and do not engage in commerce or any other gainful occupation shall not be liable to arrest or detention pending trial, except when they are caught *in flagrante delicto* and the act committed constitutes a criminal offence against life or personal freedom.

2. Except in the case specified in paragraph 1 of this article, the consular officials referred to in that paragraph may not be committed to prison or subjected to any other restriction upon their personal freedom save for the purpose of serving a court sentence, possessing the force of *res judicata*, for an offence punishable by a term of imprisonment of one year or more.

3. In the event of criminal proceedings being instituted against a consular official, that official may in no event be compelled to appear before the court. He may be invited in writing to give his deposition in person. If he refuses to do so, the court shall request him to send his deposition in writing, if the law of the receiving State so permits. Otherwise, the judicial authority shall visit his residence for the purpose of taking his deposition in the form prescribed by the law of the receiving State.

4. In the event of the arrest of, or of criminal proceedings being instituted against, one of the consular officials referred to in paragraph 1 above, the receiving State shall immediately notify the diplomatic representative of the State to which the consular official belongs (unless the letter was taken *in flagrante delicto*).

PART II

The most-favoured-nation clause and consular intercourse and immunities

SECTION I

1. Introduction

1. Since the functions and immunities of consuls are largely based on international treaties which give the consuls powers, privileges and immunities in excess of those accorded by customary international law, the most-favoured-nation clause plays quite an important part in this sphere. If one studies the treaties, and particularly the consular conventions, one will see that States have long been using this clause as a means of securing the right to establish consulates in towns and ports open to the consular representatives of any country for the purpose of generalizing the system of privileges, exemptions, immunities and other advantages granted to consuls and securing for their consuls any wider powers that might be conferred upon the consuls of any foreign State.

2. In order to judge whether it is possible and desirable to insert a most-favoured-nation clause in the codification of consular law, it is necessary to recapitulate the essential principles governing the operation of the most-favoured-nation clause and to see how far they can be applied in the particular matter of consular intercourse and immunities.

2. General considerations

3. The most-favoured-nation clause is a contractual provision whereby the contracting Parties grant to each other the right to participate in the most considerable advantages which they have granted or may in future grant to a third State.¹⁰² Fundamentally, therefore,

its effect is to generalize the advantages which one of the contracting Parties might grant, either generally or in certain particular respects, to a third State. Hence it is an important means of achieving the purpose expressed in Article 1, paragraph 2, of the Charter of the United Nations, viz. "To develop friendly relations among nations based on respect for the principle of equal rights... of peoples".

4. The clause therefore constitutes an undertaking to accord, as of right and without compensation, to the other contracting Party, and to its agents, nationals, goods or ships, treatment equal to that accorded to any third State. A State which accepts the most-favoured-nation clause binds itself either in general or in some specific area of international relations, not to permit any discrimination against the other contracting Party and to give the other contracting Party automatically the benefits enjoyed or in future to be enjoyed by any third State.¹⁰³

5. It follows from the above that the automatic extension to the other contracting Party of any advantage conceded or to be conceded to a third State (most favoured State) is the essence of the clause. The main purpose of the clause is to place the beneficiary State in the same position as third States in a particular market or territory. But equality of treatment *vis-à-vis* third States is not coterminous with equality of advantages in the same sphere *vis-à-vis* the granting State, for the treatment of third States is not necessarily identical in the two States bound by the clause. If two States A and B have subscribed to a most-favoured-nation clause and State B subsequently grants an advantage (covered by the clause) to State C, State A automatically becomes entitled to the same advantage, without being itself under any obligation to grant any advantage to State B.

6. Most-favoured-nation treatment is usually granted by treaty, but it may also be granted to another State autonomously by legislative act, decree or government declaration.¹⁰⁴

7. Except in the case mentioned in the preceding paragraph, the legal basis of most-favoured-nation treatment is the original treaty in which the two States undertook to give to each other most-favoured-nation treatment. It is this original treaty which establishes the legal *vinculum* between the beneficiary State and the advantage granted to a third State, whether the

¹⁰² See: Calvo, *Droit international théorique et pratique*, 4th edition, vol. IV, p. 1597; Suzanne Basdevant, *Clause de la nation la plus favorisée*, *Répertoire de droit international* (Paris, 1927), vol. 3, p. 467; Anzilotti, *Cours de droit international* (Paris, 1929), pp. 432-439; Scelle, *Règles générales du droit de la paix*, *Recueil des cours*, vol. 46/1933-IV, pp. 461-464; McNair, *The Law of Treaties* (Oxford, 1938), pp. 285-306; Rousseau, *Principes généraux de droit international public* (Paris, 1944), pp. 464 ff.; Kozhevnikov, *Uchebnoe posobie po mezhdunarodnomu publichnomu pravu* (Moscow, 1947), pp. 124 ff.; H. F. Oppenheim, *La clause de la nation la plus favorisée dans la pratique internationale de la Suisse* (Zürich, 1948), p. 23; Hershey, *The Essentials of International Public Law and Organization*, Revised Edition (New York, 1927), pp. 448 and 449; Guggenheim, *Traité de*

droit international public (Geneva, 1953), vol. I, pp. 104-109; A. Verdross, *Völkerrecht*, 2nd edition (Vienna, 1950), p. 468; L. Oppenheim, *International Law*, 8th edition by Sir H. Lauterpacht (London, 1955), vol. I, p. 972; Genkin, *Printsip naibolshego blagopriyatstvovaniya v torgovykh dogovorakh gosudarstv*, *Sovetskoe gosudarstvo i pravo*, 1958, No. 9, pp. 22-32; A. S. Korolenko, *Torgovie dogovory i soglasheniya SSSRs innostranymi gosudarstvami* (Moscow, 1953); Korovin, *Soviet Treaties and International Law*, *American Journal of International Law*, vol. XXII, 1928, pp. 754-762.

¹⁰³ Genkin, *loc. cit.*, p. 22; see also Sibert, *Traité de droit international public* (Paris, 1951), vol. II, p. 254.

¹⁰⁴ It is in this way that the United States of America and Switzerland granted each other most-favoured-nation treatment from 1899 to 1936. H. F. Oppenheim, *op. cit.*, pp. 47 and 48.

advantage is granted under an international treaty or by national legislation, or whether it results from the *de facto* circumstances.¹⁰⁵

8. If a convention granting an advantage to a third State expires, the effects of the most-favoured-nation clause arising out of that convention also cease. Consequently, the beneficiary State loses the advantage which it had acquired through the clause. This logical solution has been confirmed both by learned authorities¹⁰⁶ and by the case-law of the International Court of Justice.¹⁰⁷

9. The scope of the clause is vast. In particular, it may cover commercial relations and especially Customs advantages, the conditions of residence and legal status of foreigners, the status of diplomatic and consular representatives, access to courts and judicial protection, the charging of taxes and duties, shipping and especially the use of ports, and favours granted in the matter of the protection of industrial or literary and artistic property.¹⁰⁸

10. The most-favoured-nation clause appears variously either in the form of a general clause of unlimited scope, even though its scope is sometimes qualified by a few exceptions, or in the form of a special clause specifying its scope, or else in the form of a limited clause (sometimes also called a "specialized" or "specific" clause) applying only to certain goods or only to certain acts or services.¹⁰⁹ It is these last two forms of the clause which occur in instruments concerning consular intercourse and immunities.

11. In such instruments, as in treaties governing other matters, the most-favoured-nation clause appears sometimes in a positive form, whereby the contracting States grant to each other most-favoured-nation treatment in general or in particular respects, and sometimes in a negative form, whereby they agree that consuls or consular officials will not be treated less favourably than like officials of any third State. An example of the positive form, which is the more common, occurs in article 4 of the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal, which deals with the issue of the exequatur to consuls (consuls-general, consuls, vice-consuls and consular agents) and provides in its last paragraph that "The persons mentioned above shall enjoy on a reciprocal basis all the rights, privileges, exemptions and immunities that are accorded to persons of corresponding status of any other State".¹¹⁰ An example of the negative form of the clause

occurs in article II of the Treaty of Friendship between Persia and Belgium of 23 May 1929, under which the contracting Parties agree that "the diplomatic and consular representatives of each of them shall receive in the territory of the other, subject to reciprocity, the treatment consecrated by general international law, a treatment which shall not be less favourable than that granted to the diplomatic and consular representatives of the most favoured nation".¹¹¹ The same formula is in the Provisional Agreement between the United States of America and Afghanistan of 26 March (art. II, *in fine*) and in the Exchange of Notes of 4 May 1946 between the United States of America and Yemen constituting an Agreement relating to Friendship and Commerce (art. II, *in fine*).

12. The most-favoured-nation clause often appears in conjunction with the reciprocity clause, already in the treaties of the nineteenth century. For example, the Treaty of Navigation of 30 December 1881 between France and Sweden and Norway contains the following provision (art. 9):

*"Les consuls généraux, consuls, vice-consuls et agents consulaires, ainsi que leurs chanceliers, jouiront à charge de réciprocité, des mêmes privilèges, pouvoirs et exemptions dont jouissent ou jouiront ceux des nations les plus favorisées."*¹¹²

The article excludes from the benefit of this provision, however, consular officials who engage in trade, and stipulates that, in such cases, they "*seront tenus de se soumettre aux mêmes lois et règlements auxquels sont soumis, dans le même lieu, par rapport à leurs transactions commerciales, les particuliers de leur nation*" (shall be subject to the same laws and regulations as those to which, in the same place, private persons of their nation are subject in respect of their commercial transactions).¹¹³

13. The term "reciprocity" describes the position where a State assures to another State and to its representatives, nationals, ships and products, treatment equal or equivalent to that which that other State assures to it.¹¹⁴ Like the most-favoured-nation clause, the reciprocity clause may take either a general form, a special form or a limited form. It may denote an abstract or *formal* reciprocity, or else a material reciprocity. Under a formal reciprocity, identity of treatment in a particular sphere is guaranteed but not necessarily identity of advantages in a specific case, as for example where one of the two States grants to a third State national treatment in some particular respect.¹¹⁵ Material

¹⁰⁵ See on this subject the decision of the International Court of Justice in the Anglo-Iranian Oil Company case, International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, Judgment of 22 July 1952, p. 109.

¹⁰⁶ See para. 3 of the resolution of the Institute of International Law on the effects of the most-favoured-nation clause in trade and navigation, 23 April 1936. *Tableau général des résolutions de l'Institut (1873-1956)*, Bâle, 1957, p. 132.

¹⁰⁷ I. C. J., *Reports of Judgments, Advisory Opinions and Orders*, Judgment of 27 August 1952, pp. 204 and 205.

¹⁰⁸ Cf. the article by Suzanne Basdevant (Mrs. Bastid), cited above, *op. cit.*, p. 470.

¹⁰⁹ Guggenheim, *op. cit.*, pp. 108 and 109; H. F. Oppenheim, *op. cit.*, pp. 36 *et seq.*

¹¹⁰ United Nations, *Treaty Series*, vol. 94, p. 6.

¹¹¹ League of Nations, *Treaty Series*, vol. CX, p. 371.

¹¹² De Martens, *Nouveau Recueil général des traités*, second series, vol. IX, p. 195. (Translation: "The consuls-general, consuls, vice-consuls and consular agents, and their *chanceliers*, shall enjoy, subject to reciprocity, the same privileges, powers and exemptions as are or may in future be enjoyed by those of the most favoured nations").

¹¹³ *Ibid.*

¹¹⁴ Cf. *Dictionnaire de la terminologie du droit international*, Paris, Sirey, 1960, p. 504.

¹¹⁵ Formal reciprocity in this sense is to be distinguished from the concept of reciprocity inherent in every international treaty.

reciprocity, on the other hand, entitles a State to claim for itself, its representatives, nationals, ships and products, the same effective treatment as it grants in its territory to the other State, even though, in the case in question, the grantor State does not discriminate between the nationals of the beneficiary State and the nationals of other foreign States.

14. The practice of inserting a reciprocity clause in the most-favoured-nation clause used in instruments concerning consular intercourse and immunity has become very widespread. Among recent conventions, reference may be made in particular to the following: the Convention of 12 May 1933 between France and Canada (art. 8, para. 2); and the Treaty of Peace and Friendship between India and Nepal of 31 July 1950 (art. 4, third para.).

15. Very often the reciprocity clause in consular conventions takes a more explicit form. A good example occurs in article 14, paragraph 2, of the Consular Convention of 9 September 1929, between Italy and Turkey:

“The High Contracting Parties agree that neither of them shall be entitled to appeal to the advantages under a Convention with a third Party in order to claim for its consular officials privileges or immunities other or more extended than those granted by the Party itself to the consular officials of the other Party.”¹¹⁶

A large number of conventions use this formula, for example: the Convention of 22 June 1926 between Albania and the Kingdom of the Serbs, Croats and Slovenes regarding Establishment and the Consular Service (art. 8, para. 2); the Treaty of Commerce and Navigation of 24 March 1928 between Germany and Greece (art. 26, para. 2); the Consular Convention of 7 November 1928 between Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes (art. 5, para. 2); the Treaty of Commerce and Navigation of 2 November 1927 between Greece and the Kingdom of the Serbs, Croats and Slovenes (art. 27, para. 2, *in fine*); and the Consular Treaty of 28 May 1929 between Germany and Turkey (art. 14, para. 2).

3. The conditional most-favoured-nation clause in conventions concerning consular intercourse and immunities

16. The importance attached by the mercantilists, in the seventeenth and eighteenth centuries, to foreign trade, which some of them, including for example Colbert, regarded as a sort of financial war,¹¹⁷ explains the appearance in international treaties of the clause which is known as the conditional most-favoured-nation clause (also known as the *clause onéreuse*). According to this clause, an advantage granted to a third State in return for compensation furnished by the latter cannot accrue to the beneficiary State unless that State itself furnishes equivalent compensation. In this form, the clause was introduced into international practice by the United States in its Treaty of Amity and Com-

merce with France of 6 February 1778.¹¹⁸ This conception of the clause was subsequently, by interpretation, extended in the practice of some States even to cases in which the most-favoured-nation clause was expressed in the unconditional form.

17. At first applied in commerce, the conditional most-favoured-nation clause was also extended to consuls in certain nineteenth century treaties. For example, the Treaty of Friendship, Commerce and Navigation signed on 9 December 1834 between France and Bolivia, after providing in article 30 that the diplomatic and consular agents, citizens of all classes, ships and goods of one of the two States will enjoy as of right in the other State any freedoms, privileges and immunities whatsoever which are or may be granted to the most favoured nation, adds;

“*et ce gratuitement si la concession est gratuite, ou avec la même compensation si la concession est conditionnelle*”.

(And these favours are granted without compensation, if they are granted to the other States without compensation, and subject to the same compensation if the grant is conditional).¹¹⁹

The conditional clause was also inserted in the Consular Convention of 7 January 1876 between France and Greece (art. 25)¹²⁰ and certain other conventions of that period.

18. The application of the conditional clause presupposes an agreement with the grantor State on the subject of the compensation offered, which that State has the discretionary power to accept or to refuse. In some treaties, there is express provision for such an agreement. This type of clause therefore introduces the possibility of all kinds of demands for compensation, both of an economic and of a political nature, which may be unacceptable to the beneficiary State. Instead of ensuring equality of treatment, which is the principal purpose of the most-favoured-nation clause, the conditional clause is a source of discrimination. For this reason, there is everything to be said for Mr. H. F. Oppenheim's view that to call the conditional clause a most-favoured-nation clause is a misnomer.¹²¹ And the conditional clause has in fact been attacked precisely on these grounds by the great majority of European writers on international law. It has not been used by the United States of America in commercial treaties since the conclusion of the treaty with Germany of 8 December 1923 (art. VII, para. 4).¹²² Even since then, however, the Department of State has interpreted all most-favoured-nation clauses in treaties concluded with foreign

¹¹⁸ Under art. II of this Treaty, the two States undertook mutually “not to grant any particular favour to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favour, freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional”. W. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers, 1776-1909*, vol. I, p. 469.

¹¹⁹ De Clercq, vol. 4 (1824-1842), p. 294.

¹²⁰ De Martens, *Nouveau Recueil général de traités*, second series, vol. IV, p. 381.

¹²¹ H. F. Oppenheim, *op. cit.*, p. 41.

¹²² League of Nations, *Treaty Series*, vol. LII, pp. 134 *et seq.*

¹¹⁶ League of Nations, *Treaty Series*, vol. CXXIX, p. 204.

¹¹⁷ Ellul, *Histoire des institutions*, vol. 2, p. 351.

Governments as conditional, so far as consular privileges and immunities are concerned.¹²³

19. It is interesting to note that the conditional clause was expressly condemned by the Economic Committee of the League of Nations precisely because of its discriminatory nature.¹²⁴ It may nowadays be regarded as having been abandoned. Accordingly, when the most-favoured-nation clause is mentioned in the following pages of this report, it is the unconditional clause which is meant.

20. The last question to be considered in this section is whether the exceptions admitted by customary international law to the operation of the most-favoured-nation clause may have any significance so far as consular intercourse and immunities are concerned. It is generally agreed that the most-favoured-nation clause does not apply to:

(a) Frontier zone traffic, and

(b) Customs unions,

even in cases where these exceptions are not expressly stipulated by the contracting Parties.¹²⁵ The reasons for these exceptions are inherent in the very essence of the clause and in the specific nature of the economic and legal relations envisaged. For the same reasons, the most-favoured-nation clause does not apply to agreements concluded between landlocked States and the countries by which they are separated from the sea for the purpose of regulating the right of free access to the sea which every landlocked State possesses.¹²⁶

Cases are conceivable in which the exceptions in question, or at least some of them, might operate even in consular law. If a State bound by an appropriate most-favoured-nation clause permitted one of its neighbours to set up a consulate mainly with a view to facilitating frontier zone traffic—which might be of practical value, especially in the case of cession of territory—third States could not claim the benefit of the most-favoured-nation clause for the purpose of establishing their own consulates in the same locality.

SECTION II: SCOPE OF THE MOST-FAVOURLED-NATION CLAUSE IN THE MATTER OF CONSULAR INTERCOURSE AND IMMUNITIES

1. Introduction

21. In the matter of consular intercourse and immu-

¹²³ Hackworth, *Digest of International Law*, vol. IV, p. 702, and the examples he quotes.

¹²⁴ "... the very essence of the most-favoured-nation clause lies in its exclusion of every sort of discrimination, whereas the conditional clause constitutes, by its very nature, a method of discrimination; it does not offer any of the advantages of the most-favoured-nation clause proper, which seeks to eliminate economic conflicts, to simplify international trade and to establish it on firmer foundations." (*League of Nations Publications*, II. Economic and Financial, 1933, II.B.1 (document E/805), p. 7; quoted by H. F. Oppenheim, *op. cit.*, p. 43).

¹²⁵ Riedel, *Ausnahmen von der Meistbegünstigung* (Vienna, 1931), p. 5.

¹²⁶ This exception to the most-favoured-nation clause was recognized by the Preliminary Conference of Landlocked States held at Geneva from 10 to 14 February 1958: see the preamble to the final declaration of principles, inserted at the Conference on the Law of the Sea in document A/CONF.13/C.5/L.1.

nities, the most-favoured-nation clause most often refers to:

(a) The powers, privileges and immunities of consuls;

(b) The treatment of consuls in general;

(c) The privileges, immunities and prerogatives of consuls;

(d) Particular immunities or advantages;

(e) The establishment and location of consulates.

2. Most-favoured-nation clause mentioning the powers, privileges and immunities of consuls

22. There are many treaties which extend the most-favoured-nation clause to the functions of consuls, though they use different expressions for describing them (powers, functions, duties, competence, general legal status, rights). For example, the early Treaty of Commerce and Navigation of 18 December 1832 between Russia and the United States of America, which authorized the contracting Parties to maintain in each other's ports consuls, vice-consuls, agents and commissaries of their own appointment, provided that the latter should enjoy the *same privileges and powers* as those of the most favoured nation (art. VIII).¹²⁷ The word "powers" occurs in other treaties, e.g. the Treaty of Commerce and Navigation of 14 May 1926 between Germany and Sweden (art. 22) and the Commercial Agreement of 14 December 1927 between Finland and Sweden (art. 14, para. 2).

23. The Treaty of Commerce and Navigation of 6 August 1863 between Great Britain and Italy contains a similar clause in article XIII. After stipulating that consuls-general, consuls and vice-consuls and consular officials shall not enter upon their duties until after they have been approved and admitted in the usual form by the Government to which they are sent, this article goes on to say:

"They shall exercise whatever functions, and enjoy whatever privileges, exemptions and immunities are or shall be granted there to consuls of the most favoured nation."¹²⁸

24. In addition to referring to privileges, exemptions and immunities, other treaties refer to attributions (powers). Examples are the Treaty of Commerce of 31 March 1927 between Hungary and Czechoslovakia (art. XXIX, para. 2, and the Provisional Commercial Agreement of 4 April 1925 between Germany and the Economic Union of Belgium and Luxembourg (art. 14, para. 2). More rarely, the clause mentions the competence of consuls; an example occurs in the Treaty of Commerce of 2 November 1927 between Greece and the Kingdom of the Serbs, Croats and Slovenes (art. 27, para. 2). The Convention of 15 December 1925 between the USSR and Norway contains a most-favoured-nation clause which also mentions the general legal status of consuls. It says: "As regards prerogatives, immunities, exemptions and the general

¹²⁷ *British and Foreign State Papers*, vol. XX, p. 271.

¹²⁸ *Op. cit.*, vol. LIII, p. 39.

legal status of consular representatives admitted to perform their duties in the territory of the other Party, the High Contracting Parties agree to grant each other most-favoured-nation treatment" (art. 1, para. 2).¹²⁹

25. But it is the term "rights" which occurs most frequently juxtaposed to the reference to consular privileges and immunities. As is evident from a comparison of this term with the terms used in other authentic treaty texts, it means in most cases the powers of the consuls.

26. The treaties in which a most-favoured-nation clause covering also, in one form or another, the powers or functions of consuls occurs are very numerous. It will be sufficient to mention by way of example: the Economic Agreement of 1 September 1920 between Germany and Austria (art. 25, para. 2); the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States of America and Germany (art. XVII, second para.); the Treaty of 22 November 1921 between the United Kingdom and Afghanistan for the Establishment of Neighbourly Relations (art. 5); the Treaty of Commerce and Navigation of 16 July 1926 between the United Kingdom and Greece (art. XXII, para. 2); the Commercial Convention of 10 September 1926 between Greece and Sweden (art. 10, para. 2); the Convention of 1 December 1927 between Greece and Switzerland regarding Conditions of Residence and Legal Protection (art. 12, para. 3); the Commercial Agreement of 17 August 1927 between France and Germany (art. 46, para. 2); the Treaty of Commerce and Navigation of 6 October 1927 between Germany and the Kingdom of the Serbs, Croats and Slovenes (art. 29, para. 2); the Convention on Commerce and Navigation of 29 June 1927 between Greece and Norway (art. 10, para. 2); the Treaty of Friendship of 19 March 1927 between Poland and the Persian Empire (art. III); the Convention of Commerce and Navigation of 8 November 1928 between Hungary and Sweden (art. 13, para. 2); the Treaty of Commerce of 9 March 1928 between Colombia and Sweden (art. 3, second para.); the Treaty of Commerce of 6 April 1928 between Austria and Denmark (art. XIX, second para.); the Convention of Commerce and Navigation of 22 August 1928 between Denmark and Greece (art. XI, para. 2); the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States of America and Germany (art. XVII, second para.); the Consular Convention of 14 March 1947 between the United States of America and the Philippines (art. XIV); the Treaty on Civil Rights and Consular Prerogatives of 20 May 1948 between Spain and the Philippines (art. IV, fourth para.); the Consular Convention of 12 January 1948 between the United States of America and Costa Rica (art. I, para. 2); and the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal (art. 4, para. 3).

27. The Treaty of Commerce and Navigation of 24 March 1928 between Germany and Greece uses, in

addition, the term "rights", the term "facilities" (*Be-fugnisse*) in article 26, paragraph 1.

3. *Most-favoured-nation clause mentioning the treatment of consuls in general*

28. In other treaties and conventions, the most-favoured-nation clause speaks of the treatment accorded to consuls in general terms. An example is article 1, fourth paragraph, in the Exchange of Notes of 30 July and 9 August 1928 between Persia and Sweden:

"The treatment accorded, on condition of reciprocity, to the diplomatic and consular representatives of Persia in Swedish territories shall in no case be inferior to that accorded to the most favoured nation."

29. Provisions of this type are found in several treaties, e.g. the Provisional Agreement of 26 March 1936 between the United States and Afghanistan (art. II); the Treaty of Friendship of 23 May 1929 between Belgium and Persia (art. II, second para.); the Provisional Agreement of 7 November 1933 between the United States of America and Saudi Arabia (art. I); the Provisional Agreement of 4 July 1946 between the United States of America and the Philippines (art. III, *in fine*) and others.

4. *Most-favoured-nation clause mentioning consular privileges and immunities*

30. States very frequently use the most-favoured-nation clause to secure for their consular officials the privileges, immunities and advantages of all kinds which may be granted to the consular officials of a third State. For example, the Convention of 12 May 1933 between Canada and France concerning the Rights of Nationals and Commercial and Shipping Matters contains the following provision (art. 8, para. 2):

"The heads of posts, titular or acting, as well as the agents of the consular service, chancellors, attachés or others, on condition of reciprocity, shall enjoy the personal privileges, immunities and exemptions such as are or may be accorded to similar agents of the same class and grade of the most favoured foreign nation."¹³⁰

By another provision in the same article, the contracting Parties undertake to conclude a convention with a view to determining and defining the powers and functions of these agents (para. 3).

31. Some conventions define the essential privileges and immunities and stipulate most-favoured-nations treatment in respect of advantages not specified in the convention. An illustration of this formula is provided by article 13 of the Convention of 31 December 1913 between Cuba and the Netherlands:

"Cuban Consuls General, Consuls, Vice-Consuls and Consular Agents in the Netherlands Colonies shall enjoy, in addition to those privileges agreed upon in the present Convention, all privileges, exemp-

¹²⁹ League of Nations, *Treaty Series*, vol. XLVII, p. 10.

¹³⁰ United Nations, *Treaty Series*, vol. 253, p. 293.

tions and immunities which have been granted or may in the future be granted to officials of the same category belonging to the most favoured nation.”¹³¹

A similar formula occurs in the Consular Convention of 4 November 1913 between Chile and the Netherlands (art. 13) and also in the Treaty on Consular Arrangements, Navigation, Civil and Commercial Rights of 6 October 1948 between Greece and the Lebanon 1948 (art. 32).

32. Many of the more recent conventions contain a most-favoured-nation clause whose scope is restricted to consular privileges and immunities; examples are: the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (art. 5), which mentions prerogatives, immunities, honours and privileges; the Convention of 22 June 1926 between the Albanian Republic and the Kingdom of the Serbs, Croats and Slovenes regarding Establishment and the Consular Service (art. 8, para. 1); the Treaty of Friendship, Commerce and Navigation of 16 July 1926 between Norway and Siam (art. XVII, para. 3); the Treaty concerning Consular Matters, Navigation, Civil and Commercial Rights, and Establishment of 23 September 1926 between Spain and Greece (art. 10, para. 1); the Convention of Commerce and Navigation of 9 February 1927 between Chile and Norway (art. 4, para. 2); the Convention of Commerce and Navigation of 2 March 1927 between Finland and Czechoslovakia (art. 14, para. 2); the Exchange of Notes of 25 April 1947 between the United States of America and Nepal relating to Diplomatic and Consular Representation (art. 2, *in fine*); the Exchange of Notes of 4 May 1946 between the United States of America and Yemen constituting an Agreement relating to Friendship and Commerce (art. II); and the Provisional Agreement of 4 July 1946 between the United States of America and the Philippines concerning Friendly Relations and Diplomatic and Consular Representation (art. III).

5. *Most-favoured-nation clause mentioning a specific immunity*

33. In some cases, the most-favoured-nation clause covers only a specified advantage or immunity. For example, the Consular Convention of 25 April 1958 between the Union of Soviet Socialist Republics and the Federal Republic of Germany, after stipulating that consuls, consular officials and consular employees who are citizens of the sending State enjoy immunity from taxation in respect of the remuneration they receive at the consulate, goes on to provide that the said persons are entitled, in addition to the immunity referred to, and subject to reciprocity, to exemption from taxation to the same extent to which the consular staff of any third State is eligible for such exemption (art. 10, para. 2). The Consular Convention of 28 February 1959 between the Union of Soviet Socialist Republics and Austria contains a similar clause (art.

7, para. 2). The clause in question also covers the wives and minor children of members of the consular staff.

6. *Most-favoured-nation clause mentioning the establishment and location of consulates*

34. In a large number of consular conventions and other international treaties, the scope of the most-favoured-nation clause is restricted to the establishment and location of consulates. The contracting Parties accord to each other the right to appoint consuls in all ports, towns and places open to the consular representatives of any third State. For example, the Treaty of Commerce and Navigation of 30 October 1936 between Chile and Sweden contains the following provision (art. 6, para. 1):

“The Government of each of the two countries may appoint consuls-general, consuls, vice-consuls and other officials or consular agents in all ports, towns and centres of the other country where the right of appointing consular representatives has been granted to any third State.”¹³²

35. Other treaties, after reserving to the contracting Parties the right to designate the places where the establishment of consulates will not be allowed, provide that this right may not be exercised by either of the contracting Parties against the other *unless it is also exercised against all other Powers*.

36. A provision of this kind is to be found in article I of the Agreement of Caracas of 1911, on the functions of the respective consuls in each of the contracting republics.¹³³ A clause relating to the establishment of consulates occurs in the following treaties, among others: the Treaty of Friendship, Commerce and Consular Relations of 8 December 1923 between the United States and Germany (art. XVII, first para.); the Treaty of 21 August 1924 between Italy and the Kingdom of the Serbs, Croats and Slovenes (art. 10, second para.); the Provisional Commercial Agreement of 4 April 1925 between Germany and the Economic Union of Belgium and Luxembourg (art. 14, para. 1); the Consular Convention of 30 December 1925 between France and Poland (art. 1, para. 1); the Treaty of Commerce and Navigation of 14 May 1926 between Germany and Sweden (art. 22, para. 1); the Treaty of Friendship, Commerce and Navigation of 16 July 1926 between Norway and Siam (art. XVII, para. 1); the Treaty of Commerce and Navigation of 16 July 1926 between the United Kingdom and Greece (art. 22, para. 1); the Commercial Convention of 10 September 1926 between Greece and Sweden (art. 10, para. 1); the Treaty regarding Consular Matters, Navigation, Civil and Commercial Rights, and Establishment, concluded between Spain and Greece on 23 September 1926 (art. 8, para. 1); the Convention of Commerce and Navigation of 9 February 1927 between Chile and Norway (art. 4, para. 1); the Commercial Agreement of 17 August 1927 between France and Germany

¹³¹ League of Nations, *Treaty Series*, vol. XIV, p. 45.

¹³² League of Nations, *Treaty Series*, vol. CLXXXVIII, p. 289.

¹³³ *United Nations Legislative Series*, op. cit., p. 417.

(art. 46, para. 1); the Convention regarding Conditions of Residence and Legal Protection of 1 December 1927 between Greece and Switzerland (art. 12, para. 1); the Commercial Agreement of 14 December 1927 between Finland and Sweden (art. 14, para. 1); the Treaty of Commerce of 9 March 1928 between Colombia and Sweden (art. 3, para. 1); the Consular Convention of 9 June 1928 between Mexico and Panama (art. 1); the Convention of Commerce and Navigation of 22 August 1928 between Denmark and Greece (art. XI, para. 1); the Consular Treaty of 28 May 1929 between Germany and Turkey (art. 2, para. 1); the Treaty of Friendship, Commerce and Navigation of 8 December 1937 between Japan and Siam (art. 25, first para.); the Treaty of Friendship, Commerce and Navigation of 5 November 1937 between Denmark and Siam (art. 20, first para.); the Consular Convention of 7 October 1938 between the United States of America and Liberia (art. I, first para.); the Consular Convention of 14 March 1952 between the United Kingdom and Sweden (art. 3, para. 1); the Consular Convention of 17 April 1953 between the United Kingdom and Greece (art. 3, para. 1); and the Consular Convention of 20 March 1954 between the United Kingdom and Mexico (art. III, para. 1). The Consular Convention of 4 November 1913 between Chile and the Netherlands lays down a similar rule with regard to ports which are open to the trade of all nations.

7. Interpretation of the clause

37. The use of the most-favoured-nation clause in relation to consular intercourse and immunities raises two important questions of interpretation. Firstly, does the most-favoured-nation clause, whether entered into in a separate instrument or incorporated in general form in an international treaty, also apply *ipso facto* to the powers, privileges and immunities of consuls? Secondly, in order that its benefit can be claimed, should the special clause referring expressly to the powers, privileges and immunities of consuls specify some particular consular competence?¹³⁴ These questions can be answered only by reference to the will of the Parties as reflected in the terms of the clause, construed according to their ordinary and natural meaning and taken in their logical context. It has been rightly said that, in law, there is no such thing as a most-favoured-nation clause, but as many separate provisions as there are treaties containing it.¹³⁵ The purpose and scope of the treaty containing the clause will obviously have an important bearing on the interpretation, but there are no ready-made answers to the questions raised above.

SECTION III: IS IT DESIRABLE TO INCLUDE A MOST-FAVOURLED-NATION CLAUSE IN THE DRAFT ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES?

38. Before replying to the question whether it is

desirable to include the most-favoured-nation clause in the draft articles which the Commission is preparing, it is necessary to recall the Commission's decision that the draft should be prepared on the assumption that it would form the basis of a convention.¹³⁶ It must also be remembered that at its fourteenth session the General Assembly of the United Nations decided, by resolution 1450 (XIV) of 7 December 1959, to convoke at Vienna, in the spring of 1961, a conference of plenipotentiaries to consider, on the basis of the draft articles prepared by the Commission,¹³⁷ the question of diplomatic intercourse and immunities and to embody the results of its work in an international convention, together with such additional instruments as might be necessary. There are good reasons for hoping that the same procedure will be adopted in relation to the draft convention on consular intercourse and immunities.

Accordingly, the question whether a most-favoured-nation clause should be included in the draft of a multilateral convention must be discussed.

The above survey of the consular conventions and other treaties governing the status of consuls has shown that not all instruments contain the most-favoured-nation clause, although the use of the clause is very widespread. What is more important, however, is the great diversity of the advantages covered by the clause. This proves decisively that in the matter of consular intercourse and immunities States are not prepared to grant most-favoured-nation treatment of the same scope to all other States and, consequently, that a uniform most-favoured-nation clause would hardly be acceptable to all States. That being so, it would accordingly be more reasonable to leave States free to include whatever clause they consider appropriate in bilateral conventions than to include the clause in a multilateral convention. There is still another reason in favour of this solution. Inasmuch as existing bilateral conventions will not be affected by the multilateral convention being prepared by the Commission (see art. 38 of the draft submitted by the Special Rapporteur), the inclusion of a uniform most-favoured-nation clause in the multilateral convention might create difficulties in practice, for in many cases the clause would necessarily differ from the clause appearing in existing bilateral conventions. Besides, there is much less need for a most-favoured-nation clause in a multilateral convention of world-wide scope, since the multilateral form of the undertakings assumed itself ensures that the advantages granted are general in nature.

Moreover, the solution proposed is in keeping with that adopted in the case of the draft articles on diplomatic intercourse and immunities. Though in some respects they deal with similar questions, those draft articles likewise do not contain a most-favoured-nation clause. For all the reasons explained above, the Special Rapporteur does not propose any most-favoured-nation

¹³⁴ Cf. Suzanne Basdevant, *loc. cit.*, p. 506.

¹³⁵ Anzilotti, *op. cit.*, p. 438.

¹³⁶ Report of the International Law Commission covering the work of its eleventh session, *Official Records of the General Assembly, fourteenth session, Supplement No. 9*, paragraph 37.

¹³⁷ *Ibid.*, thirteenth session, *Supplement No. 9*, chap. III.

clause for inclusion in the draft articles on consular intercourse and immunities.

PART III

Additional articles

Having now obtained the documentary material which was not available to him when he prepared his first report in the autumn of 1956, the Special Rapporteur proposes below a number of additional articles concerning questions not covered by the first report. In drafting these articles, the Special Rapporteur was at pains to bring the draft on consular intercourse and immunities into line, as far as appropriate, with the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission at its tenth session.¹³⁸ The additional articles, numbered provisionally with Roman numerals, will be placed in their appropriate context in the final draft.

Article I

Staff employed in the consulate

Subject to the provisions of articles 8 and 11, the sending State is entitled to employ in its consulate the requisite number of consular officials and employees, whose titles and legal status it shall itself determine.

Commentary

1. This article deals with the staff employed in the consulate, other than the head of consular post, whose appointment is governed by articles 5 *et seq.* of the draft provisional articles on consular intercourse and immunities.¹³⁹

2. The receiving State's obligation to accept the necessary number of consular officials and employees results from the agreement whereby the receiving State consented to the establishment of the consulate. Obviously, the consulate could not function if the consular officials and employees were not admitted to the receiving State. The issue of the exequatur to the head of consular post is not enough for this purpose, for the consul could not discharge his duties without the help of colleagues whose rank and number depend on the importance of the consulate.

Article II

Persons deemed unacceptable

1. The receiving State may, upon being notified of the name of a member of the consular staff (art. IV), inform the sending State that the said person is not acceptable.

2. Were the conduct of a member of the consular staff other than the head of post gives serious grounds for complaint, the receiving State may request the sending State to recall this person or to terminate his functions, as the case may be. The sending State shall then recall the person concerned or terminate his functions, as the case may be.

3. If the sending State refuses to comply with this request or

fails within a reasonable period to fulfil its obligations under paragraph 2, the receiving State may refuse to recognize the person concerned as a member of the consular staff.

Commentary

1. In keeping with practice, the draft articles on consular intercourse and immunities distinguish the following categories of consular staff:

(a) The *head of consular post*, i.e. the person appointed by the sending State to take charge of the consulate;

(b) *Consular officials*, i.e. persons in the consular service who exercise consular functions, and

(c) *Consular employees*, i.e. persons who perform administrative, technical or similar work in a consulate. This category also includes the service staff.

2. Since the procedure for the appointment and recognition of the head of post, and the withdrawal of recognition, is governed by articles 6, 8, 9, 10, 11, 13 and 18 of the draft, this article relates only to members of the consular staff other than the head of post.

3. Persons employed in the service of a consulate are in principle freely chosen by the sending State, which is not obliged to submit their names in advance to the receiving State for approval.

4. The interests of the receiving State are fully safeguarded by the text of Article II, which gives the receiving State every facility for refusing a member of the consular staff or for getting rid of him, if there are serious grounds for considering him unacceptable. Article II covers two possible situations. First, in the case of newly-appointed officials and employees, if the receiving State has any objections to a newly-appointed member of the consular staff, it may, at the time when it is notified of the appointment, inform the sending State that the person in question is not acceptable. In some circumstances, it may do this before the person concerned has arrived in the country to take up his duties. Like the draft articles on diplomatic intercourse and immunities (art. 8), this paragraph is silent on the point whether, in declaring unacceptable a person appointed by the sending State, the receiving State must give reasons for its decision. The absence of any express provision on this point should be interpreted as meaning that the matter is left to the discretion of the receiving State. Secondly, in the case of a member of the staff who is already carrying out his duties in the receiving country, the latter may, if it has serious grounds for complaint, request the sending State to recall the person concerned or to terminate his functions. This last clause is concerned with the case in which the person in question is a national of the receiving State, and with the case in which, though a national of the sending State or of a third State, he was resident in the territory of the receiving State before his appointment.

5. If the sending State refuses to carry out its obligations under paragraphs 1 and 2, or fails to carry them out within a reasonable time, the receiving State

¹³⁸ *Ibid.*, pp. 11-27.

¹³⁹ *Ibid.*, pp. 23 ff.

may refuse to recognize the person concerned as a member of the consular staff. In that case, the person concerned will cease to enjoy consular privileges and immunities except in respect of acts performed up to that time in the discharge of his official duties.

6. Article 8, already adopted by the Commission, imposes a further limitation on the sending State's right to choose freely the staff engaged by its consulate. Under this article, if the sending State wishes to choose consular officials from among the nationals of the receiving State, it may do so only with the express consent of the latter.

7. The expression "not acceptable", used in paragraph 1 of article II, corresponds to the expression *persona non grata* which is customarily used with reference to diplomatic personnel.

Article III

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

Subject to reciprocity, members of the consular staff, members of their families and their private staff, if they are not nationals of the receiving State, shall be exempt from all obligations under local legislation in the matter of registration of aliens and residence permits, provided that their names have been notified to the Ministry of Foreign Affairs of the receiving State or to the authority designated by that Ministry.

Commentary

1. The legislation of many countries requires aliens to have their names entered in the register of aliens kept by the police or municipal authorities. Some legislations have introduced a residence permit which any alien has to apply for if he wishes to make a prolonged stay and which constitutes an identity card. To facilitate the exercise of the consular functions, many States exempt the members of the consular staff and members of their families from this obligation. Under the regulations or practice of a large number of countries, the names of such persons are notified to the Ministry of Foreign Affairs, which issues special identity cards to them. This practice is even expressly mentioned in some consular conventions. That being so, it would be excessive to require the persons in question to submit to the general regulations governing the registration of aliens. Since under article IV of the present draft the names of members of the consular staff and of members of their families are to be notified both on their arrival and on their final departure, the persons in question ought to be exempted from the obligations relating to the registration of aliens and residence permits. For this reason a special article has been inserted.

2. The exemption also applies, for reasons of practical convenience, to persons not nationals of the receiving State who are employed in the private service of members of the consular staff.

3. It should be noted that the exemption is subject to reciprocity. Hence, the receiving State will be under no obligation to grant this exemption except to States which

grant the same exemption and to the extent to which they grant it.

4. The exemption does not apply to members of the consular staff and to members of their families who are nationals of the receiving State.

Article IV

Notification of arrival and departure

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

(a) the arrival of members of the consular staff after their appointment to the consulate and of members of their families and of their private staff who are not nationals of the receiving State;

(b) the departure of the persons referred to in the foregoing subparagraph, when they cease to be part of the consular staff or of the families of members of the consular staff.

2. A similar notification shall be given whenever members of the consular staff are engaged (or discharged) locally.

Commentary

The receiving State ought to be advised of the names of the persons on the staff of the consulate and of the members of their families, for, in varying degrees, these persons may claim the benefit of consular privileges and immunities. For this reason, the article makes it compulsory to notify the Ministry of Foreign Affairs or an authority designated by that Ministry of the names of persons newly appointed to the consulate and of persons whose appointment is terminated.

The duty to report the arrival of newly-appointed members of the staff and of members of their families and private staffs, together with the duty to give notice of their final departure, is a counterpart, as it were, to the exemption granted by article III.

Article V

Acquisition of nationality

Members of the consular staff, not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

Commentary

1. This article is taken from the draft articles on diplomatic intercourse and immunities, for the purpose of its insertion in the present draft is the same: to prevent the automatic acquisition of the nationality of the receiving State

(a) by a child born, in the territory of the receiving State, of persons who are members of the consular staff but not nationals of the receiving State, where the legislation of the receiving State regarding the acquisition of nationality applies the *jus soli*;

(b) by a woman member of the consular staff who marries a national of the receiving State.

The Rapporteur would have preferred to limit the scope of this article to the case mentioned under (a), but he reproduced the text already adopted by the Commission so as to bring the two drafts into harmony on this point.

2. The article is not intended to deal with the acquisition of nationality by a child born in a *jus soli* State of parents whom only one is a member of the consular staff and a national of the sending State, while the other is a national of the receiving State or of a third State.

Article VI

Members of the consular staff who are nationals of the receiving State

1. A consular official who is a national of the receiving State shall enjoy immunity from jurisdiction in respect of acts performed in the exercise of his functions.

2. Other members of the consular staff who are nationals of the receiving State shall enjoy privileges and immunities only to the extent admitted by the receiving State.

Commentary

1. This article does not cover the case in which the sending State appoints as consul a national of the receiving State who does not receive a regular, fixed salary from the sending State and is authorized to engage in commerce or carry on a gainful occupation in the receiving State. In such cases, the consul is an honorary consul, whose legal status is governed by the provisions of chapter III (art. 35 to 37) of the Special Rapporteur's draft.

2. It is accepted in practice, however, that, even apart from the case mentioned in paragraph 1 above, nationals of the receiving State may be appointed career consular officials in the consulate of a foreign State. Besides, the Commission recognized this practice when it adopted article 8 of the draft on consular intercourse and immunities, which provides that consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

3. But it is chiefly consular employees who are more commonly recruited by many States from among the nationals of the receiving State.

4. Accordingly, it seemed necessary to determine, first, whether and to what extent consular officials who are nationals of the receiving State enjoy consular privileges and immunities. There are cogent arguments against the granting of any privileges and immunities to such consular officials. The practice of States is not uniform and the writings of learned authorities do not offer conclusive guidance. As in the case of diplomatic agents, two extreme opinions may be argued. One is that these officials, even if not nationals of the sending State, should enjoy the same consular privileges and immunities as officials who are nationals of the sending State. The other is that, if they are not nationals of the sending State, consular officials should enjoy only those privileges and immunities which are expressly granted to them by the receiving State.

5. In the light of the Commission's prolonged discussion of a similar problem in connexion with the draft articles on diplomatic intercourse and immunities, the Special Rapporteur proposes an intermediate solution

which gives these consular officials immunity from jurisdiction in respect of acts performed in the exercise of their functions.

6. This solution may be justified on two grounds. In the first place, the official acts of the consulate are acts of the sending State. It may therefore be justly affirmed that in this case the immunity is not the personal immunity of the consular official but an immunity which attaches to the foreign State as such. Since, secondly, the appointment of nationals of the receiving State as consular officials is conditional on that State's consent, it is arguable that its consent implies assent to the official's enjoying the minimum immunity he needs in order to be able to carry out his functions. And this minimum consists precisely of the exemption from the local jurisdiction, both civil and criminal, in respect of acts performed in the discharge of the consular office.

7. Admittedly, this solution does not dispose of all the difficulties; but it has the merit of being in line with the course of the discussion on diplomatic intercourse and immunities and should therefore receive—such at least is the hope of the Special Rapporteur—sufficiently broad support to qualify for inclusion in the draft articles under preparation.

8. A fully satisfactory solution would be to recruit consular officials exclusively from among nationals of the sending State. A fairly large number of States have adopted this practice, which has even found expression in some consular conventions, e.g. the Consular Convention of 4 September 1957 between the USSR and the Romanian Peoples' Republic (art. 2, para. 2).

9. As regards consular employees who are not nationals of the sending State, there is no evidence in the practice of States for the existence of a rule giving them any privileges or immunities whatsoever. They may, however, enjoy such privileges and immunities as are granted to them by the receiving State of its own accord. It seemed useful to express this idea in paragraph 2 of the article.

10. The draft says nothing about the status of members of the families and of the private staff of the persons referred to in this article. The absence of any provision regarding them should be interpreted as meaning that they do not enjoy consular privileges and immunities.

Article VII

Duration of consular privileges and immunities

1. Every person entitled to consular privileges and immunities shall enjoy them from the moment when he enters the territory of the receiving State on proceeding to take up his post, or if already in its territory at the time of his appointment, from the moment when his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

2. When the functions of a person enjoying consular privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do

so, but shall subsist until that time even in case of armed conflict. However, with respect to acts performed by him in the exercise of his functions as a member of the consular staff, immunity shall continue to subsist.

Commentary

1. This article deals with the commencement and termination of consular privileges and immunities. Even though consular privileges and immunities are in some respects much less extensive than those of the members of a diplomatic mission it is nevertheless desirable to specify the dates on which they begin and end. The draft follows the provisions adopted concerning persons entitled to diplomatic privileges and immunities in article 38 of the draft articles on diplomatic privileges and immunities and to a large extent reproduces the text of that article.¹⁴⁰

2. Paragraph 1 deals with two possible situations. The first is the case in which the member of the consular staff arrives in the receiving State after being appointed to a consular post in that State. In this case, it seems right that he should be regarded as entitled to consular privileges and immunities as soon as he enters the territory of the receiving State. He should of course disclose his identity and his status as a member of the consular staff of a consulate situated in the territory of the receiving State. The second case is that of a person who, being already in the territory of the receiving State, is appointed to the staff of a consulate. In this case, he begins to be eligible for consular privileges and immunities as from the time when his appointment is notified to the Ministry of Foreign Affairs. The Ministry may of course designate another authority to which such notifications should be sent. This may be particularly convenient in a federal State.

3. On the subject of the termination of consular privileges and immunities the learned authorities are not in agreement. It seems right to recognize consular privileges and immunities up to the time when the person in question leaves the territory of the receiving State, if he leaves within a period which gives him a reasonable interval in which to prepare his departure or, in other cases, before the expiry of whatever reasonable period is allowed by the receiving State for that purpose.

4. The annoyances which consular officials have often suffered in the past in cases where an armed conflict has broken out between the sending State and the receiving State are a decisive argument in favour of maintaining the words "even in case of armed conflict" in the text of the article.

5. The reason for the immunity from jurisdiction in respect of acts performed by members of the consular staff in the course of their duties is the special immunity which, as explained in the commentary on article IV, attaches to the acts of a foreign sovereign State.

Article VIII

Estates of deceased members of the consular staff or of deceased members of their families

In the event of the death of a member of the consular staff, or of a member of his family, who is not a national of the receiving State, that State shall permit the withdrawal of the movable property of the deceased, with the exception of any property which was acquired in the country and the export of which was prohibited at the time of his death. In such an event, estate, succession or inheritance duties shall be levied only on immovable property situated in the receiving State.

Commentary

This rule, which was adopted with respect to members of a diplomatic mission in the draft articles on diplomatic intercourse and immunities (art. 38, para. 3), is also fully justified in the case of members of the consular staff. Since it is concerned not with consular immunities in general but with a particular event, the Special Rapporteur thought that, at least provisionally, it should form the subject of a separate article.

Article IX

Duties of third States

1. If a consular official passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord him the inviolability he enjoys by virtue of these articles and such immunities as may be required to ensure his transit or return.

2. The third State shall accord the same immunities to the members of the family of a consular official as referred to in paragraph 1 above who are accompanying the official or who are travelling separately to join him or to return to their country.

3. In the circumstances specified in paragraph 1, third States shall not hinder the passage of other members of the consular staff and of members of their families through their territories.

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving State.

Commentary

1. In connexion with the rules concerning consular intercourse, the question arises whether a member of the consular staff who is in the territory of a third State, either in transit or for some other reason, may claim the privileges and immunities he enjoys in the receiving State. Since no precise guidance on this point is provided by the practice of States, the Special Rapporteur believed he would be justified in following the provisions of article 39 of the draft articles on diplomatic intercourse and immunities, subject to the adjustments necessitated by the differences between the two institutions.

2. Paragraph 1 relates to consular officials, i.e. any person carrying out consular duties in the receiving State, including the head of post, and lays down the rule that the third State is bound to accord to consular officials in transit the inviolability they enjoy under these articles and any immunities required for the pur-

¹⁴⁰ Document A/3589, p. 25.

pose of their transit or return. Unlike the inviolability enjoyed by the members of a diplomatic mission, the personal inviolability of consular officials under the terms of the proposal contained in part I, section III, of this second report on consular intercourse and immunities is a limited inviolability. Moreover, the scope of this inviolability may vary from one consular convention to another. It was necessary, therefore, to define "inviolability" by a reference to the articles on consular intercourse and immunities which the Commission is preparing. As regards the immunities to be granted to officials in transit, it should be noted that the State of transit is not bound to accord all the immunities for which such officials are eligible under the present articles or under other relevant agreements, but only such immunities as are necessary for the purpose of their transit or return.

3. It should be noted that the third State assumes the obligation in question *vis-à-vis* those States only whose consular officials:

- (a) Are passing through its territory,
- (b) Are in its territory while
 - (i) Proceeding to take up their posts, or
 - (ii) Returning to their posts, or
 - (iii) Returning to their countries.

4. The same immunities should be granted to the members of the families of consular officials who are accompanying the officials concerned or who are travelling separately in order to join them in the receiving country or to return to the sending State. The reasons for which these immunities are granted to consular officials in the third State are also sufficient to justify the grant of the same immunities to the members of their families.

5. Paragraph 3, which corresponds to article 39, paragraph 2, of the draft articles on diplomatic intercourse and immunities, stipulates that the third State should not hinder the transit through its territory of other members of the consular staff and of members of their families. This provision is conducive to smooth consular intercourse, so important to all States.

6. For the sake of the efficiency of the consular service and of the development of consular intercourse between States, official correspondence and other communications should enjoy in third States a freedom and protection equal to those which they enjoy in the receiving State. Paragraph 4 lays down a rule to this effect.

Article X

Duty to respect the laws and regulations of the receiving State

Without prejudice to their consular 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.

Commentary

1. This article lays down the fundamental rule that consuls and any other persons enjoying consular pri-

ileges and immunities must respect the legislation of the receiving State, with the exception of those provisions from the observance of which they are relieved by these articles, by the consular conventions and other relevant agreements. In particular, legislation providing for the rendering of any kind of personal service (service in the militia, personal service in case of public disaster, service as juryman or lay judge, etc.) is not binding on those members of the consular staff who are not nationals of the receiving State. Nor are such persons bound to comply with laws and regulations which manifestly conflict with the recognized principles of general international law (e.g. legislation providing for racial discrimination).

2. While the first sentence of the article expresses a positive duty, the second lays down a negative obligation. It provides that members of the consular staff must not interfere in the domestic affairs of the receiving State. In particular, they must refrain from taking part in political campaigns. Obviously, there is no interference in the domestic affairs of the receiving State if consular officials make representations to the authorities of that State for the purpose of defending the interests of the sending State or of its nationals in conformity with these articles and with other relevant international agreements. Since the Charter of the United Nations prohibits the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations (art. 2, para. 4), consular officials must not resort to the threat or use of force in carrying out their consular functions.

Article XI

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

1. Upon the termination of the functions of persons enjoying consular privileges and immunities, the receiving State shall, save as otherwise provided in the present articles, allow such persons and the members of their families who are not nationals of that State to leave its territory, even in case of armed conflict.

2. The receiving State shall grant the persons referred to in paragraph 1 the necessary time and facilities to enable them to leave its territory for their own country. It must treat those persons with respect and courtesy and protect them until their departure, which shall take place within a reasonable time. If need be, the receiving State must place at their disposal the necessary means of transport.

Commentary

1. In the past, consuls have quite often been prevented from leaving the territory, on the termination of their functions, particularly in the case of armed conflict. Since their right to leave the territory in such a contingency has been questioned even by learned authorities (see, for example, the Harvard Draft, commentary on art. 10, *in fine*, in *Harvard Law Research, op. cit.*, p. 527), it seemed indispensable to lay down first of all in paragraph 1 of the article the sending State's right to secure the departure from the receiving State's territory of its nationals who enjoy consular privileges and immunities.

2. Since the members of the consular staff are subject in principle to the jurisdiction of the receiving State, it was necessary to qualify their right to leave by a general proviso concerning the cases in which such persons may be prevented from leaving the territory of the receiving State by reason of their subjection to the local jurisdiction. If, for example, a consular official is serving a sentence imposed upon him by a final judgement he cannot exercise this right. The obligation in question extends not only to the members of the consular staff, but also to those members of their families who are not nationals of the receiving State.

3. Paragraph 2 of this article lays down the duty of the receiving State to allow the persons referred to in paragraph 1 the necessary time for preparing their departure and facilities enabling them to leave the territory of the receiving State for their own country. It also lays down the receiving State's duty to protect such persons until their departure, which should take place within a reasonable time, and to place at their disposal, if need be, the necessary means of transport.

4. The right of consuls to return to their country was recognized in Field's Code of 1876 (art. 180) and in Bluntschli's Code of 1868 (art. 275). The obligation to allow the members of the consular staff and the members of their families to leave the country when a consulate is closed owing to armed conflict or the severance of relations between the sending State and the receiving State, and to grant them the necessary facilities and protection, has been laid down in several recent conventions. See the first Protocol of Signature attached to the Consular Conventions concluded by the United Kingdom with Norway on 22 February 1951, with the United States of America on 6 June 1951, with France on 31 December 1951, with Greece on 17 April 1953 (United Nations, *Treaty Series*, vol. 191, p. 181), with Italy on 1 June 1954, with Sweden on 14 March 1952 (United Nations, *Treaty Series*, vol. 202, p. 235), with Mexico on 20 March 1954 and with the Federal Republic of Germany on 30 June 1956.

Article XII

Protection of premises, archives and interests

If consular relations are broken off between the sending State and the receiving State, or if a consulate is closed temporarily or permanently:

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

(b) the sending State may entrust the custody of the premises of the consulate, together with its property and archives, to the consulates or diplomatic mission of a third State acceptable to the receiving State;

(c) the sending State may entrust the protection of its interests to the consulates or diplomatic mission of a third State acceptable to the receiving State.

Commentary

1. The draft articles prepared by the Special Rapporteur in his first report contained provisions relating to the termination of consular functions (art. 18) and

to the breaking off of consular relations (art. 19). Accordingly, this draft ought likewise to contain an article specifying the rights and duties of the receiving and sending States in the circumstances described, especially since an analogous provision appears in the draft articles on diplomatic intercourse and immunities (art. 43). The present draft virtually reproduces the text of the said provision concerning the severance of diplomatic relations or the withdrawal of a diplomatic mission. Since, however, a study of the practice of States which have represented the interests of foreign States after the severance of diplomatic and consular relations shows that in the vast majority of cases these States secured the consent of the State in whose territory they were asked to protect foreign interests, the expression *d'un Etat tiers acceptable pour* in the French text is here amended to *d'un Etat tiers accepté par* ("of a third State acceptable to" in both English texts). The consent may be express or tacit. From a practical point of view, it will not make much difference whichever wording is adopted.

2. In the event of the severance of consular relations in consequence of a state of war declared as the result of armed aggression, the aggressor State cannot claim that the provisions contained in this article give it any rights to the respect and protection of the consular premises and archives and to the protection of its interests. For, inasmuch as under the law of nations aggression is an international crime, the aggressor cannot claim any right by reason of his crime, nor can he claim the benefit of international treaties, other than the humanitarian conventions (which by their very nature apply to every armed conflict, whether it was started by an aggression or by international military sanctions ordered in conformity with the Charter of the United Nations).

Article XIII

Non-discrimination

1. In the application of the present rules, the receiving State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place if the receiving State:

(a) applies one of the present rules restrictively because of a restrictive application of that rule to its consulate in the sending State;

(b) grants subject to reciprocity privileges and immunities in respect of which the condition of reciprocity is expressly provided for in the present articles or in other relevant international agreements.

Commentary

1. Paragraph 1 applies to consular intercourse and immunities the general principle of international law which is inherent in the sovereign equality of States. The fundamental principle having been stated in paragraph 1, paragraph 2 mentions two cases in which inequality of treatment does not constitute a violation of that fundamental principle because the inequality is justified by the principle of reciprocity, which is widely applicable in this sphere, especially as regards fiscal immunities, exemption from customs duties and the

other material advantages granted to members of the consular staff.

2. In the first case, the principle of reciprocity operates with negative effect, in that the receiving State is authorized to apply one of the present rules in a restrictive manner in cases where that rule is so applied to its consulate in the sending State. It should be emphasized that the restrictive application by the sending State must be in keeping with the strict terms of the rule in question; otherwise, there is an infringement of the rule, and the action of the receiving State becomes an act of reprisal.

3. In the second case, the receiving State may, pursuant to the principle of reciprocity, restrict the consular

privileges and immunities which it accords to the members of the consular staff of the sending State, because the latter's practice in this respect is less liberal than its own; or, conversely, it may, pursuant to the same principle, grant to members of the consular staff of the sending State more extensive privileges and immunities than to the staff of other foreign consulates in its territory, because the sending State grants more extensive privileges and immunities to the staff of the receiving State's consulates.

4. The text of the article and of the commentary is largely taken from the text of article 44 of the draft articles on diplomatic intercourse and immunities and the commentary thereon.

DOCUMENT A/CN.4/L.86

Provisional draft articles submitted by Jaroslav Zourek, Special Rapporteur

[Original text : French]

[21 April 1960]

[NOTE : This text, prepared by the Special Rapporteur for the convenience of members of the International Law Commission and to expedite the Commission's work, comprises the articles already adopted by the Commission at its eleventh session, the texts contained in the first report submitted by the Special Rapporteur at the Commission's ninth session (A/CN.4/108, *Yearbook of the International Law Commission, 1957*, vol. II, pp. 71 *et seq.*) and the additional articles contained in the second report which the Special Rapporteur is submitting to the Commission at its twelfth session. The structure of the draft prepared before the adoption by the Commission of the draft articles concerning diplomatic intercourse and immunities has been adapted to bring it into line, wherever this seems justified, with the draft articles concerning diplomatic intercourse and immunities. To that end, also, the wording of certain articles which have not yet been discussed by the Commission has been amended or expanded.]

CHAPTER I

Article 1 (adopted). *Definitions*

For the purposes of this draft :

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

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

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

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

(e) The expression "consular archives" means official correspondence, documents and other chancery papers, as well as any article of furniture intended for their protection or safe keeping;

(f) The term "consul", except in article 6, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise those functions in conformity with articles 11 or 12 of this draft;

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.

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

(h) The expression "consular official" means any person, including a head of post, who exercises consular functions in the receiving State and who is not a member of a diplomatic mission;