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# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/4425\*

Report of the International Law Commission covering the work of its twelfth session, 25 April-1 July 1960

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### CHAPTER I

#### ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with the Statute of the Commission annexed thereto, as subsequently amended, held its twelfth session at the European Office of the United Nations in Geneva from 25 April to 1 July 1960. The work of the Commission during the present session is described in the present Report. Chapter II of the Report contains draft articles on Consular Intercourse and Immunities, with a commentary. Chapter III contains draft articles on Special Missions, with a commentary. Chapter IV deals with certain administrative and other matters.

##### I. Membership and attendance

2. The Commission consists of the following members:

<i>Name</i>	<i>Country</i>
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoš	Yugoslavia
Mr. Douglas L. Edmonds	United States of America
Mr. Nihat Erim	Turkey
Sir Gerald Fitzmaurice	United King- dom of Great Britain and Northern Ireland
Mr. J. P. A. François	Netherlands
Mr. F. V. García Amador	Cuba
Mr. Shuhsi Hsu	China
Mr. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Faris El-Khoury	United Arab Republic
Mr. Ahmed Matine-Daftary	Iran
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India

Mr. A. E. F. Sandström	Sweden
Mr. Georges Scelle	France
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Mr. Mustafa Kamil Yasseen	Iraq
Mr. Kisaburo Yokota	Japan
Mr. Jaroslav Zourek	Czecho- slovakia

3. On 16 May 1960 the Commission elected Mr. Eduardo Jiménez de Aréchaga (Uruguay) to fill the casual vacancy caused by the election of Mr. Ricardo J. Alfaro to the International Court of Justice and also elected Mr. Mustafa Kamil Yasseen (Iraq) to fill the casual vacancy caused by the resignation of Mr. Thanat Khoman. Mr. Yasseen attended the meetings of the Commission from 23 May and Mr. Jiménez de Aréchaga from 1 June onwards.

## II. Officers

4. At its 526th meeting on 25 April 1960, the Commission elected the following officers:

*Chairman*: Mr. Luis Padilla Nervo;  
*First Vice-Chairman*: Mr. Kisaburo Yokota;  
*Second Vice-Chairman*: Mr. Milan Bartos;  
*Rapporteur*: Sir Gerald Fitzmaurice.

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

## III. Agenda

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

1. Filling of casual vacancies in the Commission (article 11 of the Statute).
2. Consular intercourse and immunities.
3. State responsibility.
4. Law of treaties.
5. *Ad hoc* diplomacy.
6. General Assembly resolution 1400 (XIV) on the codification of the principles and rules of international law relating to the right of asylum.
7. General Assembly resolution 1453 (XIV) on the study of the juridical régime of historic waters, including historic bays.
8. Co-operation with other bodies.
9. Date and place of the thirteenth session.
10. Planning of future work of the Commission.
11. Other business.

7. In the course of the session the Commission held fifty-four meetings. It took up all the items on its agenda except item 4 (Law of treaties). At its 566th and 568th meetings the Commission held a discussion on item 3 (State responsibility), in the course of which it heard a statement by Mr. Antonio Gómez Robledo, observer of the Inter-American Juridical Committee, and also a statement by Professor Louis B. Sohn on

the work currently being undertaken in this field as part of the programme of International Legal Studies of the Harvard Law School. For the decisions taken with regard to items 6, 7, 8, 9 and 10, see chapter IV below.

## CHAPTER II

### CONSULAR INTERCOURSE AND IMMUNITIES

#### I. Introduction

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

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

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

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

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

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

14. At the same session the Commission decided to make the draft on consular intercourse and immunities the first item on the agenda for its eleventh session (1959) with a view to completing at that session, and if possible in the course of the first five weeks, a provisional draft on which governments would be invited to comment.<sup>6</sup> It further decided that if, at the eleventh session, it could complete a first draft on consular intercourse and immunities to be sent to governments for comments, it would not take up the subject again for the purpose of preparing a final draft in the light of

<sup>1</sup> *Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925)*, paras. 16 and 20.

<sup>2</sup> *Ibid.*, Tenth Session, Supplement No. 9 (A/2934), para. 34.

<sup>3</sup> *Ibid.*, Eleventh Session, Supplement No. 9 (A/3159), para. 36.

<sup>4</sup> *Ibid.*, Twelfth Session, Supplement No. 9 (A/3623), para. 20.

<sup>5</sup> *Ibid.*, Thirteenth Session, Supplement No. 9 (A/3859), para. 56.

<sup>6</sup> *Ibid.*, para. 57.

those comments until its thirteenth session (1961), and would proceed with other subjects at its twelfth session (1960).

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

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

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

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

## II. General considerations

19. Consular intercourse and immunities are governed partly by municipal law and partly by international law. Very often regulations of municipal law deal with matters governed by international law. Equally, consular conventions sometimes regulate questions which are within the province of municipal law, e.g. the form of the consular commission. In drafting a code on consular intercourse and immunities, it is necessary, as the Special Rapporteur has pointed out,<sup>8</sup> to bear in mind the distinction between those aspects of the status of consuls which are principally regulated by municipal law and those which are regulated by international law.

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

21. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which, if incorporated in a codification, may be expected to obtain the support of many States.

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

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

"A draft set of articles prepared by that method will therefore entail codification of general customary

<sup>7</sup> *Ibid.*, para. 64.

<sup>8</sup> *Yearbook of the International Law Commission, 1957, Vol. II* (United Nations publication, Sales No.: 57.V.5, Vol. II), para. 80.

law, of the concordant rules to be found in most international conventions, and of any provisions adopted under the world's main legal systems which may be proposed for inclusion in the regulations."<sup>9</sup>

24. The choice of the form of any codification of consular intercourse and immunities is determined by the purpose and nature of the codification. The Commission had this fact in mind when (bearing in mind also its decision on the form of the Draft Articles on Diplomatic Intercourse and Immunities) it approved the Special Rapporteur's proposal that his draft should be prepared on the assumption that it would form the basis of a convention. A final decision on this point cannot be taken until the Commission has considered the comments of governments on the provisional draft.

25. The Commission, wishing to bring the provisional draft articles on consular intercourse and immunities into line, as far as it considered desirable, with the Draft Articles on Diplomatic Intercourse and Immunities adopted at its tenth session in 1958, decided to insert in the draft a number of articles which the Special Rapporteur had not included in his original draft.

26. The draft is now divided into four chapters. The first chapter is devoted to consular intercourse and immunities in general (articles 1 to 28); and it is subdivided into two sections dealing with consular intercourse in general and with the end of consular functions. The second chapter, entitled "Consular privileges and immunities", contains the articles specifying the privileges and immunities of consulates and of members of the consulate who are career officials or staff (articles 29 to 53) and is subdivided into four sections concerning consular premises and archives (section I); the facilities accorded to the consulate for its activities and freedom of movement and of communication (section II); personal privileges and immunities (section III) and the duties of the consulate and of its members towards the receiving State (section IV). The third chapter contains the provisions concerning the legal status of honorary consuls and their privileges and immunities (articles 54 to 63). The fourth chapter contains the general provisions (articles 64 and 65). A fifth chapter containing the final clauses may be added later.

27. As the articles were adopted during the last two weeks of the present session, the commentary has had to be limited to the material required for an understanding of the texts. The Commission intends to submit a more detailed commentary when the draft has been put into final form at the next session in 1961, at which it will be reviewed in the light of the comments of governments.

28. The text of draft articles 1 to 65 and the commentary, as adopted by the Commission, are reproduced below.

### III. Draft articles on consular intercourse and immunities, and commentary

#### CHAPTER I

##### Article 1

##### 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 all the chancery papers, as well as any article of furniture intended for their protection or safe keeping;

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

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

(h) The expression "members of the consulate" means the head of consular post and the members of the consular staff;

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

(j) The expression "employee of the consulate" means any person who performs administrative or technical work in a consulate, or belongs to the service staff.

(k) The expression "members of the consular staff" means the consular officials (other than the head of post) and the employees of the consulate;

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

#### Commentary

This article was adopted in order to establish a consistent terminology for the articles prepared by the Commission. Certain members of the Commission expressed doubts concerning certain of these definitions, especially as to the appropriateness of using the term "consul" in a generic sense, and on the definition of "consular official".

#### SECTION I: CONSULAR INTERCOURSE IN GENERAL

##### Article 2

##### Establishment of consular relations

The establishment of consular relations takes place by mutual consent of the States concerned.

#### Commentary

(1) The expression "consular relations" means the relations which come into existence between two States

<sup>9</sup> *Ibid.*, para. 84.

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

(2) Consular relations may be established between States which do not maintain diplomatic relations.

(3) In a number of cases where diplomatic relations exist between States, their diplomatic missions also exercise certain consular functions, usually maintaining consular sections for that purpose. The Special Rapporteur had accordingly submitted the following second paragraph for article 1:

“2. The establishment of diplomatic relations includes the establishment of consular relations.”

The Commission, after studying this provision, reserved its decision on this matter.

(4) No State is bound to establish consular relations with any other State unless it has previously concluded an international agreement to do so. None the less, the interdependence of nations and the importance of developing friendly relations between them, which is one of the purposes of the United Nations, makes it desirable that consular relations should be established.

### Article 3

#### *Establishment of a consulate*

1. No consulate may be established on the territory of the receiving State without that State's consent.

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

3. Subsequent changes in the seat of the consulate or in the consular district may not be made by the sending State except with the consent of the receiving State.

4. Save as otherwise agreed, a consul may exercise his functions outside his district only with the consent of the receiving State.

5. The consent of the receiving State is also required if the consul is at the same time to exercise consular functions in another State.

#### *Commentary*

(1) The first paragraph of this article lays down that the consent of the receiving State is essential for the establishment of any consulate (consulate-general, consulate, vice-consulate or consular agency) on its territory. This principle derives from the sovereign authority which every State exercises over its territory, and applies both in those cases where the consulate is established at the same time as the consular relations

are established, and in those cases where the consulate is to be established later. In the former case, the consent of the receiving State to the establishment of a consulate will usually already have been given in the agreement for the establishment of consular relations; but it may also happen that this agreement is confined to the establishment of consular relations, and that the establishment of the consulate is reserved for a later agreement.

(2) An agreement on the establishment of a consulate presupposes that the States concluding it agree on the boundaries of the consular district and on the seat of the consulate. It sometimes happens in practice that the agreement on the seat of the consulate is concluded before the two States have agreed on the boundaries of the consular district.

(3) The consent of the receiving State is also necessary if the consulate desires to open a vice-consulate, an agency or an office in a town other than that in which it is itself established.

(4) Since the agreement for the establishment of a consulate is in a broad sense an international treaty, it is governed by the rules of international law relating to the revision and termination of treaties. The Commission has therefore not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving State, that the sending State may not change the seat of the consulate, or the consular district, without the consent of the receiving State. The silence of the article as to the powers of the receiving State must not be taken to mean that this State would always be entitled to change the consular district or the seat of the consulate unilaterally. The Commission thought, however, that in exceptional circumstances the receiving State had the right to request the sending State to change the seat of the consulate or the consular district. If the sending State refused its consent the receiving State could denounce the agreement for the establishment of the consulate and order the consulate to be closed.

(5) Since the powers of the consul in relation to the receiving State are limited to the consular district, the consul may exercise his functions outside his district only with the consent of the receiving State. There may, however, be exceptions to this rule. Some of the articles in the draft deal with situations in which the consul may be obliged to act outside his consular district. This is the case, for instance, as regards article 18, which deals with the occasional performance of diplomatic acts by a consul, and article 19, which governs the exercise by a consul of diplomatic functions. Both situations are covered by the words “Save as otherwise agreed” at the beginning of paragraph 4.

(6) Paragraph 5 applies both where the district of a consulate established in the receiving State is to include all or part of the territory of a third State, and where the consul is to act as head of a consulate established in the third State. A similar rule relating to the accrediting of the head of a mission to several States

is contained in article 5 of the Draft Articles on Diplomatic Intercourse and Immunities.

(7) The term "sending State" means the State which the consulate represents.

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

#### Article 4

##### Consular functions

1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are:

(a) To protect the interests of the nationals of the sending State, and the interests of the sending State itself;

(b) To help and assist nationals of the sending State;

(c) To act as notary and civil registrar, and to exercise other functions of an administrative nature;

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

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

(f) To acquaint himself with the economic, commercial and cultural life of his district, to report to the Government of the sending State, and to give information to any interested persons.

2. Subject to the exceptions specially provided for by the present articles or by the relevant agreements in force, a consul in the exercise of his functions may deal only with the local authorities.

##### Commentary

(1) The Special Rapporteur had prepared two variants. The first, following certain precedents, especially the Havana Convention (article 10), merely referred the matter to the law of the sending State, and provided that the functions and powers of consuls should be determined, in accordance with international law, by the States which appoint them.<sup>10</sup> The second variant, after stating the essential functions of a consul in a general clause, contained an enumeration of most of the functions of a consul. This enumeration was not, however, exhaustive.

(2) During the discussion two tendencies were manifested in the Commission. Some members expressed their preference for a general definition of the kind which had been adopted by the Commission for the case of diplomatic agents, in article 3 of its Draft Articles on Diplomatic Intercourse and Immunities. They pointed to the inconveniences of too detailed an enumeration, and suggested that a general definition would be more acceptable to governments. Other members, *per contra*, preferred the Special Rapporteur's second variant with its detailed list of examples, but requested that it should be shortened and contain only the heads of the different functions as set out in numerals

1 to 15 in the Special Rapporteur's draft. They maintained that too general a definition, merely repeating the paragraph headings, would have very little practical value. They also pointed out that the functions of consuls are much more varied than those of diplomatic agents, and that it was therefore impossible to follow in this respect the Draft Articles on Diplomatic Intercourse and Immunities. Finally they suggested that governments would be far more inclined to accept in a convention a detailed and precise definition than a general formula which might give rise to all kinds of divergencies in practice. In support of this opinion they pointed to the fact that recent consular conventions all defined consular functions in considerable detail.

(3) The Commission, in order to be able to take a decision on this question, requested the Special Rapporteur to draft two texts defining consular functions: one containing a general and the other a detailed and enumerative definition. After studying the two types of definitions together, the Commission, by a majority, took a number of decisions:

(a) It rejected a proposal to postpone a decision on the article to the next session;

(b) It decided to submit the two types of definitions to governments for comment when the Commission had completed the entire draft;

(c) It decided not to include the two definitions in the text of the articles on consular relations and immunities;

(d) It decided to include the general definition in the draft, on the understanding that the more detailed definition should appear in the commentary.

(4) The draft general definition prepared by the Special Rapporteur was referred, with the amendments presented by Mr. Verdross,<sup>11</sup> Mr. Pal<sup>12</sup> and Mr. Padilla Nervo,<sup>13</sup> to the Drafting Committee, which, on the basis of a revised proposal prepared by the Special Rapporteur, drafted a definition<sup>14</sup> which was discussed and, with some amendments, adopted at the 523rd meeting of the Commission.

(5) The text of the article first states in a general clause that the functions of consuls are determined

(a) by the articles which the Commission is drafting;

(b) by any relevant agreements in force;

(c) by the sending State, subject to the law of the receiving State.

(6) Some members objected to the word "protect", although it appears in the Draft Articles on Diplomatic Intercourse and Immunities, and would have preferred the word "defend".

(7) Some members found the word "interests" inadequate and would have preferred the term "rights and

<sup>11</sup> *Yearbook of the International Law Commission, 1959*, vol. I (United Nations publication, Sales No.: 59.V.1, Vol. 1), pp. 156 and 159.

<sup>12</sup> *Ibid.*, p. 157.

<sup>13</sup> *Ibid.*, p. 170.

<sup>14</sup> See A/CN.4/L.84, art. 13.

<sup>10</sup> *Ibid.*, p. 91.

interests". The word "interests" must, however, be taken to include rights.

(8) The word "nationals" applies also to bodies corporate having the nationality of the sending State.

(9) The provision headed (a) is distinct from that headed (b) in that the former relates to the protection which the consul exercises vis-à-vis the authorities of the receiving State, while the latter covers any kind of help and assistance which the consul may extend to nationals of his State. This assistance may take many forms: e.g. information, provision of an interpreter, assistance in case of distress, repatriation, monetary help, introduction of commercial agents to commercial concerns, and assistance to nationals working in the receiving State.

(10) Paragraph 2 provides that a consul in the exercise of his functions may deal only with the local authorities. It makes an exception where the present draft or the relevant agreements in force contain a provision allowing consuls also to deal with the central authorities or with authorities outside the consular district.

(11) The text of the more detailed, or enumerative, definition as prepared and revised by the Special Rapporteur (but not discussed in detail by the Commission), together with a commentary which he has since added but which had likewise not been considered by the Commission, is reproduced below :

#### CONSULAR FUNCTIONS

1. *The task of consuls is to defend, within the limits of their consular district, the rights and interests of the sending State and of its nationals and to give assistance and relief to the nationals of the sending State, as well as to exercise other functions specified in the relevant international agreements in force or entrusted to them by the sending State, the exercise of which is compatible with the laws of the receiving State.*

2. *Without prejudice to the consular functions deriving from the preceding paragraph, consuls may perform the under-mentioned functions:*

##### I. Functions concerning trade and shipping

1. *To protect and promote trade between the sending State and the receiving State and to foster the development of economic relations between them;*

##### Commentary

This function has always been recognized by international law. In States where the sending State is represented by a diplomatic mission, the latter performs most of these functions.

2. *To render all necessary assistance to ships and merchant vessels flying the flag of the sending State;*

##### Commentary

In the exercise of this function the consul is competent or entitled:

(a) To examine and stamp ships' papers;

(b) To take statements with regard to a ship's voyage and destination, and to incidents during the voyage (master's reports);

(c) To draw up manifests;

(d) To question masters, crews and nationals on board;

(e) To settle, in so far as authorized to do so by the laws of the sending State, disputes of any kind between masters, officers and seamen, especially those relating to pay and the execution of contracts between them;

(f) To facilitate the departure of vessels;

(g) To assist members of the ship's company by acting as interpreters and agents in any business they may have to transact, or in any applications they may have to make, for example to local courts and authorities;

(h) To be present at all searches (other than those for customs, passport and aliens control purposes and for the purpose of inspection by the health authorities), conducted on board merchant vessels and pleasure craft;

(i) To be given notice of any action by the courts or the administrative authorities on board merchant vessels and pleasure craft flying the flag of the sending State, and to be present when such action is taken;

(j) To direct salvage operations when a vessel flying the flag of the sending State is wrecked or runs aground on the coast of the receiving State;

(k) To settle, in accordance with the laws of the sending State, disputes concerning general average between nationals of the State which he represents.

3. *To render all necessary assistance to aircraft registered in the sending State;*

##### Commentary

This function consists of the following:

(a) Checking log-books;

(b) Rendering assistance to the crew;

(c) Giving help in the event of accident or damage to aircraft;

(d) Supervising compliance with the international air transport conventions to which the sending State is a party.

4. *To render all necessary assistance to vessels owned by the sending State, and particularly its warships, which visit the receiving State;*

##### Commentary

This function is recognized in a large number of consular conventions.

II. *Functions concerning the protection of nationals of the sending State*

5. *To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the receiving State and under the international customs and conventions in force and to take appropriate steps to obtain redress if these rights have been infringed;*

##### Commentary

This right in no way means that the consul is authorized to interfere in the domestic affairs of the receiving State or to intercede continually with the local authorities on behalf of nationals of his State. This provision clearly limits the cases in which he may intervene to those where the rights of the sending State or of its nationals under the municipal law of the receiving State or under international law are infringed. The term "nationals" in this context means both individuals and bodies corporate possessing the nationality of the sending State.

6. *To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the office of guardian or trustee, and to supervise the guardianship of minors and trusteeships for insane and other persons lacking full capacity who are nationals of the sending State;*

##### Commentary

There are consular conventions which even confer upon the consul the right to appoint guardians or trustees in the case of minors or persons lacking full capacity who are nationals of the sending State. As, however, the laws of certain countries reserve this function to the courts, the proposed provision limits the consul's powers in this matter to those of:

(a) Proposing the appointment of guardians or trustees;



(b) Submitting nominations to courts for the office of guardian or trustee;

(c) Supervising the guardianship or trusteeship.

7. *To represent in all cases connected with succession, without producing a power of attorney, the heirs and legatees, or their successors in title, who are nationals of the sending State and who are not represented by a special agent; to approach the competent authorities of the receiving State in order to arrange for an inventory of assets or for the winding up of the estate; and, if necessary, to apply the competent courts to settle disputes and claims concerning the estates of deceased nationals of the sending State;*

#### Commentary

The scope of the functions vested in consuls by consular conventions and other international agreements for the purpose of dealing with succession questions is very varied. In order that this provision should be acceptable to as many governments as possible, the proposed clause refers to those functions only which may be regarded as essential to the protection of the rights of heirs and legatees and their successors in title. Under this provision, in all cases in which nationals of the sending State beneficiaries in an estate as heirs or legatees, or because they have acquired rights in the estate through heirs or legatees, and are not represented by a special agent the consul has the right to:

(a) Represent the heirs and legatees, or their successors in title, without having to produce a power of attorney from the persons concerned;

(b) Approach the appropriate authorities of the receiving State with a view to arranging for an inventory of assets or the distribution of the estate;

(c) Apply to the competent courts to settle any disputes and claims concerning the estate of a deceased national.

The consul is competent to perform this function for so long as the heirs or legatees (or their successors in title) have not appointed special agents to represent them in proceedings connected with the estate.

#### III. Administrative functions

8. *To perform and record acts of civil registration (births, marriages, deaths), without prejudice to the obligation of declarants to make whatever declarations are necessary in pursuance of the laws of the receiving State;*

#### Commentary

These functions are determined by the laws and regulations of the sending State. They are extremely varied and include, *inter alia*, the following:

(a) The keeping of a register of nationals of the sending State residing in the consular district;

(b) The issuing of passports and other personal documents to nationals of the sending State;

(c) The issue of visas on the passports and other documents of persons travelling to the sending State;

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

(e) Supplying to interested persons in the receiving State information concerning the trade, industry, and all aspects of the national life of the sending State;

(f) Certifying documents indicating the origin or source of goods, invoices, and the like;

(g) Transmitting to the persons entitled any benefits, pensions or compensation due to them in accordance with their national laws or with international conventions, in particular under social welfare legislation;

(h) Receiving payment of pensions or allowances due to nationals of the sending State absent from the receiving State;

(i) Performing all acts relating to service in the armed forces of the

sending State, to the keeping of muster-rolls for those services and to the medical inspection of conscripts who are nationals of the sending State.

9. *To solemnize marriages in accordance with the laws of the sending State, where this is not contrary to the laws of the receiving State;*

#### Commentary

The consul, if so empowered by the laws of the sending State, may solemnize marriages between nationals of his State or under the laws of certain States, also between nationals of his State and those of another State. This function cannot, however, be exercised if it is contrary to the laws of the receiving State.

10. *To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by the conventions in force or in any other manner compatible with the laws of the receiving State;*

#### Commentary

This function, which is very often exercised nowadays, is recognized by customary international law.

#### IV. Notarial functions

11. *To receive any statements which nationals of the sending State may have to make, and to draw up, attest and receive for safe custody wills and deed-polls executed by nationals of the sending State and indentures the parties to which are nationals of the sending State or nationals of the sending State and nationals of other States, provided that they do not relate to immovable property situated in the receiving State or to rights in rem attaching to such property;*

#### Commentary

Consuls have many functions of this nature, e.g.:

(a) Receiving in their offices or on board vessels flying the flag of the sending State or on board aircraft of the nationality of the sending State, any statements which nationals of that State may have to make;

(b) Drawing up, attesting and receiving for safe custody, wills and all deed-polls executed by nationals of the sending State;

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

12. *To attest or certify signatures, and to stamp, certify or translate documents, in any case in which these formalities are requested by a person of any nationality for use in the sending State or in pursuance of the laws of that State. If an oath or declaration in lieu of oath is required under the laws of the sending State, such oath or declaration may be sworn or made before the consul;*

#### Commentary

Consuls have the right to charge for these services fees determined by the laws and regulations of the sending State. This right is the subject of a subsequent article proposed by the Special Rapporteur (art. 26).<sup>15</sup>

13. *To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to the consuls by nationals of the sending State;*

#### Commentary

Transfers of sums of money or other valuables, especially works of art, are governed (in the absence of an international agreement) by the laws and regulations of the receiving State.

<sup>15</sup> *Yearbook of the International Law Commission, 1957, vol. II (United Nations publication, Sales No.: 57.V.5, Vol. II), p. 99.*

### V. Other functions

14. To further the cultural interests of the sending State, particularly in science, the arts, the professions and education;

#### Commentary

This function has recently become prevalent and is confirmed in a considerable number of consular conventions.

15. To act as arbitrators or mediators in any disputes submitted to them by nationals of the sending State, where this is not contrary to the laws of the receiving State;

#### Commentary

This function, which enables nationals of the sending State to settle their disputes rapidly, has undeniable practical value but does not seem to be much used nowadays.

16. To gather information concerning aspects of economic, commercial and cultural life in the consular district and other aspects of national life in the receiving State and to report thereon to the Government of the sending State or to supply information to interested parties in that State;

#### Commentary

This function is related to the consul's economic, commercial and cultural functions.

17. A consul may perform additional functions as specified by State, provided that their performance is not prohibited by the laws of the receiving State.

#### Commentary

This is a residual clause comprising all other functions which the sending State may entrust to its consul. Their performance must never conflict with the law of the receiving State.

(12) The Special Rapporteur proposed an additional article in the following terms:

*The consul shall have the right to appear, without producing a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals and bodies corporate of the sending State that owing to their absence or for any other reason are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the persons or bodies in question have appointed an attorney or have themselves assumed the defence of their rights and interests.*

This provision, which occurs in many consular conventions, grants to consuls the right to represent *ex officio* before the courts and other authorities of the receiving State such nationals of the sending State as cannot defend their rights and interests themselves. This prerogative of the consul is necessary for the exercise of the consular functions which consist (among others) of the protection of the interests of nationals of the sending State and of the interests of that State (Article 4, paragraph 1 (a)). The consul would not be able to discharge this function if he had not the power to approach the courts and administrative authorities regarding the progress of the affairs of absent nationals of his country, to transmit to the courts and other competent authorities information and proposals which may help to protect the rights of absent nationals, to draw the attention of local courts to the provisions of inter-

national treaties applicable to specific cases before them, and to arrange for the representation of absent nationals in court and before other competent authorities until the persons concerned can themselves take charge of the defence of their rights and interests. It is precisely for this purpose that the additional article allows the consuls a power of representation limited both in time and in scope. The provision does not, of course, give the consul the powers of an attorney.

After thorough debate, the Commission concluded that it did not possess sufficient information on the point, and it decided to await the comments of governments without making any recommendation for the time being.

### Article 5

#### Obligations of the receiving State in certain special cases

The receiving State shall have the duty

(a) in the case of the death in its territory of a national of the sending State, to send a copy of the death certificate to the consulate in whose district the death occurred;

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

(c) if a vessel flying the flag of the sending State is wrecked or runs aground on the coast or in the territorial sea of the receiving State, to inform the consulate nearest to the scene of the occurrence, without delay.

#### Commentary

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

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

### Article 6

#### Communication and contact with nationals of the sending State

1. With a view to facilitating the exercise of the consular functions relating to the protection of the nationals of the sending State who are present in the consular district:

(a) Nationals of the sending State shall be free to communicate with and to have access to the competent consul, and the consul shall be free to communicate with and, where appropriate, to have access to the said nationals;

(b) The competent authorities shall inform the competent consul of the sending State without undue delay if, within his district, a national of that State is committed to custody pending trial or to prison. Any communications addressed by the person in custody or

in prison to the consul shall be forwarded by the said authorities, also without undue delay;

(c) The consul shall be permitted to visit a national of the sending State who is in custody or imprisoned, to converse with him and to arrange for his legal representation. He may also visit any national of the sending State who is imprisoned within his district in pursuance of a judgement.

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

#### Commentary

(1) Like the preceding article, this article defines the freedoms granted to consuls in order to facilitate the exercise of the consular function in connexion with the protection of nationals of the sending State.

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

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

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

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

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

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

(5) All the above-mentioned freedoms are exercisable in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or

imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody, against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consul must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consul may wish to make to a prisoner who is a national of the sending State.

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

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

#### Article 7

##### *Carrying out of consular functions on behalf of a third State*

No consul may carry out consular functions on behalf of a third State without the consent of the receiving State.

#### Commentary

(1) Whereas article 3, paragraph 5, of the draft deals with the case where the jurisdiction of a consulate, or the exercise of the functions of a consul is to extend to the whole or part of the territory of a third State, the purpose of the present article is to regulate the case where the consul desires to exercise in his district consular functions on behalf of a third State. In the first place, such a situation may arise when a third State, not maintaining consular relations with the receiving State, nevertheless desires to afford consular protection there to its nationals. For example, the Caracas Agreement, signed on 18 July 1911, between Bolivia, Colombia, Ecuador, Peru and Venezuela, relating to the functions of the consuls of each contracting Republic in the others, provided that the consuls of each of the contracting Republics residing in any other of them, could exercise their functions on behalf of persons belonging to any other contracting Republic not having a consul in the particular place concerned (art. 6).

(2) Another case in which the exercise of consular functions on behalf of a third State meets a practical need is that of a rupture of consular relations.

(3) The law of a considerable number of countries provides for the exercise of consular functions on behalf of a third State, but subjects it to consent by the Head of State, by the Government, or by the Foreign Minister.

(4) It is obvious that in the cases covered by the article the consul will rarely be able to exercise all consular functions on behalf of the third State. In some cases he may confine himself to the exercise of

only a few. The article contemplates both the occasional exercise of certain consular functions and the continuous exercise of such functions. In both cases the consent of the receiving State is essential.

#### Article 8

##### *Classes of heads of consular posts*

Heads of consular posts are divided into four classes, viz:

- (1) Consuls-general;
- (2) Consuls;
- (3) Vice-consuls;
- (4) Consular agents.

#### Commentary

(1) Whereas the classes of diplomatic agents were determined by the Congress of Vienna in 1815 and the Congress of Aix-la-Chapelle in 1818, the classes of consuls have not yet been codified. Since the institution of consuls first appeared in relations between peoples, a large variety of titles has been used. At present the practice of States, as reflected in their domestic law and in international conventions, shows a sufficient degree of uniformity in the use of the four classes set out in article 8 to enable the classes of heads of consular posts to be codified, thus doing for consular law what the Congress of Vienna did more than 140 years ago for diplomatic law.

(2) This enumeration of four classes in no way means that States accepting it are bound to have all four classes in practice. They will be obliged only to give their heads of consular posts one of the four titles in article 8. Consequently, those States whose domestic law does not provide for all four classes will not find themselves under any necessity to amend it.

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

(4) Under some domestic laws, consular agents are invested only with functions that are more limited than those of consuls-general and consuls and relate merely to the protection of commerce and navigation; and such consular agents are appointed, with the consent of the receiving State, not by the government of the sending State, but locally by the consuls and they remain under the orders of the appointing consuls. The Commission desires to draw the especial attention of governments to this class of consular official, and to ask governments for detailed information enabling the Commission to decide what is the function and method of appointment of consular agents according to the domestic law of different States, and to ascertain the extent to which the institution of the consular agent is in practice made use of today. This information will constitute the basis for a final decision as to this class of consular official when the Commission reverts to the subject.

(5) The domestic law of some (but not very many) States allows the exercise by vice-consuls and consular

agents of gainful activities in the receiving State. Some consular conventions sanction this practice by way of exception (see, as regards consular agents, art. 2, para. 7 of the Consular Convention of 31 December 1951 between France and the United Kingdom). The Special Rapporteur's draft treats vice-consuls and consular agents exercising a gainful activity on the same footing as honorary consuls, whose legal position will be dealt with by chapter III of the draft.

(6) The proposed classification is in no way affected by the fact that certain domestic legal systems include heads of consular sections of diplomatic missions in their consular classifications for the term "head of consular section of a diplomatic mission" refers only to a function, not to a new class of consular officials.

(7) It should be emphasized that the article deals only with heads of posts as such, and in no way purports to restrict the power of States to determine the titles of the consular officials and employees who work under the direction and responsibility of the head of post.

#### Article 9

##### *Acquisition of consular status*

A consul within the meaning of these articles is an official who is appointed by the sending State to one of the four classes enumerated in article 8, and who is recognized in that capacity by the State in whose territory he is to carry out his functions.

#### Commentary

(1) This article states a fundamental principle which is developed in the succeeding articles. It lays down two requirements which must be satisfied in order that a person may be considered a consul in international law:

(a) He must be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent;

(b) He must be recognized in that capacity by the government of the State in whose territory he is to carry out his functions.

(2) This provision is necessary in order to bring out the fact that the articles drafted by the Commission relate only to consuls who have international status, and to members of their staffs, and that they do not apply to persons who may have the title of consul, but whose activities are confined to the internal services of their State.

#### Article 10

##### *Competence to appoint and recognize consuls*

1. Competence to appoint consuls, and the manner of its exercise, is governed by the internal law of the sending State.

2. Competence to grant recognition to consuls, and the form of such recognition, is governed by the internal law of the receiving State.

#### Commentary

(1) There is no rule of international law determining which in particular is the authority in a State competent to appoint consuls. This matter is governed by the internal law of each State. Consuls—at any rate

those in the first two classes—are appointed either by the Head of State on a recommendation of the government, or by the government, or by the Foreign Minister. Even within a single State there may be different competent authorities according to whether the appointment involves consuls-general and consuls, or vice-consuls and consular agents; or again, for the appointment of career consuls on the one hand and of honorary consuls on the other.

(2) The same applies to the manner of the appointment of consuls. This matter also is governed by the internal law of each State, which determines the qualifications required for the appointment of a consul, the procedure of appointment, and the form of the documents furnished to consuls. Thus it is, for example, that in some States, although consular agents may be appointed by a central authority, this is done on the recommendation of the consul under whose orders and responsibility they are to work. Since in the past the mistaken opinion has sometimes been voiced that only Heads of State are competent to appoint consuls, and since it is even the case that concrete attitudes have been taken up on the basis of these opinions, it has seemed timely to state in this article that the competence to appoint consuls, and the method of exercising this competence, is governed by the internal law of each State. Such a rule would put an end to all these differences of view, and would for the future prevent frictions calculated to injure good relations between States.

(3) Nor does international law determine which particular authority shall have competence to grant recognition to a consul appointed by the sending State, or the form of such recognition. The present draft provides only that, in the absence of the final recognition given by means of an *exequatur* (art. 13), there shall be a provisional recognition (art. 14). Internal law therefore governs the other relevant matters dealt with by the present article.

(4) Subject to article 8, which classifies heads of consular posts, every State is also free to determine the seniority of its consuls, and whether and to what extent it will make use of honorary consuls. However, as regards the appointment of a consul abroad, the views of the receiving State must also be considered. The receiving State has in fact a corresponding freedom to refuse to recognize honorary consuls, or to require in return for recognition that such a consul be appointed in a particular class, unless indeed the matter was settled when the consulate was established. It is therefore recommended that the matter should be regulated beforehand by negotiation between the States concerned. However, the point is not important enough to call for a special provision such as that contained in article 14 of the Draft Articles on Diplomatic Intercourse and Immunities.

(5) The principle underlying paragraph 1 of the present article has been codified in a different form in the 1928 Havana Convention on consuls, article 6 of which provides as follows:

“The manner of appointment of consuls, their qualifications for appointment and their classes and

categories, shall be governed by the internal law of the State concerned.”

The Commission, having regard to the development of international law reflected in international conventions and in the present draft, article 12 of which relates to the consular commission, submits in the first paragraph of the present article a provision having a more limited object, and supplements this in paragraph 2 of the article by providing that the competence to grant recognition to consuls and the form of such recognition, is governed by the internal law of the receiving State.

#### Article 11

##### *Appointment of nationals of the receiving State*

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

#### Commentary

In those cases where the sending State wishes to appoint as the head of a consular post or as consular official a person who is a national of the receiving State, or who is a national both of the sending State and of the receiving State, it can do so only with the express consent of the receiving State. This is a case in which a conflict could arise between the consular official's duties towards the sending State and his duties as a citizen of the receiving State. It should be noted that according to the terms of this article, the express consent of the receiving State is not required if the consular official is a national of a third State. The article corresponds to article 7 of the Draft Articles on Diplomatic Intercourse and Immunities.

#### Article 12

##### *The consular commission*

1. Heads of consular posts shall be furnished by the State appointing them with full powers in the form of a commission or similar instrument, made out for each appointment, and showing, as a general rule, the full name of the consul, the consular category and class, the consular district, and the seat of the consulate.

2. The State appointing a consul shall communicate the commission through the diplomatic or other appropriate channel to the government of the State on whose territory the consul is to exercise his functions.

3. If the receiving State so accepts, the commission may be replaced by a notice of the appointment of the consul, addressed by the sending State to the receiving State. In such case the provisions of paragraphs 1 and 2 of this article shall apply *mutatis mutandis*.

#### Commentary

(1) As a general rule, the consul is furnished with an official document known as a “consular commission” (variously known in French as *lettre de provision*, *lettre patente* or *commission consulaire*). The instrument issued to vice-consuls and consular agents sometimes bears a different name—*brevet*, *décret*, *patente* or *licence*.

(2) For purposes of simplification article 12 uses the expression “consular commission” to describe the official documents of heads of consular offices of all

classes. While it may be proper to describe differently the full powers given to consular officials not appointed by the central authorities of the State, the legal significance of these documents from the point of view of international law is the same. This *modus operandi* is all the more necessary in that the manner of appointment of consuls pertains to the domestic jurisdiction of the sending State.

(3) While the form of the consular commission remains none the less governed by municipal law, paragraph 1 of the article states the particulars which should be shown in any consular commission in order that the receiving State may be able to determine clearly the competence and legal status of the consul. The expression "as a general rule" indicates clearly that this is a provision the non-observance of which does not have the effect of nullifying the consular commission. The same paragraph specifies, in keeping with practice, that a consular commission must be made out in respect of each appointment. Accordingly, if a consul is appointed to another post, a consular commission must be made out for that case, even if the post is in the territory of the same State. On this point, too, the Commission would like to receive further information concerning prevailing practice.

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

(5) The consular commission, together with the *exequatur*, is retained by the consul. It constitutes an important document which he can make use of at any time with the authorities of his district as evidence of his official position.

(6) While the consular commission as above described constitutes the regular mode of appointment, the recent practice of States seems to an ever-increasing extent to permit less formal methods, such as a notification of the consul's posting. It was therefore thought necessary to allow for this practice in article 12, paragraph 3.

(7) For the presentation of the consular commission, the diplomatic channel is prescribed by a large number of national laws and international conventions, for example the Havana Convention of 20 February 1928 (art. 4). This seems to be the normal method of obtaining the *exequatur*. Nevertheless, to take account also of the circumstances and cases in which the diplomatic channel cannot be used, and where another procedure would be appropriate, the text of paragraph 2 expressly states that, as well as the diplomatic channel, some "other appropriate channel" may be used.

### Article 13

#### The *exequatur*

Without prejudice to the provisions of articles 14 and 16, heads of consular posts may not enter upon their duties until they have obtained the final recognition of the government of the State in which they are to exercise them. This recognition is given by means of an *exequatur*.

#### Commentary

(1) The *exequatur* is the act whereby the receiving State grants to the foreign consul final recognition, and thereby confers upon him the right to exercise his consular functions. Accordingly, the *exequatur* invests the consul with competence vis-à-vis the receiving State. The same term also serves for describing the document containing the recognition in question.

(2) As is stipulated in article 10, competence to grant the *exequatur* is governed by the municipal law of the receiving State. In many States, the *exequatur* is granted by the Head of the State if the consular commission is signed by the Head of the sending State, and by the Minister of Foreign Affairs in other cases. In many States the *exequatur* is always granted by the Minister of Foreign Affairs. In certain countries, competence to grant the *exequatur* is reserved to the government.

(3) As is evident from article 10, the form of the *exequatur* is likewise governed by the municipal law of the receiving State. As a consequence, it varies considerably. According to the information at the Commission's disposal, the types of *exequatur* most frequently found in practice are granted in the form of:

(a) A decree by the Head of the State, signed by him and countersigned by the Minister of Foreign Affairs, the original being issued to the consul;

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

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

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

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

(5) As stated in the article on definitions, the term "*exequatur*" is used in this article, at least for the time being, to denote any final authorization granted by the receiving State to a foreign consul to exercise consular functions in the territory of that State, whatever the form of such authorization. The reason is that the form is not *per se* a sufficient criterion for differentiating

between acts which have the same purpose and the same legal significance.

(6) Inasmuch as subsequent articles provide that the consul may obtain a provisional recognition before obtaining the *exequatur* (article 14), or may be allowed to act as temporary head of post in the cases referred to in article 16, the scope of the article is limited by an express reference to these two articles of the draft.

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

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

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

#### Article 14

##### *Provisional recognition*

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

##### *Commentary*

(1) The purpose of provisional recognition is to enable the consul to take up his duties before the *exequatur* is granted. The procedure for obtaining the *exequatur* takes some time, but the business handled by a consul will not normally wait. In these circumstances the institution of provisional recognition is a very useful expedient. This also explains why provisional recognition has become so prevalent, as can be seen from many consular conventions, including the Havana Convention of 1928 (art. 6, para. 2).

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

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

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

#### Article 15

##### *Obligation to notify the authorities of the consular district*

The government of the receiving State shall immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions. It shall also ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to admit him to the benefits of the present articles and of the relevant agreements in force.

##### *Commentary*

(1) The grant of recognition, whether provisional or definitive, involves a twofold obligation for the government of the receiving State:

(a) It must immediately notify the competent authorities of the consular district that the consul is authorized to assume his functions;

(b) It must ensure that the necessary measures are taken to enable the consul to carry out the duties of his office and to enjoy the benefits of the present articles and of the relevant agreements in force.

(2) Nevertheless, the commencement of the consul's function does not depend on the fulfilment of these obligations. Should the government of the receiving State omit to fulfil these obligations, the consul could himself present his consular commission and his *exequatur* to the higher authorities of his district.

#### Article 16

##### *Acting head of post*

1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, the direction of the consulate shall be temporarily assumed by an acting head of post whose name shall be notified to the competent authorities of the receiving State.

2. The competent authorities shall afford assistance and protection to such acting head of post, and admit him, while in charge of the consular post, to the benefits of the present articles and of the relevant agreements in force on the same basis as the head of the consular post concerned.

##### *Commentary*

(1) The institution of acting head of a consular post has long since become part of current practice, as



witness many national regulations concerning consuls and a very large number of consular conventions. The text proposed therefore merely codifies the existing practice.

(2) The function of acting head of post in the consular service corresponds to that of *chargé d'affaires ad interim* in the diplomatic service. In view of the similarity of the institutions, the text of paragraph 1 follows very closely that of article 17 of the Draft Articles on Diplomatic Intercourse and Immunities.

(3) It should be noted that the text leaves States quite free to decide the method of appointing the acting head of post, who may be chosen from any of the consular officials attached to either the particular consulate or another consulate of the sending State, or from the officials of a diplomatic mission of that State. Where no consular official is available to assume the direction of the consulate, one of the consular employees may be chosen as acting head of post (see the Havana Convention, art. 9). The text also makes it possible, if the sending State considers this advisable, for the acting head of post to be designated prior to the occurrence preventing the head of post from carrying out his functions.

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

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

(6) The expression "competent authorities" means the authorities designated by the law or by the government of the receiving State as responsible for the government's relations with foreign consuls.

(7) While in charge of the consular post, the acting head has the same functions and enjoys the same privileges and immunities as the head of the consular post. The question of the precedence of acting heads of post is dealt with in article 17, paragraph 5, of this draft.

#### Article 17 Precedence

1. Consuls shall rank in each class according to the date of the grant of the *exequatur*,

2. If the consul, before obtaining the *exequatur*, was recognized provisionally, his precedence shall be determined according to the date of the grant of the provisional recognition; this precedence shall be maintained even after the granting of the *exequatur*.

3. If two or more consuls obtained the *exequatur* or provisional recognition on the same date, the order of precedence as between them shall be determined according to the dates on which their commissions were presented.

4. Heads of posts have precedence over consular officials not holding such rank.

5. Consular officials in charge of a consulate *ad interim* rank after all heads of posts in the class to which the heads of posts whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of posts.

#### Commentary

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

(2) It would seem that, according to a very widespread practice, career consuls have precedence over honorary consuls. This question is dealt with in chapter III of the present draft.

(3) Paragraph 5 establishes the precedence of acting heads of posts according to the order of precedence of the heads of posts whom they replace. This is justified by the nature of the *ad interim* function. It has undoubted practical advantages, in that the order of precedence can be established easily.

#### Article 18

##### *Occasional performance of diplomatic acts*

In a State where the sending State has no diplomatic mission, a consul may, on an occasional basis, perform such diplomatic acts as the government of the receiving State permits in the particular circumstances.

#### Commentary

(1) This article deals with the special position of the consul in a country in which the sending State has no diplomatic mission and in which the consul is the sole official representative of his State. It has been found in practice that the consul in such circumstances will occasionally have to perform acts which normally come within the competence of diplomatic missions and which are consequently outside the scope of consular functions. Under this article, the consent, express or tacit, of the receiving State is essential for the performance of such diplomatic acts.

(2) Unlike article 19, this article is concerned only with the occasional performance of diplomatic acts. Such performance, even if repeated, does not affect the legal status of the consul or confer any right to diplomatic privileges and immunities.

#### Article 19

##### *Grant of diplomatic status to consuls*

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

#### Commentary

(1) This article provides for the case where the sending State wishes to entrust its consul with the per-



formance not merely of occasional diplomatic acts, as provided for in article 18, but with diplomatic functions generally. In several countries the law makes provision for this possibility. It would seem that States are at the present day less prone than in the past to entrust consuls with diplomatic functions. But even if the practice is not now very common, the Commission considers that it should be mentioned in a general codification of consular intercourse and immunities.

(2) Consuls entrusted with diplomatic functions have in the past borne a variety of titles: commissioner and consul-general, diplomatic agent and consul-general, *chargé d'affaires*-consul-general, or consul-general-*chargé d'affaires*. The Commission has adopted the last-named title as being the most in keeping with the function exercised by the consul in such cases.

(3) The consul-general-*chargé d'affaires* must, in addition to having the *exequatur*, at the same time be accredited by means of letters of credence. He enjoys diplomatic privileges and immunities.

(4) The question was raised in the Commission whether the proper place for article 19, and article 18 too, would not be in the Draft Articles on Diplomatic Intercourse and Immunities. Since in both cases the consular function is predominant and gives the post its basic character, the Commission took the view that both articles ought to remain in the draft on consular intercourse and immunities.

#### Article 20

##### *Withdrawal of exequatur*

1. Where the conduct of a consul gives serious grounds for complaint, the receiving State may request the sending State to recall him or to terminate his functions, as the case may be.

2. If the sending State refuses, or fails within a reasonable time, to comply with a request made in accordance with paragraph 1 of this article, the receiving State may withdraw the *exequatur* from the consul.

3. A consul from whom the *exequatur* has been withdrawn may no longer exercise consular functions.

##### *Commentary*

(1) It is customary to signify the revocation of the receiving State's recognition of a consul by the withdrawal of his *exequatur*, though the destruction or return of the document evidencing the grant of the *exequatur* is not required.

(2) It should be noted that, according to the terms of the article, the withdrawal of the *exequatur* must always be preceded by a request to the sending State for the recall of the consul or for the termination of his functions. This latter expression refers mainly to the case where the consul is a national of the receiving State, as honorary consuls often are.

(3) The right of the receiving State to make the request referred to in paragraph 1 is restricted to cases where the conduct of the consul has given serious grounds for complaint. Consequently, the withdrawal of the *exequatur* is an individual measure which may only be taken in consequence of such conduct. The obligation to request the recall of the consul or the termination of his functions before proceeding to withdraw the

*exequatur* constitutes some safeguard against an arbitrary withdrawal which might cause serious prejudice to the sending State by abruptly or unjustifiably interrupting the performance of consular functions in matters where more or less daily action by the consul is absolutely essential (e.g. various trade and shipping matters, the issue of visas, attestation of signatures, translation of documents, etc.).

(4) In the event of the withdrawal of the *exequatur*, the consul concerned ceases to be entitled to exercise consular functions. In addition, he loses the benefits of the present articles and of the relevant agreements in force. The question whether the consul continues in such circumstances to enjoy consular immunities until he leaves the country or until the lapse of a reasonable period within which to wind up his affairs will be dealt with in a separate article.

#### Article 21

##### *Appointment of the consular staff*

Subject to the provisions of articles 11, 22 and 23 the sending State may freely appoint the members of the consular staff.

##### *Commentary*

(1) The receiving State's obligation to accept the necessary number of consular officials and employees of the consulate flows from the agreement by which that State gave its consent to the establishment of consular intercourse, and in particular its consent to the establishment of the consulate. The issue of the *exequatur* to the head of consular post is not enough to ensure the smooth operation of the consulate, for the consul cannot discharge the many tasks involved in the performance of the consular function without the help of colleagues, whose qualifications, rank and number will depend on the importance of the consulate.

(2) This article is concerned only with the subordinate staff who assist the head of post in the performance of the consular functions. The procedure relating to the appointment of the head of consular post, to his recognition by the receiving State, and to the withdrawal of such recognition, has been dealt with in previous articles of the draft.

(3) The staff of a consulate is divided into two categories:

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

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

(4) The sending State is free to choose the members of the consular staff. But there are exceptions to this rule, as appears from the proviso in article 21.

(a) As stipulated in article 11, consular officials may be appointed from amongst the nationals of the receiving State only with the express consent of that State.

(b) Article 22, which gives the receiving State the right to limit the size of the consular staff in certain circumstances, is another exception.

(c) A third exception to the rule laid down in article 21 consists in the faculty of the receiving State, under article 23, at any time to declare a member of the consular staff not acceptable, or if necessary to refuse to recognize him as such.

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

(6) The free choice of consular staff provided for in article 21 naturally does not in any way imply exemption from visa formalities in the receiving State in cases where a visa is necessary for admission to that State's territory.

#### Article 22

##### Size of the staff

In the absence of a specific agreement as to the size of the consular staff, the receiving State may refuse to accept a size exceeding what is reasonable and normal, having regard to circumstances and conditions in the consular district, and to the needs of the particular consulate.

##### Commentary

(1) The Special Rapporteur did not include this provision in his original draft (A/CN.4/L.86), because he was of the opinion that the question dealt with in article 10, paragraph 1, of the Draft Articles on Diplomatic Intercourse and Immunities did not arise in the case of consulates, the staff of which is usually much smaller.

(2) Nevertheless, the majority of the members of the Commission, although recognizing that on this question there were differences of a practical nature between diplomatic missions and consulates, considered that it was advisable for the time being to recognize the receiving State's competence to settle the question of the size of staff, and that it was therefore desirable to follow in this respect the text of article 10 of the Draft Articles on Diplomatic Intercourse and Immunities.

(3) This article relates to the case in which the receiving State considers that the size of the consular staff has been unduly increased. If the receiving State considers that the consular staff is too large, it should first try to reach an agreement with the sending State. If these efforts fail, then, in the opinion of most members of the Commission, it should have the right to limit the size of the sending State's consular staff.

(4) This right of the receiving State is not, however, absolute, for such State is obliged to take into account not only the conditions prevailing in the consular district, but also the needs of the consulate concerned, i.e. it must apply objective criteria, one of the

most decisive being the consulate's needs. Any decision by the receiving State tending to limit the size of the consular staff should, in the light of the two criteria mentioned in the present article, remain within the limits of what is reasonable and normal.

#### Article 23

##### Persons deemed unacceptable

1. The receiving State may at any time notify the sending State that a member of the consular staff is not acceptable. In that event, the sending State shall, as the case may be, recall the person concerned or terminate his functions with the consulate.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the consular staff.

##### Commentary

(1) This article, which is concerned only with the consular staff, gives the receiving State the right at any time to declare any member of the consular staff unacceptable. The sending State is then obliged to recall the person concerned or to terminate his functions, as the case may be.

(2) Paragraph 1 takes into account two different situations which may arise. First of all, in the case of a newly-appointed consular official or employee of the consulate, the receiving State, if it has objections to the appointment, may, at the time when it learns of the appointment, and in particular when it is notified thereof, inform the sending State that the person in question is not acceptable. In some circumstances, it may do this even before the person concerned has arrived in the country to take up his duties at the consulate. On the other hand, in the case of a member of the consular staff who is already exercising his functions in the receiving State, the latter may, in the circumstances under consideration, ask the sending State to recall the person in question or to terminate his functions. This last phrase relates particularly to the cases in which the person concerned is a national of the receiving State or to cases in which, although a national of the sending State, he was in permanent residence in the territory of the receiving State before being appointed to the sending State's consulate.

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

(4) Paragraph 2 provides that, if the sending State refuses to carry out the obligation specified in paragraph 1, or fails to carry it out within a reasonable time, the receiving State may refuse to recognize the person concerned as a member of the consular staff. This means that the person concerned will cease to enjoy any consular privileges and immunities except in respect of acts performed in the exercise of official functions and, should the case arise, may even be expelled from the territory of the receiving State.

(5) Like the Draft Articles on Diplomatic Intercourse and Immunities (article 8), the article is silent on the question whether, in declaring a member of the consular staff not acceptable, the receiving State must

give reasons for its decision. The absence of any express provision on this point can only be interpreted as meaning that it is left entirely to the discretion of the receiving State whether or not to disclose the reasons for its action.

(6) However, even though the text contains no provision on this point, the receiving State should not declare a member of the consular staff unacceptable without having sufficient reason for doing so. It would be inconsistent with the obligations assumed by the receiving State in consenting to the establishment of the consulate in its territory, if it arbitrarily declared a member of the consular staff, or perhaps even all the members of the staff, unacceptable.

(7) In the wording originally proposed by the Special Rapporteur, this article stated that the right provided for in paragraph 1 might be exercised in cases where the behaviour of a member of the consular staff gave serious grounds for complaint. A similar stipulation appears in some consular conventions and may be justified by the fact that the staff of a consulate is usually much smaller than that of a diplomatic mission. That being so, the enforced withdrawal of any member of the consular staff may interfere much more seriously with the discharge of the consular function than the withdrawal of a member of a diplomatic mission would interfere with the functioning of the mission.

(8) Nevertheless many members of the Commission raised objections against the insertion of the aforesaid condition, which they thought went too far. Some of these members considered in particular that the obligation contained in the proposed text, obliging the receiving State to indicate the reasons for which the conduct of a member of the consulate gives serious grounds for complaint, was neither in the interests of the two States in question, nor in the interests of the officials or employees envisaged by such a provision. For the members of the consulate, it was thought preferable to follow the same procedure as that provided by article 8 of the Draft Articles on Diplomatic Intercourse and Immunities. In order to facilitate agreement on this point, the Special Rapporteur withdrew the words "whose conduct gives serious grounds for complaint".

#### Article 24

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

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

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

(b) The arrival and final departure of a person belonging to the family of a member of the consulate and, where appropriate, the fact that a person joins the family or leaves the household of a member of the consulate;

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

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

#### Commentary

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

(a) The arrival of members of the consulate after being appointed to the consulate;

(b) Their departure or the termination of their functions with the consulate;

(c) The arrival of members of the families of members of the consulate;

(d) The arrival of members of the private staff of members of the consulate;

(e) Cases in which persons referred to in sub-paragraph (c) cease to belong to the household of members of the consulate;

(f) Cases in which members of the private staff cease to be employed by members of the consulate;

(g) Cases of the local appointment or dismissal of members of the consular staff.

(2) The receiving State has, in effect, an interest in knowing at all times what persons belong to the consulate of the sending State, since these persons, though in varying degrees, may claim the benefit of consular privileges and immunities.

(3) It should be noted that the enjoyment of consular privileges and immunities is not conditional on notification, except in the case of persons who were in the territory of the receiving State at the time of their appointment or at the time when they entered the household of a member of the consulate (article 51 of this draft).

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

(5) The obligation stipulated in the present article has a counterpart in article 43, at least as far as concerns members of the consulate, members of their families and their private staff who are not nationals of the receiving State. It consists in the exemption from obligations in the matter of the registration of aliens and residence and work permits.

(6) This article corresponds to article 9 of the Draft Articles on Diplomatic Intercourse and Immunities.

#### SECTION II: END OF CONSULAR FUNCTIONS

#### Article 25

##### *Modes of termination*

1. The functions of the head of post shall be terminated in the following events, amongst others:

(a) His recall or discharge by the sending State;

(b) The withdrawal of his *exequatur*;

(c) The severance of consular relations.

2. Except in the case referred to in paragraph 1(b) of this article, the functions of consular officials other than the head of post shall be terminated on the same grounds. In addition, their functions shall cease if the receiving State gives notice under article 23 that it considers them to be terminated.

*Commentary*

(1) This article deals with the modes of termination of the functions of the members of the consulate. The enumeration in paragraph 1 is not exhaustive, and it contains only the most common causes. The functions may also be terminated by other events, e.g. the death of the consular official or employee, the extinction of the sending State, or the incorporation of the consular district into another State. The events terminating the functions of a member of the consulate are sometimes set out in international consular conventions.

(2) The distinction between the termination of the functions of the head of post and the termination of the functions of other consular officials is justified by the differences in the manner of their appointment and in the manner in which their functions may be terminated.

*Article 26**Maintenance of consular relations in the event of the severance of diplomatic relations*

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

*Commentary*

This article sets forth a generally accepted rule of international law. It is understood that this article may later be combined with the provision of article 2, paragraph 2, if the Commission approves the latter.

*Article 27**Right to leave the territory of the receiving State and facilitation of departure*

1. Subject to the application of the provisions of article 40, the receiving State shall allow the members of the consulate whose functions have terminated, the members of their families and the private staff in their sole employ, to leave its territory even in case of armed conflict.

2. The receiving State shall grant to all the persons referred to in paragraph 1 of this article the necessary facilities for their departure as soon as they are ready to leave. It shall protect them up to the amount when they leave its territory. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects.

3. The provisions of paragraph 2 of this article shall not apply where a member of the consulate is discharged locally by the sending State.

*Commentary*

(1) In the past, consuls whose functions had terminated have often been prevented from leaving the territory, particularly in the case of armed conflict. Their right to leave the territory after the termination of their functions in the case of armed conflict has even been questioned as a matter of doctrine. Accordingly, the Commission considered it indispensable to provide in paragraph 1 of this article that the sending State has a right for the members of its consulate, the members of their families, and the private staff in their sole employ, to depart from the territory of the receiving State.

(2) The expression "as soon as they are ready to leave" used in paragraph 2 of the article, should be interpreted to mean that the receiving State should

accord to the persons referred to in this article the time necessary to prepare for their departure and to arrange for the transport of their personal property and effects.

(3) This article corresponds to article 42 of the Draft Articles on Diplomatic Intercourse and Immunities. In view of the differences between the legal status of the members of diplomatic missions and that of consular officials and employees, more explicit and detailed provisions have had to be included in the present article.

(4) By virtue of article 50 of this draft, the article does not apply to persons who are nationals of the receiving State.

*Article 28**Protection of consular premise and archives and of the interests of the sending State*

1. In the event of the severance of consular relations between the sending State and the receiving State,

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

(b) The sending State may entrust the custody of the consular premises and of the consular 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.

2. The provisions of paragraph 1 of the present article shall apply also if a consulate of the sending State is closed temporarily or permanently, and the sending State has no diplomatic mission and no other consulate in the receiving State.

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

*Commentary*

(1) In the case referred to in paragraph 2 of this article, the sending State may entrust the custody of the consular archives to the consulate or diplomatic mission of a third State acceptable to the receiving State, unless it decides to evacuate the archives.

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

(3) This article corresponds to article 43 of the Draft Articles on Diplomatic Intercourse and Immunities.

## CHAPTER II. CONSULAR PRIVILEGES AND IMMUNITIES

*Article 29**Use of the national flag and of the State coat-of-arms*

1. The consulate shall have the right to fly the national flag and to display the State coat-of-arms, with an inscription identifying the

consulate, on the building occupied by the consulate, and at or near the entrance door.

2. The head of post shall have the right to fly the national flag on his means of transport.

#### Commentary

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

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

(3) A study of the consular conventions shows that the right of the head of consular post to fly the national flag on his means of transport is recognized by a large number of States. This practice may therefore be regarded as establishing a rule of general international law. As the actual text of the article shows, the means of transport in question must be individual ones, such as motor vehicles, vessels of all kinds used exclusively by the head of consular post, aircraft belonging to the consulate, etc. Accordingly, this right is not exercisable when the head of consular post uses *public* means of transport (trains, ships and boats, commercial aircraft).

(4) Besides the head of post who has received the *exequatur* (article 13) or provisional recognition (article 14), an acting head of post (article 16) may also exercise the privilege referred to in paragraph 3 of this commentary.

(5) The consular regulations applied by some States provide for the use of a consular flag (*fanion*) by their consuls. Article 29 should be interpreted as applying to these cases also.

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

(7) In connexion with this article, the question was raised of what would be the relations between its provisions, once they have been adopted and incorporated in a multilateral convention, and municipal law. Some members of the Commission considered that the article should not be drafted in terms capable of being interpreted as placing upon the receiving State the obligation to enforce even as against the owner of the building in which the consulate is housed the right of the sending State under article 29. In their opinion, the receiving State's obligation should not be so far-reaching as to

require that State to ensure the exercise of the right in question in every particular case. This view was opposed by those who maintained that any State which has accepted an international undertaking is bound to put into effect rules of domestic law for the purpose of ensuring the implementation of that undertaking. Other members of the Commission, without expressing any definite opinion on this point, considered that the question raised no difficulty in practice since it could be settled in connexion with the lease. For these reasons, the Commission did not think it necessary to examine the problem of the relationship between an international treaty and municipal law, as that problem will be discussed and resolved within the framework of the law of treaties.

(8) This article corresponds to article 18 of the Draft Articles on Diplomatic Intercourse and Immunities.

### SECTION I: CONSULAR PREMISES AND ARCHIVES

#### Article 30

##### Accommodation

The sending State has the right to procure on the territory of the receiving State, in accordance with the internal law of the latter, the premises necessary for its consulates. The receiving State is bound to facilitate, as far as possible, the procuring of suitable premises for such consulates.

#### Commentary

(1) The right to procure on the territory of the receiving State the premises necessary for a consulate derives from the agreement by which that State gives its consent to the establishment of the consulate. The reference in the text of the article to the internal law of the receiving State signifies that the sending State may procure premises only in the manner laid down by the internal law of the receiving State. That internal law may however contain provisions prohibiting the acquisition of the ownership of premises by aliens or by foreign States, so that the sending State may be obliged to rent premises. Even in this case, the sending State may encounter legal or practical difficulties. Hence, the Commission decided to include in the draft an article making it obligatory for the receiving State to facilitate, as far as possible, the procuring of suitable premises for the consulate of the sending State. This obligation does not extend to the residence of members of the consular staff, for such a duty would be too onerous for the receiving State.

(2) As compared with article 19 of the Draft Articles on Diplomatic Intercourse and Immunities, the wording of this article was modified so as not to impose an unduly heavy burden on receiving States which have a large number of consulates in their territory, and also to make allowance for the fact that States tend to lease rather than purchase premises when seeking accommodation for their consulates in the receiving State.

#### Article 31

##### Inviolability of the consular premises

1. The consular premises shall be inviolable. The agents of the

receiving State may not enter them, save with the consent of the head of post.

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

3. The consular premises and their furnishings shall be immune from any search, requisition, attachment or execution.

#### Commentary

(1) The consular premises comprise any building or any part of a building which is used for the purposes of a consulate, whether the building is owned by the sending State or by a third party acting on its account, or whether the premises are occupied under a lease. If the consulate uses an entire building for its purposes, the consular premises also comprise the surrounding land and the appurtenances, including the garden, if any; for the appurtenances are an integral part of the building and are governed by the same rules. It is hardly conceivable that the appurtenances should be governed by rules different from those applicable to the building to which they are attached.

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

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

(4) Paragraph 3 of the article provides that the consular premises must not be entered even in pursuance of an order made by a judicial or administrative authority. The paragraph states that the consular premises, including their furnishings and fittings, are immune from any search, requisition, attachment or execution. This immunity naturally includes immunity from military requisitioning and billeting.

(5) If the consulate uses rented premises, measures of execution against the private owner are permissible, but only in so far as they do not necessitate entry upon the premises of the consulate.

(6) By reason of article 28 of the present draft, the inviolability of the consular premises will subsist even in the event of the severance of consular relations or of the permanent or temporary closure of the consulate.

(7) The present article follows *mutatis mutandis* the terms of article 20 of the Draft Articles on Diplomatic Intercourse and Immunities.

(8) The principle of the inviolability of the consular

premises is recognized in numerous consular conventions, including the following: Cuba-Netherlands, 31 December 1913 (article 5); Albania-France, 5 February 1920 (article 6); Czechoslovakia-Italy, 1 March 1924 (article 9); Greece-Spain, 23 September 1926 (article 9); Poland-Yugoslavia, 6 March 1927 (article VIII); Germany-Turkey, 28 May 1929 (article 6); Costa Rica-United States of America, 12 January 1948 (article VI); Philippines-Spain, 20 May 1948 (article IX, paragraph 2); the consular conventions concluded by the United Kingdom with Norway on 22 February 1951 (article 10, paragraph 4), with France on 31 December 1951 (article 11, paragraph 1), with Sweden on 14 March 1952 (article 10, paragraph 4), with Greece on 17 April 1953 (article 10, paragraph 3), with Mexico on 20 March 1954 (article 10, paragraph 3) and with the Federal Republic of Germany on 30 July 1956 (article 8, paragraph 3); the conventions concluded by the Union of Soviet Socialist Republics with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 2), with the Mongolian People's Republic on 28 August 1957 (article 13, paragraph 2), with the Romanian People's Republic on 4 September 1957 (article 9, paragraph 2), with the People's Republic of Albania on 18 September 1957 (article 3, paragraph 2), with the People's Republic of Bulgaria on 16 December 1957 (article 13, paragraph 2), with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 3), with Austria on 28 February 1959 (article 13, paragraph 2), with the Democratic Republic of Viet-Nam on 5 June 1959 (article 13, paragraph 2) and with the People's Republic of China on 23 June 1959 (article 13, paragraph 2); the Consular Convention of 23 May 1957 between Czechoslovakia and the German Democratic Republic (article 5, paragraph 2); and the Havana Convention of 1928 regarding consular agents (article 18).

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

#### Article 32

##### *Exemption from taxation in respect of the consular premises*

The sending State and the head of post shall be exempt from all taxes and dues levied by the receiving State or by any territorial or local authority in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

#### Commentary

(1) The exemption provided for in article 32 relates to the taxes and dues which, but for the exemption, would, under the legislation of the receiving State be leviable on the consular premises owned or leased by the sending State or by the head of consular post. The exemption covers the taxes and dues charged on the contract of sale, or on the lease, and also those charged on the building and rents.

(2) The exemption to which this article relates is an exemption *in rem* affecting the actual building acquired or leased by the sending State, even if the entity

entitled to claim the exemption is the sending State or the head of consular post. In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated.

(3) The expression "any territorial or local authority" means any one of the territorial or political subdivisions of the State: state (in a federal State), autonomous republic, canton, province, county, region, department, district, commune, municipality, etc.

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

(5) The article repeats *mutatis mutandis* the text of article 21 of the Draft Articles on Diplomatic Intercourse and Immunities.

#### Article 33

##### *Inviolability of the consular archives, and documents and official correspondence of the consulate*

The consular archives, the documents and the official correspondence of the consulate shall be inviolable.

#### Commentary

(1) This article lays down one of the essential rules relating to consular privileges and immunities, recognized by customary international law. While it is true that the inviolability of the consular archives and of the documents and the official correspondence of the consulate (hereinafter designated as the papers of the consulate) is to some extent guaranteed by the inviolability of the consular premises (article 31), the papers of the consulate must as such be inviolable wherever they are, even, for example, if a member of the consulate is carrying them on his person, or if they have to be taken away from the consulate owing to its closure or on the occasion of a removal. For the reasons given, and because of the importance of this rule for the exercise of the consular function, the Commission considered it necessary that it should form the subject of a separate article.

(2) The expression "archives... of the consulate" means the chancery documents and other papers, together with any furniture intended for their custody (article 1, paragraph (e)).

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

their representatives as evidence of certain legal acts or events.

(4) The expression "official correspondence" means all correspondence sent by the consulate, or addressed to it by the authorities of the sending State, the receiving State or a third State.

(5) This article corresponds to article 22 and article 25, paragraph 2, of the Draft Articles on Diplomatic Intercourse and Immunities. The Commission considered it necessary to combine the provisions relating to the consular archives, the documents and the official correspondence of the consulate in a single article, not only because of the similarity of what is protected, but also because of the legal status of consular officials, who, unlike diplomatic agents, enjoy only a limited personal inviolability and are subject to the jurisdiction of the receiving State in respect of all acts other than those performed in the exercise of their official duties.

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

#### SECTION II: FACILITATION OF THE WORK OF THE CONSULATE, FREEDOM OF MOVEMENT AND COMMUNICATION

#### Article 34

##### *Facilitation of the work of the consulate*

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

#### Commentary

(1) This article, which follows the terms of article 23 of the Draft Articles on Diplomatic Intercourse and Immunities, was inserted because the consulate needs the assistance of the government and authorities of the receiving State, both during its installation and in the exercise of its functions. Consuls could not successfully carry out any of the functions enumerated by way of example in article 4 without the assistance of the authorities of the receiving State. The obligation which this article imposes on the receiving State is moreover in its own interest, for the smooth functioning of the consulate helps to develop consular intercourse between the two States concerned.

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

#### Article 35

##### *Freedom of movement*

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



*Commentary*

The Special Rapporteur did not propose any article relating to freedom of movement, because he considered that, since the consular district is usually rather small and only in very exceptional cases comprises the whole territory of the State, such a provision was unnecessary. He based his view on an analysis of the bilateral conventions, which contain no provisions of this kind. Some of the members of the Commission shared the Special Rapporteur's view, but the majority took the view that the consulate could not properly discharge its duties unless its members were assured of the same freedom of movement as the members of diplomatic missions. The majority was therefore in favour of including in the present draft a rule similar to that contained in article 24 of the Draft Articles on Diplomatic Inter-course and Immunities.

*Article 36**Freedom of communication*

1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or other special couriers, the diplomatic or consular bag and messages in cipher.

2. The bags containing the consular correspondence shall not be opened or detained.

3. These bags, which must bear visible external marks of their character, may only contain documents or articles intended for official use.

*Commentary*

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

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

(3) As regards the means of communication, the article specifies that the consulate may employ all appropriate means, including diplomatic or other special couriers, the diplomatic or consular bag, and messages in cipher. In drafting this article, the Commission based itself on existing practice, which is as a rule to make use of the diplomatic courier service, i. e. of the couriers dispatched by the Ministry of Foreign Affairs of the sending State or by a diplomatic mission of the latter. Such diplomatic couriers maintain the consulate's communications with the diplomatic mission of the sending State, or with an intermediate post acting as a collecting and distributing centre for diplomatic mail; with the authorities of the sending State; or even with the sending State's diplomatic missions and consulates

in third States. In all such cases, the rules governing the dispatch of diplomatic couriers, and defining their legal status, are applicable. The consular bag may either be part of the diplomatic bag, or may be carried as a separate bag shown on the diplomatic courier's waybill. This last procedure is preferred where the consular bag has to be transmitted to a consulate en route.

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

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing documents or articles, or both, intended for official purposes. The consular bag must not be opened or detained. This rule, set forth in paragraph 2, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents, which is the subject of article 33 of the draft. As is specified in paragraph 3, consular bags must bear visible external marks of their character, i.e. they must bear an inscription or other external mark so that they can be identified as consular bags.

(6) Freedom of communication also covers messages in cipher, i.e. messages in secret language, and, of course, also messages in code, i.e. messages in a conventional language which is not secret and is employed for reasons of practical utility and, more particularly, in order to save time and money. Some consular conventions add that the messages of consulates shall enjoy transmission at the same rates as the messages of diplomatic missions. In the absence of sufficient information on the practice of States in this matter, the Commission preferred not to enter upon it for the time being.

(7) The question whether the article authorizes the consulate to instal and use a wireless transmitter must be answered in the negative. Under the international conventions on telecommunications, the consulate has to apply to the receiving State for a special licence if it wishes to instal a telecommunication post.<sup>16</sup>

(8) Correspondence and other communications in transit, including messages in cipher, enjoy protection in third States also, in conformity with the provisions of article 52, paragraph 4, of the present draft. The same protection is enjoyed by special couriers in third States.

<sup>16</sup> Sir Gerald Fitzmaurice said that in voting in favour of the Report he must reserve his position in regard to paragraph 7 of the Commentary to article 36 since in his view the provisions of the various telecommunications conventions have no relation to the use of what is known as the diplomatic wireless.



### Article 37

#### *Communication with the authorities of the receiving State*

1. In the exercise of the functions specified in article 4, consuls may address the authorities which are competent under the law of the receiving State.

2. Nevertheless, consuls may not address the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.

3. The procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the laws and usages of the receiving State.

#### *Commentary*

(1) It is a well-established principle of international law that consuls, in the exercise of their functions as set out in article 4, may address only the local authorities. The Commission was divided on the question of what these authorities are.

(2) Some members of the Commission, pointing out that the exercise of the competence of the consulate with respect to the receiving State is restricted to the consular district—as is apparent, also, from article 1 (c) and article 4 of the present draft—considered that the only cases in which consuls could address authorities outside the consular district were those where a particular service constituted the central service for the entire territory of the State, or for one of the State's territorial or political sub-divisions (e.g. the emigration or immigration services, or the chambers of commerce in many States). They held that if the consul's applications to the local authorities or to the centralized services were not given due consideration, he could address the government through the diplomatic mission of the sending State, direct communication with a ministry of the receiving State being permissible only if the sending State had no diplomatic mission in the receiving State.

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

(4) The text of the article represents a compromise between the two points of view. It leaves it for each receiving State to determine what are the competent authorities which may be addressed by consuls in the exercise of their functions, and yet it does not exclude recourse to central authorities. The text gives consuls the right themselves to address the Ministry of Foreign Affairs of the receiving State in the special case where the sending State has no diplomatic mission in the receiving State.

(5) Paragraph 3 of the article provides, in conformity with the practice of States, that the procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined

by the relevant international agreements and by the laws and usages of the receiving State. For example, the laws of some countries require consuls who wish to address the government of the receiving State to communicate through their diplomatic mission; or they provide that consuls of countries which have no diplomatic representation in the receiving State may address only certain officials of the Ministry of Foreign Affairs in well-defined cases. The receiving State may also prescribe other procedures to be observed by foreign consuls.

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

### Article 38

#### *Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues*

1. The consulate is entitled to levy in the territory of the receiving State the fees and charges provided by the law of the sending State for consular acts.

2. Neither the receiving State nor any territorial or local authority shall levy any tax or due on the consular fees and charges referred to in paragraph 1 of this article, or in respect of the issuance of receipts for such fees or charges.

#### *Commentary*

(1) This article states a rule of customary international law. Since the earliest times consuls have levied fees for services rendered to their nationals, originally fixed as a percentage of the quantity or of the value of goods imported through the ports by the nationals concerned. At the present time, every State levies fees provided by law for official acts performed by its consulates. It must be borne in mind that since the levying of consular fees and charges is bound up with the exer-

cise of consular functions it is subject to the general limitation laid down in the introductory sentence of paragraph 1 of article 4. For this reason, a consulate would not be entitled to levy charges on consular acts which are not recognized by the present articles or by other relevant international agreements in force, and which would be a breach of the law of the receiving State.

(2) Paragraph 2 of this article affirms another rule of customary international law in this particular sphere, namely that no sovereign State can be subjected to the jurisdiction of another State. This provision stipulates that the revenue obtained from the fees and charges levied by a consulate for consular acts shall be exempt from all taxes and dues levied either by the receiving State or by any of its territorial or local authorities. In addition, this paragraph recognizes that the receipts issued by a consulate for the payment of consular fees or charges are likewise exempt from taxes or dues levied by the receiving State. These dues include, amongst others, the stamp duty charged in many countries on the issuance of receipts.

(3) The expression "any territorial or local authority" comprises all territorial or political sub-divisions of the State: state (in a federal State), autonomous republic, canton, province, county, region, department, commune, district, municipality, etc.

(4) This article leaves aside for the time being the question of the extent to which acts performed at a consulate between private persons are exempt from the taxes and dues levied by the law of the receiving State. The opinion was expressed that such acts should be subject to the said taxes or dues only if intended to produce effects in the receiving State. It was contended that it would be unjustifiable for the receiving State to levy taxes and dues on acts performed, for example, between the nationals of two foreign States and intended to produce legal effects in one or more foreign States. However, as the Commission had not sufficient information at its disposal about the practice of States in this matter, it contented itself with bringing the problem to the attention of governments and requesting them for information about the way in which it is handled under their law or practice.

(5) The exemption of the members of the consulate and members of their families from taxation is dealt with in article 45.

### SECTION III : PERSONAL PRIVILEGES AND IMMUNITIES

#### *Article 39*

##### *Special protection and respect due to consuls*

The receiving State is bound to accord special protection to consuls by reason of their official position, and to treat them with due respect. It shall take all reasonable steps to prevent any attack on their persons, freedom or dignity.

#### *Commentary*

(1) The rule that the receiving State is under a legal obligation to accord special protection to consuls and to treat them with respect must be regarded as

forming part of customary international law. Its basis lies in the fact that, according to the view generally accepted today, the consul represents the sending State in the consular district, and by reason of his position is entitled to greater protection than is enjoyed in the territory of the receiving State by resident aliens. He is also entitled to be treated with the respect due to agents of foreign States.

(2) The rule laid down tends in the direction of assuring to the consul a protection that may go beyond the benefits provided by the various articles of the present draft relative to consular intercourse and immunities. It applies in particular to all situations not actually provided for, and even assures to the consul a right of special protection where he is subjected to annoyances not constituting attacks on his person, freedom or dignity as mentioned in the second sentence of this article.

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

(4) Under the provisions of article 51, a consul starts to enjoy the special protection provided for in article 39 as soon as he enters the territory of the receiving State on proceeding to take up his post, or, if already in that territory, as soon as his appointment is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

(5) The protection of the consul after the termination of his functions is dealt with in article 27 of the draft.

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

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

#### *Article 40*

##### *Personal inviolability*

1. Consular officials who are not nationals of the receiving State and do not carry on any gainful private activity shall not be liable to arrest or detention pending trial, except in the case of an offence punishable by a maximum sentence of not less than

five years' imprisonment [*Alternatively: "except in the case of a grave crime"*].

2. Except in the case specified in paragraph 1 of this article, the officials referred to in that paragraph shall not be committed to prison or subjected to any other restriction upon their personal freedom save in execution of a final sentence of at least two years' imprisonment.

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

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

#### Commentary

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

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

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

(4) From an analysis of recent consular conventions, it is evident that States, while asserting the subjection of consuls to the jurisdiction of the receiving

State, recognize their personal inviolability except in cases where they have committed a grave crime. While some conventions exempt consuls not only from arrest, but also from prosecution save in cases of felony (e.g. the Convention of 12 January 1948 between Costa Rica and the United States of America, article II), the vast majority of recent conventions do no more than exempt consuls simply from arrest or detention or, in general, from any restriction on their personal freedom, except in cases where they have committed an offence the degree of seriousness of which is usually defined in the convention.

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

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

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

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

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

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

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

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

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

(12) Paragraphs 1 to 3 of the article refer solely to consular officials, i.e. heads of post and other members of the consulate who exercise a consular function in the receiving State (article 1 (h)). Hence, personal inviolability does not extend to consulate employees. Moreover, only consular officials who are not nationals of the receiving State, and who are not engaged in gainful private activity, enjoy the personal inviolability provided for in this article.

(13) Under the terms of paragraph 1 of this article, the consular officials referred to in this article enjoy general immunity from arrest and detention pending trial in the case of all minor offences. The difficulty is to determine the offences in respect of which inviolability should not be granted. The Commission realized that none of the methods which it might adopt to define such offences would be entirely satisfactory. It therefore proposes two variants for paragraph 1. Under the terms of the first variant, exemption from arrest and detention pending trial is not granted in respect of offences which, under the law of the receiving State, are punishable by a maximum sentence of not less than five years' imprisonment. The second variant permits arrest and detention pending trial for all serious offences. The term "imprisonment" covers, of course, all forms of the penalty, which vary from country to country (imprisonment, solitary confinement, forced labour, etc.).

(14) Paragraph 2 of the article provides that consular officials, save in cases where, under paragraph 1 of the article, they are liable to arrest or detention pending trial, enjoy personal inviolability except in execution of a final sentence of at least two years' imprisonment. According to this provision, consular officials

(a) May not be committed to prison in execution of a judgement if the sentence imposed is of less than two years;

(b) May not be committed to prison in execution of a court decision other than a judgement such as, for example, an ordinary procedural ruling given in the course of the proceedings; and, *a fortiori*, not in execution of a mere administrative order;

(c) Are not liable to any other restriction upon their

personal freedom, such as, for instance, methods of execution involving restrictions on personal freedom (imprisonment for debt, imprisonment for the purpose of compelling the debtor to perform an act which he must perform in person, etc.).

(15) Accordingly, this article excludes the arrest or imprisonment of consular officials for minor offences. The imprisonment of a consul or other consular official hampers considerably the functioning of the consulate, and makes the discharge of its daily tasks difficult—which is particularly serious inasmuch as many of the matters calling for consular action will not bear delay (e.g. the issue of visas, passports and other travel documents; the legalization of signatures on commercial documents and invoices; various activities in connexion with shipping, etc.). Any such step would harm the interests, not only of the sending State, but also of the receiving State, and would seriously affect consular relations between the two States. It would be difficult to admit the possibility that the functioning of a consulate could at any time be interrupted, or at least seriously jeopardized, by action taken by local authorities in connexion with some trivial offence.

(16) The Commission could not accept the argument that a sentence pronounced by a court of the receiving State would be meaningless if, under this article, it could not be executed. It must be noted, first, that the same argument applies to the exceptional cases in which diplomatic agents are liable to the jurisdiction of the receiving State (see article 29, paragraph 1 (a), (b), and (c) and paragraph 3 of the Draft Articles on Diplomatic Intercourse and Immunities), and to cases where the sending State has waived the immunity (article 30 of the same draft). Nevertheless, the exercise of judicial authority by the receiving State may be regarded as desirable and even indispensable. A further point to be taken into consideration is that under the laws of many countries, courts may—for example, in the case of a first offence—award a suspended sentence. Lastly, a court sentence may always be made a ground by the receiving State for requesting the recall of the convicted consular official.

(17) Paragraph 3 of this article, which deals with the conduct of criminal proceedings against a consular official, prescribes that an official against whom such proceedings are instituted must appear before the competent authorities. The latter expression means other tribunals as well as ordinary courts. The consular official is not required to appear in person and may be represented by his attorney. The rule set out in the first sentence of paragraph 3 is to be read in the light of the second sentence of that paragraph, which specifies that the proceedings must be conducted with the respect due to the consular official by reason of his official position and, except where he is arrested or detained pending trial in conformity with paragraph 1, in such manner as to hamper the exercise of consular functions as little as possible. This requirement must be taken as meaning that, save where arrest pending trial is admissible under paragraph 1, no coercive measure may be applied against a consular official who refuses

to appear before the court. The authority concerned can of course always take the consular official's deposition at his residence or office, if this is permissible under the law of the receiving State and possible in practice.

(18) Paragraph 4 of this article, unlike the other paragraphs, refers not only to consular officials but also to all other members of the consulate. It establishes the obligation of the receiving State to notify the head of the consular post if a member of the consular staff is arrested or placed in custody pending trial, or if criminal proceedings are instituted against him. The duty to notify the diplomatic representative of the sending State if the head of the consular post is himself the object of the said measures is to be accounted for both by the gravity of the measures that affect the person in charge of a consulate and by practical considerations.

(19) The inviolability which this article confers is enjoyed from the moment the consular official to whom it applies enters the territory of the receiving State to take up his post. He must, of course, establish his identity and claim status as a consular official. If he is already in the territory of the receiving State at the time of his appointment, inviolability is enjoyed as from the moment when the appointment is notified to the Ministry of Foreign Affairs, or to the authority designated by that Ministry (see article 51 of this draft). A consular official enjoys a like inviolability in third States if he passes through or is in their territory when proceeding to take up or return to his post, or when returning to his own country (article 52, paragraph 1).

(20) If a member of the diplomatic staff of the sending State's diplomatic mission is assigned to a consulate, he continues to enjoy the full measure of inviolability accorded to diplomatic agents.

#### Article 41

##### *Immunity from jurisdiction*

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

#### Commentary

(1) Unlike members of the diplomatic staff, all the members of the consulate are in principle subject to the jurisdiction of the receiving State, unless exempted by one of the present rules or by a provision of some other applicable international agreement. In particular, they are, like any private person, subject to the jurisdiction of the receiving State in respect of all their private acts, more especially as regards any private gainful activity carried on by them. The exceptions to this rule are stated in article 41 *et seq.*

(2) The rule that, in respect of acts performed by them in the exercise of their functions (official acts), members of the consulate are not amenable to the jurisdiction of the judicial and administrative authorities of the receiving State, is part of customary interna-

tional law. This exemption represents an immunity which the sending State is recognized as possessing in respect of acts which are those of a sovereign State. By their very nature such acts are outside the jurisdiction of the receiving State, whether civil, criminal or administrative. Since official acts are outside the jurisdiction of the receiving State, no criminal proceedings may be instituted in respect of them. Consequently, consular officials enjoy complete inviolability in respect of their official acts.

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

(4) This article does not apply to members of the consulate who are nationals of the receiving State. Their legal status is governed by article 50 of these draft articles.

#### Article 42

##### *Liability to give evidence*

1. Members of the consulate are liable to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if they should decline to do so, no coercive measure may be applied with respect to them.

2. The authority requiring the evidence of a consular official shall take all reasonable steps to avoid interference with the performance of his official duties and shall, where possible and permissible, arrange for the taking of such testimony at his residence or office.

3. Members of the consulate may decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto. In this case also, the authority requiring the evidence shall refrain from taking any coercive measures with respect to them.

#### Commentary

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

(2) The Commission noted that consular conventions apply different methods so far as concerns the procedure to be followed in taking the testimony of

consular officials. In view of the provisions contained in numerous conventions, the Commission merely inserted two fundamental rules on the subject in paragraph 2 of this article :

(a) The authority requiring the evidence shall take all reasonable steps to avoid interference with the performance by the consular official of his official duties ;

(b) The authority requiring the evidence shall, where possible and permissible, arrange for the taking of such testimony at the consular official's residence or office.

As can be seen from this last condition, the testimony of a consular official cannot be taken at his residence or office unless this is permitted by the legislation of the receiving State. But even in cases where the legislation of that State allows testimony to be taken at the consular official's residence or office, e.g. through a judge deputed to act for the president of the court (*juge délégué*), there may be exceptional cases in which the consular official's appearance in court is, in the opinion of the court, indispensable. The Commission wished to make allowance for this case by inserting the word "possible". If the testimony of the consular official is to be taken at his residence or office, the date and hour of the deposition should of course be fixed by agreement between the court and the consulate to which the official in question belongs. The date of the deposition should be fixed in such a way as not to delay the proceedings unnecessarily. While the second rule may be regarded as an application of the first, the first rule nevertheless expresses a general principle which should be applied both in cases which are covered by the second rule and in cases in which the consular official is to appear before the court.

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

(4) This article applies to career consuls only, since the similar liability of honorary consuls is governed by articles 54 and 60 of this draft.

(5) By virtue of article 50 of this draft, this article does not apply to members of the consulate who are nationals of the receiving State.

#### Article 43

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

Members of the consulate, members of their families, and their private staff, shall be exempt from all obligations under local

legislation in the matter of the registration of aliens, residence permits and work permits.

#### *Commentary*

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

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

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

(4) Since the appointment of consular staff is governed by article 21 of the draft, the exemption from the obligations imposed by local legislation in the matter of work permits can apply only to members of a consulate who wish to employ in their service, in a country in which the employment of foreign workers is subject to a work permit, persons who have the nationality of the sending State or of a third State.

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

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

*Article 44**Social security exemption*

1. Subject to the provisions of paragraph 3 of this article, the members of the consulate and the members of their families belonging to their household, shall be exempt from the social security system in force in the receiving State.

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

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

(b) That they are covered by the social security system of the sending State or of a third State.

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

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

*Commentary*

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

(2) The exemption provided for in paragraph 1 of the article does not apply to members of the consulate and members of their families who are nationals of the receiving State (article 50 of the draft).

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

(4) The reasons which justify exemption from the social security system in the case of members of the consulate and members of their families, also justify the exemption of members of the private staff who are in the employment of members of the consular staff. But since those persons may be recruited from among the nationals of the sending State permanently resident in the receiving State, or from among foreign nationals who may not be covered by any social security laws, provision has had to be made for these contingencies in paragraph 2 of the article.

(5) Different rules from the above can obviously be laid down in bilateral conventions. Since, however, the draft provides in article 65 for the maintenance in force of previous conventions relating to consular intercourse and immunities, and of the right to conclude such conventions in the future, there is no need for a special provision to this effect in article 44.

*Article 45**Exemption from taxation*

1. Members of the consulate and members of their families, provided they do not carry on any gainful private activity, shall be exempt from all taxes and dues, personal or real, levied by the State or by any territorial or local authority, save

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

(b) Taxes and dues on private immovable property, situated in the territory of the receiving State, unless held by a member of the consulate on behalf of his government for the purposes of the consulate;

(c) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 47 concerning the succession of a member of the consulate or of a member of his family;

(d) Taxes and dues on private income having its source in the receiving State;

(e) Charges levied for specific services furnished by the receiving State or by the public services;

(f) Registration, court or record fees, mortgage dues and stamp duty, subject to the provisions of article 32.

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

*Commentary*

(1) Exemption from taxation is often accorded to consular officials by consular conventions or other bilateral agreements concluded between the receiving State and the sending State. In the absence of treaty provisions, this matter is governed by the law of the receiving State, which always makes exemption from taxation conditional upon the grant of reciprocal treatment to the consular officials of the receiving State in the sending State. The extent of the exemption from taxation varies greatly from one legal system to another. The Commission considered that members of the consulate should enjoy the same exemption from taxation as is enjoyed by the members of diplomatic missions (Draft Articles on Diplomatic Intercourse and Immunities, article 32 in conjunction with article 36). For that reason, article 45 repeats, with some drafting changes, article 32 of the Draft Articles on Diplomatic Intercourse and Immunities.

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

(a) By virtue of an express provision in the article itself, members of the consulate and members of their families who carry on a gainful private activity;

(b) By virtue of article 50 of the present draft, members of the consulate and members of their families who are nationals of the receiving State.

(3) Bilateral consular conventions usually make the grant of exemption from taxation conditional on re-



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

(4) Since the consular premises enjoy exemption from taxation under article 32 of this draft, it was necessary to include in paragraph 1 (f) a reservation referring back to that article, in order to cover cases in which it is the consul or a member of the consulate who owns or leases the consular premises for the purposes of the consulate, and who, by reason of article 32, would in such case not be liable to pay the fees or duties specified in sub-paragraph (f).

(5) The provision of paragraph 2 of this article which corresponds to the first sentence of paragraph 3 of article 36 of the Draft Articles on Diplomatic Intercourse and Immunities, does not apply to persons who are nationals of the receiving State.

#### Article 46

##### *Exemption from customs duties*

The receiving State shall, in accordance with the provisions of its legislation, grant to members of the consulate who do not carry on any gainful private activity exemption from customs duties and from all other charges and taxes chargeable at the time of customs clearance on articles intended

- (a) For the use of a consulate of the sending State;
- (b) For the personal use of members of the consulate and of members of their families belonging to their households, including articles intended for their establishments.

##### *Commentary*

(1) According to a very widespread practice, articles intended for the use of a consulate are exempt from customs duties, and this practice may be regarded as evidence of an international custom in this particular sphere. By "articles intended for the use of a consulate" is meant coats-of-arms, flags, signboards, seals and stamps, books, official printed matter for the service of the consulate, and also furniture, office equipment and supplies (files, typewriters, calculating machines, stationery, etc.), and all other articles for the use of the consulate.

(2) While the members of the consulate do not enjoy exemption from customs duties under general international law, they are being given an increasingly wide measure of exemption from customs duties under numerous individual agreements, and there is a tendency to extend to members of the consulate advantages similar to those enjoyed by members of diplomatic missions. The Commission therefore decided to include in article 46, sub-paragraph (b), a provision identical to that of

article 34, paragraph 1 (b), of the Draft Articles on Diplomatic Intercourse and Immunities, although it realizes that this exemption is not yet granted by all States.

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

(4) The present article does not apply

(a) To members of the consulate who carry on a gainful private activity;

(b) To members of the consulate who are nationals of the receiving State (article 50).

(5) Only articles intended for the personal use of the members of the consulate and members of their families enjoy exemption from customs duties. Articles imported by a member of the consulate in order to be sold clearly do not qualify for exemption.

#### Article 47

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

In the event of the death of a member of the consulate or of a member of his family who was not a national of the receiving State and did not carry on any gainful private activity there, the receiving State

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

(b) Shall levy estate, succession or inheritance duties only on immovable property situated in its territory.

##### *Commentary*

As in the case of a member of a diplomatic mission, the exemption of the movable property of a member of the consulate or a member of his family from estate, succession or inheritance duties is fully justified, because the persons in question came to the receiving State to discharge a public function in the interests of the sending State. For the same reason, the free export of the movable property of the deceased, with the exception of any such property which was acquired in the country and the export of which was prohibited at the time of his death, is justified. The article corresponds to article 38, paragraph 3, of the Draft Articles on Diplomatic Intercourse and Immunities.

#### Article 48

##### *Exemption from personal services and contributions*

The receiving State shall

(a) Exempt members of the consulate, members of their families, and members of the private staff who are in the sole employ of



members of the consulate, from all personal services, and from all public service of any kind whatever;

(b) Exempt the persons referred to in sub-paragraph (a) of this article from such military obligations as those connected with requisitioning, military contributions and billeting.

#### Commentary

(1) The exemption afforded by sub-paragraph (a) covers military service, service in the militia, the functions of jurymen or lay judges, and personal labour ordered by a local authority on highways or in connexion with a public disaster, etc.

(2) The exemptions provided for in this article should be regarded, at least in so far as they concern the members of the consulate and members of their families, as constituting a part of customary international law. The Commission was of the opinion that these exemptions should be extended to members of the private staff who are in the sole employ of members of the consulate, for, if such persons were subject to the obligations mentioned in the article, the exercise of the functions of the consulate might suffer considerably.

(3) By virtue of article 50 of this draft, the present article applies to members of the consulate, members of their families and members of the private staff, only in so far as they are not nationals of the receiving State.

(4) This article corresponds to article 33 of the Draft Articles on Diplomatic Intercourse and Immunities, but, in contrast with the latter, it also applies to members of the private staff for the reasons given above.

#### Article 49

##### *Question of the acquisition of the nationality of the receiving State*

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

#### Commentary

(1) The primary purpose of this article, which reproduces, *mutatis mutandis*, the text of article 35 of the Draft Articles on Diplomatic Intercourse and Immunities, is to prevent the automatic acquisition of the nationality of the receiving State, more particularly

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

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

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

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

of the sending State through her marriage with a national of the receiving State.

#### Article 50

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

1. Consular officials who are nationals of the receiving State shall enjoy immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. They may in addition enjoy any privileges and immunities granted to them by the receiving State.

2. Other members of the consulate, members of their families, and members of the private staff, who are nationals of the receiving State, shall enjoy only the privileges and immunities granted to them by the receiving State.

#### Commentary

(1) The present draft recognizes that the sending State may appoint consular officials and employees of the consulate from among the nationals of the receiving State. In the case of consular officials, it may do so only with the consent of the receiving State (article 11). The Commission had therefore to define the legal status of the members of the consulate who are nationals of the receiving State.

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

(3) As regards consular officials who are nationals of the receiving State, the present article, following the solution adopted for a similar problem which arose during the discussion of article 37 of the Draft Articles on Diplomatic Intercourse and Immunities, grants them immunity from jurisdiction only in respect of official acts performed in the exercise of their functions. As these persons are nationals of the receiving State, the present article, unlike article 41, uses the expression "official acts", the scope of which is more restricted than that of the expression used in article 41.

(4) The grant of this immunity from jurisdiction to consular officials who are nationals of the receiving State can be justified on two grounds. First, the official acts performed by officials in the exercise of their functions are acts of the sending State. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular official, but rather an immunity attaching to the foreign State as such. Secondly, as the consent of the receiving State is required for the appointment of a national of that State as a consular official (article 11), it can be argued that the receiving State's consent implies consent to the official in question having the minimum immunity he needs in order to be able to exercise his functions. That minimum is the immunity from jurisdiction granted in respect of official acts. The receiving State may, of course, of its own accord grant the consular officials in question any other privileges and immunities.

(5) As regards the other members of the consulate, members of the private staff and members of families,

these persons enjoy only such privileges and immunities as may be granted to them by the receiving State, which is therefore under no obligation by virtue of the present articles to grant them any privileges or immunities at all.

#### Article 51

##### *Beginning and end of consular privileges and immunities*

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

2. The privileges and immunities of persons belonging to the household of a member of the consulate shall be enjoyed as soon as such persons enter the territory of the receiving State, whether they are accompanying the member of the consulate or proceeding independently. If such a person is in the territory of the receiving State at the moment of joining the household of the member of the consulate, privileges and immunities shall be enjoyed as soon as the name of the person concerned is notified to the Ministry of Foreign Affairs or to the authority designated by that Ministry.

3. When the functions of a member of the consulate have come to an end, his privileges and immunities, and those of the members of his household, shall normally cease at the moment when the persons in question leave the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The privileges and immunities of a member of the consulate who is discharged by the sending State shall come to an end on the date on which the discharge takes effect. However, in respect of acts performed by members of the consulate in the exercise of their functions, immunity from jurisdiction shall continue to subsist without limitation of time.

#### *Commentary*

(1) This article is modelled on the provisions applicable to persons entitled to diplomatic privileges and immunities, by virtue of article 38 of the Draft Articles on Diplomatic Intercourse and Immunities. In the opinion of the Commission, it is important that the date when consular privileges and immunities begin, and the date on which they come to an end, should be fixed.

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

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

(4) Where a member of the consulate is discharged by the sending State, and accordingly loses his status as a consular official or employee, his privileges and immunities come to an end on the date on which the discharge takes effect. Although this is an exceptional case, the Commission wanted on this point to amplify

the original text of the Draft Articles on Diplomatic Intercourse and Immunities.

#### Article 52

##### *Obligations of third States*

1. If a consular official passes through or is in the territory of a third State while proceeding to take up or to return to his post, or when returning to his own country, the third State shall accord to him the personal inviolability provided for by article 40, and such other immunities as may be required to ensure his transit or return.

2. The third State shall accord the necessary facilities to the members of the family of such consular official who accompany him or who travel separately to join him or to return to their own country.

3. In the circumstances specified in paragraph 1 of this article, third States shall not hinder the transit through their territories of other members of the consulate or of members of their families.

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

#### *Commentary*

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

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

- (a) Who pass through its territory, or
- (b) Who are in its territory in order to
  - (i) Proceed to take up their posts, or
  - (ii) Return to their posts, or
  - (iii) Return to their own country.

(3) The Commission proposes that consular officials should be accorded the personal inviolability which they enjoy by virtue of article 40 of this draft, and such of the immunities as are necessary for their passage or return. The Commission considers that these prerogatives should not in any case exceed those accorded to the officials in question in the receiving State.

(4) With regard to the members of the families of the consular officials referred to in the preceding paragraph, the article imposes on third States the duty to accord the facilities necessary for their transit. As regards the employees of the consulate and the members of their families, third States have a duty not to hinder their passage.

(5) The provisions of paragraph 4 of the article, which guarantee to correspondence and to official communications in transit the same freedom and protection in third States as in the receiving State, are in keeping with the interest that all States have in the smooth and unimpeded development of consular relations.

(6) The article corresponds to article 39 of the Draft Articles on Diplomatic Intercourse and Immunities, and it largely follows the structure of that article.

SECTION IV: DUTIES OF THE CONSULATE AND OF ITS MEMBERS TOWARDS THE RECEIVING STATE

Article 53

*Respect for the laws and regulations of the receiving State*

1. Without prejudice to the privileges and immunities recognized by the present articles or by other relevant international agreements, it is the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

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

3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in the consular premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of the present articles, be deemed to form part of the consular premises.

*Commentary*

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

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

(3) Paragraph 2 reproduces the rule contained in article 40, paragraph 3, of the Draft on Diplomatic Intercourse and Immunities. This provision means that consular premises may be used only for the exercise of consular functions. A breach of this obligation does not render inoperative the provisions of article 31 relative to the inviolability of consular premises. But equally, this inviolability does not permit the consular premises to be used for purposes incompatible with these articles or with other rules of international law. For example, consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities.

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

CHAPTER III. HONORARY CONSULS  
INTRODUCTION

(1) The term "honorary consul" is not used in the same sense in the laws of all countries. In some, the

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

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

"A consul may be:

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

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

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

Article 54

*Legal status of honorary consuls*

1. The provisions of chapter I of the present articles shall apply to honorary consuls.

2. In chapters II and IV, articles 29, 30, 32, 34, 35, 36, 37, 38, 40 (paras. 3 and 4), 41, 42 (para 2), 46 (except sub-para. (b)), 50, 51, 52 and 64 shall likewise be applicable to honorary consuls.

3. As regards the matters dealt with in articles 33, 39, 42 paras. 1 and 3, 43, 45, 48 and 53, articles 55 to 62 shall apply to honorary consuls.

*Commentary*

(1) The Commission reviewed all the articles concerning the privileges and immunities of career consuls and decided that certain of these articles are also applicable to honorary consuls. These articles are listed in paragraph 2 of the present article.

(2) Special attention should be drawn to article 50 of the draft, which is also applicable to honorary consuls. Consequently, honorary consuls who are nationals of the receiving State do not, under the terms of this draft, enjoy any consular immunities other than im-

munity from jurisdiction in respect of official acts performed in the exercise of their functions.

(3) As regards the articles listed in paragraph 3 of this article, the Commission was of the opinion that they cannot apply in full to honorary consuls. However, it acknowledged that some of the rights accorded in these articles to career consuls should also be granted to honorary consuls. The immunities which should be granted to honorary consuls with respect to the points covered by the articles referred to in paragraph 3 are defined in the succeeding articles.

(4) The Special Rapporteur and several members of the Commission are of the opinion that the privileges and immunities granted to honorary consuls in Chapter III far exceed those which are granted to them in the practice of States.

(5) The Commission decided to defer any decision as to whether article 31 concerning the inviolability of consular premises was applicable to honorary consuls until governments had furnished their observations on the matter, since the Commission had no information as to whether States grant the privilege of inviolability to the premises used by an honorary consul for the purposes of exercising consular functions, and, if they do, the extent to which they grant that privilege.

#### Article 55

##### *Inviolability of the consular archives, the documents and the official archives of the consulate*

The consular archives, the documents and the official correspondence of a consulate headed by an honorary consul shall be inviolable and may not be the subject of any search or seizure, provided that they are kept separate from the private correspondence of the honorary consul, and from the books and documents relating to any gainful private activity which he carries on.

#### Commentary

The official correspondence, archives and documents of an honorary consul enjoy inviolability only if they are kept separate from his private correspondence, and from the books and documents relating to any business or occupation which he carries on. This condition is explained by the fact that in most cases honorary consuls carry on some gainful private activity in the receiving State.

#### Article 56

##### *Special protection*

The receiving State is bound to accord to an honorary consul special protection in keeping with his official position.

#### Commentary

The protection referred to in this article would have to be accorded chiefly in cases where the life or dignity of an honorary consul was jeopardized by reason of his exercising an official function on behalf of the sending State.

#### Article 57

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

An honorary consul and the members of his family, with the

exception of those who carry on a gainful private activity outside the consulate, shall be exempt from all obligations under local legislation in the matter of registration of aliens, residence permits and work permits.

#### Commentary

This article does not apply to honorary consuls and members of their families who carry on a gainful private activity outside the consulate. In so far as it is concerned with registration of aliens and with residence permits, this exemption cannot by its very nature apply to nationals of the receiving State. So far as concerns exemption from obligations in the matter of work permits, the application of this article to nationals of the receiving State is excluded by article 50 of the present draft, which is also applicable to honorary consuls (article 54, paragraph 2).

#### Article 58

##### *Exemption from taxation*

An honorary consul shall be exempt from taxes and dues on the remuneration and emoluments which he receives from the sending State in his capacity as honorary consul.

#### Commentary

The majority of the members of the Commission considered that the provision contained in this article, though not in accordance with the general practice of States, should be included so as to avoid the difficulties which would be raised by the taxation of income derived from a foreign State, and because the remuneration and emoluments in question are paid by a foreign State. Nevertheless, the Commission considered that this provision does not apply to honorary consuls who are nationals of the receiving State (article 50 of the present draft, in conjunction with article 54, paragraph 2).

#### Article 59

##### *Exemption from personal services and contributions*

The receiving State shall

(a) Exempt honorary consuls, other honorary consular officials, and the members of their families, from all personal services, and from all public service of any kind whatever;

(b) Exempt the persons referred to in sub-paragraph (a) of this article from such military obligations as those connected with requisitioning, military contributions and billeting.

#### Commentary

(1) It should be noted that this article relates only to honorary consuls, other honorary consular officials, and the members of their families.

(2) This article is not applicable to nationals of the receiving State.

#### Article 60

##### *Liability to give evidence*

In any case in which he is requested to do so in connexion with matters relating to the exercise of his consular functions, an honorary consul may decline to give evidence in the course of judicial or administrative proceedings or to produce official correspondence and documents in his possession. In such event, the authority requiring the evidence shall refrain from taking any coercive measures with respect to him.

*Commentary*

Unlike the privilege of career consuls, against whom no coercive measures may be taken even if they decline to give evidence concerning a matter not connected with the exercise of their functions (article 42 (1) of this draft), the privilege of an honorary consul is more limited. He may decline to give evidence or to produce official documents in his possession without incurring a penalty only in those cases in which the testimony or the official correspondence is connected with the exercise of his functions.

However, the honorary consul like the career consul (see paragraph 3 of the commentary on article 42 of this draft) should not decline to give evidence concerning events which come to his notice in his capacity as registrar of births, marriages and deaths, nor should he decline to produce the documents relating thereto.

*Article 61**Respect for the laws and regulations of the receiving State*

In addition to the duty specified in the first sentence of paragraph 1 of article 53, an honorary consul has the duty not to use his official position in the receiving State for purposes of internal politics or for the purpose of securing advantages in any gainful private activity which he carries on.

*Commentary*

Inasmuch as most honorary consuls are nationals, or at least permanent residents, of the receiving State, the obligation laid down in article 53 of this draft had to be modified, particularly as regards the second sentence of paragraph 1 of the article, in order to take the special position of honorary consuls into account.

*Article 62**Precedence*

Honorary consuls shall rank in each class after career consuls in the order and according to the rules laid down in article 17.

*Commentary*

According to the information available to the Commission, this rule is in keeping with the practice followed in many States. The Commission would be grateful if Governments would communicate particulars of the practice followed in this respect.

*Article 63**Optional character of the institution of honorary consuls*

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

*Commentary*

This article, taking into consideration the practice of those States, which neither appoint nor accept honorary consuls, confirms the rule that each State is free to decide whether it will make use of the institution of honorary consuls.

## CHAPTER IV. GENERAL PROVISIONS

*Article 64**Non-discrimination*

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

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

*Commentary*

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

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

(3) This article reproduces the text of article 44 of the Draft Articles on Diplomatic Intercourse and Immunities, except for paragraph 2 (a) of that article. Having had an opportunity to reconsider this provision at the present session, the Commission doubted whether it should be retained even in the Draft Articles on Diplomatic Intercourse and Immunities. While it could not reverse its decision so far as the latter draft articles were concerned, it decided not to include the provision in the present draft.

*Article 65**Relationship between the present articles and bilateral conventions*  
[First text]

Acceptance of the present articles shall not rule out the possibility of the maintenance in force by the Parties, in their mutual relations, of existing bilateral conventions concerning consular intercourse and immunities, or the conclusion of such conventions in the future.

## [Second text]

The provisions of the present articles shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the Contracting Parties, and shall not prevent the conclusion of such conventions in the future.

*Commentary*

(1) The Commission decided to submit two texts for governments to choose from.

(a) The first variant is based on the idea that the bilateral conventions will be automatically abrogated by the entry into force of the multilateral consular convention in the reciprocal relations between the contracting Parties unless the Parties decide to maintain them in force. In this case, therefore, a special agreement of the two contracting Parties would be needed to keep a particular bilateral convention in force.

(b) The second text, proposed by the Special Rapporteur, would automatically maintain in effect the bilateral conventions on consular intercourse and immunities previously concluded between contracting Parties. In this case the multilateral convention would apply only to questions not covered by the bilateral conventions. At the same time, this text does not prevent the conclusion of bilateral conventions on this subject in future, even if these conventions should depart from the multilateral convention which the Commission is now preparing.

(2) During the discussion of article 59 of the draft submitted by the Special Rapporteur, some members of the Commission held that this article should state

that the draft convention contains fundamental principles of consular law which should prevail over pre-existing bilateral agreements and from which no subsequent bilateral agreement may derogate.

### CHAPTER III

#### AD HOC DIPLOMACY

##### I. General observations

29. At its tenth session, in 1958, the Commission considered the topic of "Diplomatic intercourse and immunities" and prepared draft articles on the subject, together with a commentary,<sup>17</sup> hereinafter referred to as "the 1958 draft".

30. In its report, the Commission pointed out in this connexion that while the draft it was submitting dealt only with permanent diplomatic missions, diplomatic relations also assumed other forms that could be given the name of "*ad hoc* diplomacy", namely itinerant envoys, diplomatic conferences and special missions sent to a State for restricted purposes. The Commission considered that these forms of diplomacy should also be studied, in order to determine the rules of law governing them. It requested Mr. A. E. F. Sandström, Special Rapporteur for the topic "Diplomatic intercourse and immunities", to make this study and to submit his report at a future session.<sup>18</sup>

31. The Commission took up this question at its present session, adopting as a basis for discussion the report prepared by the Special Rapporteur (A/CN.4/129). Mr. Jiménez de Aréchaga also submitted for consideration by the Commission a set of proposals (A/CN.4/L.87) and a memorandum explaining these proposals (A/CN.4/L.88). In the course of the discussions on the subject, the Special Rapporteur presented an alternative proposal regarding privileges and immunities of special mission (A/CN.4/L.89).

32. In the course of a preliminary examination of the various forms of "*ad hoc* diplomacy" which it was to study, the Commission noted that the question of "diplomatic conferences" was linked not only to that of "special missions", but also to that of "relations between States and international organizations". These relations are at present governed largely by special conventions.

33. This link with the subject of "relations between States and international organizations" makes it difficult to undertake the subject of "diplomatic conferences" in isolation, and the Commission has accordingly decided not to deal with it for the moment.

34. In addition, since "itinerant envoy" is, according to the Commission's definition, an envoy who carries out special tasks in the States to which he proceeds (and to which he is not accredited as head of a permanent mission), it must follow that the mission of an itinerant envoy is a special mission vis-à-vis

each of the States visited. Indeed, it might be said that, considered as a whole, the mission of an itinerant envoy represents a series of special missions. The mere fact that these missions are often linked together by a common objective was not thought sufficient to justify the adoption for itinerant envoys of rules differing from those which apply to special missions.

35. In the Commission's opinion, the draft articles on special missions should follow immediately after the 1958 draft, which would form the first chapter, the present draft becoming the second chapter followed in turn by a third chapter, containing articles 44 and 45 of the 1958 draft, which would apply to the whole text.

36. The General Assembly having decided at its last session that an international conference should be convened in Vienna not later than the spring of 1961 to examine the 1958 draft, the Commission recommends the Assembly to refer the present draft to the conference in order to enable the conference to examine this text. This procedure seems necessary in order that the articles of the present draft may be embodied in whatever convention the conference might prepare. It appears all the more justified in that the articles of the new draft do no more than enlarge the scope of the 1958 draft.

37. At the same time, the Commission wishes to emphasize that because of the time it has had to devote to preparing its first draft on consular intercourse and immunities at the present session, it has not been able to give the topic of *ad hoc* diplomacy the thorough study it would normally have done. These articles, together with their commentary, should therefore be regarded as constituting only a preliminary survey which the Commission has carried out at this stage mainly in order to put forward certain ideas and suggestions which could be taken into account at the Vienna Conference.

38. The text of the draft articles on special missions and the commentary, as adopted by the Commission, are reproduced below.

## II. Draft articles on special missions, and commentary

### Article 1

#### Definitions

1. The expression "special mission" means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.

2. The expression "1958 draft" denotes the Draft Articles on Diplomatic Intercourse and Immunities prepared by the International Law Commission in 1958.

### Article 2

#### Applicability of section 1 of the 1958 draft

Of the provisions of section 1 of the 1958 draft, only articles 8, 9 and 18 apply to special missions.

<sup>17</sup> Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859), chapter III.

<sup>18</sup> *Ibid.*, para. 51.

### Commentary

(1) In view of the similarity between the activities of the two kinds of mission, it is natural that the rules governing permanent missions should to a large extent be applicable to special missions.

(2) While this is true more especially of the provisions concerning the privileges and immunities made necessary by the inherent exigencies of the functions concerned, it is no less true that in certain respects, by virtue of the similarity referred to, some of the rules which in accordance with section I of the 1958 draft apply to permanent missions should also, by analogy, apply to special missions.

(3) It must however be borne in mind that these rules were devised and drafted for application to permanent missions, which have their own special characteristics, such as their permanency, their function of ensuring the maintenance of continuous diplomatic relations between countries, and the presence in capital cities of numerous missions of the same kind. Special missions, on the other hand, may be of very varied composition and character, and it is therefore difficult to make them subject to such rigid uniform regulations as those governing permanent missions.

(4) After analysing the various articles contained in section I of the 1958 draft, the conclusion was reached that only articles 8, 9 and 18 are generally applicable to special missions as well as to permanent missions.

(5) It should not however be inferred from what is proposed above that, apart from the cases covered by the rules mentioned in article 2, there may not be cases in which certain of the principles embodied in the articles of section I of the 1958 draft could sometimes be applied. However, because of the diversity of special missions, the Commission did not think it right to subject them to too rigid a regulation. It will be quite a simple matter for States, when discussing the sending of a special mission, or when any question arises, to make use, if necessary, of the rules relating to permanent missions.

(6) So far as questions of precedence and protocol are concerned, there should be no difficulty in settling them on the same lines if the case arises.

#### Article 3

##### *Applicability of sections II, III and IV of the 1958 draft*

1. The provisions of sections II, III and IV apply to special missions also.

2. In addition to the modes of termination referred to in article 41 of the 1958 draft, the functions of a special mission will come to an end when the tasks entrusted to it have been carried out.

### Commentary

(1) An analysis, article by article, of sections II, III and IV of the draft, despite the fact that directly or indirectly they contemplate first and foremost diplomatic privileges and immunities, nevertheless shows,

in the opinion of the Commission, that there is no occasion to exclude the application of any of these articles to special missions, even if it would be only in exceptional circumstances that the provisions of some of these articles could apply to special missions.

(2) The only adjustment required is to make it clear that, in addition to being terminable in the manner described in article 41, the functions of a special mission come to an end when its assignment is accomplished.

## CHAPTER IV

### OTHER DECISIONS OF THE COMMISSION

#### I. Codification of the principles and rules of international law relating to the right of asylum

39. Resolution 1400 (XIV) of the General Assembly, dated 21 November 1959, concerning the question of the codification of the principles and rules of international law relating to the right of asylum had been placed on the agenda of the Commission for the present session. The Commission took note of the resolution and decided to defer further consideration of this question to a future session.

#### II. Study of the juridical régime of historic waters, including historic bays

40. Resolution 1453 (XIV) of the General Assembly, dated 7 December 1959, concerning a study of the juridical régime of historic waters, including historic bays, had been placed on the agenda of the Commission for the present session and was discussed by the Commission. The Commission requested the Secretariat to undertake a study of the juridical régime of historic waters, including historic bays, and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays prepared by the Secretariat<sup>19</sup> in connexion with the first United Nations Conference on the Law of the Sea. Apart from this, the Commission deferred further consideration of the subject to a future session.

#### III. Planning of future work of the Commission

41. The Commission decided to complete its work on consular intercourse and immunities at its thirteenth session, and thereafter to take up at the same session, the subject of State responsibility.

#### IV. Co-operation with other bodies

42. The Commission took note of the report by the Secretary (A/CN.4/124) on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists held at Santiago, Chile, from 24 August to 9 September 1959, which the Secretary of the Commission had attended in the capacity of observer.

<sup>19</sup> See *United Nations Conference on the Law of the Sea, Official Records*, vol. I (United Nations publication, Sales No.: 58.V.4, Vol. I), document A/CONF.13/1.

43. The Commission also had before it a letter from the Secretary of the Asian-African Legal Consultative Committee, inviting the Commission to send an observer to the fourth session of that Committee, to be held in Tokyo in March 1961. The Commission noted that among the topics on the agenda for that session of the Asian-African Legal Consultative Committee was that of State responsibility, a subject which the Commission itself would be discussing at its next session. The Commission decided to designate its Special Rapporteur on the subject of State responsibility, Mr. F. V. García Amador, as its observer at the fourth session of the Asian-African Legal Consultative Committee.

44. The Commission also desires to refer in the present connexion to the account given in chapter I of the present Report (see paragraph 7 above) of the statements made to the Commission at the present session by Mr. Antonio Gómez Robledo, the observer for the Inter-American Juridical Committee, and Professor Louis B. Sohn of the Harvard Law School.

45. The Commission agreed that the Secretariat should be asked to ensure, as far as possible, that members were supplied with the documents of those inter-governmental organizations with which it was in consultative relationship.

#### **V. Date and place of the next session**

46. The Commission was informed by the Secretary that the next session of the Commission was scheduled to take place from 24 April to 30 June 1961. However, it was noted by the Commission that as a consequence of the decision to call a Plenipotentiary Conference on Diplomatic Intercourse and Immunities in Vienna from 2 March to 14 April 1961, there might be practical difficulties in holding the opening session of the Commission as soon as 24 April. In order therefore to ensure that there should be a reasonable interval between the end of the Vienna Conference and the beginning of the Commission's next session, it was decided, after consultation with the Secretary-General, that the normal opening and closing dates originally proposed should be postponed for one week, and that the thirteenth session of the Commission should be held in Geneva from 1 May until 7 July 1961.

#### **VI. Representation at the fifteenth session of the General Assembly**

47. The Commission decided that it should be represented at the next (fifteenth) session of the General Assembly, for purposes of consultation, by its Chairman, Mr. L. Padilla Nervo.