

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1961

Volume II

*Documents of the thirteenth session
including the report of the Commission
to the General Assembly*

UNITED NATIONS



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INTERNATIONAL LAW COMMISSION

DOCUMENTS OF THE THIRTEENTH SESSION, INCLUDING THE REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

STATE RESPONSIBILITY

[Agenda item 3]

DOCUMENT A/CN.4/134 & ADD.1

International responsibility: Sixth report by F. V. García Amador, Special Rapporteur

RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS — REPARATION OF THE INJURY

[Original: Spanish]

[26 January 1961]

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INTRODUCTION

1. Of all the questions involved in the subject of international responsibility, reparation alone combines two distinguishing features: it cannot be considered without constant reference to virtually every problem or principle connected with responsibility as a whole; and the diplomatic and arbitral practice, as also the writings of the authorities thereon, are at present in a state of complete anarchy. As far as the first point is concerned, the "duty to make reparation" is, above all, an obligation stemming from the non-fulfilment of international obligations; to that extent, therefore, it tends to merge and become identified with the very notion of responsibility. Since it is concerned with the injury resulting from the acts or omissions which give rise to responsibility, that duty is directly related to one of the component elements of responsibility; and it is also to a considerable extent bound up with another of those elements, for reparation often depends not only on the injury but also on the gravity of the act or omission which caused it. If the subject is viewed from another angle — without suggesting in any way that the interrelationship discussed here will thereby be fully outlined — it will be noted that some of the modes of reparation are similar in form to the "compensation" due in respect of certain measures which affect the patrimonial rights of aliens. As to the anarchy prevailing in the matter, it cannot be attributed to any single cause; obviously, however, it is largely the result of the political factors introduced by the traditional concept of responsibility.

2. This last fact explains the space allotted to "satisfaction" in a study fundamentally concerned with the reparation of the real injury sustained exclusively by the individual alien. In traditional international law, this reparation is only one of the two forms of discharging the duty to make reparation. No purpose would therefore be served by considering it separately and in isolation. Moreover, at least in diplomatic practice and in certain private and official codifications, measures of satisfaction have in the past been regarded as means of making reparation in cases which involve injury to aliens. Accordingly, without prejudice to the conclusions which may be reached on this point, it will first be necessary to consider the question of "satisfaction" at some length, principally because, in certain circumstances, the partial applicability of a type of measure usually placed under that heading must still be admitted.

3. In this report, consideration is also given to some special modes of reparation and to certain questions which there was no opportunity to examine in the reports prepared with a view to the presentation of the preliminary draft. The Special Rapporteur hopes that all this will facilitate the Commission's task when it undertakes the codification of the topic in conformity with the principles and trends of international law in its present state of development.

Chapter I

THE DUTY TO MAKE REPARATION

1. *The "duty to make reparation" in traditional international law*

4. In his first report (A/CN.4/96) the Special Rapporteur endeavoured to stress the distinctly special characteristics of reparation when considered in the light of *traditional* international law. By contrast with municipal law, where the institution is already perfectly defined in both character and function, in international relations it retains a close link with the idea of punishment or penalty; in other words, with the idea of a sanction or censure of the wrongful act which caused the injury. It is useless to contend that an act or omission contrary to international law has no other consequence than to impose upon the State to which it is imputable an exclusively "civil" responsibility — i.e., the duty to repair, purely and simply, the damage caused by the act or omission. A study of diplomatic practice and international case-law, as also of the writings of publicists, immediately shows that this obligation stemming from the wrongful act or omission may have, and in practice often does have, other consequences.

5. In *traditional* international law, the "duty to make reparation" comprises both reparation proper (restitution, damages, or both) of the injury caused to an alien or to the State itself, as a body corporate, and the measures of "satisfaction" which have frequently accompanied those of reparation *stricto sensu*. The latter, determined much more by the nature of the imputable act than by the injury actually caused, are essentially "punitive" in character and purpose. This is so obvious that it is perhaps hardly necessary to state it expressly, although such statements are often made. Moreover, even measures of reparation in the strict sense are not always directed towards a strictly "compensatory" objective. On occasions, again determined by the gravity of the act causing the injury, reparation assumes a manifestly "punitive" character. In the circumstances, therefore, the Special Rapporteur feels bound to consider the "duty to make reparation" in the light of all these considerations, the purpose remaining at all times to determine the extent to which the Commission will be able to codify the subject, as already stated in the introduction, in conformity with the principles and trends of international law in its present state of development.

6. Nor was reparation regarded, in *traditional* international law, as the sole "consequence" of the wrongful act or omission imputable to a State. Both practice and doctrine show that international responsibility was regarded in the past as involving not only the duty to make reparation but also the right of the injured State to resort to the "sanctions" then recognized by international law: reprisals and war. Viewed from such an angle, the problem is simply whether or not the exercise of that right is conditioned by the failure to make reparation — in other words, whether the injured State can immediately opt in favour of sanctions or whether it is first obliged to demand reparation. The prevailing

opinion in doctrine has naturally always favoured the second alternative, and the same can generally be said of the practice followed by States.¹ In that sense, reparation or the duty to repair is not only not the sole consequence of the act or omission contrary to international law, but rather is the condition *sine qua non* of the application of any of the aforesaid sanctions. It is not difficult to see, however, that this relationship between the two institutions, conceivable in *traditional* international law, has no place or justification in the present system of international law and organization. A wrongful act or omission imputable to the State will give rise to its international responsibility and, consequently, to its duty to repair the damage caused. The reparation may, admittedly, in certain circumstances assume a character or perform a function involving some degree of censure of the act imputed and thus become an essentially punitive measure, but the idea of "sanctions" imposed unilaterally and implying any measure of coercion is one that must be absolutely rejected. In the event of a State's non-compliance with its duty to make reparation, the only recourse now open is to the peaceful means and procedures provided for the purpose; and it is particularly in the matter of international claims that such sanctions can now least be invoked.²

7. Those, however, are not the only questions arising in connexion with the study of the duty to make reparation in *traditional* international law. On the contrary, the greatest difficulties encountered in a study of the subject in the light of the principles and trends of international law in its present state of development derive from the special character of the traditional concept of "damage" and of the claimant or beneficiary of the reparation. Another category of questions includes those which arise in connexion with the true nature and scope of the duty to make reparation, particularly in specific circumstances.

2. Other special features of the traditional concept

8. Undoubtedly the outstanding peculiarities of the traditional international doctrine and practice lie in their conception of the "injury" calling for reparation and of the recipient of the reparation. As the Special Rapporteur has repeatedly stated in his earlier reports, international responsibility had been viewed as a strictly "interstate" legal relationship. Whatever may be the nature of the imputed act or omission or of its consequences, the injured interest is in reality always vested in the State alone. Vattel seems to have been the first to formulate the traditional view, no doubt reflecting

¹ For a recent and detailed analysis of the doctrine and practice relating to this question, see Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, Paris, Sirey, 1938, pp. 25 *et seq.*

² On the obligation to seek peaceful settlement and the prohibition of recourse to force or to other means of coercion in this matter, see the Special Rapporteur's first report, sections 30 and 31, *Yearbook of the International Law Commission, 1956*, vol. II (United Nations publication, Sales No. 1956.V.3, vol. II), pp. 216-219; and fifth report, sections 39-41, *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. 60.V.1, vol. II).

the political and juridical realities of his age: "Whoever maltreats a citizen indirectly offends the State which owes him protection. . . ." ³ Subsequently, the idea was adopted and developed by the most eminent publicists, by governments in the exercise of diplomatic protection over their citizens abroad, and even by claims commissions, culminating in the well-known statement of the Permanent Court of International Justice: ". . . by taking up the case of one of its subjects . . . a State is in reality asserting *its own rights*. . . The question, therefore, whether the present dispute originates in an injury to a private interest . . . is irrelevant from this standpoint." ⁴

9. Beginning from that premise, there was no avoiding the conclusion that the State was the true and only beneficiary of the reparation. Thus, the Harvard Law School draft convention of 1929 provided: "A State is responsible . . . when it has the duty to make reparation to another State for the injuries sustained by the latter State as a consequence of an injury to its national." ⁵ The Permanent Court also took this position in stating that "The reparation due by one State to another does not, however, change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure." ⁶ Nobody, however, has explained the traditional view on this aspect of the question better than Anzilotti. In his view: ⁷

" . . . International responsibility does not derive, therefore, from the fact that an alien has suffered injury, and does not form a relationship between the State and the injured alien. . . . The alien as such has no rights against the State, save in so far as the law confers them upon him; accordingly, a right to reparation can only be vested in him on the basis of the legal provisions in force in the State and is independent of the right which the State to which he belongs may have to demand reparation for a wrong suffered in consequence of treatment contrary to international law. . . . The reparation sought by the State in cases of this kind [denial of justice] is not, therefore, reparation of the wrong suffered by individuals, but reparation of the wrong suffered by the State itself."

10. Referring to the position of the laien with regard to the duty to make reparation, Anzilotti had previously written that "The indemnification of individuals is no more than an *indirect* effect of international responsibility: the sole direct consequence of that responsi-

³ *Le droit des gens* . . . (1758 ed., Carnegie Publ., Washington (1916), p. 309).

⁴ Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 12. For other statements of this type, see the Special Rapporteur's first report, section 15, *Yearbook of the International Law Commission, 1956*, vol. II, pp. 192-193, and sections 6 and 8 of this report concerning the "moral injury" caused [indirectly] to the State through the injuries sustained by its nationals abroad.

⁵ See *Yearbook of the International Law Commission, 1956*, vol. II, p. 229 (annex 9, article 1).

⁶ Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, The Chorzów Factory (Merits) case, p. 28.

⁷ *Corso di diritto internazionale*, 4th ed. (Padua, 1955), vol. I, p. 423.

bility is the obligation of the responsible State to give to the *injured State* reparation for the wrong which has been caused.”⁸ Accordingly, even though this notion does not accurately reflect the criterion applied in practice, as a study of concrete cases reveals, the duty to make reparation is conceived as a juridical relationship between State and State, which inevitably leads to the conclusion that, theoretically, the injuries suffered by the individual are impossible of reparation.⁹

11. The artificiality, and consequently also the inconsistencies and contradictions, of the traditional doctrine become clearly apparent when one considers the criterion generally applied for measuring the reparation. Let us again consider the statement of the Permanent Court in the *Chorzów Factory* (Merits) case, referred to above, with the relevant passage cited in full:

“The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which had committed the wrongful act and the individual who had suffered damage. Rights or interests of an individual the violation of which rights causes damage are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a *convenient scale* for the calculation of the reparation due to the State.”

Since it was dealing with claims made on behalf of individuals, the Court naturally could not ignore the injuries sustained by them. But as, in its view, “the question . . . whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint”, the damage suffered by the individual would only be taken into consideration as “a convenient scale for the calculation of the reparation due to the State”; in other words, solely for the purpose of determining the means of repairing the injury caused to the State. Besides being manifestly artificial, this criterion is inconsistent with the distinction, also traditionally drawn, between injuries caused to the State as such and the “moral injury” caused to it “indirectly” through the person or property of its nationals. Although this distinction, as will be shown in the next chapter (section 8), is also not fully in keeping with what happens in reality, it has in practice at least helped to determine the reparation due in each particular case and to separate satisfaction for “moral injury” from the reparation for the damage actually sustained by the individual. Moreover, the criterion is at variance with the practice, generally followed in the decisions of claims commissions and

of the International Court itself, of fixing the form and amount of reparation with due regard to the damage in fact caused to the private person concerned. Far from having served merely as a “convenient scale for the calculation of the reparation due”, that damage has constituted the sole basis of the reparation granted. This general statement does not, of course, apply to cases in which the nature or gravity of the act or omission was also taken into account, nor does it diminish the influence often exerted by political and moral factors, especially in diplomatic practice, on the material or financial content of international claims.

3. *Nature and scope of the duty to make reparation*

12. Certain special features of the nature and scope of “the duty to make reparation” should be pointed out immediately, in order to facilitate the study of the different forms and modes of reparation in international law. Some of these features are closely linked to the traditional concept, and a survey of them will therefore help to round off the comments made in the preceding two sections of this chapter.

13. The first question which we shall consider is not necessarily related to the traditional concept, but rather to the origin or basis of reparation in certain cases — viz., its so-called “*ex gratia* reparation”. In international law reparation cannot be demanded except when the act or omission that caused the injury can be imputed to the State — i.e., when the State can be declared internationally “responsible” in the strict sense of the word. In practice, however, injury caused to aliens has fairly frequently been repaired irrespective of any question of (legal) responsibility, and even when the respondent State had not admitted responsibility.¹⁰ Some claims commissions, while holding that, strictly according to the law, no reparation of the injury was due, have recommended to the State that it indemnify the loss as “an act of grace”.¹¹ But the quantum of reparation in these cases is generally determined in the same manner as when the responsibility of the State is admitted.¹²

14. *Ex gratia* reparation has been linked with the notion of “moral” responsibility, in the sense that it is based on non-compliance with moral standards.¹³ This is certainly true in principle, but can these “moral” standards always be distinguished in international law from legal standards properly so called? Under a provision common to virtually all the conventions concluded by Mexico with the United States and with certain European countries, each member of the various claims commissions was to examine and decide the claims “according to the best of his judgement and in accordance with the principles of justice and equity”,

⁸ See “La responsabilité internationale des états à raison des dommages soufferts par des étrangers”, *Revue générale de droit international public* (1906), vol. XIII, p. 309.

⁹ In this connexion, it has even been said that “All injuries sustained by the alien individual which have not been caused by such a wrongful act [affecting the right of the plaintiff State] should be disregarded.” Decencière-Ferrandière, *La responsabilité internationale des états à raison des dommages subis par des étrangers* (Thesis, Paris, 1925), pp. 248-249.

¹⁰ See the many cases referred to in Personnaz, *La réparation du préjudice en droit international public*, Paris, Sirey, 1939, pp. 71-73.

¹¹ See Ralston, *The Law and Procedure of International Tribunals* (Revised ed. 1926), pp. 57-58.

¹² On this point see Whiteman, *Damages in International Law*, Washington, U.S. Govt. Print. Off., 1937, vol. I, pp. 745 *et seq.*

¹³ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 164.

since "the Mexican Government desires that the claims shall be so decided because Mexico wishes that her responsibility shall not be fixed according to the general accepted rules and principles of international law, but *ex gratia* feels morally bound to make full indemnification and agrees, therefore, that it will be sufficient that it be established that the alleged loss or damage in any case was sustained and was due to any of the causes enumerated in article III hereof."¹⁴ But under the corresponding provision of the Convention establishing the United States-Mexican General Claims Commission, the Commission was to decide: "... in accordance with the principles of international law, justice and equity."¹⁵ In view of the nature of the cases heard and decided by these commissions, was there really a possibility of disregarding completely the rules of international law governing the responsibility of the State for injuries caused to the person or property of aliens? Moreover, do these clauses constitute a true expression of the desire of the States parties to a dispute that the same should be decided *ex aequo et bono*? When the decisions of these commissions are considered in the course of this report, it will be seen to what extent these doubts are justified.

15. Just as the "duty to make reparation", in the strictly juridical sense of the expression, presupposes that the respondent State has incurred international responsibility, so in certain circumstances it is apparently sufficient that there has been a wrongful act or omission which is imputable to that State. Even if the consequences of the act or omission have not materialized or run their course, or, in any event, even if it has not been possible to prove injury, some form of "reparation" has in practice been held to be due. This takes the form of what is usually called, by analogy with municipal law, a "declaratory judgement". This institution will be considered elsewhere in this report, where its true juridical character will be determined (section 10 (b) *infra*); what is of interest for the moment is whether the reparation, regardless of the form which it takes, is in fact based on the injury sustained or reflects rather the act or omission contrary to international law; in other words, whether in the circumstances just mentioned, as in any other, "injury" is always deemed to have been sustained by reason of the mere fact that there has been a violation of a prohibitory rule of international law. These questions call for a further glance at the traditional concept and the opinion expressed by Anzilotti, who was its most consistent exponent and, to some extent, its principal architect.

16. In his opinion, "... a violation of international juridical standards by a State bound by those standards thus gives rise to a duty to make reparation, which generally consists in the restoration of the juridical position that has been disturbed.... Injury is thus deemed implicit in the anti-juridical character of the act. A violation of a rule always constitutes trespass

upon the interests which the rule protects...."¹⁶ The idea that the "injury" is inherent in the actual breach of the international legal order, and that consequently the reparation is due chiefly in respect of the act or omission contrary to international law, receives expression in the first part of the statement of the Permanent Court to which repeated reference had been made: "It is a principle of international law that the reparation of the wrong [tort] may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law."¹⁷ According to this doctrine, then, the reparation of the actual injury caused is no more than a means of repairing the violation of international law. On the other hand, even according to the traditional doctrine itself, it is usual to speak of the "reparation of the injury".¹⁸ And even when the duty to make reparation is defined in another manner, the element of "injury" may appear linked with the reparation. "Responsibility," states Eagleton, "is simply the principle which establishes an obligation to make good any violation of international law *producing injury*, committed by the respondent State."¹⁹

17. The question, then, is how to unravel this apparent confusion regarding the basis of the duty to make reparation. In the first place, it is clear that in the traditional doctrine the idea of "injury", wherever it may originate and whatever it may consist of, is never wholly absent. Since in the final analysis the prevailing notion in this doctrine is that of "moral injury", which is theoretically always done to the State whenever injury is caused to its nationals, reparation must necessarily be related, as a matter of principle, to the unlawful act or omission. This is implicit in the Permanent Court's definition of diplomatic protection, in one of the decisions already referred to, as the State's "right to ensure, in the person of its subjects, respect for the rules of international law."²⁰ If, then, one looks at the question from another angle, and if one considers what really happens in international practice as regards the forms and functions of reparation *lato sensu*, what is the true purpose of reparation? When it is intended as "satisfaction" the purpose of the reparation is undoubtedly to punish or censure the act or omission imputable to the respondent State. And even when it is reparation proper if account is taken, as is sometimes done, not only of the nature of the injury caused to the alien, but also of the gravity of the act or omission, this second factor obviously gives the reparation a "punitive" character. It can accordingly be said, without resorting to a fiction which does not even correspond to the practice normally followed, that the duty to make reparation relates

¹⁶ See the article cited in footnote 8, p. 13.

¹⁷ See the judgement cited in footnote 6, pp. 27-28.

¹⁸ See the expressions cited in the preceding section and in the Special Rapporteur's first report, *op. cit.*, section 6.

¹⁹ *The Responsibility of States in International Law*, New York, The New York University Press, 1928, p. 22.

²⁰ On the notion of "moral injury" caused to the State through injury to individuals, see section 8, *infra*.

¹⁴ See Feller, *The Mexican Claims Commissions 1923-1934* (1935), p. 222. See the original texts in the appendices, pp. 321 *et seq.*

¹⁵ *Ibid.*, p. 324.

to the injury, to the act or omission contrary to international law, or to both simultaneously.

18. Secondly, the mere existence of an injury does not necessarily involve the duty to make reparation. This is not, of course, a reference to the need for the presence of all the other essential components of international responsibility, according to the circumstances of the case, which were considered in the Special Rapporteur's earlier reports. What is envisaged here are the intrinsic conditions which the injury itself must satisfy in order to be reparable. Thus, in cases of injury to the person or property of individuals, the principle whereby reparation "must wipe out all the consequences" of the act or omission does not oblige the respondent State to make good all the damage or loss which the individual is claiming, or has in reality suffered, by reason of the said act or omission. The reparation will extend only to such injury as is genuinely the "normal", "natural", "necessary or inevitable" or, where applicable, "foreseeable" consequence of the act which has given rise to the responsibility of the State.²¹

19. The last of the special features to be considered in a study of the nature or scope of the duty to make reparation is the "appropriateness" of certain reparation measures; they may, for example, prove incompatible with the municipal law of the respondent State, offend national honour and dignity or be seriously out of proportion to the injury sustained or to the character of the act or omission imputable to that State. As will be shown below (section 16, *infra*), any of these factors may render the measure "inappropriate", and thereby entitle the respondent State to raise a valid objection thereto, without the duty to make reparation being in any manner affected.

4. The problem of "sources"

20. Although the duty to make reparation is linked, and tends almost to merge, with the notion of international responsibility, in the sense that it constitutes an obligation arising from the imputability of an act or omission contrary to international law, the problem of the "sources" from which are derived the principles and criteria governing the nature and scope of the reparation does not arise in exactly the same manner as when the only question to be determined is that of the conditions on which depends the imputation of the injurious act or omission.

21. The problem was in fact first perceived when doubts and divergences of opinion arose as to whether, under general international law, the duty to make reparation was the sole consequence of unlawful acts or omissions.²² In the present context, however, the question is whether, besides imposing the duty to make reparation, general international law contains fully defined principles and criteria for determining the nature and extent of the reparation. It would certainly

be very difficult to find any authority prepared to give an affirmative answer, and there are even some, like Kelsen, who believe that the absence of such principles and criteria constitutes an additional reason to deny the very existence of the right to a reparation and of the duty to make reparation unless these are stipulated in an international treaty or convention.²³

22. General international law certainly does not provide any principles, criteria or methods for determining *a priori* how reparation is to be made for the injury caused by a wrongful act or omission, or, where applicable, for the very violation of the rule of international law which gives rise to the responsibility of the State. Some writers refer to "the general principles of law recognized by civilized nations," apparently regarding them as the source of the rules applicable in the matter of reparation.²⁴ As will be seen, these principles have likewise been cited quite frequently, as the "source" of the rules or criteria applied, in international case-law. The applicability of such principles, however, is in the first place only conceivable with regard to reparation *stricto sensu*; i.e., when the issue is restitution in kind or damages, but not where it is "satisfaction", the other principal form of reparation known to international law and also employed in cases of injury to the person or property of private persons. And even as regard the modes of reparation proper, it can hardly be argued that "general principles of law" — which have been and remain one of the most prolific sources of international law in other fields — have systematically and consistently served as the basis for determining the nature and quantum of reparation. While this point will be raised again below, it is not contrary to the traditional view to say that these principles apply to the reparation of the injury caused to an individual since, in the very words of the Permanent Court, that injury "can only afford a convenient scale for the calculation of the reparation due to the State", because "the rules of law governing the reparation are the rules of international law in force between the two States concerned" and the "rights or interests of an individual... are always on a different plane to rights belonging to a State, which rights may also be infringed by the same act."²⁵

23. A survey of the clauses of the compromis setting up and organizing various arbitral tribunals and claims commissions shows that they, too, contain no detailed and precise rules on the subject of reparation. As will be seen when the question is considered in chapter III (section 17), clauses relating to this matter rarely occur, and when they do, they are too vague to offer guidance concerning the exact way in which the injury is to be repaired. The vagueness and lack of precision of these clauses increase when they provide, as is not infrequent, for the application of the general principles of justice and equity. In both cases, the arbitrator had no choice but to exercise a wide discretion, which has

²³ Cited by Reitzer, *op. cit.*, p. 113.

²¹ On the chain of causation which must exist between the injury and the act or omission imputable to the State see, in particular, section 22, *infra*.

²⁴ For such a view see, among other authorities, Anzilotti, in the work cited in footnote 7, p. 426.

²² On this point, see section 1, *supra*.

²⁵ See the complete text of the Court's statement in section 2, above.

frequently resulted in an arbitrary decision— itself often the product of a “settlement behind closed doors”. Furthermore, the situation in diplomatic practice is, for obvious reasons, even more deplorable, the exercise of the discretionary power in favour of the “injured” State being essentially subject to no limitation in this case.²⁶

24. In such circumstances, it is not surprising that both official and private draft codifications have generally omitted any rules relating to the nature and scope of reparation in the varied and different contingencies which may arise. When, exceptionally, the drafting of some such provisions has been attempted, they have been drawn up in terms so general and imprecise as to contribute in reality very little to a satisfactory solution of the problem. A good example of this is basis of discussion No. 29 prepared by the Preparatory Commission of the Hague Conference (1939).²⁷ In commenting on this basis, one of the sub-committees of the Conference stated that “the question of measure of damages, it seemed to the Committee, had best be left to the jurisprudence of the courts for the present, until there had been a sufficient crystallization of principles to warrant codification.”²⁸ Perhaps that was why the text adopted in first reading by committee III maintains absolute silence on the form which the reparation of damages should take.²⁹

5. The problem of terminology

25. In a discussion of “the duty to make reparation” in international law, certain additional difficulties are encountered by reason of the lack of uniformity in the terminology used. This is true not only of diplomatic practice and international case-law, but also of the writings of authors. What is serious is that this lack of uniformity is quite often attributable to differences of opinion concerning substance, and that the differences cannot always be distinguished from those deriving solely from the grammatical interpretation placed on the term or expression used. The problem of terminology has thus inevitably contributed, to a considerable degree, to the confusion prevailing in the matter, for the use of different terms and expressions has led to individual, and at times capricious, interpretations of substantive issues. The purpose of this section is solely to draw attention to the problem and to point out, by way of illustration, the principal terms and designations used in connexion with “reparation” and “injury”, the two basic notions underlying the “duty to make reparation”. On that basis, it will be easier to appreciate the concrete examples cited in this report as well as the problem of terminology in general.

26. The term “sanction” is at times used as a synonym either of “reparation” or of some of its

forms or modes of execution. For example, the Permanent Court of Arbitration declared on one occasion that an arbitral award which held an act to be contrary to international law constituted a “sanction sérieuse”.³⁰ This assimilation of the two words and notions is also found in the works of certain learned authors.³¹ Again, the same or similar words have been used to describe the “punitive” character or purpose of certain reparation measures. At other times, the word used properly denotes some form or mode of reparation other than the one envisaged, strictly speaking, in the context. This happens with the term “satisfaction”, which has at times been used to designate a pecuniary indemnification demanded or granted solely as reparation for the injury sustained by the private individual; but, as will be seen, the same word has also been used, both in diplomatic practice and in international case-law, in a generic sense, to describe all the reparation measures claimed or accorded in respect of a given claim. Some specific forms of satisfaction have also been identified with modalities of reparation proper; this is particularly true of the expressions “satisfaction of a pecuniary nature” and “reparation of a punitive character”. To give another example, satisfaction and reparation *strictu sensu* are at times distinguished by their respective “moral” or “material” nature or content; this distinction was apparently intended to be drawn in the following clause: “. . . in order that [the Court] may decide the questions of law, define the responsibilities and determine the *moral* and *material* reparation flowing therefrom”.³² In other cases, however, the first form of reparation is described as “political” and the second as “financial”.³³

27. As far as “injury” is concerned, the terminological problem is principally caused by the confusion and uncertainty surrounding its very definition and by the different categories of injury which can result from acts or omissions contrary to international law. What is, in fact, the “injury” caused by an illegal or arbitrary act or omission? When the only entity affected is the State as such, there are no major difficulties, since it is strictly a case of a “moral and political” injury except in the very exceptional cases in which the only property or interest affected is held by the State under a title of private ownership (*jure gestionis*). But when the wrong consists of “moral injury” caused to the State “indirectly”, through the injury done to its nationals, how can the injury be defined and delimited? Moreover, how and to what extent does the nature of the injury (whether the actual victim is the State, or the individual, or both) influence the form

³⁰ See the decision in the *Carthage* and *Manouba* cases, section 10 (b), below.

³¹ See, among other authorities, Bourquin, “Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international*, 1931, I (vol. 35), p. 212.

³² Agreement of 15 April 1912 between France and Italy relating to the question of the S.S. *Tavignano* and others. See J. B. Scott, *Les Travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), p. 444.

³³ See Antonio Sánchez de Bustamante, *Derecho internacional público* (Havana, Carasa y Cía., 1936), vol. III, pp. 488-489.

²⁶ See on this point section 12, below.

²⁷ See the complete text in the Special Rapporteur's first report, *Yearbook of the International Law Commission*, 1956, vol. II, p. 223 (annex 2).

²⁸ See League of Nations publication, 1930.V.17, p. 234.

²⁹ *Ibid.*, p. 236, art. 3.

and measure of reparation? For the idea that satisfaction is the mode of repairing an injury caused to the State, and that restitution or indemnification for damage is the mode of repairing a wrong caused to an individual, has not always found corroboration in diplomatic practice or international case-law. Similarly, attention has already been drawn to the difficulties encountered in trying to ascertain the relationship between the "injury" and the true object of the "duty to make reparation". And finally, to what extent should the various injuries be separated or segregated from the original act or omission in order to avoid any possible confusion between the two notions?

28. From the etymological point of view, the difficulties derive either from the translation of the terms from one language into another or from the different meanings of a word in the same language. As an example of the former, the English word "injury" is synonymous with "damage", so that the two can be, and often are, used indiscriminately, but in translating them into French or Spanish the words "dommage" and "daño", or some equivalent word, have always had to be used.³⁴ As to the second, in every language there are various words which are frequently used as mere synonyms. In Spanish, for example, besides the word *daño*, which is obviously the most generic, as is also the case with the corresponding words in other languages, it is possible to use the word *lesión*, *perjuicio*, *pérdida* or *detrimento*. Again, in the three languages referred to, the plural of the word corresponding to the Spanish *daño* (injury) appears in the name given to one specific form of reparation: indemnification for "damage and loss" (*daños y perjuicios*, *dommages - intérêts*); and the English "damages", without further qualification, is also the term most frequently used to designate the reparation itself, regardless of the form envisaged.

Chapter II

THE INJURY AND THE FORMS AND FUNCTIONS OF REPARATION IN GENERAL

1. *The different categories of injury*

29. In a study of injury in international law, relatively little purpose would be served by seeking analogies with municipal law. As has been shown, the traditional concept has perhaps more special features in this regard than can be found anywhere else. The resulting difficulties begin to appear as soon as an attempt is made at a systematic classification of the injuries susceptible of reparation.

6. *Possible classifications*

30. Under one system, injuries may be classified according to the personality of the actual victim. In applying this criterion, authors generally distinguish between injuries caused to the State (as a body corpo-

rate) and injuries caused to private persons (aliens). In other words, according to the traditional concept, the distinction is between an injury caused to the State "directly", through one of its organs or component elements, and an injury caused "indirectly" through its nationals. To take a typical statement of this view, "The wrongful act or omission... may consist of a direct injury to the public property of the [claimant] State, to its public officials, or to the State's honor or dignity, or of an indirect injury to the State through an injury to its nationals."³⁵ It has already been shown that, in the present stage of development of international law, the notion on which this classification is based is strictly artificial. It would be insufficient, however, to speak only of injuries to the State and to aliens. Today the classification must also cover injuries caused to international organizations as such, which constitute a third category whose existence has been formally recognized by the International Court of Justice.³⁶

31. The first category comprises the various manifestations of what is usually called "moral and political" injury *stricto sensu*. It includes attacks of various kinds against the person of the official representatives of the State or the premises of its diplomatic or consular missions. Other manifestations of such injury may take the form of insults to the flag or other emblem of the foreign State, or insulting words or demonstrations against such State or its government. A third and last group consists of violations of territorial sovereignty, in circumstances where the principal issue is that of reparation.³⁷ The second category should also be subdivided, in order to facilitate the study of the forms of reparation, a distinction being drawn between injuries to the person and injuries to property. This distinction is often encountered in draft codifications and is constantly observed in diplomatic practice and international case-law. Injuries to the person, for their part, may consist of deprivation of liberty, physical and mental injury or moral damage. Damage to property can also take different forms, depending on the nature of the property concerned or on the manner in which the alien's assets have been affected. As will be shown below, injuries caused to the person, whether physical or moral, quite frequently result in financial loss, either to the injured individual himself or to third parties entitled to claim. The reason is that a single act or omission can result in several different types of injury or loss susceptible of reparation.

32. Injuries have also been classified according to their nature, those of a "moral and political" character being distinguished from those described as "pri-

³⁵ Whiteman, *Damages in International Law* (1937), vol. I, pp. 80-81. For a detailed analysis of the classification, see, amongst other authorities, Personnaz, *La Réparation du préjudice en droit international* (1952), pp. 45 *et seq.*; and Bissonnette, *La satisfaction comme mode de réparation en droit international* (Thesis, Geneva, 1952), pp. 45 *et seq.*

³⁶ See the Special Rapporteur's first report, *Yearbook of the International Law Commission*, 1956, vol. II, p. 195.

³⁷ Some authors simplify the classification, distinguishing between violations of a treaty and those of a "duty of mutual respect", within which all the above-mentioned are included. See Podestá Costa, *Derecho internacional público* (third ed., 1955), vol. I, p. 413.

³⁴ See *Reparation for Injuries Suffered in the Service of the United Nations*, advisory opinion, *I.C.J. Reports* 1949, p. 174.

vate". The first category comprises all injuries caused to the State, whether "directly" or "indirectly", while the second covers those caused to aliens, whatever the nature of the damage, or to property held by the State under a title of private ownership [domaine de gestion].³⁸ As can be seen, except for this last distinction, this classification leads to practically the same results as the previous one. If the purpose is to distinguish injuries in a manner which will have some bearing on the question of their reparation, the sole generally applicable criterion would be their origin — i.e., whether the damage was caused directly by the act or omission of an organ or official of the State, or by the act of a private individual acting either independently or in the course of internal disturbances. As will shortly be shown, the distinction is important for the purpose of determining whether, in the latter case, the reparation will reflect the damage actually caused by the act of the individual or the conduct of the local authorities before or after the said act took place (chapter III, section 19, *infra*).

33. The different categories and types of injury may also be classified and distinguished in other ways, as will be shown later in this report. For the time being, however, it is necessary to describe the two principal categories already referred to: damage suffered by an alien and "political and moral" injury. In connexion with the latter category, it will be necessary to examine separately the "moral injury" caused to the State through damage sustained by its nationals. Since the sole purpose of the three sections immediately following is to facilitate the study of the forms and modes of reparation, the description of the various injuries will be somewhat summary, especially as far as damage caused to individuals is concerned, in order to avoid unnecessary repetition.

7. Injury caused to an individual

34. The injury sustained by an alien may consist of damage to his person or damage to his property. The former comprises all injury affecting the physical or moral personality of individuals, without prejudice to the consequences of a proprietary character which often derive therefrom in favour of the individual directly injured or of third party claimants. This last point is particularly important. Another fact which needs stressing is that in the majority of cases the various heads of damage cannot be considered in complete isolation from each other, because they are usually sustained concurrently and, hence, it is not always possible to differentiate between them or to separate them for purposes of reparation. This difficulty arises in every one of the groups into which injuries are usually divided for the purposes of analysis.

35. Thus, for example, in the different cases of deprivation of liberty, the consequences of the act or omission imputable to the State often cannot be reduced to the mere fact that the alien was illegally or arbitrarily detained, arrested or placed in prison. As will be

seen during the consideration of reparation in such cases, in addition to the financial loss which the individual may have sustained as a result of his detention, arrest or imprisonment, he may also have suffered physical or moral maltreatment, which represents another type or class of injury to the person. This group should also include cases of expulsion of aliens, if the expulsion takes place in circumstances contrary to the applicable rules of international law. The expulsion may also be accompanied by circumstances which aggravate the responsibility of the State, as happened in the *Maal* case, when it was necessary to take into consideration not so much the fact of the expulsion itself as the unnecessary humiliation to which the victim was subjected (chapter III, section 18 (a)). The notion of "deprivation of liberty" also covers certain restrictions on a person's right of free movement.

36. Bodily and mental injury, as well as violent death, constitutes a second group of injuries to the person. The former may lead to other loss and injury which will have to be borne in mind for purposes of reparation, such as the medical expenses which the victim had to incur, pecuniary loss suffered during convalescence and, if the injuries are of a permanent character or have in some manner affected the person's health, limitations on future capacity for work. With regard to this last point, it is of course important to know whether the chain of causation between the original injury and its consequences is sufficiently direct for this additional damage to be taken into account in computing reparation. One of the consequences may be a mental injury, although damage of this nature may also be a direct consequence of the act which gives rise to the duty to make reparation and thus constitute an independent injury. The anguish suffered by some of the passengers of the *Lusitania* as a result of the shock of being hurled into the water during the sinking of the ship was held by umpire Parker to constitute an injury susceptible of indemnification (chapter III, section 18 (d)). In the event of violent death the situation is different, since in that instance the damage is not the taking of a person's life but the loss sustained as a result thereof by a certain category of third persons. First, there is the strictly pecuniary loss sustained by persons dependent on the deceased, which is measured mainly by the degree of financial dependency that existed between them at the time of his death. Secondly, there is the purely moral damage determined by the close relationship between the third parties and the deceased. Losses of this category, which may give rise to an independent and separate reparation, belong rather to the group of "moral injuries" caused to a person as a consequence of certain acts or omissions contrary to international law.

37. A "moral injury" in its widest sense can be described as the opposite to a physical injury, but its nature does not easily lend itself to an exact definition. The matter is, in effect, essentially psychological and dependent on circumstances. Its manifestations are extremely varied and range from attacks against the honour or reputation to the moral injury resulting from a business failure, from the suffering caused by

³⁸ See *Personnaz*, *op. cit.*, p. 17.

the death of a close relative or from ill treatment.³⁹ This strictly psychological or "intellectual" character is precisely what distinguishes "moral" damage from the mental injuries referred to in the preceding paragraph, which are of a more organic and pathological character. Moreover, moral injury may be sustained in the most varied circumstances which necessarily influence the assessment of the reparation due especially in cases where the responsibility and duty to make reparation derive from the conduct of the State vis-à-vis the acts of the private individuals who caused the original damage. Moreover, in order to be susceptible of reparation the injury "must be real and actual, rather than purely sentimental and vague".⁴⁰

38. Damage caused to the property of aliens can also take different forms and arise in very varied circumstances. Occasionally it results from the acts of private individuals, but only in exceptional cases is the conduct of the local authorities considered to justify reparation. This is also true of cases of injury caused during a civil war or other internal disturbances. If the State cannot be shown to have been at least manifestly negligent in the performance of its duty of preventing and punishing the injurious acts, there is technically no "reparable" injury because the State has incurred no international responsibility. In such cases of internal disturbances, reparation will be more likely to be due if the damage was the consequence of measures taken by the state authorities or, where applicable, by the revolutionaries if the insurrection ultimately succeeds. Thus, the reparation of the injury will depend on the circumstances in which such measures were taken (chapter III, No. 21 (b)).

39. The chances of the damage being "reparable" improve if it is the consequence of other official measures. One of the most frequent instances is the detention or sequestration or other similar measure affecting the property of aliens. At times the measure is accompanied by the use and exploitation of the property by the State. Some of these measures affect immovable property and other rights *in rem*, although the difficulty of deciding whether the damage is "reparable" arises regardless of the nature of the property involved. This difficulty is due to the fact that the responsibility of the State, and hence the question whether reparation is due depends not so much on the measure *per se* as on the circumstances in which it was taken or the manner in which it was applied.

40. The difficulties referred to above increase, or at least assume a special character, because many of the measures in question are taken in the exercise of powers vested in the State with regard to private property, whatever the nature of such property or the nationality of the owner. This applies to cases of expropriation and other related measures affecting "acquired rights" examined in the Special Rapporteur's fourth report (A/CN.4/119). In those cases, the measure should

not be regarded as resulting in "injury" in the true sense of the word, since injury can only derive from an act or omission intrinsically contrary to international law. The fact that the State is generally duty bound to compensate the owners of the property affected does not mean in any way that the "compensation" involves any "reparation" *stricto sensu*, or that, consequently, the victim is being "compensated" for an "injury". The obvious importance of this distinction has already been pointed out;⁴¹ and it will, in any case, be emphasized again, in connexion with the reparation for injury caused to property, in chapter III of this report (section 21 (d)).

8. The "moral injury" caused to the State through injuries to private individuals

41. Under the traditional view of international responsibility and of the duty to make reparation, the interest injured in consequence of an act or omission contrary to international law is always vested in the State. This is not, of course, true only of acts or omissions which damage the interests of the State as such. It applies also to cases in which the State's interests are damaged "indirectly" — i.e., by reason of the "moral injury" caused to the State through injuries sustained by its nationals abroad. As a claims commission has expressed it, "The injury inflicted upon an individual, a national of the claimant State, which implies a violation of the obligations imposed by International Law upon each member of the Community of Nations, constitutes an act internationally unlawful, because it signifies an offense against the State to which the individual is united by the bond of nationality."⁴² Thus, since any injury to the person or property of aliens implies a violation of the obligations imposed by international law, the State of nationality is always "indirectly" affected by the unlawful act or omission. In short, any injury to the person or property of an alien constitutes, at the same time, a "moral injury" to that State.

42. The basis of this "moral injury" has been said to reside in the juridical nature of any act or omission contrary to international law. "Injury," said Anzilotti, "is thus deemed implicit in the anti-juridical character of the act. A violation of a rule always constitutes trespass upon the interest which the rule protects and, consequently, upon the subjective right of the person whose interest is affected; in international relations, the injury caused is generally moral (failure to respect the honour and dignity of the State as a juridical person) rather than material (financial or patrimonial injury in the true sense of the term)."⁴³ The same idea is expressed in the statement that "an injury to a private individual could not in itself constitute a viola-

⁴¹ See the Special Rapporteur's fourth report, *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, vol. II), sections 16 and 34.

⁴² *Dickson Car Wheel Co.* case, decided by the General Claims Commission (United States-Mexico). Cf. *Opinions of Commissioners* (1931), p. 188.

⁴³ "La responsabilité internationale des états . . ." *Revue générale de droit international public* (1906), vol. XIII, pp. 13-14.

³⁹ See Personnaz, *op. cit.*, p. 202.

⁴⁰ See *Opinion in the Lusitania Cases* (1923) in *Reports of International Arbitral Awards*, vol. VII (United Nations publication, Sales No. 56.V.5), p. 37.

tion of international law. Responsibility of this kind can arise only from the non-observance of an obligation to the State of which the individual in question is a national."⁴⁴ In this connexion it is relevant to recall that the right of "its own" which the State asserts in affording diplomatic protection is in reality "its right to ensure, in the person of its subjects, respect for the rules of international law"⁴⁵ Viewed from this standpoint, there can be no doubt that any injury caused to an alien by an act or omission contrary to international law in theory involves a "moral injury" to the State of nationality.

43. The question does not, however, always present itself in these terms. Even in the body of traditional doctrine statements occur which are at variance with the orthodox or absolute view outlined above. De Visscher, for example, wrote that "An act which is contrary to international law *may*, irrespective of whether it causes material injury, result in *moral* injury to another State which consists in the impairment of the latter's honour or prestige."⁴⁶ This is, in fact, the view taken both in international case-law and in diplomatic practice. "Moral injury" to the State is not always alleged or taken into consideration in cases involving injury to the person or property of aliens. There are relatively few cases in international case-law in which responsibility and a duty to make reparation have been found to exist on this ground. When the various forms of reparation, particularly in the case of injury to individuals, are examined, it will be seen in what situations and circumstances "moral injury" to the State of nationality has been taken into consideration or alleged in addition to the injury to the individual in question. It will be seen that the determining factor is not so much the nature of the injury to the individual as the character or gravity of the imputable act or omission. This question will be discussed below in the conclusions of the present report, and attention will again be drawn to the importance of distinguishing between the "private interest" and the "general interest" in considering the various categories of acts and omissions contrary to international law.⁴⁷

9. "Moral and political" injury *stricto sensu*

44. Like injuries to aliens, "moral and political" injury *stricto sensu* may be caused to the State by the acts or omissions of organs or agents of another State or by the acts of private individuals of that State. However, even if the injury is caused by the acts of individuals, there need not be an accompanying act

or omission imputable to the State, such as must exist in all cases of international responsibility for injuries to the person or property of aliens. In diplomatic practice, this condition is not generally required, no doubt because of the highly political character of the interest injured by such acts of individuals; consequently, reparation for injuries of this type may be made in circumstances other than those in which a duty to make reparation normally exists and may not be subject to the same conditions.

45. The most typical and most frequent cases involving moral and political injury are those arising from acts of various kinds against the person of official representatives of the State or against the premises of its diplomatic or consular missions. Such acts may take the form of insults to the Head of State, as was the case when King Alfonso XII was hissed by a crowd during his visit to Paris in 1883, and an apology was offered to the King by President Grévy.⁴⁸ They may also consist of violations of diplomatic immunity, one of the earliest precedents being the arrest of Russian Ambassador Muttueof in England (1708).⁴⁹ Even if the incident does not affect the head of the diplomatic mission the act may constitute a violation of diplomatic immunity and call for some form of satisfaction. Yugoslavia demanded satisfaction from Bulgaria for an attack on a military attaché accredited to its embassy at Sofia (1923).⁵⁰ Such incidents have also frequently arisen in connexion with the immunity enjoyed—generally under treaties—by consular officials, or with the "special protection" to which they are entitled from the receiving State. Satisfaction may be called for even if the act complained of does not involve a serious offence such as the murder of a consular official or physical assault. On one occasion, the United States Government acknowledged that "the search of the person of a foreign consul, his imprisonment, and the carrying off of his archives... is a violation of the law of nations, for which the Government of the United States considers itself bound to apologize and to give all other suitable redress."⁵¹ For similar reasons, acts committed against members of an official mission, even where it does not possess the status of a special diplomatic mission, have in practice also been treated on the same footing as acts against the representatives of a foreign State.⁵² Injuries to members of foreign armed forces may also be included in this category. In connexion with the Valparaiso incident involving sailors from the U.S.S. *Baltimore* (1891), the United States Department of State expressed the view

⁴⁴ Decencière-Ferrandière, *La responsabilité internationale des états, à raison des dommages subis par des étrangers* (Thesis, Paris, 1925), p. 35.

⁴⁵ Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 2, The Mavrommatis Palestine Concessions case, p. 12.

⁴⁶ "La responsabilité des états", *Bibliotheca Visseriana* (1924), vol. II, p. 119.

⁴⁷ With regard to this distinction, see the Special Rapporteur's first report, *Yearbook of the International Law Commission, 1956*, vol. II, p. 195 (section 16) and third report, *Yearbook of the International Law Commission, 1958*, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), p. 70 (section 21).

⁴⁸ See Moore, *A Digest of International Law*, vol. VI, p. 864.

⁴⁹ See Stowell & Munro, *International Cases* (1916), vol. I, p. 3.

⁵⁰ See Eagleton, "The Responsibility of the State for the Protection of Foreign Officials", *American Journal of International Law* (1925), vol. 19, p. 299.

⁵¹ Moore, *op. cit.*, vol. V, p. 41. As will be seen below, it has been held on occasion that in certain circumstances attacks or injuries suffered by a consul are to be considered on the same footing, for purposes of reparation, as those suffered by private persons. See the case of consul *Mallén*, cited in section 14 *infra*.

⁵² For examples of incidents involving such official missions see Bissonnette, *La satisfaction comme mode de réparation en droit international* (Thesis, Geneva, 1952), pp. 55-56.

that "an attack upon the uniform of the U.S. Navy, having its origin and motive in a feeling of hostility to this government and not in any act of the sailors" called for an apology and some adequate reparation for "the injury done to this government".⁵³

46. Violation of the premises of a diplomatic mission by the state authorities and any acts by private individuals resulting in breaches of the inviolability of such a mission also constitute acts against the foreign State concerned. The Persian Government apologized to the British Government when the local authorities entered the latter's embassy for the purpose of seizing certain political refugees (1908).⁵⁴ Similarly, Hungary presented an apology to Yugoslavia for the hostile demonstrations of a crowd outside the Yugoslav legation at Budapest (1920).⁵⁵ In practice, incidents involving consular premises, which have been much more frequent, are generally treated on the same footing as acts of this kind. Such violations, whether committed by individuals or by the local authorities, may result in material damage, and in such cases, in addition to the outrage against its mission, any pecuniary losses which may have been caused to the foreign State are taken into account.⁵⁶

47. Outrages against the flag or other emblem of a foreign State, and insulting words or demonstrations directed against the State or its government, constitute another type of "moral and political" injury. In contrast to the acts mentioned earlier, these acts are purely symbolic in character as no material injury is likely to arise from them. The same is true of insults to official representatives of a foreign State. Despite this fact, however, acts of this type have been placed on an equal footing with the others and satisfaction has been demanded or offered. Thus, in the case of mass demonstrations outside the German consulate at Lausanne, in the course of which the flag was torn down, the measures of satisfaction given included a warrant of arrest for "an act contrary to the law of nations".⁵⁷ During the blockade of Venezuela in 1903, Great Britain and Germany demanded satisfaction when a crowd compelled the British vessel *Topaze* to strike its colours.⁵⁸ An act directed against any object having symbolic value for the offended nation may cause injury of this kind. Thus, the United States ambassador at Havana made a public apology to the Minister of Foreign Affairs of Cuba after several United States sailors had climbed on the statue of José Martí, the hero of Cuban independence (1949).⁵⁹ As an example

of insulting words or demonstrations constituting a breach of the respect due to foreign nations, reference may be made to the remarks offensive to Germany made by a United States magistrate on the occasion of the *Bremen* incident (1935).⁶⁰

48. With regard to insults to a flag, the most common incidents are those resulting from official acts which constitute an infringement of freedom of navigation or of other safeguards afforded to vessels under customary international law. When the British vessel *Trent* (1861) was visited on the high seas by a Union warship and compelled to surrender two Confederate commissioners who were on board, Great Britain characterized the incident as "an act of violence which was an affront to the British flag and a violation of international law".⁶¹ An even graver insult to the flag is, of course, committed if a vessel is seized or attacked without justification. When the United States merchant vessel *Colonel Lloyd Aspinwall* (1870) was arrested and towed to port by a Spanish frigate, the United States demanded the return of the vessel and reparation for the offence against the freedom and dignity of its flag.⁶² In connexion with the incident resulting from an attack on another United States merchant vessel by a Japanese brig in the Straits of Shimonoseki (1863), Secretary of State Seward said that "When the injury involves also an insult to the flag of the United States, the demand for satisfaction must be imperative."⁶³ Acts against vessels in port may also be regarded as an insult or affront to the flag. For example, after the incident at Constantinople on the French steamer *Circassie*, when a captain of artillery threatened the crew with a weapon, the local military authorities offered an apology to the French Embassy and punished the culprits.⁶⁴ Satisfaction has on occasion been demanded for insults to the flag committed by private individuals, as in the case of the storming of the Romanian vessel *Imperatul-Trajan*.⁶⁵

49. Violation of a State's territorial sovereignty may involve various types of conduct contrary to international law, depending on the nature, purpose and circumstances of the violation. Only in certain situations, however, is the violation of national territory of special interest from the point of view of the class of injuries under consideration. In the rather numerous cases in which military or customs authorities or other officials of one State have crossed the frontier of another State for any purpose without the latter's authorization or consent, apologies have generally been demanded or volunteered as reparation for the violation of territorial sovereignty, and, in many instances, the culprits have been punished.⁶⁶ Violations of territorial waters have resulted in incidents of the same type, although much

⁵³ Moore, *op. cit.*, vol. VI, p. 857.

⁵⁴ See Eagleton, *op. cit.*, p. 297.

⁵⁵ Fauchille, *Traité de droit international public* (1921-26, eighth ed.), vol. I, part I, p. 528.

⁵⁶ See Bissonnette, *op. cit.*, pp. 59-61, for examples of cases of these types and for the case in which satisfaction was given because of an act of local jurisdiction performed on the premises of the French consulate at Florence.

⁵⁷ See *Revue générale de droit international public* (1916), pp. 340-5.

⁵⁸ *Ibid.* (1904), p. 409.

⁵⁹ *Time*, New York, 21 March 1949, p. 24, cited by Bissonnette, *op. cit.*, p. 67.

⁶⁰ See Eustathiades, *La responsabilité internationale de l'Etat pour les actes des organes judiciaires, etc.* (1936), vol. I, pp. 295-7.

⁶¹ Moore, *op. cit.*, vol. VII, p. 768.

⁶² See Lapradelle & Politis, *Recueil des arbitrages internationaux* (1923), vol. II, p. 669.

⁶³ See Moore, *op. cit.*, vol. VII, p. 117.

⁶⁴ See *Revue générale de droit international public* (1895), p. 626.

⁶⁵ See *ibid.* (1910), pp. 408-10.

⁶⁶ See examples cited by Bissonnette, *op. cit.*, pp. 46-8.

less frequently. In some incidents of this type, warships of one State have captured warships or merchant vessels of another State in harbours of a third State, as in the case of the *Postillion*, the *General Armstrong* and the *Chesapeake*.⁶⁷ Other cases, on the other hand, have involved a simple violation of the territorial waters of one State by warships of another State, as in the relatively recent *Corfu Channed* case (1949), which was brought before the International Court of Justice.⁶⁸

50. Before this discussion of "moral and political" injury is closed, it should be pointed out that, in diplomatic practice, the question of the existence of any intention to offend the honour or dignity of the State has been raised on occasion. In the *Virginus* (1873) and *Maria Luz* (1875) cases, for example, measures of satisfaction were considered not to be called for since the claimant State recognized that in seizing the vessels there had been no intention to offend its honour or dignity. In the *Henry Crosby* incident (1893), the United States Department of State acknowledged that a "mistake" had been made and that there had been no insult to the flag.⁶⁹ As the question has a bearing on the conditions under which reparation may be claimed in such cases as well as on the character of this category of injuries, it will be discussed below in examining the essential characteristics of satisfaction (section 12, *infra*).

II. The various forms and functions of reparation

51. Before considering the question of the reparation of injuries caused to aliens, the principal subject of the present report, it will be of value to examine the various forms and functions of reparation in general. In traditional international law, because of the traditionally accepted concept of "injury", the notions of reparation *stricto sensu* and of "satisfaction" are, of course, closely intertwined, with the result that, although only reparation is of interest in this context, it cannot usefully be studied separately. The two traditional forms of reparation and the special procedure known as the "declaratory judgement" are examined below.

10. Reparation *lato sensu*

(a) The traditional forms of reparation

52. From ancient times, the term "reparation" has been defined in terms broad enough to embrace both reparation *stricto sensu* and satisfaction, which represent the two principal traditional methods of making reparation for injuries resulting from an act or omission contrary to international law. As regards codification, the two were given formal recognition in the drafts of the Preparatory Committee of The Hague Conference (1930). Point XIV of the questionnaire submitted to governments dealt both with the various procedures employed in reparation *stricto sensu* and the problems involved in determining the amount of pecuniary com-

penation, and with some of the customary methods of giving satisfaction, such as the offer of an apology and the punishment of the guilty persons.⁷⁰ Despite differences on specific points, the two forms of reparation were generally accepted in a number of the replies from the governments.⁷¹ In the light of the views of governments, the preparatory committee drafted the following basis of discussion (No. 29):⁷²

"Responsibility involves for the State concerned an obligation to make good the damage suffered in so far as it results from failure to comply with the international obligation. It may also, according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons."

It will be recalled, however, that the text adopted in the first reading by the Third Committee of the Conference mentioned only "the duty to make reparation for the damage sustained in so far as it [the international responsibility of a State] results from failure to comply with its [the State's] international obligation." The reasons for the omission from the article of the two methods of giving satisfaction referred to in the basis of discussion will be discussed below (section 15, *infra*).

53. The two forms of reparation also appear in the writings of authorities, who differentiate them on the basis of the type of injury covered by each. As early a writer as Vattel stated that the purpose of reparation *stricto sensu* was to make good the injury actually caused by the unlawful act, while satisfaction was given in the case of injuries which "cannot be repaired".⁷³ More recent writers have continued to make this distinction and have tried to define each of these forms of reparation more clearly, with particular reference to the type of injury for which reparation is made. Anzilotti, for example, states that there are "two possible consequences of an unlawful act: satisfaction and reparation (in the strict sense)... The concept of satisfaction is based on that of moral wrong... It is intended primarily to make good an offence against the dignity and honour [of the State]... Just as the concept of satisfaction is based on that of moral wrong, the concept of reparation is based on that of material wrong."⁷⁴ Accioly, too, holds that "implicit in the idea of reparation is that of material wrong... Implicit in the idea of satisfaction is that of moral wrong and that of compensation — also moral — proportionate to the wrong suffered."⁷⁵

⁷⁰ League of Nations publication, *V, Legal*, 1929.V.3 (document C.75.M.69.1929.V), p. 146.

⁷¹ *Ibid.*, pp. 146 *et seq.*

⁷² *Ibid.*, p. 151. The paragraph of the basis of discussion quoted here substantially reproduces the text of article X of the draft prepared by the Institute of International Law at its Lausanne session (1927). See the Special Rapporteur's first report, annex 8, *Yearbook of the International Law Commission, 1956*, vol. II, p. 228.

⁷³ *Op. cit.*, vol. I, book II, chapter XVIII, section 324.

⁷⁴ *Corso di diritto internazionale*, pp. 425-7.

⁷⁵ *Tratado de direito internacional público* (second ed., 1956), vol. I, pp. 354-5.

⁶⁷ *Ibid.*, pp. 48-9.

⁶⁸ With regard to this case and the Court's decision concerning the satisfaction due, see section 10 (b), below.

⁶⁹ See Moore, *op. cit.*, vol. VI, p. 760.

54. It has been argued that it is futile to attempt to maintain this distinction since "in international practice, material and moral injuries are inextricably intertwined".⁷⁶ Anzilotti himself acknowledged, in this connexion, that in all forms of reparation "there is invariably an element of satisfaction and an element of reparation, the idea of punishing the wrongful act and that of making good the damage sustained; what varies is, rather, the relative proportion of the two elements."⁷⁷ This is undoubtedly the case under the strict traditional view in which every injury, irrespective of the identity of the victim or the nature of the act or omission by which it is caused, is regarded as a "moral injury" to the State. Even in diplomatic practice, however, as has been indicated and as will be shown below, "reparation" is not always claimed for the moral injury to the State; often, the issue is solely one of making reparation for the real injury actually caused to the individual alien, or for the purely material injury suffered by the State in cases in which the property affected is held by the State under a title of private ownership. What happens — fairly frequently in diplomatic practice, but less commonly in cases adjudicated by international tribunals — is that the two types of reparation are employed together in respect of the same injury or, perhaps more properly, the same unlawful act or omission. But, as Bissonnette has observed, this does not mean that satisfaction cannot be regarded as a distinct form of reparation; the joint employment of measures of satisfaction and of reparation *stricto sensu* in such cases is intended to accomplish the purpose of "wiping out . . . all the consequences of the unlawful act or omission".⁷⁸ In this connexion, it should be pointed out that even in cases involving the reparation of injuries sustained by private individuals where the question of "moral injury" to the State of nationality is not raised, certain measures are sometimes applied which imply "satisfaction", given to the individual concerned rather than reparation *stricto sensu*; however, this is a question of terminology and not of substance.

55. In the light of the foregoing, it is natural to ask on what basis it can be decided whether the measures taken in a specific case constitute reparation *stricto sensu* or satisfaction. The practice of international tribunals shows that the most characteristic method of reparation *stricto sensu* — the payment of "damages" — may be employed for the purpose of affording satisfaction. Hence, even though the converse is not true, it is not always possible to define and identify these two forms of reparation in terms of their content. Nor can they be differentiated on the basis of whether the injured party is the private individual or the State of nationality, and in any case this approach indirectly involves a return to differentiation on the basis of the nature of the injury itself. Although, as a rule, reparation *stricto sensu* is applicable in the case of injury to private individuals and satisfaction in cases where

the question of "political and moral" injury is raised, satisfaction is often employed in cases of injury to private individuals, either alone or in conjunction with measures of reparation for the injury sustained. Nevertheless, it is possible to differentiate between the two types of reparation, as many writers do, on the basis of the purpose underlying the measures taken in each specific case. Thus, if the reparation allowed is intended strictly as compensation, it is to be regarded as reparation *stricto sensu*. If on the other hand, reparation is intended to make good a "political and moral" injury caused directly or indirectly to the State, it is to be regarded as satisfaction, even if given in the form of a pecuniary indemnity. It may of course be difficult in some cases to determine the purpose for which reparation is made, or to what extent it constitutes compensation and to what extent satisfaction, not to mention the theoretical difficulties encountered if every injury is regarded as a "moral injury" to the State.

56. There would appear to be no question that satisfaction, whatever the form it assumes, always entails reparation for a "moral and political injury" and, hence, constitutes reparation made *to the State*. What is open to some question is the rather widely stated view that reparation *stricto sensu* is always purely "compensatory" in nature. Can reparation in fact be regarded as exclusively compensatory in cases where all or part of the indemnity is obviously awarded for the purpose of punishing or censuring the unlawful act — i.e., in cases where the reparation of the injury caused to a private individual is, in view of the gravity of the act or omission imputable to the State, "punitive" in nature? It would seem not, even where in such cases the sole beneficiary or recipient of reparation remains the private individual and not the State of nationality. In these cases, the reparation undoubtedly contains an element of satisfaction. Unlike satisfaction, which, as will be seen below, is essentially and invariably penal in character, reparation *stricto sensu* is a civil institution, although it may in certain cases assume a characteristically "punitive" form because no distinction is made in traditional international law between the concepts of civil and criminal responsibility.⁷⁹

(b) "Declaratory judgements"

57. In the discussion of the nature and scope of the duty to make reparation in chapter I, section 3, reference was made to situations in which "reparation" has been held to be due even though the injury alleged by the private individual in question has not materialized or run its course, or, in any event, even though it has not been possible to prove injury. Essentially, international tribunals have followed one of two courses in dealing with such cases. Either the claim has been dismissed as unfounded or not receivable, no decision being taken on the question of the responsibility incurred by the State, or else a "declaratory" judgement has been rendered. An example of the first approach is the *Sánchez* case, in which the Spanish-Venezuelan Com-

⁷⁶ Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938), pp. 125-6.

⁷⁷ *Op. cit.*, p. 425.

⁷⁸ *Op. cit.*, p. 84.

⁷⁹ In this connexion, see the Special Rapporteur's first report, *Yearbook of the International Law Commission, 1956*, vol. II, p. 211 (section 8).

mission considered it unnecessary to deal with the question of responsibility on the ground that, if Venezuela was held responsible in principle, it would not be possible to fix the terms of that responsibility concretely in order to make it effective since the claimant had not proved even one of the facts necessary to estimate and determine an indemnity.⁸⁰ It should be noted that, in this instance, not only is the claim dismissed by reason of failure to prove injury, but, in addition, the Commission refuses to deal with the question of substance on the ground that "it would not be possible to fix the terms concretely in order to make it [the responsibility] effective".

58. The position is reversed in the case of a "declaratory judgement". While it is recognized that no material or objective injury has been suffered, or that it has not been possible to prove such injury, the act or omission imputed to the defendant State is declared to be unlawful. The judgement of the Permanent Court in the *Mavrommatis Concessions* case (1925) contains a declaration of this kind: "... That the existence, for a certain space of time, of a right on the part of M. Rutenberg to require the annulment of the aforesaid concessions of M. Mavrommatis was not in conformity with the international obligations accepted by the Mandatory for Palestine; that no loss to M. Mavrommatis, resulting from this circumstance, has been proved; that therefore the Greek Government's claim for an indemnity must be dismissed."⁸¹ In some instances, purely "declaratory" judgements of this nature are given because no pecuniary or other reparation is claimed. Thus, in its advisory opinion of 4 December 1935, the Permanent Court merely declared, in conformity with the terms of the request submitted by the Council of the League of Nations, that the legislative decrees promulgated by the free city of Danzig "are not consistent with [the latter's] constitution" and, therefore, not consistent with the international obligations implicit in the special régime to which the free city was subject.⁸² In the *Trail Smelter Arbitration* (1941), one of the tribunal's decisions was also, for the same reason, purely declaratory in nature. With regard to the second question under article III of the convention of 15 April 1935, the tribunal held that "it is ... the duty of the Government of the Dominion of Canada to see to it that this conduct [i.e., the future conduct of the Trail Smelter] should be in conformity with the obligation of the Dominion under international law as herein determined."⁸³

⁸⁰ See Ralston, *Venezuelan Arbitrations of 1903*, p. 938.

⁸¹ Publications of the Permanent Court of International Justice, *Collection of Judgments*, series A, No. 5, p. 51. In the *Case concerning certain German interests in Polish Upper Silesia* (1925), the court held, with reference to the "abstract interpretation of a treaty", that articles 36 and 63 of its statute provided for "the possibility of a judgement having a purely declaratory effect". *Ibid.*, series A, No. 7, pp. 18-19.

⁸² Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 65, p. 57.

⁸³ *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 49.V.2), p. 1966. In an earlier passage, the tribunal had stated that "... under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in

59. In some cases a declaratory judgement, instead of merely declaring that the act or omission imputable to the State is unlawful, assumes, as will be seen below, the character of a "sanction" or measure of "satisfaction". In contrast with the cases referred to earlier, this occurs when a State alleges a "political and moral" injury caused by the unlawful act or omission. The decision of the Permanent Court of Arbitration in the *Carthage* and *Manouba* cases (1913) is a declaratory judgement of this kind. In refusing to award the damages sought by France "as reparation for the moral and political injury resulting from the failure to observe general international law and conventions binding on both Italy and France", the Court stated that the "establishment" of this fact, especially in an arbitral award, constitutes in itself a serious penalty and that "this penalty is made heavier in such case by the payment of damages for material losses".⁸⁴ In its judgement in the *Corfu Channel* case (1949), the International Court of Justice expressed itself in different terms but apparently intended that the meaning or effect of its declaration concerning the British Navy's operations in Albanian territorial waters should be the same as in the case just referred to. Under the terms of the special agreement, the Court was to rule both on the claim based on the damage and loss of life resulting from the explosion of the mines and on the question of whether the British Navy's operations had constituted a violation of international law and whether there was, under international law, "any duty to give satisfaction". On the last point, the Court stated that "to ensure respect for international law, ... the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty" and that "This declaration is in accordance with the request made by Albania through her Counsel [for "the declaration of the Court from a legal point of view"] and is in itself appropriate satisfaction."⁸⁵

60. In the light of these precedents, can it be said that the "declaratory judgement" truly constitutes a form of reparation? There seems to be no doubt so far as judgements of the second type are concerned: they constitute a simple means of giving satisfaction for "moral and political" injury caused to the State, or, in other words, a method of "making reparation" for an act contrary to international law by formally declaring it to be unlawful and thus sanctioning or censuring the conduct imputable to the defendant State. But can the same be said of the judgements in the first group? There the position is somewhat different, for they simply find or declare that the conduct

such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Ibid.*, p. 1965.

⁸⁴ See Scott, J. B., *Les travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), pp. 356-57. In the discussion below of "pecuniary satisfaction" in cases of injury caused to private individuals (section 15), other precedents will be examined which show the position that has been taken by international tribunals with regard to pecuniary claims based on "political and moral" injury to the State.

⁸⁵ *I.C.J. Reports* (1949), p. 35.

of the State is unlawful, although it might be argued that such a declaration constitutes, in itself, an implicit or indirect sanction or censure, which does not, however, appear to be the purpose of judgements of this kind. Nor can an analogy be drawn with "juridical restitution", since, as will be seen in the next section, the characteristic feature of this form of reparation is that it is intended to bring about the revocation of the legislative, executive or judicial measure held to be contrary to international law. A declaratory judgement does not, in a strictly legal sense, seek to re-establish the *status quo ante*.

61. It would also be wrong to think in terms of the "moral injury" caused to the State of nationality and to say, in accordance with the traditional view, that "injury is deemed implicit in the anti-juridical character of the act". As has been shown, the question is not always presented in these terms in practice and in the cases cited the reparation was viewed solely from the standpoint of the interests of the private individual concerned and of the injuries sustained by him. The only correct view of the declaratory judgement, in these cases, would therefore appear to be that its sole purpose is to define or affirm a right where there has been non-observance of the rule of law by which that right is recognized and protected. In this sense, the declaratory judgement unquestionably constitutes a type of "juridical reparation" for the unlawfulness of an act or omission capable of occasioning actual and effective injury and therefore constitutes a form of reparation *sui generis*.

11. Reparation stricto sensu

62. In a discussion of reparation *stricto sensu*, the chief concern must be to determine its actual nature or scope, for it is in connexion with this form of reparation, rather than with reparation *lato sensu*, that the principle is put forward that reparation must be made "in full" for the injury caused by an act or omission contrary to international law. The principle is defined in the well-known declaration by the Permanent Court quoted in the Special Rapporteur's earlier reports:⁸⁶

"The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

63. On another occasion, the Court had declared that "the breach of an engagement involves an obli-

gation to make reparation *in an adequate form*".⁸⁷ The idea that reparation "must wipe out all the consequences" of the illegal act and must be "full" or "adequate" is frequently stated in international case-law. Thus, in the *Opinion in the Lusitania cases* it was stated that the "remedy must be commensurate with the injury received... The compensation [a term employed in the opinion as synonymous with "reparation"] must be adequate and balance as near as may be the injury suffered."⁸⁸

64. But can the principle that "full" or "adequate" reparation must be made for an injury be really applied in practice? In the opinion quoted above, umpire Parker admitted that "In many tort cases, including those for personal injury and for death, it is manifestly impossible to compute mathematically or with any degree of accuracy or by the use of any precise formula the damages sustained... This, however, furnishes no reason... why he who has suffered should not receive reparation therefor measured by rules as nearly approximating accuracy as human ingenuity can devise."⁸⁹ On this point, Personnaz went so far as to say that it is impossible in most cases to re-establish the previously existing situation, so that the term "reparation" should not be construed in the strict sense—i.e., it should not be understood to mean restoring what has been taken away or wiping out the past, but should merely be taken to mean affording the victim the possibility of obtaining satisfaction equivalent to that which has been lost.⁹⁰ In short, the strict, absolute application of the principle referred to is not always possible in practice. Even in cases of injury to property, where it is somewhat easier to assess the consequences of the unlawful act or omission than in the case of physical or moral injury to the person, serious difficulties are often encountered, as will be seen below, in determining what reparation is to be made.

65. Apart from these considerations, the purpose of reparation should certainly be to wipe out all the consequences of the unlawful act or omission. This purpose can be achieved if reparation takes the two forms explicitly mentioned in the declaration of the Permanent Court quoted above: restitution in kind (*restitutio in integrum*) and pecuniary damages (*dommages-intérêts*).⁹¹ The distinction between these two forms or methods of reparation is quite frequently drawn in international case-law and even, on occasion, in diplomatic practice. It has even been specifically embodied in international instruments setting up arbitration tribu-

⁸⁷ Judgement in the *Chorzów Factory (Jurisdiction)* case, *ibid.* series A, No. 9, p. 21.

⁸⁸ See United Nations, *Reports of International Arbitral Awards*, vol. VII, pp. 35, 36.

⁸⁹ *Ibid.*, p. 36. See a similar statement by umpire Ralston in his opinion in the *Di Caro* case, Ralston, *Venezuelan Arbitrations of 1903*, p. 770.

⁹⁰ *Op. cit.*, pp. 197-8.

⁹¹ Some writers speak of "direct" reparation, which consists in re-establishing the situation existing prior to the injurious act, and "indirect" reparation, which consists in the payment of an indemnity. Cf. De Visscher, *La responsabilité des états*, *Bibliotheca Visseriana* (1924), vol. II, p. 118.

⁸⁶ Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, p. 47.

nals and commissions.⁹² Before each of these two forms of reparation is discussed separately, it should be noted that, since they share a common purpose, neither one necessarily precludes the other.

(a) *Methods of restitution*

66. In international practice, *restitutio in integrum* possesses certain characteristics which are not found in domestic law. Although essentially of the same legal character in both cases, in international practice this type of restitution sometimes assumes forms or pursues objectives which are necessarily imposed upon it by the special nature of reparation for injuries caused by acts or omissions imputable to a State.

67. Restitution may be either of the "material" or of the "legal" type, depending on the nature of the injury to be repaired or of the act or omission which caused the injury. Material restitution is most commonly made in cases of injury to property belonging to an alien or to the State itself. The most frequent cases have been those resulting from unlawful expropriations, from the confiscation of property, or from the seizure of vessels or of other property or goods. As will be seen from the discussion of reparation in respect of this type of injury in the next chapter, restitution is accompanied by the payment of damages in the great majority of cases, both in diplomatic practice and in international case-law. In addition, however, material restitution can also be considered to have been made in those cases, which will be mentioned presently, where a person who has been unlawfully detained, arrested or seized is released. An example of restitution for the benefit of a State is the award of Arbitrator Huber ordering Spain to provide premises for use by the British consulate at Tetuán.⁹³ It must be pointed out, however, that the idea underlying material restitution is not always precisely that of making reparation for material injury to a private individual. Thus, in his decision in the *Compagnie générale des asphaltes de France* case, umpire Plumley, while acknowledging that there had been no actual injury inasmuch as customs duties had not been collected a second time, ordered restitution to be made on the ground that the action of the Venezuelan consul in requiring the payment of duties at Trinidad had constituted a violation of British territorial sovereignty. The purpose of this decision was to give "satisfaction" to the British Government rather than to make reparation for an injury which had not actually materialized.⁹⁴

68. The special features of restitution in international law are most often in evidence in the case of legal resti-

⁹² For example, article IX of the convention of 8 September 1923, which set up the United States-Mexican General Claims Commission, provided that "In any case the Commission may decide that international law, justice and equity require that a property or right be restored to the claimant in addition to the amount awarded in any such case for all loss or damage sustained prior to the restitution." Feller, *The Mexican Claims Commissions, 1923-1934* (1935), pp. 328-9.

⁹³ See Max Huber, *Réclamations britanniques dans la zone espagnole du Maroc* (The Hague, 1925), pp. 176-81.

⁹⁴ See Ralston, *op. cit.*, p. 340.

tion—i.e., where the reparation consists in abrogating or modifying a specified provision of an international agreement or in rescinding a legislative, executive or judicial measure.⁹⁵ An example of the first type is the judgement of the Central American Court of Justice requiring Nicaragua to use all available means, in conformity with international law, to re-establish and maintain the legal situation existing between the litigant States prior to the conclusion of the treaty in which Nicaragua had granted the United States the right to build a canal across its territory joining the Atlantic and the Pacific, as well as certain rights in the Gulf of Fonseca.⁹⁶ More precedents exist for the second type of legal restitution. For the most part, they concern legislative and even constitutional measures incompatible with specified provisions of agreements concluded between the States concerned, as in the case of the tariff measure adopted by Serbia in contravention of the Treaty of 28 July/9 August 1892 with the Austro-Hungarian Empire, and in the case of article 61, paragraph 2, of the Weimar Constitution, which was regarded as incompatible with the obligations imposed on Germany by article 80 of the Treaty of Versailles.⁹⁷ In the face of a protest by the Japanese Government and pressure by the United States Government, the San Francisco Board of Education rescinded a measure barring persons of Japanese nationality from the public schools.⁹⁸ In diplomatic practice, too, there have been cases in which the setting aside of a sentence or other judicial decision has been demanded as reparation. That is what happened in the *Lueders* case, which will be examined below, and in the case of the arrest and sentencing of *Bonhomme*, in which France requested not only that the person concerned should be released but also that the sentence should be set aside.⁹⁹ It will be noted that here, as in the decision of the British-Venezuelan Commission referred to in the preceding paragraph, restitution constitutes satisfaction in the true sense.

69. In international case-law, legal restitution does not as a rule go so far as to involve the repeal or rescission of the legislative, executive or juridical measure in question. In fact, one should perhaps mention, as the only exception to the rule, the *Martini* case (1930), which

⁹⁵ Not included here is "punishment of the culprits", which some authorities, such as Personnaz, *op. cit.*, pp. 79-80, appear to regard as restitution in cases of "direct" responsibility, i.e., where the punishment is imposed as reparation for the act or omission imputable to the State. Punishment of the guilty, as will be seen in the next section, is a typical method of giving satisfaction which should not be equated with restitution, since, like other forms of satisfaction, it does not serve to re-establish the *status quo ante*. Perhaps, from a psychological point of view, a certain parallel could be drawn in the sense that punishment, as a measure intended to express censure of the unlawful act, tends to prevent the latter from being repeated. In this sense, however, the other forms of satisfaction would also have to be regarded as restitution.

⁹⁶ See *Anales de la Corte de Justicia Centroamericana* (1917), vol. IV, sections 16-18, pp. 124-5.

⁹⁷ See Bissonnette, *op. cit.*, p. 21.

⁹⁸ See *Revue générale de droit international public* (1907), pp. 636-85.

⁹⁹ See de Martens, *Nouveaux suppléments au recueil de traités*, vol. III, pp. 570 et seq.

was decided by the Italian-Venezuelan Commission. In one passage, the award stated that "These obligations [imposed by a judicial decision described as 'manifestly unjust'] must be annulled by way of reparation." In ordering them annulled, the Arbitral Tribunal noted that an unlawful act had been committed and it proceeded on the principle that the "consequences of the said act must be wiped out". Although no injury had actually been sustained, since the judicial decision in question had never been carried out, the arbitrator held that the payment obligations imposed on the Martini enterprise had constituted "a patent injustice" to that firm and that, consequently, "the obligations exist in law" even though they had never been carried out.¹⁰⁰ As regards the nature or, rather, the effects of legal restitution in cases like this one where injury was not actually suffered, it must be said that, strictly speaking, the reparation consists solely in ordering the unlawful act to be annulled or rendered ineffective and not in "wiping out" consequences which have not come to pass. To be sure, when the Tribunal in the case just referred to stated that the obligations existed in law, it may have been thinking in terms of presumed, potential and future consequences or injuries.¹⁰¹ However, if the principle of "full" reparation is interpreted literally—and that is how it is in fact interpreted and applied in practice—the consequences which are to be "wiped out" by reparation are the injuries already caused by the act or omission imputable to the State, not those which may possibly be caused by it in the future. Hence, it is sufficient to think purely in terms of annulling the measure which is deemed to be unlawful, since that is enough to ensure the accomplishment of the sole purpose which reparation is intended to achieve in the case just considered—namely, the re-establishment of the *status quo ante*.

(b) Damages

70. As a method of reparation, restitution presents serious practical difficulties. In the pronouncement by the Permanent Court quoted at the beginning of this section, restitution in kind is explicitly made contingent on whether it is "possible" to carry it out. In actual fact, restitution is rarely practicable. Sometimes it is not possible for purely material reasons, as in cases where the property of which the alien in question was unlawfully deprived has been destroyed. At other times it is not possible for legal reasons, since, as will be seen in connexion with the admissibility of certain methods of reparation, it is no simple matter from the point of view of domestic law to contemplate compelling a State to rescind a legislative measure or to set aside a decision pronounced by its courts (sec-

¹⁰⁰ See United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1002.

¹⁰¹ Bustamante maintained that a claim may be based "on past injury and on presumed injury", pointing out that "it is not necessary for the injury to result in material or pecuniary loss, since the mere failure to permit the exercise of a right can provide grounds for a claim". See *Derecho internacional público* (1936), vol. III, p. 481.

tion 16). Another consideration is that restitution does not always serve, "as far as possible, [to] wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". For example, where a claim is admissible on the basis of loss of profits, the mere restitution of the property or rights of which the alien in question was deprived is not sufficient.

71. When *restitutio in integrum* is not possible for material or legal reasons, or when it is not in itself sufficient to repair all the consequences of the act or omission imputable to the State, the payment of an indemnity is appropriate either in lieu of or as a supplement to restitution. There appears to be a third situation in which this other type of reparation may also be employed in place of restitution—viz., where the claimant elects in its favour because he regards it as more advantageous than restitution. In the *Chorzów Factory* (Merits) case, the Permanent Court, describing payment of an indemnity as "the most usual form of reparation", declared that "it is the form selected by Germany in this case and the admissibility of it has not been disputed."¹⁰² In any one of the situations described above, reparation takes the form of the payment of "damages", just as under domestic law, and it is pecuniary in nature because, in Grotius' well-known phrase, "money is the common measure of valuable things". Even where, as often happens, no material injury is involved or the purpose in making reparation is not solely that of compensation, the indemnity always consists of a sum of money.

72. The nature or scope of "damages" is also completely different from that of restitution. While restitution merely restores the property or right of which the alien in question has been deprived, an indemnity is intended to compensate him for all the other consequences of the act or omission contrary to international law. In this sense, reparation is not confined to the *damnum emergens*, but may also be made for the *lucrum cessans* and other injuries consequential on the original injury or on the act by which it was caused, provided that the necessary causal connexion can be proved. This form of reparation, where appropriate, also applies to types of injury which by their nature are not capable of restitution, such as "moral injury" and other kinds of injury to the person of aliens. If it is interpreted broadly, it can even include the payment of a sum of money for interest, expenses and costs as an integral part of the indemnity, or as a supplement thereto. For all these reasons, "damages" are, in fact, the only method of reparation which makes it possible in all situations to abide by the principle, discussed at the beginning of this section, that "full" reparation must be made for any injury caused by an act or omission contrary to international law. As a result, various problems arise with regard to the criteria to be applied

¹⁰² See Publications of the Permanent Court of International Justice, *Collection of Judgments*, Series A, No. 17, p. 28. With regard to the question how the amount of the indemnity is to be fixed in the type of case here considered, see the dissenting opinion by Lord Finlay, *ibid.*, pp. 70 *et seq.*

in fixing the quantum of the indemnity, the limits to which it is subject, and so forth, as will be seen in connexion with the question of reparation for injuries caused to private individuals (chapter III of this report).

12. *The essential characteristics of satisfaction*

73. Notwithstanding the difficulties of differentiating clearly between the two major forms of reparation, satisfaction possesses certain characteristics which are, essentially, peculiar to it. For one thing, satisfaction takes a particular, characteristic form, even in the case of injuries to private individuals; furthermore, and above all, the two kinds of reparation differ in substance. The determining factor in satisfaction is not so much the nature or scope of the injury for which reparation is to be made as the actual or alleged gravity of the act giving rise to satisfaction. This is a basic consideration in examining this type of reparation. Whereas in reparation *stricto sensu* the primary consideration is the injury actually sustained by the individual in question (or by the State, as the case may be), in satisfaction the "political and moral" injury is appraised in the light of the act imputable to the State and even in that of external circumstances affecting the act which aggravate it or diminish its seriousness, such as the amount of publicity which it received, the popular attitude towards the persons responsible, and so forth.¹⁰³

74. Owing to the very nature of the injury for which it seeks to make reparation, and to that of the acts which give rise to it, what characterizes satisfaction above all is that its context is variable and ill-defined. A "political and moral" injury is not capable of objective assessment, nor are the acts by which it is caused; hence, it would be virtually useless to try to work out guiding rules for the kind of reparation to be made in the various situations in which the State claims to have suffered such an injury. Satisfaction is generally given in the shape of one or more of what may be regarded as its typical forms (the offer of an apology, punishment of the guilty, and so forth). However, satisfaction does not always represent purely "moral" reparation, since it is sometimes pecuniary in nature and at times even takes the form of an increase in an indemnity paid as reparation for injuries suffered by nationals of the State concerned. The practice of simultaneously employing two or more different methods of satisfaction in respect of the same act is even more wide-spread and, in fact, was the practice most commonly adopted in the past. Even more than the factors already referred to, however, what adds to this inconsistency and imprecision characteristic of satisfaction is the fact that it is not even possible to affirm in all cases that satisfaction "is due", since, when injury has been caused to the State in an "indirect" manner, reparation is generally made only for the injuries actually sustained by the private individuals concerned. There are also cases where, even though a "political and moral" injury in the proper sense of the term is in fact involved, the State refrains from requesting

satisfaction — a curious political phenomenon which is observed with increasing frequency in modern times.

75. The inconsistency characteristic of satisfaction is closely bound up with another of its essential characteristics: its highly discretionary nature. In this connexion, it is no exaggeration to say that the "discretion enjoyed by the injured State is, in principle, unlimited"¹⁰⁴ This is readily understandable in the light of the *de facto* situation that generally obtains when the occasion arises for this type of reparation. In the great majority of cases, the "injured party" is a powerful State and the other party is a State that is incapable of resisting successfully the demands for satisfaction put forward by the first State, even though they may be utterly disproportionate to the acts imputed to the respondent State. Frequently, too, the political prestige of the claimant State is involved and that State's prestige requirements can be met only if it decides itself what measures of satisfaction are "due". What most strikingly characterizes the history of satisfaction, or at all events its history until fairly recently, is this disequilibrium of power between the States concerned and the resultant abuse of discretion by one State for the purpose of demanding, and perhaps exacting, from the other State such measures of satisfaction as it considers appropriate.¹⁰⁵ It is perhaps because of this state of affairs that the measures of satisfaction to be applied in each case have generally been decided by direct diplomatic negotiation.

76. So far as form is concerned, it can be said that a characteristic feature of satisfaction is the publicity attending it. Sometimes the actual measure constituting satisfaction includes a public act, such as a salute to the flag or other forms of presenting an apology. However, other measures of satisfaction are also accompanied by wide publicity so that they will accomplish what is in fact their twofold purpose — that of "satisfying" the honour and dignity of one State and that of "punishing" the act imputed to the other State. This second purpose reflects the last of the characteristics of satisfaction which will be emphasized here — viz., its essentially punitive nature. When the question of reparation for injuries to private individuals is examined in the next chapter, it will be seen that even reparation *stricto sensu* is at times frankly "punitive" in its nature or purpose. However, in all cases of satisfaction, whatever the nature of the injury involved or of the act giving rise to satisfaction, the element of censure or condemnation is implicit in the measure or measures demanded if it is not explicitly indicated in the claims put forward by the State concerned — as will be more fully demonstrated in subsequent sections of this report.¹⁰⁶

77. A final problem that has sometimes been raised by the authorities is whether the "duty" to give satisfaction is dependent on an intention (*animus*) to offend

¹⁰⁴ See Reitzer, *op. cit.*, p. 141.

¹⁰⁵ The "manifest abuses" resulting from the discretionary nature of satisfaction have not escaped the attention of the commentators. See, for example, Personnaz, *op. cit.*, p. 289.

¹⁰⁶ This characteristic of satisfaction is so obvious that it is stressed constantly by the authorities. See, for example, Personnaz, *op. cit.*, pp. 306 *et seq.*, and Bissonette, *op. cit.*, pp. 27-30.

¹⁰³ See Anzilotti, *Corso di diritto internazionale*, p. 426.

the dignity or honour of the claimant State. This is related to, although not identical with, the question whether international responsibility is dependent not only upon an unlawful and injurious act, but also upon a wilful attitude (*culpa* or *dolus*) on the part of the respondent State.¹⁰⁷ The first to raise this question was Triepel, although he did so only with respect to cases of responsibility for acts of private individuals ("indirect" responsibility). In his view, material reparation for injuries suffered by aliens was called for only if there was fault on the part of the State; "however, regardless of whether it gives rise to a duty to make reparation, the act of an individual may give rise to a duty on the part of the State to give *satisfaction* to the injured State. The giving of such satisfaction does not represent an obligation arising out of an offence; it may arise even in the absence of fault. . . . It represents neither compensation nor damages. . . . Rather, it is a measure designed to *appease the sensibilities of the alien offended by the act in question.*"¹⁰⁸ Others, however, share the view of Pons, who stated, with reference to all cases of responsibility, that an act "cannot, by rights, give rise to measures of satisfaction (e.g., diplomatic apologies) unless there has at least been fault on the part of the State responsible for the act."¹⁰⁹

78. As will be seen below, in connexion with the conditions and circumstances in which satisfaction has been employed, it is not always apparent in a particular case whether or not satisfaction was dependent on the element of intention. In some rather exceptional cases specific reference is made to this point — e.g., in cases where the State refrains from requesting satisfaction because it feels that there was no intention to offend its national honour or dignity. Thus, in the incident arising out of the seizure of the *Virginus* (1873), the Spanish Government was not required to give satisfaction of any kind because it was felt that there had been no intention to show disrespect for the United States flag, while in the incident caused by the arrest of the *Maria Luz* (1875) the Peruvian Government noted "with satisfaction the statement that the Japanese Government had no intention of offending the dignity of Peru."¹¹⁰ In other cases, even those involving acts which resulted in "political and moral" injury in the proper sense of the term, it would be useless to inquire into the basis of the claims for satisfaction. Only in a very few cases would it be possible to establish that there had in fact been an intention to "offend" the

¹⁰⁷ Concerning theory and practice with regard to this question, see the Special Rapporteur's fifth report, Part B, chapter II, *Yearbook of the International Law Commission, 1960*, vol. II (United Nations publication, Sales No. 60.V.1, vol. II).

¹⁰⁸ *Droit international et droit interne* (trans. by R. Brunet, 1920), p. 332.

¹⁰⁹ L. Pons, *La responsabilité internationale de l'Etat à raison de dommages causés sur son territoire aux étrangers* (Thèse, Toulouse, Imprimerie F. Boisseau, 1936), p. 70.

¹¹⁰ See other cases in Personnaz, *op. cit.*, pp. 283-4. An arbitral decision rendered by the King of Belgium in 1863 stated that "in the mode in which the laws of Brazil had been applied towards the English officers there was neither premeditation of offence nor offence to the British Navy." See Whiteman, *op. cit.*, vol. I, p. 288.

honour or dignity of the claimant State. However, the view taken in the past has been that, if it is not at least presumed that there was such an intention, it is scarcely possible even to conceive of an injury whose very existence is essentially dependent on the subjective judgement of the "offended" State.

13. Typical measures of satisfaction

79. Since the primary purpose of this report is to examine the duty to make reparation in cases involving injuries to the person or property of aliens, it will surely be useful to provide a description of the various methods of giving satisfaction so as to see to what extent and in what circumstances they have been employed in cases of this type and which of them are normally used in making reparation for "moral injury" indirectly caused to the State. For methodological reasons, a distinction will be drawn between the "typical" methods or measures and "pecuniary satisfaction", which will be examined in the next section. Although the latter contains all the essential elements of satisfaction, it is, strictly speaking, the "typical" measures that are usually considered to be the "moral reparation" that is made to a State when its interests are injured directly or indirectly as the result of an act or omission contrary to international law. In a sense, it could be said that these measures represent the ways in which satisfaction *stricto sensu* is given expression. A brief description of the typical measures will, of course, adequately serve the purpose indicated above; a convenient guide can be found in the system of classification and differentiation devised by Bissonnette, whose monograph is unquestionably the best and most systematic study yet made of satisfaction.¹¹¹

80. To begin with, in Bissonnette's view all these forms and methods of satisfaction can be grouped under three headings: apologies, punishment of the guilty persons, and guarantees for the future. As will be seen shortly, neither this classification nor the system of sub-classification which should be used within each of these categories should be taken to mean that various forms or methods are not employed simultaneously in many cases. That is, in fact, what occurs when measures of the first type are applied, presumably because apologies constitute the form of satisfaction most often employed in practice. It should be noted in this connexion that it is not always possible, either in theory or in practice, to make a distinction between apologies in the strict sense and expressions of regret at what has occurred. It should also be pointed out that certain other methods of satisfaction are sometimes employed where the objective, avowed or implicit, is that the State should offer its apologies in that way.

81. Apologies in the strict sense are generally presented verbally. For example, when a number of western European countries protested to the Turkish Government concerning the violation of mail pouches at Constantinople (1901), the Turkish Minister for Foreign Affairs was instructed to present his government's apologies verbally to the diplomatic missions con-

¹¹¹ See pp. 85 *et seq.* of the thesis cited in footnote 35.

cerned.¹¹² Written apologies, of course, receive much less publicity than those presented verbally and sometimes none at all; hence, the written method is employed only when the incident in question has had no impact on public opinion.¹¹³ The instrument of apology may be a letter addressed to a high authority of the offended country, or an ordinary diplomatic note. Apologies have even been transmitted by telegraph — e.g., in the case of the *Baltimore* incident (1891), as a result of which the Chilean Minister for Foreign Affairs cabled an apology to the United States Government.¹¹⁴ Expressions of regret are, as has already been said, frequently equated with apologies *stricto sensu*. An instance in which regrets were expressed although an apology was neither asked for nor given was the incident caused by the violation of Argentine territory by a Brazilian police officer (1907).¹¹⁵ Such expressions of regret should not be confused with those which represent merely a gesture or an act of courtesy. This point can be illustrated by reference to the *Chesapeake* incident (1863), as a result of which Mr. Seward, the United States Secretary of State, informed Lord Lyons that if authority had been exercised by agents of the United States Government within the waters or on the soil of Nova Scotia, that government would “at once express its profound regret; and it stands ready, in that case, to make amends which shall be entirely satisfactory.”¹¹⁶ It will be noted that such gestures or acts of courtesy, far from constituting satisfaction or having that as their purpose, are intended by the State in question precisely as a means of declining any international responsibility with respect to the act which gives rise to them. In this sense, their similarity to *ex gratia* reparation, which has been dealt with elsewhere (section 3 above), is readily recognizable.

82. Saluting the flag of the offended State is, as Bissonnette points out, the “most ceremonious and spectacular” of all forms of apology, but relatively little used. For the most part, a salute to the flag has been demanded as a result of breaches of the inviolability of diplomatic and consular missions (or violations of the immunity of diplomatic and consular representatives), violations of the national territory or vessels of the State concerned, or an affront against the flag itself. In one case which received wide publicity, that of the murder of General Tellini and other members of his commission, the Conference of Ambassadors demanded, among other measures of satisfaction, that the Greek fleet should fire a twenty-one gun salute to the flag of each of the three Powers (Italy, Great Britain and France).¹¹⁷ Another form of satisfaction falling within this category is that which consists in

expressing disapproval of the injurious or offensive act. Such disapproval may, at various times, take the form of disavowal of the act and punishment of the person responsible, as in the case of *Captain Haddock* (1863);¹¹⁸ of disavowal, an expression of regret, and the issuance of orders designed to prevent a repetition of the act, as was requested in the *Alliança* incident (1895);¹¹⁹ or merely of condemnation or reprobation of the act, which was the nature of the apology made by Secretary of State Hay to the German Ambassador for the conduct of soldiers from the transport *Sheridan* (1900).¹²⁰ Apologies may be conveyed, and quite often are, by dispatching an extraordinary or special mission, which is in the nature of an “expiatory mission” quite apart from any measures it may be instructed to take for the purpose of giving satisfaction to the State that receives it. The mission called for in the first of the long series of demands for satisfaction which the Powers presented to the Chinese Government as a result of the *Boxer Rebellion* (1900) was of this kind.¹²¹ Finally, apologies may take a much simpler form when a request is made merely for an explanation of the act in question. Thus, in the *Major Barbour* incident (1857), the United States Government simply requested an explanation by the Mexican Government for the shots fired at the vessel in the harbour of Coatzacoalcas.¹²²

83. Measures of satisfaction of the second type referred to above — punishment of the guilty persons — generally arise in practice as a result of injuries caused to nationals (officials or private individuals) of the claimant State. Within this category, an effort has been made to distinguish between demands for the actual punishment of the guilty persons and demands for an investigation of the facts or for the trial of nationals of the claimant State who are considered to have been unlawfully imprisoned. An investigation is, of course, appropriate only if the acts or circumstances which occasioned the injury have not been sufficiently clarified. Hence, it is doubtful to what extent it can be regarded as a measure of satisfaction, since any such measure is necessarily dependent on an actual, proved act or omission contrary to international law. This does not mean, of course, that in exceptional cases a demand for an investigation cannot be made in conjunction with demands for satisfaction, as occurred in the *Corfu* incident.¹²³ Nor can the trial of an unlawfully detained person really be regarded as a form of satisfaction. Since this problem arises only in connexion with injuries suffered by private individuals, it will be dealt with in the context of the applicability of satisfaction in cases of that

¹¹² See *Revue générale de droit international public* (1901), p. 777 *et seq.*

¹¹³ In this connexion, see Personnaz, *op. cit.*, pp. 295-6.

¹¹⁴ See Moore, *A Digest of International Law*, vol. VI, p. 859.

¹¹⁵ *Ibid.*, vol. V, p. 42.

¹¹⁶ *Ibid.*, vol. II, p. 366. Concerning this distinction, see also Anzilotti, *op. cit.*, pp. 426-7.

¹¹⁷ See Eagleton, “The Responsibility of the State for the Protection of Foreign Officials”, *American Journal of International Law* (1925), vol. 19, p. 304.

¹¹⁸ See Moore, *op. cit.*, vol. II, p. 370.

¹¹⁹ *Ibid.*, pp. 908-9.

¹²⁰ *Ibid.*, pp. 141-142.

¹²¹ See Eagleton, *The Responsibility of States in International Law*, p. 185.

¹²² See Moore, *op. cit.*, vol. VI, p. 955.

¹²³ The sixth of the demands made on Greece by the Conference of Ambassadors was that it should agree to the appointment by the conference of a special commission which would supervise, and, indeed, have full powers to take part in, the preliminary investigation undertaken by the Greek authorities. See the article cited in footnote 117 above.

kind; it will then be seen that, rather than constituting a claim for satisfaction, a demand for the trial of an unlawfully detained person is, like a demand for an investigation, made for the purpose of elucidating the facts in the case and so obtaining the revocation of the detention order.

84. The actual punishment of guilty persons, on the other hand, poses a different problem, since one of the conditions for such punishment is, of course, that the act or omission contrary to international law should be imputable to the respondent State. Hence, serious doubts arise with regard to the many cases cited by Bissonnette and others as instances where the punishment of the guilty persons served as a measure of satisfaction. For example, in the *Duvall* case (1894), the United States Secretary of State refrained from presenting a claim for damages because "The Mexican authorities promptly apprehended the murderers, and the Department understands that they were tried, convicted and punished."¹²⁴ However, in this as in other cases, the guilty person to be punished was a private individual. The situation is completely different and absolutely clear-cut where agents or authorities of the State are involved. While there is no need to cite here any of the numerous cases of this kind, it may be noted that the punishment sometimes consists in the execution of the agent concerned but, as a rule, takes the form of dismissal or some other disciplinary measure.¹²⁵ The use of punishment in these cases as a measure of satisfaction is readily understandable, for the very status of the guilty person at the time of the act or omission which is imputable to the State has the effect of automatically establishing the latter's international responsibility and, consequently, the appropriateness of punishment as a means of making reparation for the injuries sustained.

85. The third category of measures of satisfaction referred to above also tends to give rise to confusion concerning the actual nature or function of the measure in question. This is because demands for guarantees for the future are sometimes made even where the international responsibility of the State for the act giving rise to such demands has not been established. This is particularly common in cases of injuries caused by private individuals, where the real purpose of the demand is to ensure that the State will be more diligent or effective in the future in carrying out its obligation to afford protection. An obvious example of this is the demand submitted by the Chinese Government as a result of incidents which had occurred at Denver, Colorado; in that instance, the United States Government offered renewed assurances that Chinese residents would receive the same protection from the authorities as that enjoyed by citizens.¹²⁶ At other times, the demand is made as the result of an act or circumstance which has in fact given rise to international responsi-

bility on the part of the State. For example, among the demands presented to the Chinese Government as a result of the *Boxer Rebellion* was one for the continuance of the import ban on arms and on materials used exclusively for their manufacture.¹²⁷ A form of satisfaction sometimes demanded by one State of another, which falls within the category here considered, is that of the express recognition of a particular right. For example, as a result of the *Constitución* incident (1907), Uruguay demanded that Argentina should make a statement to the effect that it had had no intention of disregarding the jurisdiction enjoyed by Uruguay, as a neighbouring riparian country, in the River Plate.¹²⁸ Also to be included in this category are demands for the enactment of legislation that will forestall the recurrence of the acts in question. The classic example would still appear to be the *Mattueof* affair (1708), as a result of which the British Parliament enacted a law, the "Act of Anne", providing penalties for attacks on ambassadors in the future.¹²⁹ With some exceptions, all other cases in which this form of satisfaction has been employed have related to injuries suffered by private individuals, as will be seen below.

14. Pecuniary satisfaction

86. This section is concerned with a particular form of satisfaction, the payment of a pecuniary indemnity to the claimant State for the "political and moral" injury sustained by reason of an act or omission contrary to international law. Reparation for this category of injury is, as has been seen, normally moral or political in form, but moral or political reparation has fairly frequently been regarded as inadequate or as not the most appropriate form of reparation for such injuries, which may include material losses. While the distinction will be taken up again later, pecuniary satisfaction should not be confused, as it is by some writers, with a form of reparation *stricto sensu* whose basis is similar to that of the various forms of satisfaction. As will be seen in the next section, the distinction between the two is valid, even in the case of injury to individuals. Strictly speaking, the term "pecuniary satisfaction" should be applied only when the indemnity, or a part of it, is claimed or allowed as reparation for an injury suffered directly or "indirectly" *by the State*. The distinguishing mark of pecuniary satisfaction is in fact the purpose for which the indemnity is intended.¹³⁰

87. The question of pecuniary satisfaction generally arises in cases involving injury to officials of the claimant State, when special circumstances accompany the injury or the act imputed to the respondent State. Claims for satisfaction of this kind, as distinct from the typical forms of satisfaction, have fairly frequently been made in cases heard by claims tribunals and commissions. Thus, in the *Charles Weile* case (1870), which arose from the arrest and imprisonment of

¹²⁴ See Moore, *op. cit.*, vol. VI, p. 806.

¹²⁵ For a virtually exhaustive enumeration, see Bissonnette, *op. cit.*, pp. 116 *et seq.*

¹²⁶ See *Foreign Relations of the United States* (1881), p. 319. See other examples in section 15 below.

¹²⁷ See the work cited in footnote 121 above.

¹²⁸ See *Revue générale de droit international public* (1908), p. 318.

¹²⁹ See Stowell & Munro, *op. cit.*, vol. I, p. 3.

¹³⁰ For differentiation from "punitive" damages, see section 20, *infra*.

the United States consul at Tumbes, Peru, the United States Commissioner "insisted on the importance of giving a decision which would, by the magnitude of the *award*, show the local authorities how wrong it is for them to act in a hasty manner when the *liberty and honour* of the consul of a friendly Power are concerned." The size of the award (\$32,407.40), which was clearly disproportionate to the injury likely to have been caused by the consul's arrest and imprisonment, seems to confirm the view that the respondent State was required to pay the indemnity on these grounds.¹³¹ In the case of *F. Mallen* (1927), a Mexican consul at El Paso, Texas, who was attacked and arrested by the deputy State constable, no pecuniary satisfaction was allowed, but the Presiding Commissioner, Mr. Van Vollenhoven, stated that "while recognizing that an amount should be added as *satisfaction for indignity suffered*, for lack of protection, and for denial of justice, as established heretofore, account should be taken of the fact that very high sums claimed or paid in order to uphold the consular dignity related either to circumstances in which the nation's honour was involved, or to consuls in backward countries, where their position approaches that of the diplomat. [Reference was then made to the *Casablanca* case, decided by the Permanent Court of Arbitration in 1909.]"¹³²

88. Notwithstanding the foregoing, when the British Vice-Consul at San José, Guatemala, *John Magee* (1874), was arrested, ill-treated and threatened with death by the Guatemalan authorities, Great Britain demanded (1) a reiteration of the promise to prosecute the guilty parties, (2) an agreement by the Guatemalan Government to order a salute of twenty-one guns to the British flag, and (3) "an indemnity for the outrage done to Vice-Consul Magee of Guatemala by Commandant Gonzalez." The sentences imposed on the guilty parties (ten years' imprisonment, deprivation of the right to hold office, etc.) being in its opinion unsatisfactory, the Government demanded and obtained the sum of \$50,000 as pecuniary satisfaction.¹³³ During disturbances at New Orleans in 1851, the Spanish consul and consulate were attacked by demonstrators. In a note from Secretary of State Webster, it was recognized that, in contrast to private persons of Spanish nationality, the consul, because of his official status, had a right to a "special indemnity". In his message to Congress of 2 December 1851, President Fillmore explained the purpose of the indemnity as follows: "... that you might make provision for such indemnity as a just regard for the *honour of the nation and the respect which is due to a friendly Power*..."¹³⁴

89. A special note is struck, within this group of cases, by that of Vice-Consul R. M. Imbrie (1924),

who was murdered by a mob at Teheran. The United States Government stated that it had "no wish to offend a friendly government or to require punitive damages." The indemnity requested, in addition to the compensation which the Persian Government had undertaken to grant to the widow, was intended to pay the expenses of a United States warship to transport the body home. It appears, however, that it was decided, under a joint resolution of Congress, that \$30,000 of the sum received for this purpose (\$110,000) should be granted to the widow in addition to the \$60,000 she had received from the Persian Government.¹³⁵

90. Injuries suffered by members of the armed forces and other officials or official representatives have also given rise to claims of this kind. In connexion with the murder of *Dr. Mauchamp*, a French physician attached to the dispensary at Marrakesh (Morocco), France demanded, in addition to other measures of satisfaction and the payment of an indemnity to the victim's family, another "indemnity to be paid to the French Government as reparation for the offence it has suffered through the death of a person to whom it had entrusted an official mission." This indemnity, which was to be fixed by the French Government, was intended for the construction of a hospital honouring the victim's memory.¹³⁶ In connexion with the murder of *Sergeant Mannheim*, a French soldier on guard at the French Embassy at Berlin, France requested and obtained one million francs as satisfaction (*amende*), in addition to the sum of 100,000 francs as compensation for the loss suffered by the victim's family.¹³⁷

91. The reparation granted for the murder of *General Tellini* (1923) while he was serving as a member of a commission appointed by the Conference of Ambassadors was complex. The reparation decided upon by the conference included an indemnity which the Greek Government was to undertake to pay the Italian Government "in respect of the murder of its delegate." Although it had been agreed that the amount of the indemnity would be determined by the Permanent Court of International Justice acting by summary procedure, the conference later decided, without waiting for the final report of the Commission appointed to investigate the incident, that "as a penalty [for negligence in the punishment of the guilty parties], the Greek Government shall pay to the Italian Government a sum of 50 million Italian lire." Before the close of the Conference, the Italian Government had presented direct demands to the Greek Government for various measures of satisfaction, including the payment of an indemnity of 50 million lire. The Greek Government declared its willingness to give the satisfactions requested, although in a modified form, "taking into consideration that the abominable crime was committed in Greek territory against subjects of a great friendly State en-

¹³¹ Mixed Claims Commission established under the Convention of 4 December 1868 between the United States and Peru. See Moore, *History and Digest* . . . (1898), vol. II, pp. 1653, 1646.

¹³² General Claims Commission (United States-Mexico), *Opinions of Commissioners*, 1927, p. 264.

¹³³ See Whiteman, *Damages in International Law* (1937), vol. I, pp. 64-65.

¹³⁴ Moore, *A Digest of International Law*, vol. VI, pp. 812-813.

¹³⁵ See Whiteman, *op. cit.*, pp. 136-138.

¹³⁶ See *Revue générale de droit international public* (1908), pp. 301-302.

¹³⁷ See Fauchille, *Traité de droit international public* (8th ed., 1921-1926), vol. 1, part 1, p. 528.

trusted with an international mission."¹³⁸ The last phrase is italicized in order to draw attention to the fact that the Greek Government was apparently prepared to give the satisfaction demanded, including the pecuniary satisfaction, because of the international character of General Tellini's mission. This circumstance was, however, only taken into account by the Conference in ordering the other measures of satisfaction; the indemnity was to be paid to one of the members of the Delimitation Commission. In this connexion, it is interesting to note that in his claim to the Government of Israel for damages caused by the assassination of Count Bernadotte, the Mediator for Palestine, the Secretary-General asked only for a formal apology, for continued efforts to punish the perpetrators of the crime and for payment of \$54,628 "for the monetary damage borne by the United Nations."¹³⁹

15. Satisfaction in cases involving injury to individuals

92. As has been shown, satisfaction, in its various forms, is a method of making reparation for "political and moral" injury. But in accordance with the traditional view, injury to the person or property of an alien also involves a "moral (indirect) injury" to the State of nationality, and consistency would therefore seem to require that measures of satisfaction should be recognized as admissible in all cases, even when the injury is sustained by a private individual. This conclusion is not, however, borne out in practice. In the great majority of cases, the State in fact only claims reparation, in the strict sense of the term, for the injuries suffered by its nationals, although it has been argued that in such cases the State considers that the reparation constitutes sufficient "satisfaction" of the "moral injury" it has "indirectly" sustained.¹⁴⁰ Not only would it be difficult to substantiate this argument, but also what is quite clear, at least from the formal point of view, is that (apart from the cases discussed below in this section) the only reparation claimed is that for the damage caused to the person or property of the private individual. The only purpose of analysing such cases from this point of view is therefore to determine the situations or circumstances in which, in addition to damages for the injury sustained by the alien, measures of satisfaction have been deemed appropriate to repair the "moral injury" claimed by the State. Cases in which typical measures of satisfaction have been applied are examined below.

(a) Application of typical measures of satisfaction

93. The Preparatory Committee of The Hague Codification Conference (1930) explicitly recognized the applicability of some of the typical measures of satisfaction in cases involving injury to private individuals.

¹³⁸ See pp. 306 and 304 of the article cited in footnote 117 above.

¹³⁹ See Eagleton, "International Organization and the Law of Responsibility", *Recueil des cours de l'Académie de droit international* (1950-I), vol. 76, p. 377. In a memorandum (document A/955), the Secretary-General said that he "would not advance any claim for exemplary damages".

¹⁴⁰ See Personnaz, *op. cit.*, p. 285.

As will be recalled, basis of discussion No. 29 laid down that the international responsibility of the State in such cases "... may also [in addition to reparation of the damage suffered by the private individual], according to the circumstances, and when this consequence follows from the general principles of international law, involve the obligation to afford satisfaction to the State which has been injured in the person of its national, in the shape of an apology (given with the appropriate solemnity) and (in proper cases) the punishment of the guilty persons."¹⁴¹ The preparatory committee was undoubtedly influenced by the fact that the replies of governments tended generally to regard the various measures of satisfaction as admissible in cases of injury to private individuals.¹⁴²

94. What were the "circumstances" (and the "general principles of international law") which the preparatory committee had in mind?¹⁴³ By using the term "circumstances" the committee may have meant to refer to the nature of the injury caused to the private individual—i.e., whether he suffered injury in his person or in his property; or to the nature or seriousness of the act or omission imputable to the State; or to some other factor or criterion—e.g., whether the injurious act was the act of an individual or of an agent of the State. In so far as concerns the "general principles of international law," the only precedents, as will be seen below, are those offered by diplomatic practice, and here again the pattern that emerges is not consistent. It will, nevertheless, be useful to examine the precedents briefly, in order to see how the typical measures of satisfaction have been applied in the cases under discussion.¹⁴⁴ One precedent that might be cited is that of the *Kellet* case (1897), in which a commission constituted as a board of arbitration allowed measures of satisfaction of this type; in this case, however, the person injured was a vice-consul and not a private person.¹⁴⁵ There have also been cases, although rather infrequent, in which typical measures of satisfaction were stipulated by the States concerned in submitting to arbitral settlement or arbitration by third parties the pecuniary reparation of injuries caused to a private individual. The *Cerruti* case (1886), involving Colombia

¹⁴¹ See the full text at the beginning of section 10 (a), *supra*.

¹⁴² The German Government considered that reparation in international law was more comprehensive than in private law, and might include satisfaction of any kind as well as reparation. In the Belgian Government's view, pecuniary reparation did not necessarily exclude the granting of satisfaction to the injured State in the form of apologies, saluting of the flag, etc. The Danish Government requested that the circumstances in which satisfaction was to be granted should be defined. League of Nations publication 1929.V.3, pp. 146-151.

¹⁴³ It may be noted also that the text finally approved by committee III of the conference spoke only of the "... obligation to make good the damage suffered..." See the complete text at the beginning of section 10 (a), *supra*.

¹⁴⁴ The admissibility of such measures of satisfaction appears to have been submitted to arbitration on only one occasion: the Peruvian-Bolivian agreement of 26 August 1895 "to submit to the arbitration of a friendly government the question of a salute to the Bolivian flag". See La Fontaine, *Pacificisme internationale* (1902), pp. 603-604.

¹⁴⁵ See Moore, *History and Digest . . .*, vol. II, pp. 1863-4.

and Italy, and the *Alabama* case (1872) are perhaps the only cases which need be cited.¹⁴⁶

95. Measures of satisfaction have most frequently been demanded by the State of nationality in cases involving injury to the person of aliens. Diplomatic practice affords few instances of satisfaction of this kind for injury to property. One such case is that of the *Natalia Sugar Plantation* (1897), which was the property of three United States citizens and which, after being occupied by the Spanish forces during the Cuban war of independence, was looted and devastated by members of those forces. In a note to the Spanish Minister at Washington, Secretary of State Sherman observed that the acts in question violated not only the treaty rights of United States citizens but the ordinary rules of war, and requested not only that full compensation should be made to the individuals concerned, but that the matter should be investigated, that guilty persons be punished and strict orders given to prevent the recurrence of such acts.¹⁴⁷ The measures of satisfaction demanded have not been the same in all cases. In some instances only an apology has been requested. In connexion with the assault and robbery of *Dr. Shipley*, a United States citizen, by a Turkish policeman, in the presence of another Turkish policeman who refused to intervene, the United States, in demanding an apology, stated that this was a minimum and that it might also demand the dismissal of the policeman.¹⁴⁸ On occasion repayment of the costs incurred in connexion with the incident, and even the execution of the culprit or person responsible for the injury, have been requested in addition to an apology.¹⁴⁹ It is interesting to note that the Third Sub-Committee of committee III of The Hague Conference, in discussing the reference to an apology in basis of discussion No. 29, agreed unanimously that it should be deleted because that form of satisfaction involved "political questions which might better be omitted from the draft."¹⁵⁰

96. In the majority of cases involving injury to the person of private individuals, the punishment of the guilty parties was requested, either alone or in conjunction with other measures of satisfaction. Most of the cases related to arbitrary expulsion, unlawful arrest or imprisonment, bodily injury, loss of life, or exceptionally serious denials of justice. The precedents are not, however, sufficiently consistent to permit a systematic classification that would show the relationship between the gravity of the injury or of the act or omission and the specific measure or measures of satisfaction demanded. A glance at some of the best-known cases will illustrate this point.

97. In the cases in which aliens suffered violent death, the form of satisfaction most frequently demanded

¹⁴⁶ *Ibid.*, pp. 295-6 and Moore, *A Digest of International Law*, vol. I, pp. 547-78.

¹⁴⁷ *Ibid.*, vol. VI, p. 970.

¹⁴⁸ *Ibid.*, pp. 746-7.

¹⁴⁹ With regard to this type of case see Bissonnette, *op. cit.*, pp. 70-71.

¹⁵⁰ League of Nations publication, 1930.V.17, pp. 129, 234.

was the punishment of the murderer and his accomplices, if any. Thus, in the case of *Frank Pears* (1900), the United States required from Honduras, first, the arrest and punishment of the sentry who had killed Pears, and second, the payment of an indemnity of \$10,000 to Pears' relatives.¹⁵¹ Similarly, in the case of *G. Webber* (1895), who died as a result of ill-treatment in prison, the United States demanded that Turkey conduct an investigation, punish each of the guilty parties, and remove the governor of the prison.¹⁵² In the case of the death of another United States citizen, *W. Wilson* (1894), it demanded that the Government of Nicaragua manifest its disapproval of the conduct of its officials, that the person who had committed the crime and his accomplice be tried and punished, and that the Government should adopt such measures as to leave no doubt as to its purpose and ability to protect the lives and interests of United States citizens in the area and to punish crimes committed against them.¹⁵³

98. Though they differ appreciably from the above-mentioned cases in the seriousness of the act and of its consequences, in some cases of denial of justice, when they were accompanied by other acts, the punishment of the guilty parties, including the judicial authorities involved, has likewise been demanded as satisfaction for the injury caused to an alien. For example, in 1838 France demanded, in an ultimatum, that Mexico remove two high-ranking officers and a judge who had been guilty of ordering a massacre and attempting to murder French citizens, and of having imposed illegal sentences on them. In 1831, before taking reprisals, France demanded of Portugal, among other things, that it release a French citizen and quash the sentence imposed on him, that it remove the judges who had imposed the sentence, and that it make official publication of the rehabilitation order.¹⁵⁴ In the *Lueders* case (1897), Germany, after taking certain steps to obtain the release of its citizen, who had been unjustly sentenced to imprisonment by a Haitian court, demanded his release, the removal from office of the judges who had convicted him, the arrest and imprisonment of the policeman who had made the charge, and a large sum as indemnity for the days its citizen had spent in prison. However, the punishment of the guilty persons was no longer included among the measures of satisfaction demanded by Germany at a later stage of the negotiations and accepted by Haiti under the threat of bombardment of its public buildings and fortresses by German naval units.¹⁵⁵

99. There is a contrast between the cases cited above and cases of personal injuries at the hands of agents of the State, or cases of arrest and imprisonment and expulsion. As Bissonnette points out, punishment of the guilty persons has rarely been demanded as a form of satisfaction in either of the two latter groups of

¹⁵¹ See Moore, *op. cit.*, p. 762.

¹⁵² *Ibid.*, p. 746.

¹⁵³ *Ibid.*, pp. 745-6.

¹⁵⁴ See Bissonnette, *op. cit.*, pp. 77-8.

¹⁵⁵ See Moore, *op. cit.*, pp. 474-5.

cases.¹⁵⁶ In two cases in the first group, that of *Wheelock* (1884), a United States citizen, who was tortured by a Venezuelan police superintendent, and that of *Knapp and Reynolds* (1883), two missionaries, also United States citizens, who were severely beaten in Turkey, a form of satisfaction was demanded.¹⁵⁷ In cases of arrest and imprisonment, other than those referred to in the preceding paragraph, other forms of satisfaction have been demanded, such as the repeal of a legislative provision, the expression of regrets, and the rehabilitation of the victim, in addition to the payment of an indemnity.¹⁵⁸ In cases of arbitrary expulsion, satisfaction has been given in the form of the revocation of the expulsion order and the return of the expelled alien.¹⁵⁹

100. On occasion, punishment of the culprits appears to have been demanded where aliens were killed by private individuals, although in all cases of injury caused by private persons, the State is internationally responsible and hence under a duty to make reparation only when failure to observe its obligation to protect aliens can be imputed to it. Thus, in the case of *Charles W. Renton* (1894), United States Secretary of State Olney stated that "... the desire of this government is, first, that the authorities of Honduras may be left free to punish the murderers of Renton; after that, such action as the conditions call for will be taken respecting the claim."¹⁶⁰ In this connexion, it is interesting to note that when the third sub-committee of committee III of The Hague Conference discussed the phrase "... the punishment of the guilty persons", used in the basis of discussion quoted at the beginning of this section, it was pointed out that the phrase was covered by basis of discussion No. 18, which placed on the State the duty of punishing offenders, failure to do which would entail international responsibility.¹⁶¹

101. In a somewhat greater number of cases of injury to aliens, satisfaction is afforded to the State of nationality in the form of assurances or guarantees against the recurrence of the acts which occasioned the injury complained of. Thus in the *Wilson* case cited above the third of the measures of satisfaction demanded was of this kind. But, as was indicated in the general discussion of typical forms of satisfaction, a distinction should be drawn, also in the case of this third category, between cases in which the measures are not demanded or applied as a form of satisfaction properly so called and those where the object is to ensure a more effective observance by the State of residence of its duty to protect aliens. Although the distinction is not always evident in diplomatic practice, which is frequently inconsistent, it is one that must be taken into account in deciding whether a measure is, strictly speaking,

¹⁵⁶ See Moore, *op. cit.*, pp. 78-80.

¹⁵⁷ See Moore, *op. cit.*, pp. 323 and 801 respectively.

¹⁵⁸ See in this connexion Bissonnette, *op. cit.*, pp. 79-80.

¹⁵⁹ See the cases of *Lampton* and *Wilbank* (United States citizens expelled from Nicaragua in 1894) and that of four British subjects also expelled from Nicaragua, Moore, *op. cit.*, vol. IV, pp. 99-100 and 100-1, respectively.

¹⁶⁰ *Ibid.*, vol. VI, p. 797.

¹⁶¹ See the publication cited in footnote 150 above.

one of satisfaction or in fact intended to avoid the international responsibility of the State. There would seem to be no doubt that the measures taken are in the nature of satisfaction in those cases where guarantees or assurances are given through the enactment of legislation, which implies at least tacit recognition that responsibility has been incurred for acts of the kind which the legislation is designed to prevent. The United States Government has at various times been willing to take measures of this kind. After the lynching of Italian citizens in Tallulah, President McKinley repeatedly asked Congress to "confer upon the federal courts jurisdiction in this class of international cases where the ultimate responsibility of the Federal Government may be involved."¹⁶² Similarly, in connexion with the *Japanese schools* incident (1906), President Roosevelt requested Congress to amend the criminal and civil law of the United States to enable the Executive to protect the rights of aliens in conformity with the provisions of international agreements.¹⁶³ Previously, in connexion with the case of *McLeod*, who had been arrested in New York State for murder during the destruction of the *Caroline* (1840), it had been held that the federal authorities were not competent to deal with the British Government's claim. In order to prevent any recurrence of that difficulty, Congress amended the Habeas Corpus Act in 1842.¹⁶⁴

(b) *The award of pecuniary satisfaction*

102. "Pecuniary satisfaction", which was discussed in the previous section, has also been the form of satisfaction in cases of injury to private individuals. In connexion with the murder in Persia of a missionary, the Rev. *B. M. Labaree* (1903), the United States Secretary of State asserted the right to demand reparation for the wrong done to the United States in the person of one of its citizens. This was to include "the remedial reparation due to the widow" and "the exemplary redress due to the Government of the United States..." In his note, the Secretary of State went on to say that the two governments should agree that the fine to be imposed on all those implicated in the murder should be punitive in nature and purpose. "It cannot be viewed in the light of a mere additional indemnity to the family of the murdered man. That form of reparation has already been completely accomplished. It can not inure to the pecuniary benefit of the Government of the United States, for we may not and will not purchase lucrative gain at the cost of acquiescence in a failure of justice." Lastly, the note suggested that as a practical solution the fine might, as had been done in China in earlier years, be used for the construction of a hospital or school to stand as a monument of reprobation of the crime and as an augury of a better state of things to come.¹⁶⁵

103. In some instances pecuniary satisfaction was stipulated in an agreement between the States con-

¹⁶² See Moore, *op. cit.*, vol. VI, p. 847.

¹⁶³ See *Revue générale de droit international public* (1907), p. 679.

¹⁶⁴ See Moore, *op. cit.*, vol. II, pp. 24, 30.

¹⁶⁵ See *Foreign Relations of the United States* (1907), part 2, pp. 942-944.

cerned, as in the Italian-Venezuelan protocol of 13 February 1903, which established a Mixed Commission empowered to settle pending claims for injuries suffered by Italian subjects. Under article II of the protocol: "The Venezuelan Government agrees to pay to the Italian Government, as a satisfaction of the point of honour, the sum of £5,500 in cash or its equivalent, which sum is to be paid within sixty days."¹⁶⁶ Even where the *compromis* was silent in the matter, some arbitral decisions have awarded a pecuniary indemnity as satisfaction for the "moral injury" caused to the State of nationality of injured individuals. Although these decisions are relatively few in number, there is no doubt as to their content and character.

104. In the *Van Bokkelen* case (1873) involving a claim for \$113,000 for wrongful imprisonment, the arbitrator appointed by the two governments concerned held, in ordering the payment of a smaller sum (\$60,000), that the imprisonment was "in derogation of the rights to which [the deceased] was entitled as a citizen of the United States under stipulations contained in the treaty between the United States and Haiti".¹⁶⁷ While there is no explicit statement to that effect in the decision, it is clear that neither the indemnity claimed nor that awarded by the arbitrator was intended solely as reparation for the injury caused to the individual or his relatives. In view of the ground on which so large a sum was awarded, there can be no doubt that the dominant consideration was the interests acquired by the State of nationality under an international treaty.¹⁶⁸ In other decisions, the fact that the indemnity is to be regarded as satisfaction is explicitly stated. In the *Arends* case (1903), umpire Plumley, while recognizing that the material losses occasioned by the detention of the vessel were small, expressed his belief that "... the respondent government is willing to recognize its responsibility for the untoward act of its officers under such circumstances and to express to the sovereign and sister State, with which it is on terms of friendship and commerce, its regret for such acts in the only way that it can now be done, which is through the action of this Commission by an award on behalf of the claimant sufficient to make full amends for the unlawful delay."¹⁶⁹ In the *Maninat* case, umpire Plumley distinguished between the losses suffered by the private individuals and "the more important feature of this case, [which] is the unatoned indignity to a sister Republic..." and awarded "just compensation which covers both aspects."¹⁷⁰

105. The decision in the *I'm Alone* case (1935) is perhaps the only other example which can be cited,

¹⁶⁶ See Ralston, *Venezuelan Arbitrations of 1903*, p. 643.

¹⁶⁷ See Moore, *op. cit.*, vol. VI, p. 701.

¹⁶⁸ The true character of the indemnity becomes even clearer if the decision is compared with those given in other cases of unlawful detention. See section 18 (a) *infra*.

¹⁶⁹ Ralston, *op. cit.*, p. 913.

¹⁷⁰ Ralston, *French-Venezuelan Arbitrations* (1906), p. 78. This decision may be compared with that given by umpire Plumley in the *Maal* case, in which he referred only to the indignity done to the individual, and awarded the indemnity on that ground alone. See section 20 *infra*.

in spite of the varying interpretations to which it is open. In their *Joint Final Report* the Commissioners held that as neither the ship nor its cargo was the property of the claimant State, no compensation ought to be paid in respect of the loss of either. With regard to compensation for the losses caused by the sinking they took into account only those persons who were not "a party to the illegal conspiracy" (to smuggle liquor). They considered, however, that "the act of sinking the ship by officers of the United States Coast Guard was, as we have already indicated, an unlawful act; and the Commissioners consider that the United States ought formally to acknowledge its illegality, and to apologize to His Majesty's Canadian Government therefor; and, further, that as a material amend in respect of the wrong, the United States should pay the sum of \$25,000 to His Majesty's Canadian Government."¹⁷¹ Commenting on this passage in the decision, Professor Hyde observed that, in view of the fact that the Canadian Government had claimed a sum of \$33,810.43 for expenses incurred in repatriating the crew and "legal expenses", the \$25,000 which the Commissioners recommended should be paid to the Canadian Government constituted partial compensation for expenses incurred by the latter in the prosecution of its claim. In his opinion the award could not be regarded as reparation for an "essentially public claim" and the decision should therefore not be taken "as a precedent indicative of the propriety of the imposition by an arbitral tribunal or by a joint commission of penal damages against a respondent State in satisfaction of an essentially public claim."¹⁷²

106. In contrast to these decisions, other cases can be found in which the propriety of pecuniary satisfaction as a form of reparation for the "moral injury" caused to the State of nationality was denied in principle by international tribunals. For example, in the *M. Miliani* case, umpire Ralston declared that "... unless specially charged, an international commission would scarcely measure in money an insult to the flag, while diplomats might well do so... Italy, save when her own pecuniary rights are affected, recovers nothing for her own benefit before a tribunal such as this, however much her own dignity may have been affected by the treatment of her subjects."¹⁷³ In the *Stevenson* case, decided by the British-Venezuelan Commission, it was stated that "The attention of the umpire has not been brought to an instance where the arbitrators between nations have been asked or permitted to declare the money value of an indignity to a nation simply as such. To have measured in money by a third and different party the indignity put upon one's flag or brought upon one's country is something to which nations do not ordinarily consent. Such values are ordinarily fixed by the offending party and declared in its own sovereign voice, and are ordinarily wholly

¹⁷¹ See the complete text of the Final Joint Report in White-man, *op. cit.*, vol. I, pp. 155-7.

¹⁷² "The Adjustment of the *I'm Alone* Case", *American Journal of International Law* (1935), vol. 29, p. 300.

¹⁷³ *Venezuelan Arbitrations of 1903*, p. 762.

punitive in their character — not remedial, not compensatory.”¹⁷⁴

107. The decision of the Permanent Court of Arbitration in the *Carthage* and *Manouba* cases (1915) is also consistent with these precedents. The French Government's claim included: “1. The sum of one franc for the indignity to the French flag; 2. The sum of 100,000 francs as reparation for the moral and political injury resulting from the non-observance of general international law and the agreements reciprocally binding on Italy and France.” As reparation for the material losses sustained by individuals in consequence of the seizure and detention of the ships, the Court ordered the payment of an indemnity amounting to 160,000 francs. But in so far as concerned the reparation claimed for “moral and political” injuries, the Court, as was noted above (section 10 (b) *supra*), merely gave a “declaratory judgement”, on the ground that “. . . the establishment of this fact, especially in an arbitral award, constitutes in itself a serious penalty.” The Court stated that as a general rule and without prejudice to special circumstances, a penalty of this kind seemed sufficient; that, again as a general rule, the imposition of a further pecuniary penalty appeared superfluous, and would go beyond the object of international jurisdiction, and, lastly, that in view of all those considerations, the circumstances of the case did not justify such supplementary penalty.¹⁷⁵ It will be noted that neither in this nor in the other decisions referred to in the preceding paragraph is the possibility denied that, in connexion with injuries caused to aliens, an international body may be authorized to order the payment of an indemnity as satisfaction to the State of nationality for the “moral injury” occasioned to it. In fact, the Permanent Court's decision explicitly recognizes that this may be allowable in “particular cases”.

108. Lastly, the decisions awarding a “nominal indemnity” likewise, although for different reasons, embody no clearly defined position. The decision in the *Brower* case (1923) offers an example. The claim arose out of the British Government's refusal to recognize the right of Brower, a United States citizen, to ownership of certain islands belonging to the Fiji or Ringgold group. Referring to the question of the damages appropriate in the case, the President of the Claims Commission stated: “In these circumstances [the fact that the islands had no real value] we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages. . . . The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.”¹⁷⁶ One author, commenting on this decision, has said that, in general, “nominal damages” may be regarded as reparation for the “moral

injury” caused to the State, in accordance with the same principles as those governing pecuniary satisfaction.¹⁷⁷ This opinion seems correct, although the decision does not state specifically that the indemnity was intended as reparation for moral injury and even though the claimant State does not appear to have based the claim on those grounds. There would appear to be no room for doubt on this score in view of the fact that such trifling damages would never have been awarded as reparation for the injury suffered by the individual and of the explicit statement that “the United States must be content” with these nominal damages.¹⁷⁸

16. *The appropriateness of certain measures of reparation*

109. In the discussion in chapter I on the nature and scope of the duty to make reparation (section 3 *supra*), attention was drawn to the problem of the appropriateness of measures of reparation which might prove incompatible with the municipal law of the defendant State, offend national honour or dignity or be seriously out of proportion to the injury sustained or the character of the act or omission imputed. A measure of reparation may be “inappropriate” for any of these reasons, although this fact will not, of course, affect the duty to make reparation for the injury caused.

110. With regard to compatibility with municipal law, it has been seen that “legal restitution” may involve serious practical difficulties (section 11 *supra*). The adoption of a legislative measure or the rescission of an executive or administrative decision may raise little difficulty, but the repeal of a law which is in force or the revocation of a judicial decision is a much less simple proposition. In this connexion, the Government of Colombia, in its observations on bases of discussions Nos. 5 and 6 drawn up by the preparatory committee on The Hague Conference (1930), argued that, without prejudice to the responsibility which may arise as a result of a final decision manifestly inconsistent with the State's international obligations, the decision must be enforced. “The reparation due for violation of international law,” the Colombian Government added, “does not mean that the decision must be annulled.”¹⁷⁹ In connexion with these difficulties, Anzilotti referred to the additional protocol of 1910, to convention XII of The Hague Conference of 1907 (concerning the establishment of an international prize court), under which the signatory States were authorized to declare that resort to the Court

¹⁷⁷ Bissonnette, *op. cit.*, p. 153.

¹⁷⁸ In other cases in which the question of “nominal damages” has arisen, it has been linked with the form in which “satisfaction” is to be given for an act or omission contrary to international law. See the *United States and Paraguay Navigation Company* (1860) and *Corfu Channel* (1949) cases, in which the payment of “one cent” and “one franc” respectively was considered “ridiculous” as reparation for the unlawful act. See Moore, *History and Digest etc.*, vol. II, p. 1485, and *I.C.J., Pleadings*, vol. III, p. 422.

¹⁷⁹ League of Nations publication, 1930.V.17, pp. 204-205. See in the same sense replies of Germany, Belgium and Czechoslovakia to the questionnaire prepared by the same committee, L. of N. publication 1929.V, 3, pp. 42, 43, 147, and 151, respectively.

¹⁷⁴ *Ibid.*, pp. 450-451. Compare, however, umpire Plumley's opinions in the *Arends* and *Maninat* cases cited earlier, in which he appears to have taken a completely different position.

¹⁷⁵ See Scott, J. B., *Les Travaux de la Cour Permanente d'Arbitrage de La Haye* (1921), pp. 356-357.

¹⁷⁶ See Nielsen, *American and British Claims Arbitration, etc.* (1926), p. 616.

could not be had against them except in the form of an action for damages, so as to avoid the constitutional difficulties encountered by some States in restoring ships and cargo which had been confiscated by their national courts. In his opinion, these instruments, although unratified, were evidence of "the importance attached by States to internal difficulties" raised by restitution in certain cases.¹⁸⁰ The repeal of legislation incompatible with a State's international obligations may give rise to similar difficulties.¹⁸¹ Consequently, it may be said that, whereas the plea of municipal law is not a good defence in a case involving responsibility for acts and omissions contrary to international law, the State can, on the other hand, legitimately resist a demand for or the imposition of forms of reparation which create difficulties of this kind.

111. A measure of reparation may also offend the honour or dignity of the State, or even impair its sovereignty and independence. For example, in the Greek reply of 30 August 1923 to the Italian note demanding various measures of reparation for the murder of General Tellini and the members of his mission, three of those measures were termed "prejudicial to the sovereignty and honour of the Greek State."¹⁸² It was presumably in the light of this and many other precedents that Strupp included an article ruling out "demands tending to offend the honour of the respondent state" in the draft he presented to the German International Law Association in 1927.¹⁸³ Although this is a matter which will often depend on the subjective judgement of the offending State or on the circumstances prevailing when the reparation is claimed, there is no doubt that a State can, without thereby avoiding its duty to make reparation, legitimately resist a demand for or the imposition of measures of reparation which offend its national honour or dignity.

112. On logical grounds, too, a measure of reparation which is appreciably out of proportion to the injury caused or to the nature of the act or omission imputable to the State should probably be regarded as "inappropriate". In the *Mavrommatis* case, the British Government asked the Permanent Court to find that "in any event the compensation claimed [by the Greek Government] is unreasonable and excessive."¹⁸⁴ The question has been repeatedly raised in claims commissions by umpires or arbitrators as well as by commissioners appointed by respondent States, as will be seen in the next chapter, dealing with the form in which the reparation of the injury caused to the alien has been determined.

¹⁸⁰ *Op. cit.*, p. 427.

¹⁸¹ See in this connexion Kopelmanas, "Du conflit entre le traité international et la loi interne", *Revue de droit international et de législation comparée* (1937), pp. 134-5.

¹⁸² The measures in question were: an investigation in accordance with certain stringent conditions; the death sentence for the guilty persons and payment of an indemnity of 50 million lire within five days from the presentation of the demands. See the article cited in footnote 117 above.

¹⁸³ Cited in Reitzer, *op. cit.*, p. 142.

¹⁸⁴ Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 5, p. 10.

Chapter III

THE REPARATION OF INJURY CAUSED TO THE ALIEN

17. Difficulties of repairing such injuries

113. Chapter II was concerned with general questions and principles relating to reparation *stricto sensu*. The present chapter discusses more thoroughly the reparation of injury caused to aliens, especially reparation in the form of "damages". Before proceeding any further, however, we should recall what was said in earlier reports concerning the formidable — not to say insuperable — difficulties that beset any attempt to classify methodically the factors taken into account in determining the quantum of reparation or the criteria applied for this purpose in diplomatic practice and by international tribunals. The reason for these difficulties is that international law provides no precise methods of measurement for the award of pecuniary damages.¹⁸⁵ So fragmentary and confused is this part of the law of international claims that the frequency of comments similar to that quoted should occasion no surprise.¹⁸⁶

114. The reasons for the absence of any consistent system or theory in the matter of the reparation of injury caused to aliens are various. One important factor may have been the fact that clauses concerning reparation are very rarely embodied in *compromis*, and that such clauses as do appear are not worded in terms that afford a satisfactory solution. One of the most explicit clauses of this type is perhaps that included in the convention of 19 November 1926 establishing the British-Mexican Commission:¹⁸⁷

"In order to determine the amount of compensation to be granted for damage to property, account shall be taken of the value declared by the interested parties for fiscal purposes, except in cases which in the opinion of the Commission are really exceptional.

"The amount of the compensation for personal injuries shall not exceed that of the most ample compensation granted by Great Britain in similar cases."

115. The first provision furnishes a specific standard, although it is one that strictly speaking can only be applied in the case of immovable property. The second, as Feller has pointed out, does not indicate whether or not the "most ample compensation" refers to compensation awarded by courts or by administrative authorities in the United Kingdom.¹⁸⁸ The Convention establishing the General Claims Commission (United States-Mexico) does not furnish standards of this kind and merely provides that citizens of the two countries are to receive "just and adequate compensation" for their losses or damages.¹⁸⁹ The provisions concerning the application of general principles of justice and

¹⁸⁵ Eagleton, *The Responsibility of States in International Law*, p. 191.

¹⁸⁶ See, for example, Feller, *The Mexican Claims Commissions*, p. 290.

¹⁸⁷ *Ibid.*, p. 473.

¹⁸⁸ *Ibid.*, p. 292.

¹⁸⁹ *Ibid.*, p. 326.

equity or reparation *ex aequo et bono* included in other treaties or conventions are marked by a similar vagueness.¹⁹⁰

116. The vagueness and lack of precision of these clauses are such that arbitral tribunals and commissions have of necessity been compelled to exercise a wide discretion. In this respect the situation has much in common with the position in diplomatic practice, in the sense that in the latter case the measure or amount of the reparation depends on the "unilateral will of the injured State," while in the case of international tribunals it depends on the discretionary powers delegated to disinterested third parties.¹⁹¹ This wide discretion has on occasion been expressly invoked by arbitrators themselves. Thus, in the *E. Roberts* case, umpire Lieber said that "... we, the Commissioners, are compelled to proceed solely by simple conjectures and inferences, drawn from the few facts we have before us, and to make a very ample use of the discretionary power which pertains to our office."¹⁹² It is of course true that in exercising their discretionary power arbitrators frequently accept certain self-imposed limitations,¹⁹³ which at least saves them from utter arbitrariness. But it is no less true that arbitral awards are frequently the result of "settlements behind closed doors," and thus "present a patchwork of seemingly arbitrary determinations on this subject."¹⁹⁴ Cases which illustrate this state of affairs have been cited in the previous chapter and further examples will be examined below.

117. In spite of this situation, publicists and even arbitrators themselves have sought to identify some of the general criteria and factors taken into consideration in fixing reparation for injuries to aliens. One of these, the basic and at the same time general criterion, is that the reparation should be commensurate with the nature or extent of the actual injury. But the assessment of the injury is not always easy, for, as will be seen in this chapter, even in the case of material injuries to persons or to property, the reparation is not always strictly in keeping with the true nature or extent of the injury. Other factors generally come into play, such as the circumstances in which the injury occurred, the gravity, in special situations, of the act or omission imputable to the respondent State and, on occasion, factors justifying a reduction in the amount of the reparation.

118. For these reasons, it is proposed first to consider the reparation of injuries to persons and property in general, and then to examine specific situations and problems arising in connexion with the reparation of these two classes of injury.

¹⁹⁰ See Reitzer, *La réparation comme conséquence de l'acte illicite en droit international*, 1939, p. 161. The convention between the United States and Mexico of 2 March 1897 fixed a maximum amount which no reparation was to exceed. *Ibid.*, p. 158, footnote 141.

¹⁹¹ *Ibid.*, p. 160.

¹⁹² See Whiteman, *Damages in International Law*, vol. II, p. 833.

¹⁹³ See Personnaz, *La réparation du préjudice en droit international public* (1939), pp. 35-7.

¹⁹⁴ See Feller, *op. cit.*, p. 290.

18. The reparation of personal injuries in general

119. For the purpose of a proper study of the reparation of this general category of injuries, cases of deprivation of liberty and expulsion must be distinguished from those where bodily and mental injury, including death by violence, are occasioned separately, and from cases of moral injury *stricto sensu*.

(a) Deprivation of liberty, and expulsion

120. As will be seen later on, the expression "deprivation of liberty" in the broad sense covers both cases of the expulsion of foreigners and cases of any form of restriction on freedom of movement. In its more strict sense, both in international and in municipal law, it refers only to cases of arrest, detention and imprisonment. If for the moment we speak only of the latter, we should first point out that reparation under this head will generally apply to the specific injury and damage which may result from the arbitrary or illegal deprivation of liberty which the alien has suffered, as well as the financial prejudice he may have suffered through loss of time while held in detention or in prison, and the moral injury he may have sustained in the event of ill-treatment or other circumstances tending to aggravate the act or omission imputable to the State.¹⁹⁵ Before going on to describe and classify the various cases, we should explain that there are certain special circumstances in which, despite an apparent analogy with the acts or omissions which give rise to international responsibility in such cases, reparation has been disallowed. They include, for example, unnecessarily prolonged detention, unsuitable conditions of imprisonment, detention and arrest on reasonable suspicion, the issue, in error, of an order of detention or arrest and the holding of the person arrested or imprisoned *incomunicado*.¹⁹⁶

121. Whiteman identifies four main groups of cases according to the circumstances giving cause for reparation. The first group includes cases of unjustified detention or arrest. The case of the *Costa Rica Packet* falls within this group inasmuch as reparation was ordered for the injuries caused as the result of the arrest of the ship's captain by the Netherlands authorities without "real grounds."¹⁹⁷ The second group includes cases of unjustified arrest accompanied by ill-treatment. The case of *D. Gahagan* (1842), which falls within this second group, shows to what extent the latter circumstance may affect the decision regarding the quantum

¹⁹⁵ Ralston, citing numerous cases, has indicated in this respect that "In cases of this sort where the respondent government has been liable, awards have varied in amount dependent upon the physical or moral hardship connected with the imprisonment, its duration, the station in life of the person offended against, the incidental injury to or destruction of his business (although the latter would seem rather consequential than direct), and other special circumstances." *The Law and Procedure of International Tribunals* (rev. ed., 1926), pp. 262-3.

¹⁹⁶ See examples of such cases in Whiteman, *Damages in International Law* (1936), vol. I, pp. 287 *et seq.*

¹⁹⁷ *Ibid.*, p. 314. See also the case of *Battistini*, in Ralston, *French-Venezuelan Arbitrations of 1902* (1904), p. 764.

of reparation.¹⁹⁸ The third group consists of cases where arrest was justified but was accompanied by irregularities in procedure. A typical case is that of *B. E. Chattin*, a United States citizen who was arrested in Mexico and tried, according to the arbitral decision, without "proper investigations," with "insufficiency of confrontations" and with the authorities "withholding from the accused the opportunity to know all of the charges brought against him..." etc.¹⁹⁹ The fourth and last group consists of cases where the arrest was likewise justified, but was accompanied, this time, by ill-treatment. The case of *Captain B. Ripley*, another United States citizen arrested in Mexico, who was the victim of cruel treatment by the local authorities, falls within this fourth group.²⁰⁰

122. Let us now see how damages were computed in these cases of deprivation of liberty, particularly when accompanied by circumstances aggravating the arrest or imprisonment of the alien. Referring to the precedents of the General Claims Commission (United States—Mexico), Feller notes a marked inconsistency in the criteria employed to determine the total amount of the indemnity. For example, in the *Faulkner* case, the Commission relied on the criterion established in the case of the warship *Topaze*, decided by the British-Venezuelan Commission,²⁰¹ in which the sum of \$100 was awarded for each day of detention. In other cases, however, the sums awarded do not conform to this criterion, nor do they appear to be governed by the particular circumstances of each case.²⁰² Personnaz quotes further cases to illustrate the same inconsistency in the case-law of other claims commissions.²⁰³ In the *Chevreau* case (decided in 1931), the Permanent Court of Arbitration rejected the method or criterion of determining the amount of reparation by the duration of the period of arrest or imprisonment, preferring that of a global sum which should include fair compensation for all injury and loss. "... The calculation of the indemnity at a certain rate per day is simply a practical means of avoiding an arbitrary figure. Basically, what is necessary is to determine, in the light of the individual circumstances of each case, the total sum which would represent fair compensation for the moral or material damage sustained..."²⁰⁴

123. The expulsion of foreigners only exceptionally gives rise to the reparation of the injury or damage suffered by the individual. Despite the parallel which has been pointed out between the damage or loss which may be caused by expulsion and that deriving from the acts referred to above, there are certain very real differences which are the result, not only of the intrinsic difference between the two classes of acts or measures,

but also of the wide scope of the State's right to expel from its territory persons not of its nationality. In this connexion it has been said that²⁰⁵

"It is only when the expelling State exercises this right in such an arbitrary or harsh manner as to constitute a departure from the standard obtaining for such procedure between civilized States or contrary to treaty provisions, that a liability for the payment of damages arises on the part of the respondent State. Accordingly, there is an obligation to pay damages in relatively few cases of expulsion."

One of these cases was that of *Zenman*, in which the United States-Mexican Commission established in 1868 allowed an indemnity of \$1,000 on the ground that Mexico had not given proof of its reasons for the expulsion.²⁰⁶ In the *Paquet* case (expulsion) the arbitral commission ordered the payment of 4,500 francs on the ground that "... the general practice among governments is to give explanations to the government of the person expelled, if it asks them, and when such explanations are refused, as in the case under consideration, the expulsion can be considered as an arbitrary act of such a nature as to entail reparation."²⁰⁷ In the case of *Boffolo*, umpire Ralston allowed only 2,000 bolivars in view of the low character of the person expelled, and also of the fact that he was soon allowed to return to the country.²⁰⁸ Expulsion sometimes occurs in circumstances which genuinely aggravate responsibility, as in the case of *Maal*, a Netherlands citizen who was arrested, stripped of his clothes in public view and ridiculed, before being expelled from the country. In view of the gravity of these circumstances, the umpire considered an indemnity of \$500 justifiable "solely because of these indignities".²⁰⁹

124. Certain restrictions on ordinary freedom of movement may also give rise to the international responsibility of the State and afford grounds for the reparation of the injury which an alien thereby sustains. For example, in the case of *J. L. Underhill*, who was prevented from leaving the country because her passport was wrongfully withheld from her, umpire Barge allowed an indemnity of \$3,000 for the month and a half by which she was compelled to delay her departure.²¹⁰

(b) Bodily and mental injury and violent death

125. The injuries meant here are those caused separately from and independently of any other injurious act; in this sense, they are distinguishable from the cases just considered. Furthermore, as was indicated in the discussion of this class of injuries in the previous chapter (section 7), this class generally includes, in addition to the physical and mental injury or suffer-

¹⁹⁸ See Whiteman, *op. cit.*, p. 322.

¹⁹⁹ *Ibid.*, p. 329.

²⁰⁰ *Ibid.*, p. 344.

²⁰¹ See Ralston, *Venezuelan Arbitrations of 1903*, p. 329.

²⁰² See *The Mexican Claims Commission*, pp. 300-1.

²⁰³ See *La réparation du préjudice en droit international* (1949), pp. 211-2.

²⁰⁴ *Reports of International Arbitral Awards*, vol. II, United Nations publication, Sales No. 49.V.1, p. 1139.

²⁰⁵ Whiteman, *op. cit.*, p. 419.

²⁰⁶ *Ibid.*, pp. 427-8.

²⁰⁷ See Ralston, *Venezuelan Arbitrations of 1903*, p. 267.

²⁰⁸ *Ibid.*, p. 705.

²⁰⁹ *Ibid.*, p. 916. However, this decision may be interpreted to mean that the indemnity was ordered rather as a "satisfaction of a pecuniary nature" to the State of the expelled person's nationality. On this point see section 15 (b), *supra*.

²¹⁰ *Ibid.*, p. 51.

ing, the medical expenses incurred, the financial loss suffered during the period of convalescence and also the diminution (if any) in the person's future capacity for work. Consequently, in determining the quantum of the reparation, the arbitrator may take all these elements into account, over and above the actual bodily and mental injury.²¹¹ At the same time, however, the causality factor plays an important part, and the reparation will not cover damages which are not sufficiently closely connected, by a cause-and-effect relationship, with the original injury. Besides, it is not apparently always essential to distinguish, for the purpose of determining the amount of the reparation for such injuries, cases in which the injury is the result of acts of local authorities from those in which it is caused by an individual. The same is true in the case where the alien loses his life; for as will be seen in detail later, the form and amount of the reparation in the event of loss of life, as in the cases mentioned earlier, depend rather on the nature of the act or omission imputable to the State and, in the case of violent death, on the presence of some loss or damage sustained as a result of that act by third persons.

126. With regard to bodily injury, the cases which appear to present least difficulty are those in which the injury has no consequence other than the temporary disablement of the injured individual. The amount of the reparation is usually limited, particularly if the injuries do not fall within the category of serious injuries. For example, in the decision concerning the riot which took place in 1912 in the *Cocoa Grove District* (Panama), when a number of United States nationals were injured, two of these were awarded an indemnity of only \$75 for wounds and bruises on the head caused by members of the local police.²¹² In other cases, however, the fact that the original injuries were indirectly aggravated as a result of some act or omission by the local authorities led to an increase in the indemnity.²¹³ On the other hand, if the injury results in the permanent disablement of the alien, the computation of the damages is based primarily on the permanence of the injury. Other cases will be mentioned in the following paragraphs, but even in the same decision on the disturbances in Panama, arbitrator Rappard awarded damages according to the degree of permanence of the injury. As Whiteman has indicated, the permanence or durability of this kind of injury is subject to proof — i.e., it is not usually taken for granted.²¹⁴

127. The reparation may also cover consequences which at times result from the injury to a person's health; this occurs particularly in cases where an indemnity is granted for mental injury. A number of the survivors of the *Lusitania* were indemnified in this way. For the most part the injury consisted of the shock suffered on being thrown into the sea when the sink-

ing took place, but there were also cases of persons who lost members of their families or underwent other mental anguish which affected them permanently. In those cases, some of the indemnities granted amounted to as much as \$12,000 with interest.²¹⁵ As will be seen later, such mental injuries, which are the direct result of a physical injury or at any rate of the act which gives rise to the reparation, should not be confused with what are called "moral injuries" (*préjudice moral*) in the strict sense which this term may be given. The former are primarily pathological in nature, whereas the latter are essentially moral or psychological.

128. So far as the reparation of the injury is concerned, cases involving the violent death of an alien are of a rather different nature. In the first place, as will be remembered from chapter II, the damage in these cases derives not from the actual loss of life, but from the prejudice suffered in consequence thereof by a certain class of third persons — namely, the dependants of the deceased — and sometimes also persons who, by reason of close relationship or for some other cause, suffer "moral injuries" as a result of the death. This second group will be dealt with separately, for this class of injury may also be the consequence of other acts or omissions considered to be contrary to international law. With regard to the first group, the normal criterion in determining the amount of reparation must usually be the actual circumstances of the persons held to have suffered the prejudice. In this connexion, in one of the *Lusitania* cases, umpire Parker stated: "Claims growing out of injuries resulting in death are not asserted on behalf of the *estate* of the deceased, the award to be distributed according to the provisions of a will or any other fixed or arbitrary basis. The right to recover rests on the direct personal loss, if any, suffered by each of the claimants."²¹⁶ In the cases now under consideration, the "direct personal loss" referred to is pecuniary in nature and is measured principally by the degree of financial dependence which existed between the claimant and the deceased. This basic criterion, however, has not prevented claims commissions in certain cases from also taking into account other special factors, such as the general health of the deceased, the number of his dependants, their ages, the probable increase or decrease in their incomes, etc.²¹⁷

(c) Moral injury

129. In sub-section (b), reference was made to the difference between "mental injury" and "moral injury" in the strict sense. The latter is more psychological in character, purely "intellectual", usually temporary, and includes conditions or situations such as the grief and suffering caused by the loss of a loved one, the anguish and anxiety arising from this or other causes, as well as the states of mind resulting from attacks upon a

²¹¹ On this point see Personnaz, *op. cit.*, p. 206.

²¹² See Whiteman, *op. cit.*, vol. I, pp. 523-4.

²¹³ See case of *Coleman* (1928), *Reports of International Arbitral Awards*, vol. IV, United Nations publication, Sales No. 51.V.1, pp. 367-368.

²¹⁴ *Op. cit.*, p. 593.

²¹⁵ See Mixed Claims Commission (U.S.-Germany), *Opinions* (1925), docket 430, p. 418.

²¹⁶ See Administrative Decision No. II, in United Nations, *Reports of International Arbitral Awards*, vol. VII, p. 27.

²¹⁷ In this connexion see Whiteman, *op. cit.*, pp. 667 *et seq.*

person's dignity, honour or feelings. As was indicated in chapter II, insults or attacks upon the reputation may be included within the broad concept of "pré-judice moral". In the present context, however, the question is whether this class of injury is capable of reparation, and if so, how the reparation has been computed in the past. So far as the second half of the question is concerned, we are not here speaking of the purpose or character which the reparation has had in past cases; this is a separate problem, which will be investigated later.

130. With regard to the first half of the question, one of the opinions delivered by umpire Parker appears to express the general principle of international law in the matter :²¹⁸

"That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt, and such compensation should be commensurate to the injury. Such damages are very real, and the mere fact they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty. . . ."²¹⁹

The difficulty lies rather in the way in which these damages are to be computed. In this connexion, in the *Di Caro* case, Umpire Ralston recognized that "For all this no human standard of measurement exists, since affection, devotion and companionship [of the deceased] may not be translated into any certain or ascertainable number of bolivars or pounds sterling."²²⁰ However, that did not rule out the separation of the moral injury nor, as in the case just quoted and, it seems, in the majority of those in which such injury has been claimed, has it prevented the injury from figuring among the factors which have helped to determine the total amount of reparation. The illustrations below will show how the computation has been made in various cases, including some where there were no other factors or injuries to be taken into consideration.

131. In the first place, there are the cases in which the claim is in favour of the person who suffered the moral injury. Within this first group the most frequent have been those of ill-treatment suffered by aliens upon their arrest or imprisonment. In the case of *A. C. Le More* (1883), an indemnity of \$10,000 was allowed for eleven days' imprisonment, the greater part of which must have been for his "unnecessary, extreme and much too severe" punishment during imprisonment.²²¹ In the case of *McNeill* (1931), the British-Mexican Claims Commission granted an indemnity of 6,000

²¹⁸ See *Opinion in the Lusitania Cases*, in *Reports of Arbitral Cases*, vol. VII, p. 40.

²¹⁹ Exceptionally, reparation for moral injuries has been denied as happened in the *Davis* case, in which umpire Rappard declared: "Neither can mental anguish of the beneficiaries be indemnified; the umpire holds that a *solatium* for the loss of a member of the family and for the grief caused by that death cannot be granted." *Foreign Relations of the United States (1916)*, p. 919.

²²⁰ See Ralston, *Venezuelan Arbitrations of 1903*, p. 770.

²²¹ See Whiteman, *op. cit.*, vol. I, p. 344.

pesos without clearly stating the grounds, but in the claim the sum of £5,000 was asked as compensation for the permanent damage to the claimant's health together with such sum as might be considered equitable compensation for the "moral and intellectual damages" suffered by the claimant during the twenty hours of his imprisonment, in the course of which he had been threatened with death by the rebel forces.²²² The £2,000 which *Chevreau* secured from the Permanent Court of Arbitration was granted by the latter on the grounds of "damages for imprisonment and the physical and moral suffering resulting from that imprisonment".²²³ In another case, decided *ex aequo et bono*, the indemnity granted was as much as £4,802 plus interest, to cover "the material and moral injury to his person resulting from the difficulties, vexations and ill-treatment".²²⁴ It would be possible to cite a number of cases of maltreatment or other acts contrary to human dignity which took place in different circumstances.²²⁵ Another feature to be found in such cases, although of an entirely different kind, is that reflected in the decisions of arbitrator Sissett, in allowing \$35,000 in consideration of the fact that "the United States Government also claim the sum of \$50,000 in respect of loss of time, injury to credit and grave anxiety of mind on account of the cancellation of the contract."²²⁶

132. The reparation of an injury to a person's reputation does not always appear to be treated in the same way as compensation for other moral injuries. In fact, the only occasions on which international case-law has recognized the admissibility of indemnification for damage to repute seem to have been those where the financial credit or solvency of the person was affected as a direct consequence of the acts imputable to the respondent State. For instance, in the *Fabiani* case, the arbitrator declared that Fabiani had suffered considerable material, and more particularly moral, damage (tort) as a result of the declaration of his bankruptcy in Venezuela, the closure of his commercial establishments at Maracaibo, the financial difficulties which inevitably ensued, and the compulsory abandonment of his business.²²⁷ In the *Santangelo* case, the reparation took account of the fact that the person had been "injured in health and reputation and ruined in for-

²²² See *Reports of International Arbitral Awards*, vol. V, United Nations publication, Sales No. 52.V.3, pp. 165 *et seq.*

²²³ *Ibid.*, vol. 11, p. 1139.

²²⁴ *Campbell* case (1931), United Kingdom v. Portugal, United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1154.

²²⁵ For example, the *Maal* case cited in connexion with the expulsion of aliens, in which an indemnity of \$500 was granted. A still more niggardly sum (\$250), considering the nature of the humiliation, was granted in the case of *McDaniel*, an American citizen who was forced, among other things, "to follow a circuitous route to a bull ring", and was also "subjected to gross insults, indignities and assaults". See US-Mexico Special Claims Commission, *Reports to the Secretary of State*, U.S. Govt. Print. Off., Washington, D.C., 1940, p. 150.

²²⁶ *Shufeldt Claim* (1930), United Nations, *Reports of International Arbitral Awards*, vol. II, p. 1101.

²²⁷ Ralston, *Report of French-Venezuelan Mixed Claims Commission of 1902* (1906), p. 182.

tune by his sudden and harsh expulsion".²²⁸ A British-United States commission granted \$30,204 in the *Shaver* case in which \$100,000 was claimed for three months' imprisonment and because, as a result of this, the claimant had been deprived of a lucrative position as the agent of a railway company, a fact which had in turn caused him to lose the confidence of his employees.²²⁹ In connexion with this particular type of moral injury, the admissibility of reparation has sometimes been questioned in cases concerned not with individuals but with certain bodies corporate.²³⁰

133. A second group among the cases now under discussion consists of those in which the moral injury was caused to third persons through the loss of a near relative. These cases usually arise as a result of acts committed by individuals in circumstances which give rise to the (indirect) international responsibility of the State. Since the question of reparation in connexion with this kind of responsibility is to be studied in the next chapter, it will suffice for the present to refer to the cases in which the death of an alien was caused by an agent or authority of the State; this does not necessarily mean, of course, that either the nature of the injury sustained in one or the other case or, in consequence, the title to or the amount of the reparation is essentially different.²³¹ There is also a further type of case which cannot be classified in either of these two categories — those where, as in the *Lusitania* cases, death was caused by an independent event.

19. *Reparation in cases of injuries caused by acts of individuals*

134. Where the injuries are caused to an alien not as the direct consequence of an act or omission on the part of the organs or officials of the State, but through acts of private individuals, the reparation presents different features and problems. International responsibility in these cases originates, not in the act of the individual itself, but in the conduct of the organs or officials towards that act, that is to say, from the lack of "due diligence" which may be imputed to the State in that connexion. This particular situation naturally raises the question of the grounds on which reparation is to be based: the injurious act of the individual or, on the contrary, the act or omission truly imputable to the State from the international standpoint. To facilitate the examination of practice in this matter it is useful to begin by distinguishing between two possible situations — namely, negligence in not preventing the punishable act, and failure to prosecute and punish the guilty.

135. Let us first consider the second of these, which is the one that has caused the greatest difficulties and complications both in the practice of the claims commissions and in the writings of learned authors. Before the famous *Janes* case (1926), judicial precedent seems

to show that reparation was determined on the basis of the injury actually suffered by the alien, although at times the nature or gravity of the conduct imputable to the State was taken into account. Perhaps the typical decision is that of the German-Mexican Commission in the case of *M. L. Plehn*, in which the widow was awarded the sum of \$20,000 gold, in consideration not of the degree of negligence of the Mexican authorities in apprehending and punishing the guilty, but of the financial support she would be deprived of in the future through the loss of her husband.²³² Similarly, no considerations other than those of the material loss suffered by the relatives appear to have been taken into account when the General Claims Commission (United States-Mexico), determined the amount of the reparation in the cases of *L. S. Kling*, *M. Roper*, *M. Brown* and *R. Small*.²³³ The amount of damages was therefore determined, or so it seems, in the same way as in the ordinary everyday cases of "direct" responsibility considered in section (b) of the previous chapter.

136. In the case of *Laura M. B. Janes*, however, the reparation was determined on an entirely different basis. In the first place, the General Claims Commission rejected the criterion which had generally been followed, with these comments:²³⁴

"If the murdered man had been poor, or if, in a material sense, his death had meant little to his relatives, the satisfaction given these relatives should be confined to a small sum, though the grief and the indignity suffered may have been great. On the other hand, if the old theory is sustained and adhered to, it would, in cases like the present one, be to the pecuniary benefit of a widow and her children if a government did *not* measure up to its international duty of providing justice, because in such a case the government would repair the pecuniary damage caused by the killing, whereas she practically never would have obtained such reparation if the State had succeeded in apprehending and punishing the culprit."

In the Commission's opinion, the solution reached in the past in other cases of improper governmental action would have been adequate to the present case too, for "the indignity done the relatives of Janes by non-punishment in the present case is, as that in other cases of improper governmental action, a damage directly caused to an individual by a government."²³⁵ And the following passage, referring to the method of computing this class of damages, reiterates the basis for their reparation:²³⁶

"As to the measure of such a damage caused by the delinquency of a Government, the non-punishment, it may readily be granted that its computation is more difficult and uncertain than that of the damage caused by the killing itself. The two delinquencies being different in their origin, character and effect, the measure of damages for which the Government should be liable cannot be computed by merely stating the damages caused by the private delinquency of Carbajal [the murderer]. But a computation of this character is not more difficult than computations in other cases

²²⁸ See Whiteman, *op. cit.*, p. 40.

²²⁹ See Moore, *International Arbitrations . . .*, vol. IV, p. 3333.

²³⁰ See Whiteman, *op. cit.*, pp. 364-365.

²³¹ In this connexion see Personnaz, *op. cit.*, pp. 203-4.

²³² See list of these cases in Whiteman, *op. cit.*, p. 709, footnote 246.

²³³ See *Opinions of Commissioners* (1931), p. 36 and (1927), pp. 205, 211 and 212, respectively.

²³⁴ *Ibid.* (1927), pp. 115-116.

²³⁵ *Ibid.*, pp. 117-118.

²³⁶ *Ibid.*, pp. 118-119.

of denial of justice such as illegal encroachment on one's liberty, harsh treatment in jail, insults and menaces of prisoners, or even non-punishment of the perpetrator of a crime which is not an attack on one's property or one's earning capacity, for instance a dangerous assault or an attack on one's reputation and honor. Not only the individual grief of the claimants should be taken into account, but a reasonable and substantial redress should be made for the mistrust and lack of safety, resulting from the Government's attitude. . . .

"Giving careful consideration to all elements involved, the Commission holds that an amount of \$12,000, without interest, is not excessive as satisfaction for the personal damage caused the claimants by the non-apprehension and non-punishment of the murderer of Janes."

The award of reparation for the "grief and indignity" suffered by the relatives of the victim is found also in other cases decided by the same commission, such as those of *A. Connelly and M. E. A. Munroe*, although they show considerable differences in the sums allowed on this ground.²³⁷

137. In one case, in particular, that commission referred to the peculiar nature of this kind of reparation contrasting it with a reparation of a strictly compensatory character: "It would seem, therefore, that, if in the present case injustice for which Mexico is liable is proven, the claimants shall be entitled to an award in the character of *satisfaction*, even when the direct pecuniary damages suffered by them are not proven or are too remote to form a basis for allowing damages in the character of reparation (compensation)."²³⁸ The French-Venezuelan Commission of 1902 considered that in such cases of responsibility there was, in addition, an injury to the State of the nationality of the person concerned which should be taken into account in determining the reparation. In fact, in the case of the heirs of *J. Maninat*, umpire Plumley stated that, apart from the moral injuries suffered by the relatives, "the more important feature of this case is the unatoned indignity to a sister republic through this inexcusable outrage upon one of her nationals who had established his domicile in the domain of the respondent government." As a "just compensation which covers both aspects of this case" the sum of 100,000 francs was awarded.²³⁹

138. In the *Neer* case, the General Claims Commission considered the question of the degree of negligence necessary to warrant reparation and, consequentially, whether the amount of reparation should vary according to the measures taken for the purpose of apprehending and punishing the culprits. With regard to the first, it refused to allow an indemnity because it considered that the measures taken, although they proved ineffective, fulfilled the requirements of "due diligence".²⁴⁰ In the *E. Almaguer* case, the Commission was more explicit in this regard, for it stated that in determining the reparation (\$7,000) it had taken into account the fact that "there was a certain serious prosecution of some persons, while as

regards others there was a negligent prosecution and no punishment."²⁴¹ These decisions, independently of their relative merits, are at least interesting as illustrations of the general but fundamental principle which has been applied in the kind of case considered in this context—namely, the principle that the reparation should be based on the nature of the conduct of the State towards the act of the individual and that the amount of such reparation should be determined according to the degree of gravity of such conduct. With regard to the latter, account should also be taken of the fact that sometimes the conduct of the State indicates a certain connivance at or even open complicity in the act of the individual, as will be shown in the next section.

139. In cases of injury caused by lack of due diligence in preventing an act of an individual, no claims commission has ever awarded reparation—or at any rate ever explicitly described it—as "satisfaction" to the injured alien. There has never been anything more than a recognition of its admissibility, in the finding that the injury could have been avoided if adequate measures had been taken, and, at most, an acknowledgment of the attitude of outright acquiescence sometimes adopted by the authorities towards the commission of the punishable act. This aspect of the matter will be taken up again in the next section, but some examples may help to show the circumstances in which reparation has been considered admissible and how the amount has been determined. In the case of *V. A. Ermerins*, the General Claims Commission awarded an indemnity of \$1,464.05, for damage to property, "especially in view of the fact" that since the house which suffered the damage "was situated just across the street from police headquarters and the Alcalde's office," the authorities could have taken measures to prevent the looting.²⁴²

20. *Reparation of a "punitive" character (punitive damages)*

140. In connexion with the cases considered in the previous and other sections, the question has been raised repeatedly in doctrine and even in diplomatic practice and in international case-law, whether the reparation of the injury caused to the foreign individual can be "punitive" in character. The question is fairly complex, as it is not enough merely to determine whether reparation of this kind can be awarded or not; for, if this question is decided in the affirmative, other aspects of the problem will immediately need to be solved. It will be necessary to determine, for instance, whether such reparation is applicable only to a specific category of injuries or whether, on the contrary, its applicability rests rather on the nature or gravity of the act which gave rise to international responsibility. A further question to be settled is whether this form or mode of reparation is given as a kind of "satisfaction" to the individual himself, or whether it is rather a genuine measure of satisfaction to the State for the

²³⁷ See Feller, *op. cit.*, pp. 298-9.

²³⁸ *Stephens* case, *Opinions of Commissioners* (1927), p. 397.

²³⁹ See Ralston, *Report of French-Venezuelan Claims . . .*, p. 78.

²⁴⁰ See *Opinions of Commissioners* (1927), pp. 73, 71.

²⁴¹ *Ibid.* (1929), p. 299.

²⁴² *Ibid.* (1929), p. 220.

“moral injury” which it has sustained. The first and most important point, however, is whether there can actually be any reparation of this kind and, if so, what is its real purpose.

141. International courts and tribunals have at times expressly and categorically denied that reparation for injuries caused to aliens can be punitive in character. As was seen in the passages dealing with the reparation of moral injuries in general, in his *Opinion on the Lusitania cases* umpire Parker declared that the injury was subject to reparation “but not as a penalty.” In other passages in the same opinion he was more explicit, stating that “In our opinion the words exemplary, vindictive or punitive as applied to damages are misnomers. The fundamental concept of ‘damages’ is satisfaction, reparation for a loss suffered; a judicially ascertained compensation for wrong...”, and that “...as between sovereign nations the question of the right and power to impose penalties, unlimited in amount, is political rather than legal in its nature, and therefore not a subject within the jurisdiction of this Commission.”²⁴³ In other cases, the admissibility of this kind of reparation has been denied, not for substantive reasons, but on the grounds of the lack of competence of the arbitral commission. The opinion just quoted stated that it was not necessary to hold that “exemplary damages can not be awarded in any case by any international arbitral tribunal. A sufficient reason why such damages cannot be awarded by this commission is that it is without the power to make such awards under the terms of its charter — the Treaty of Berlin.”²⁴⁴

142. Nevertheless, in diplomatic practice and even in the case-law of the claims commissions, it is sometimes possible to find reparation of a “punitive” character accepted and defined in unequivocal terms. As regards diplomatic practice, and leaving aside, of course, those incidents which have given rise to “pecuniary satisfaction,” we may cite the case of a United States missionary murdered by a mob in Canton province, in which an additional indemnity of 50,000 taels was

²⁴³ Reports of International Arbitral Awards, vol. VII, pp. 39 and 43 respectively.

²⁴⁴ *Ibid.*, p. 41. The lack of competence of the Commission to award an indemnity as a penalty was also expressly invoked, by reason of the terms of the agreement or as a matter of principle, in the decision on the *Brooks case*, Moore, *International Arbitrations, etc.*, vol. IV, p. 4311; in the Portuguese-German Arbitration of 1919, United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 1076-7; and in the *Torrey and Metzger cases*, Ralston, *Venezuelan Arbitrations of 1903*, pp. 162-4 and 578-80 respectively. These cases have provoked comments such as the following: “While there is little doubt that in many cases the idea of punishment has influenced the amount of the award, yet we are not prepared to state that any commission has accepted the views that it possessed the power to grant anything save compensation.” Ralston, *International Arbitral Law and Procedure* (1910), pp. 180-1; “Arbitral commissions, while often apparently taking into consideration the seriousness of the offense and the idea of punishment in fixing the amount of an award, have generally regarded their powers as limited to the granting of compensatory, rather than exemplary, damages. In some cases, they have in dicta considered that there was in a given case no justification for the award of punitive damages, indicating thereby that they might, in an appropriate case, have awarded exemplary damages.” Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 419.

asked for the relatives, to be “regarded as exemplary damages to which China, by the failure of her officials to prevent this outrage, has made herself liable”,²⁴⁵ and the United States claim against Panama for “such measure or redress as will be amply compensatory to the persons aggrieved or to their dependents, sufficiently exemplary for the grave offence, and strongly deterrent against similar occurrences in the future”.²⁴⁶ From the case-law of claims commissions, despite the difficulties concerning competence mentioned in the preceding paragraph, examples may even be quoted where the reparation was expressly declared to be punitive in character. One such is the case of *M. Moke*, in which the United States-Mexican Commission stated: “...we wish to condemn the practice of forcing loans by the military, and think an award of \$500 for twenty-four hours’ imprisonment will be sufficient. . . . If larger sums in damages, in such cases, were needed to vindicate the right of individuals to be exempt from such abuses, we would undoubtedly feel required to give them.”²⁴⁷ And in the decision in the *Maal case*, cited earlier, the Commission declared that “...the only way in which there can be an expression of regret on the part of the government and a discharge of its duty toward the subject of a sovereign and a friendly State is by making an indemnity therefore in the way of money compensation. This must be of a sufficient sum to express its appreciation of the indignity practised upon this subject and its high desire to fully discharge such obligations.”²⁴⁸ In the other cases in which there were circumstances aggravating responsibility it is clear, as Borchard said with reference to the *Janes case*, that “...the inarticulate purpose of such damages, which may or may not be actually compensatory, must involve the theory that by such penalty the delinquent government will be induced to improve the administration of justice and the claimant government given some assurance that such delinquencies, to the injury of its citizens, will, if possible, be prevented in the future.”²⁴⁹

143. It will thus have been observed that in case-law, and especially in the cases referred to in the preceding section, the reparation was determined at times wholly or primarily according to the injury (either moral or of some other kind) actually suffered by the individual, but at others according to the nature or gravity of the act or omission imputable to the State. In the latter circumstances, it is certainly much more difficult to see the reparation simply as a measure of

²⁴⁵ See *Foreign Relations of the United States* (1906), p. 319.

²⁴⁶ *Ibid.* (1909), p. 476.

²⁴⁷ Moore, *op. cit.*, vol. IV, p. 3411.

²⁴⁸ Ralston, *Venezuelan Arbitrations of 1903*, p. 916.

²⁴⁹ See “Important Decisions of the Mixed Claims Commission United States and Mexico”, *American Journal of International Law* (1927), vol. 21, p. 518. Dunn expressed a similar opinion when he maintained that the purpose of the award in cases of lack of adequate punishment of the culprits was clearly not to make good some fancied loss sustained by the relatives but to express disapproval of the actions of the Government. The award in the *Janes case*, he added, “... was in the nature of a penalty imposed on the Government for being derelict in its duties, not an effort merely to repair a material loss sustained by private individuals.” See *The Protection of Nationals* (1932), pp. 177-8 and also 185-6.

“compensation” for the injury caused rather than as a measure of punishment for an act or omission contrary to international law which is regarded as particularly grave. At the same time, as Briggs has observed, if damages are regarded as compensatory, it is both illogical and arbitrary, in cases of “indirect” responsibility, to measure them by the consequences of an act for which the State is admittedly not responsible. But if, on the other hand, damages are punitive, it is altogether proper to measure them by the consequences of an act (even by a private individual) which the international community wishes to discourage.²⁵⁰

144. The idea that reparation may be punitive appears to have gained fairly wide currency in doctrine. Even Anzilotti himself, who believed that no distinction could be made between civil and criminal responsibility in international law, went so far as to admit that in all the forms of reaction to the unlawful act, even when these are not clearly differentiated, “. . . there is an element of satisfaction and an element of reparation, the idea of the punishment of the act and that of the reparation of the injury suffered; what varies is rather the proportion between these two elements.”²⁵¹ But more recently, some authors have tended to regard this type of reparation as a separate and distinct concept from that of reparation *lato sensu*. Eagleton, for example, considers it a supplementary or additional indemnity granted to the injured individual on the grounds of the conduct imputable to the State.²⁵² Similarly, Schwarzenberger has said that if the term “punitive damages” was intended to express disapprobation of the international tort, or excessive damages were ordered for purposes of deterrence or reform of the offender, such damages would have a truly penal element.²⁵³ Salvioli, earlier, had already denied the basis of the decision in the *Lusitania* cases, because he believed that a réparation-sanction was possible as a means of redress for moral injuries.²⁵⁴ And other publicists, while referring to this particular kind of reparation in conjunction with other similar forms of satisfaction, have also pointed out that, in the circumstances referred to above, the former is punitive in character.²⁵⁵ Personnaz, for example, is of the opinion that the manifestly injurious or grave character of

the unlawful act would aggravate the responsibility incurred and that this factor would be reflected in an increase in the indemnity or in special measures of satisfaction. This would be so in the case of an act affecting the State either directly or indirectly (through an injury to one of its nationals).²⁵⁶

145. All the foregoing would seem to remove any serious doubt that, both in diplomatic practice and in the case-law of the claims commissions, the reparation of an injury caused to an alien individual is fairly often frankly “punitive” in character. Its purpose — namely, to punish or at least to reprove a State for its conduct — either explicitly or implicitly, and thereby to try to prevent a repetition of such acts in the future, is in fact the most characteristic and distinctive feature of this mode of reparation. This is why its admissibility depends not so much on the nature of the injury suffered by the individual as on the circumstances aggravating the act or omission imputable to the State. The examples quoted, such as the *Opinion in the Lusitania Cases*, suffice to show that the mere existence of moral injury does not necessarily give rise to a reparation of this kind. This does not mean, however, that the nature of the injury which is being repaired is of no importance. Indeed, it is the nature of the injury which accounts for the high indemnity usually awarded, and the amount suggests the idea of “supplementary damages.” It is, again, owing to the special nature of the injury that as was in fact pointed out in one of the decisions quoted, the reparation takes the form of some sort of “satisfaction” accorded to the individual. But this satisfaction should not be confused, as is frequently done by learned authors, with the kind of satisfaction in the strict sense which was considered in the previous chapter — namely, “pecuniary satisfaction”. Although the latter is also sometimes to be found in cases of injuries caused to individuals, it is always, unlike the reparation of a “punitive” character considered here, a satisfaction accorded to the State — not to the individual — and its basis is not the injury suffered by the private person but the “political and moral” injury caused indirectly to the State. There is no denying that it is sometimes difficult, if not impossible, to make the distinction; but that is a different question, though admittedly one which characterizes a good deal of the topic dealt with in this report.

21. The reparation of damage to property in general

146. The reparation of this further category of injuries likewise can be studied properly only if certain fundamental distinctions regarding the perpetrator of the harmful act are borne in mind and if it is first determined whether or not the official measures or acts or omissions involved are intrinsically contrary to international law. We shall first discuss the situation in which the damage is caused directly by an individual.

(a) Damage caused by individuals: circumstances in which reparation is warranted

147. Acts of individuals which cause damage to the property of aliens very rarely give rise to the international

²⁵⁰ See “The Punitive Nature of Damages in International Law and State Responsibility for Failure to Apprehend, Prosecute or Punish”, in *Essays in Political Science in Honor of W. W. Willoughby* (1937), p. 346.

²⁵¹ See *Corso di Diritto Internazionale* (Padova), 1955, p. 425.

²⁵² See “Measure of Damages in International Law”, *Yale Law Journal* (1929-30), vol. 39, p. 61.

²⁵³ See *International Law*, vol. I, International law as applied by International Courts and Tribunals (third edition, 1957), p. 673.

²⁵⁴ See “La responsabilité des états et la fixation des dommages et intérêts par les tribunaux internationaux”, *Recueil des cours de l'Académie de droit international* (1929-III), vol. 28, p. 236, note 1.

²⁵⁵ See, for instance, Lauterpacht, “Règles générales du droit de la paix”, *Recueil des cours de l'Académie de droit international* (1937-IV), vol. 62, pp. 355-357; Reitzer, *La réparation comme conséquence de l'acte illicite en droit international* (1938), pp. 210-212; and Bissonnette, *La satisfaction comme mode de réparation en droit international* (1952), pp. 146 et seq.; Schwarzenberger, *op. cit.*, pp. 658 and 668.

²⁵⁶ *Op. cit.*, pp. 302. See also pp. 312 et seq.

responsibility of the State. It may even be said that cases of responsibility on this ground are far less frequent than those concerning injuries to the person. It is therefore necessary to determine the exact circumstances in which responsibility arises and the manner in which the damage suffered by the alien is repaired. In cases of robbery, the possibility of reparation has been admitted only in very exceptional circumstances. In the case of *J. Smith*, the United States-Mexican Commission established in 1839 held that the robbery effected by individuals had been made possible by the fact that the authorities had not protected the merchandise which they had seized, and ordered payment of a sum (\$18,762.63) which comprised the value of the stolen property plus an amount intended to cover reasonable mercantile profit on it.²⁵⁷ In other cases the responsibility and the admissibility of reparation have had a different basis — the fact that the local authorities did not take the necessary steps to apprehend and punish those guilty of the punishable act. The case of *L. A. Mechan*, which was decided by the General Claims Commission (United States-Mexico), may serve as an example. In addition to the sum (\$25,000) allowed for the death of the husband and father of the claimants, the Commission ordered the payment of \$1,510.70, without interest, as compensation for the goods which might have been recovered if the guilty persons had been arrested.²⁵⁸

148. The question of the admissibility of reparation arises similarly in connexion with damage caused by individuals during a civil war or internal disturbances of some other kind. The principle governing responsibility in these circumstances is basically still the same, namely, that there is no responsibility and hence no cause for reparation, unless the authorities showed manifest negligence by not adopting the measures which, in the circumstances, are normally taken to prevent or stop the harmful acts.²⁵⁹ This principle is so widely accepted that it does not seem necessary to spend much time on a consideration of the international case-law. The only cases in which responsibility has been recognized and reparation held due have been those in which the authorities showed manifest negligence and, at times, a certain degree of connivance at and even complicity in the acts.²⁶⁰

(b) *Damage caused during internal disturbances*

149. Naturally, the situation is different if the property of aliens is damaged during internal disturbances as a result, not of acts of private individuals, but of measures taken by the lawfully constituted authorities

²⁵⁷ See Whiteman, *op. cit.*, vol. II, p. 852.

²⁵⁸ See *Opinions of Commissioners* (1929), p. 168. See also the case of *Coatesworth and Powell*, cited by Commissioner Nielsen in his dissent regarding the computation of the amount of the indemnity awarded, *ibid.*, p. 173.

²⁵⁹ In this connexion, see the Special Rapporteur's third report, *Yearbook of the International Law Commission*, 1957, vol. II, pp. 125 *et seq.*

²⁶⁰ On these cases, see *Research in International Law*, Harvard Law School, *Nationality, Responsibility of States, Territorial Waters*, (Cambridge, Mass. 1929), commentary on articles 11 and 12 of the draft convention, pp. 189 *et seq.*

or, as the case may be, by the revolutionaries if the insurrection should succeed. Although there are numerous precedents in this matter, a few examples will suffice to show the circumstances in which reparation is allowed. In the first place, there appears to be no duty to repair the damage if the official measure, even though it results in the total destruction of the property, is designed to avert an imminent general catastrophe. This was the case with the claim on behalf of the *West India Oil Company*, whose stocks were thrown into the sea during the bombardment of Manzanillo by the United States Navy, a claim which was rejected by the Claims Commission established by the Treaty of 1898.²⁶¹ The outcome would not have been the same if the property had been destroyed needlessly. In the case of the *China and Java Export Company*, decided by the Chinese Claims Commission, a claim was made on this ground and an indemnity was awarded for the greater part of the damage alleged.²⁶²

150. The fact that the measure taken by the authorities affected the property of the alien immediately and individually constitutes, as a general rule, a firm basis of claim for the damage sustained. In the *Bertrand* case, the Arbitral Commission ordered the payment of an indemnity for the cotton which had been destroyed to prevent it from falling into the hands of the Confederates; likewise, in the case of *Labrot*, for three acres sown with carob which were destroyed by General Wallace for military purposes.²⁶³ Nevertheless, the same Commission rejected a claim for two houses which had been destroyed during the bombing of Charleston.²⁶⁴ Similarly, in the decision on the *American and Electric Manufacturing Co.* case, the United States - Venezuelan Commission granted an indemnity for the Government's requisitioning of a telephone line but rejected the claim for other damages caused by the bombardment carried out by the Government's naval forces to put down the rebellion.²⁶⁵

(c) *Damage caused by official measures*

151. A systematic and comprehensive study of reparation for damage to the property of aliens resulting from other official measures would present serious and perhaps insurmountable difficulties because of the variety of forms such measures may take and the fact that the circumstances, which generally have a decisive bearing on the solutions adopted, differ greatly from case to case. Moreover, many of the measures are not intrinsically contrary to international law and are indeed, as will be shown below, such that they cannot invariably be regarded as involving a duty to make reparation *stricto sensu*. It is therefore proposed to consider only cases or situations in which reparation has generally been required for damage to property occasioned by

²⁶¹ See [US] Department of Justice, *Spanish Treaty Claims Commission, Special Report of W. E. Fuller*, etc. (1907), p. 65.

²⁶² See Whiteman, *op. cit.*, pp. 944-5.

²⁶³ See *American and British Claims Arbitration* (1883), p. 112 and *ibid.* (1882), p. 131, respectively.

²⁶⁴ See *Dutrieux* case, *ibid.* (1882), p. 116.

²⁶⁵ See *Ralston, Venezuelan Arbitrations of 1903*, p. 35.

measures which, at least in principle, should be included in the category of acts under reference.

152. In some cases reparation has been required for injuries or losses arising from detention by the State authorities of goods or other property owned by aliens. In the case of the United States steamer *Colonel Lloyd Aspinwall*, which had been seized on the high seas, the arbitrator considered the detention wrongful *ab initio*, and awarded compensation (\$19,702.50) to cover the losses sustained by reason of the 114 days' detention, the cost of repairing the damage occasioned by the neglect of the vessel, and other expenses.²⁶⁶ In another case the taking of the property was held to be lawful and justified, but certain acts were considered to involve evident "denial of justice" and damages were allowed.²⁶⁷ In some cases reparation is based on three grounds: the unlawful or unjustified taking of property, its detention and its use by the authorities. These three grounds were taken into account in a case which was considered by the United States - Mexican Commission established in 1839 and in which the Commission awarded compensation in the amount of \$12,620.54, to cover the value of the property seized plus interest, costs, expenses, etc.²⁶⁸

153. Reparation for the damage sustained by an alien by reason of the deprivation of the use or enjoyment of his property may of course also be due in situations other than those mentioned. Claims commissions and other arbitral tribunals have had to consider many cases arising from the detention or seizure of vessels or similar measures. In these cases the assessment of the damages involves serious difficulties and complications, since many factors must be taken into consideration, including the character of the vessel or voyage, the damage caused to the vessel and to the cargo, crew costs, insurance, loss of freight income, etc.²⁶⁹ The question of reparation may also arise in connexion with certain measures affecting real property and other rights *in rem* of aliens, in particular measures involving wrongful and unjustified interference with rights of ownership or possession acquired by aliens.²⁷⁰ In such cases, however, as in the case of rights acquired through contractual relations between the individual and the respondent State, the situation may differ from that considered in this section. The distinction will be considered in the following section.

(d) *Expropriation and similar measures distinguished from other measures*

154. This subject was considered in the Special Rapporteur's fourth report in connexion with the discussion of measures affecting acquired rights which are capable of giving rise to the international responsibility of the State; accordingly, it need not be discussed in detail

²⁶⁶ See Moore, *International Arbitrations . . .*, vol. II, p. 1014.

²⁶⁷ See *Bischoff* case, Ralston, *Venezuelan Arbitrations of 1903*, pp. 581-582.

²⁶⁸ See *Mercy Mitchell* case, etc. cited in Whiteman, *op. cit.*, p. 870. For other cases of detention or seizure in which reparation covered *lucrum cessans*, see *ibid.*, pp. 876 *et seq.*

²⁶⁹ For a detailed exposition of the principal cases see Whiteman, *op. cit.*, pp. 988 *et seq.*

²⁷⁰ *Ibid.*, pp. 1355 *et seq.*

in this context.²⁷¹ The point that should be stressed is the importance of the dividing line between measures of this kind, which are intrinsically contrary to international law and hence, directly and immediately, capable of involving the responsibility of the State, and measures which, on the contrary, constitute the exercise of a right by the State, whose responsibility is therefore only involved if the measures are attended by other factors or circumstances which represent in themselves an act or omission contrary to international law. The question of reparation *stricto sensu*, whatever the form considered proper in the individual case, only arises in the case of measures in the first category. In the case of measures in the second category, there can only be the question of compensation — where compensation can properly be awarded — for the rights of which the alien has been deprived. The same distinction should be drawn where the measures affect rights acquired under contract or concession. In this case, too, the measure may constitute an unlawful act in the true sense of the word, or merely an arbitrary act for which the only remedy is compensation in the proper form and amount.

155. Elaborating on the discussion in the fourth report (section 34), the author would point out that, as in the decision in the *Delagoa Bay Railways* case (1900) cited in that section, it was held in the case of the *Company General of the Orinoco*, despite the explicit and repeated recognition of Venezuela's right to rescind the contract and the reference to a duty to compensate, that the sum awarded in compensation should be commensurate to the damages caused and in the assessment of the damages there was added to the estimated value of the concession (1,636,078.17 francs) the sum of 25,000 francs for expenses and 747,485.18 francs in respect of interest for the fifteen years during which the sum had been in default.²⁷² In the *Robert H. May* case, although it was recognized that there might be imperative reasons justifying the withdrawal of the concession and the taking over of the railway by the Government, the arbitrator awarded the sum of \$143,750.73 gold, including \$40,000 "by way of indemnity for expenses incurred, two years' time lost, suspension of credit, and grave anxiety of mind" and \$41,588.83 as estimated profits.²⁷³ Similarly, in the *Shufeldt* claim (1930), the arbitrator, although explicitly recognizing the State's right to take legislative action to cancel a contract, held that where such action worked injustice to an alien, the government ought to make compensation for the damage, and awarded an amount of \$225,468.38, including compensation for profits lost and \$10,935.21 for interest (6 per cent).²⁷⁴

156. Consequently, in a discussion of official measures involving damage to aliens' property, it is necessary, save

²⁷¹ See, in particular, sections 28 and 34 of the Special Rapporteur's fourth report, in *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, Vol. II).

²⁷² Ralston, *French-Venezuelan Claims Commission of 1902* (1906), pp. 362-365.

²⁷³ *Foreign Relations of the United States* (1900), pp. 648, 674.

²⁷⁴ See United Nations, *Reports of International Arbitral Awards*, vol. II, pp. 1098, 1099 *et seq.*

in the situations discussed in the first two paragraphs of this section, first to determine the exact nature of the measure, in other words its reason or purpose. If in taking the measure which gives rise to the claim the State exercised one of its many powers in respect of patrimonial rights, whatever their nature or the nationality of the owner, one cannot and should not speak of "reparation", although this term is ordinarily used both in practice and in the writings of learned authors. This confusion, whose effects are obvious, should be eliminated so that the State, if held internationally responsible by reason of any such measure, should not be held liable to "make reparation" for the injury, but merely to "compensate" the alien for the rights or interests affected by the measure in question.

22. Reparation for "indirect" damage or injury

157. In defining the principle of reparation, the Permanent Court of International Justice held that "reparation must as far as possible wipe out *all the consequences* of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed". Reparation, the Court held, would include "the award, if need be, of damages for losses sustained which would not be covered by restitution in kind or payment in place of it". The interpretation of the meaning and scope of the Court's ruling involves certain difficulties, since an injury or the act occasioning an injury may set in motion innumerable consequences which cannot always be taken into account in assessing the reparation. At one stage, although this appears no longer to be true of more recent international case-law and writings on the subject, the crucial question was whether reparation should or should not cover "indirect" damage.²⁷⁵ During that first stage, the award in the *Alabama* arbitration (1872), in which the opinion was expressed that indirect claims did not constitute a good foundation for an award of damages between nations, was regarded as a reliable precedent by other tribunals.²⁷⁶

158. This does not mean that subsequent case-law has consistently disallowed claims for damages that were not the direct or immediate consequence of the original injury or of the act which occasioned it. There was in fact a tendency to criticize the terms in which the question was stated as not providing a proper basis for determining the circumstances in which claims for such damages were admissible. Thus, in the opinion in the *War Risk Insurance Claims*, the German-United

States Mixed Claims Commission unanimously expressed the view that:²⁷⁷

"The use of the term 'indirect' as applied to the 'national claims' involved in the *Alabama* case is not justified by the early debates in the Senate of the United States, by the record of the preliminary diplomatic negotiations, by the Treaty of Washington, by the 'American Case' as presented by the American Agent, or by the Award. Its use in this connexion has been productive of great confusion and misunderstanding. The use of the term to describe a particular class of claims is inept, inaccurate, and ambiguous. The distinction sought to be made between damages which are direct and those which are indirect is frequently illusory and fanciful, and should have no place in international law. The legal concept of the term 'indirect' when applied to an act proximately causing a loss is quite distinct from that of the term 'remote'. The distinction is important."

158. In their replies to point XIV of the questionnaire drawn up by the Preparatory Committee for The Hague Conference (1930), some governments objected to the distinction between direct and indirect damage, which they described as artificial or unsatisfactory.²⁷⁸ Similar criticisms are repeatedly voiced by publicists. For example, Hauriou writes: "It must be admitted that the notion is both complex and imprecise and that it is understandable that arbitrators should have been unable to draw a clear distinction between cases of direct damage and those of indirect damage."²⁷⁹ Later Personnaz, among many other writers, expressed the view that the theory of indirect damage now seemed purposeless and appeared to have no place in international law.²⁸⁰

159. These criticisms of the theory of indirect damage appear to be well founded. But how can one tell when the reparation should cover losses which are not a direct and immediate consequence of the act or omission imputable to the State or of the original injury caused by the act of an individual? As will be seen below the answer to this question lies in the causal connexion between the act or omission (or where appropriate the original damage) and the loss allegedly flowing therefrom. In other words the problem is to what extent this consequential damage or prejudice is linked by a claim of causation to the earlier act or omission or injury.

160. For the purpose of determining this connexion an objective rule has generally been applied: the damage must be the "normal" or "natural" (or "necessary and inevitable") consequence of the original injury or of the act or omission by which it was occasioned. Thus, the United States-German Commission cited above held:²⁸¹

"The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. . . .

²⁷⁷ United Nations, *Reports of International Arbitral Awards*, vol. VII, pp. 62-63.

²⁷⁸ See replies of Germany and the Netherlands, League of Nations document C.75 M.69.1929.V, pp. 149 and 146 respectively.

²⁷⁹ "Les dommages indirects dans les arbitrages internationaux", *Revue générale de droit international public* (1924), vol. III, p. 212.

²⁸⁰ *Op. cit.*, p. 135.

²⁸¹ See *Reports of International Arbitral Awards*, vol. VII, pp. 29-30.

²⁷⁵ In this connexion, Borchard recognized that "international tribunals do not necessarily apply the rule of municipal courts to the effect that a claimant must, so far as possible, be placed in the same condition as he would have been if he had been allowed to proceed without interference". *Op. cit.*, pp. 418-419.

²⁷⁶ Borchard, *op. cit.*, p. 414. It has been observed that all the *Alabama* claims were for "indirect" damage since the British Government's responsibility arose solely by reason of its non-performance of its duties as a neutral. The *Alabama* award, therefore, far from serving as a precedent from this point of view, had to be regarded as authority for the allowance of claims for indirect damage. Cf. Yntema, "Treaties with Germany and Compensation for War Damages", *Columbia Law Review* (1924), vol. 24, p. 151.

This is but an application of the familiar rule of proximate cause — a rule of general application both in private and public law — which clearly the parties to the Treaty had no intention of abrogating. It matters not whether the loss be directly or indirectly sustained so long as there is a clear, unbroken connexion between Germany's act and the loss complained of. It matters not how many links there may be in the chain of causation connecting Germany's act with the loss sustained, provided there is no break in the chain and the loss can be clearly, unmistakably, and definitely traced, link by link, to Germany's act. But the law cannot consider... the 'causes of causes and their impulsion one on another'. Where the loss is far removed in the causal sequence from the act complained of, it is not competent for this tribunal to seek to unravel a tangled network of causes and of effects, or follow, through a baffling labyrinth of confused thought, numerous disconnected and collateral chains, in order to link Germany with a particular loss. All indirect losses are covered, provided only that in legal contemplation Germany's act was the efficient and proximate cause and source from which they flowed."

Applying this test, the Commission held it to be obvious that the members of the families of those who lost their lives on the *Lusitania* — dependants who had been receiving regularly and could reasonably have expected to continue to receive pecuniary support from those who died — suffered losses which, because of the natural relations between the deceased and the members of their families, "flowed from Germany's act as a normal consequence thereof and hence, were attributable to Germany's act as a proximate cause. The usages, customs, and laws of civilized countries have long recognized losses of this character as proximate results of injuries causing death". In the same case, the claims of insurers for losses resulting from their being required to make payments under policies insuring the lives of passengers lost on the *Lusitania* were rejected by the Commission on the ground that the losses were not a natural and normal consequence of Germany's act, and were not therefore attributable to Germany's act as a proximate cause.²⁸²

161. In some cases, a somewhat subjective test — the foreseeability of the consequences of the act or omission or even the presumed intention of its author — has been applied to determine whether the chain of causation was such as to justify the award of reparation. The two tests are combined in the following passage from the Portuguese-German Arbitral Tribunal's decision of 31 July 1928 in the *Angola* case (1928-1930).²⁸³

"... And, indeed, it would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that in the chain of causation there are some intermediate links. But, on the other hand, everyone agrees that, even if the strict principle that direct losses alone give rise to a right to reparation is abandoned, it is none the less necessary to exclude losses unconnected with the initial act, save by an unexpected concatenation of exceptional circumstances which could only have occurred with the help of causes which are independent of the author of the act and which he could in no way have foreseen."

In a case decided by the United States-Venezuelan Commission an award, in addition to the reparation for

²⁸² See decision in the *Life Insurance Claims* (1924), *ibid.*, vol. VII, pp. 112-113.

²⁸³ *Ibid.*, vol. II, p. 1031.

actual damage, was made for other losses "presumed to have been in the contemplation of the parties committing the wrongful acts and in that of the Government whose agents they were". In another decision, the same commission held that international law denied compensation for the remote consequences of official acts "in the absence of evidence of deliberate intention to injure".²⁸⁴ In connexion with the failure of agents of the State to foresee the consequences of their acts, Salvioli expresses the view that the duty to make reparation arises from the want of due diligence and the *culpa* imputable.²⁸⁵ With regard to the question of intention, a circumstance aggravating responsibility, if duly proved, might justify the award of reparation even where the chain of causation does not satisfy the objective tests discussed earlier.²⁸⁶

162. The determination of the causal connexion between the damage and the act or omission imputable to the State does not present the same problem, or at least not the same difficulties, in the case of claims for loss of prospective profits (*lucrum cessans*). Although such claims were in earlier years not infrequently treated as claims for indirect damage, and therefore not allowed, the position in case-law and in the writings of publicists now appears to admit of no serious doubt.²⁸⁷ Such losses are now considered on the same footing as *damnum emergens* in the sense that reparation, if due, is made as for "direct" damage. Thus, Anzilotti points out that loss of prospective profits may in some cases plainly be the immediate and exclusive consequence of the wrongful act and adds that in referring, in the decision cited at the beginning of this section, to "losses sustained which would not be covered by restitution in kind or payment in place of it" the Permanent Court appears to have had principally in mind loss of prospective profits.²⁸⁸ The inclusion of losses of this kind in a claim does not necessarily mean that reparation must be made in respect of them. Anzilotti recognizes that such losses may not be the immediate and exclusive consequence of the wrongful act. The essential test of causality must be applied. In the *Cape Horn Pigeon* case (1902), the arbitrator held that "it is not necessary for the amount of the *lucrum cessans* to be calculable with certainty. It is sufficient to show that the act complained of has prevented the making of a profit which would have been possible in the ordinary course of events."²⁸⁹ In the light of these and many other precedents it is clear that two conditions must be satisfied: there must be an unequivocal chain of causation linking the *lucrum cessans* and

²⁸⁴ *Irene Roberts and Dix* cases, Ralston, *Venezuelan Arbitrations of 1903*, pp. 145 and 149 respectively.

²⁸⁵ *Loc. cit.*, p. 251.

²⁸⁶ With reference to the point, Salvioli has suggested, on the basis of the decision in the *Fabiani* case, that from a practical standpoint a claim for indirect damage is more likely to be allowed where there is *dolus*, than in the case of gross negligence and that the difficulty is even greater in the case of negligence. *Ibid.*, p. 269.

²⁸⁷ On this point, see De Visscher, "La responsabilité des états", *Bibliotheca Visseriana* (1924), vol. II, pp. 118-119.

²⁸⁸ *Op. cit.*, p. 430.

²⁸⁹ See Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), p. 248.

the imputable act, and at the same time the *lucrum cessans* must not be too remote or speculative.²⁹⁰

23. Reparation for interest, expenses and costs

163. So far the discussion has been concerned with the reparation of the actual damage or injury sustained by an alien. In the practice of international tribunals, however, reparation frequently also includes the award of sums under other heads. In particular, interest may be allowed, either in the form of a sum added, as part of the award, to the pecuniary damages awarded or as interest payable on the amount of the compensation from the date of the award until the date of payment. The allowance of interest in either of these two forms is not a generally accepted rule either in the writings of authors or in practice, as will be seen from the arbitral awards allowing or disallowing interest examined below by way of example.²⁹¹

164. In some decisions interest has been awarded even where the *compromis* was silent on the subject. This group of decisions includes those of the Mexican commissions. In the *Pinson* case, the presiding Commissioner (Verzijl) of the French-Mexican Commission held that the silence of the Convention meant that in claims where Mexico's liability rested solely on its *ex gratia* promise, no interest could be awarded, but where Mexico's liability was based upon principles of international law interest could be granted, at the rate of 6 per cent.²⁹² The United States - Mexican General Claims Commission awarded interest only in cases involving breach of contract. Interest was not allowed on any claims for personal injuries.²⁹³ None of the other commissions awarded interest, although on one occasion the Presiding Commissioner of the German-Mexican Commission (Cruchaga) expressed the opinion that interest might be awarded whenever the Commission considered it equitable.²⁹⁴ In the decisions of other tribunals and commissions, interest has been regarded as an integral part of the reparation — i.e., as an additional sum intended to secure full compensation for the damage sustained by the alien.²⁹⁵

²⁹⁰ See the decisions in the *Rice* and *Shufeldt* cases, *ibid.*, footnote 15.

²⁹¹ The payment of interest as part of the reparation is in some cases expressly stipulated in the *compromis*. In this connexion, see the treaties and conventions cited in Feller, *op. cit.*, p. 309, footnote 81, and in Whiteman, *op. cit.*, vol. III, pp. 1914 *et seq.*

²⁹² See *Jurisprudence de la commission franco-mexicaine des réclamations* (1933), pp. 134 *et seq.* The only cases in which the Commission awarded interest were those decided during the presidency of Commissioner Verzijl.

²⁹³ See Feller, *op. cit.*, pp. 310-311.

²⁹⁴ *Ibid.*, pp. 311-312.

²⁹⁵ With regard to these decisions, the amount of interest awarded and the date of commencement of payment of interest, see Whiteman, *op. cit.*, pp. 1920 *et seq.* and Personnaz, *op. cit.*, pp. 221-230 and 233 *et seq.* In the *Wimbledon* case the Permanent Court held that "in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 per cent claim is fair". The interest, however, was to run, not from the date of the arrival of the *Wimbledon* at the entrance of the Kiel Canal, but from the date of the judgement. See Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, p. 32. For decisions in which arbitrators have disallowed claims in respect of *lucrum cessans* and have substituted interest, see Reitzer, *op. cit.*, p. 193, footnote 260.

165. Decisions implicitly or explicitly disallowing interest appear to be more common. It is not easy to analyse the grounds for the refusal to award interest, since those grounds are frequently not stated and, even when stated, do not always follow a uniform or consistent pattern. The greatest degree of uniformity appears to exist in cases involving unlawful arrest or other injuries to the person. For example, in the *Francis W. Rice* and *George Macmanus* cases, the United States-Mexican Commission of 1868 did not allow interest where the claimant had been unlawfully arrested and imprisoned.²⁹⁶ In the *Walter H. Faulkner* case, in which an award of \$1,050 was made without interest, the General Claims Commission held that "...cases of allowing damages for illegal imprisonment are most similar to the present one, and in such cases, tribunals often allowed a gross sum without interest".²⁹⁷ In cases concerning death by violence, interest has not normally been awarded except where there were also property losses. An instance of the latter is the *Mary Ann Conrow* case, in which the widow was awarded \$50,000 "without interest" on account of the death of her husband and \$300 "with interest" for the loss of the deceased's personal property.²⁹⁸ In some instances, the claims commissions have also disallowed interest in claims for property losses.²⁹⁹

166. In some instances, the reparation has included sums allowed in respect of expenses incurred by reason of the injury sustained. In the *Dr. John Baldwin* case, in addition to the large amount awarded as compensation for personal injuries, a sum of \$74.75 was allowed for physician's charges. In the *Sara J. Ragsdale* case, the claim was allowed with interest to cover incidental expenses. In the *William Lee* case, the United States-Peruvian Commission awarded damages in the amount of \$22,000 for the unlawful detention of the vessel, including \$4,000 for repairs, and \$1,500 for all expenses during detention.³⁰⁰ In some cases the reparation has also included the costs or similar expenses incurred by the claimant by reason of the injury. In the *Don Pacifico* case, for example, the Commission, in awarding £150 sterling, stated that it took into consideration the expenses the claimant had incurred during the investigation.³⁰¹

24. *En bloc* reparation

167. Reparation for the damage sustained by an alien does not always take the form of an individualized indemnity. In some cases where a relatively large number of claims were made in respect of the same act or of a series of more or less interrelated acts, the States concerned preferred to negotiate the reparation of all

²⁹⁶ See Whiteman, *op. cit.*, p. 1984.

²⁹⁷ See *Opinions of Commissioners* (1927), p. 86.

²⁹⁸ See Whiteman, *op. cit.*, p. 1986.

²⁹⁹ For such cases, see *ibid.*, pp. 1990 *et seq.*

³⁰⁰ For these and other similar decisions, see Whiteman, *op. cit.*, pp. 2006 *et seq.*

³⁰¹ See La Fontaine, *Pasicrisie internationale, Histoire documentaire...* (1902), p. 115. For other decisions, including decisions explicitly disallowing costs of this kind, see Whiteman, *op. cit.*, pp. 2024 *et seq.*

the injuries and to agree on the payment of a single compensation to discharge and settle all the pending claims en bloc. An example is provided by the protocol of 19 November 1896, under which "the Governments of Brazil and Italy, recognizing the difficulties of reaching agreement on the value of each of the Italian claims which have been considered just by one of the parties and unjust by the other during the negotiations", "agreed to settle the claims by a single act, which shall not imply any departure from the positions of principle taken by either party". The act referred to consisted in the payment of a single sum of 4 million francs.³⁰² As was indicated in the Special Rapporteur's fourth report, agreements stipulating reparation of this type are not to be confused with the so-called "lump-sum agreements", which are the outcome of negotiations and adjustments between interested States concerning the en bloc compensation to be paid for nationalized properties.³⁰³

168. En bloc reparation may also be awarded by an arbitral commission dealing with a number of claims, particularly when the governments concerned authorize the Commission to do so. This procedure was followed by the Tribunal which decided the *Alabama* claims. The Treaty of Washington of 8 May 1871 authorized the tribunal, if it found Great Britain to have failed to fulfil any of the duties specified, to award a single sum to be paid by Great Britain to cover all the claims referred to the tribunal. In accordance with this provision, the tribunal decided that it was "preferable to adopt the form of adjudication of an amount en bloc".³⁰⁴ A similar, although not identical, situation is found in other cases. Under the agreement of 24 December 1923, establishing the American-Turkish Commission, the two governments "agreed, with a view to an amiable, expeditious and economical adjustment, that the Commission should proceed to a summary examination of the aforementioned claims for the purpose of recommending to the two governments a lump sum settlement". On the basis of this agreement the Commission recommended the payment of the sum of \$1,300,000.³⁰⁵ Where this procedure is followed, the reparation award may differ in various respects from the reparation award of an arbitral tribunal properly so called and is more akin to the type of settlement negotiated by the governments concerned, the only difference being that the final adjustment is made through an arbitral body.

169. En bloc reparation should be distinguished from the method of lump-sum assessment. In assessing the total amount of compensation allowable claims com-

missions quite frequently do not specify the amounts awarded for each of the items of damages set out in the claim or the various circumstances taken into account. A typical example is provided by the *Habana Packet* decision, in which the compensation awarded took into account various kinds of damage and the circumstances in which the incident occurred.³⁰⁶ Lump-sum assessment may take other forms. In the *Chorzów Factory* (Merits) case, for example, the Permanent Court held "that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking..."³⁰⁷

25. *The limitation of reparation and extenuating circumstances*

170. From a study of international case-law, it is possible to discern a number of principles which limit the scope or the amount of reparation. One such principle is the exclusion of damage not linked by a real and evident chain of causation to the imputable act or omission. When an arbitral commission or tribunal refuses to award additional amounts for interest, expenses or costs, the amount of the compensation awarded for the damage is automatically reduced thereby, even though, as is sometimes the case, claims for some of these items are disallowed on grounds of principle. There are, however, other factors which limit the reparation awarded.

171. One such factor is the rule against double damages—i.e., the award of reparation more than once in respect of the same injury—the object of the rule being to ensure that the amount of the reparation does not exceed the damage in fact sustained by the claimant. In its decision in the *Chorzów Factory* (Merits) case, the Permanent Court stated that if it were dealing with damage affecting persons or bodies corporate independent of one another, the natural method to be applied would be a separate assessment of the damage sustained by each of them, but that the interests possessed by the two companies in the undertaking being interdependent and complementary, those interests could not "simply be added together without running the risk of the same damage being compensated twice over."³⁰⁸ In the *Alabama* claims decision, it was held that "in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all

³⁰² See *Revue générale de droit international public* (1897), vol. IV, pp. 403 *et seq.*

³⁰³ See section 20 of the Special Rapporteur's fourth report, in *Yearbook of the International Law Commission, 1959*, vol. II (United Nations publication, Sales No. 59.V.1, vol. II).

³⁰⁴ See Lapradelle and Politis, *op. cit.*, vol. II, pp. 780 and 893 respectively.

³⁰⁵ See Nielsen, *American-Turkish Claims Settlement* (1937), pp. 45, 41. See also the settlement reached by France and Great Britain and the Republic of Uruguay in 1862 through the Commission of Montevideo, in Lapradelle and Politis, *op. cit.*, pp. 119 *et seq.*

³⁰⁶ With regard to this and other decisions of this type see Personnaz, *op. cit.*, pp. 193-195.

³⁰⁷ Publications of the Permanent Court of International Justice, *Collection of Judgements*, series A, No. 17, p. 49. The bearing of this problem on the question of the limitation of the duty to make reparation is discussed in the next section.

³⁰⁸ Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 17, p. 48. See also p. 49 and the advisory opinion of the International Court on reparation for injuries incurred in the service of the United Nations, in which it is stated that the defendant State cannot "be compelled to pay the reparation due in respect of the damage twice over". *I.C.J. Reports 1949*, p. 186. In this connexion, see Schwarzenberger, *op. cit.*, pp. 655-656, 596.

double claims for the same losses and all claims for 'gross freights' so far as they exceed 'net freights.'"³⁰⁹ The problem has also arisen in connexion with claims by insurers for sums paid by them in respect of losses to individuals caused by acts involving the international responsibility of the State. The decisions in such cases do not, however, appear to follow any consistent rule.³¹⁰

172. A second limiting factor is the principle that reparation should not result in the unjust enrichment of the claimant. In the *Cook* case, the United States-Mexican General Claims Commission held that reparation should not cause the claimant an unjust enrichment, but recognized that unjust enrichment would not result in the case before the Commission.³¹¹ In the *F. J. Acosta* case, the Commission converted money orders into dollars at the rate of exchange prevailing at the date of their purchase in order to avoid unjust enrichment of the claimant.³¹² In the *Fabiani* case, the tribunal stated that damages ought not to be a source of profit for the persons who obtain them.³¹³ In this connexion, the Permanent Court held that "This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible."³¹⁴

173. In the discussion in the Special Rapporteur's third report of the circumstances in which the State is completely exonerated from international responsibility, it was indicated that in some cases the circumstances, while not entirely justifying the act imputable to the State, might be such as to qualify its responsibility.³¹⁵ In the section of the report dealing with the criterion for determining the measure of reparation, a number of cases were cited in which extenuating circumstances had been held to justify a reduction in the amount of the reparation.³¹⁶ In view of the importance of this aspect of reparation for damage sustained by individuals, it may be useful to discuss various other precedents in international case-law.

174. The typical circumstance in such cases is a fault on the part of the injured individual. In article 8, third paragraph, of the articles approved on first reading by the Third Committee of The Hague Conference (1930), this is implicitly recognized as a circumstance

resulting in exoneration from responsibility.³¹⁷ One of the earliest precedents is to be found in the *Cowper* case, in which compensation in respect of *lucrum cessans* appears to have been disallowed because the claimant had not been diligent during the ten years that had elapsed in recruiting labourers to replace the slaves of whom he had been deprived.³¹⁸ In his decision on the *Dolan* claim, the umpire, Sir Edward Thornton, considered that the claimant's absence of prudence and the fact that, unlike other claimants, he had not ascertained the character of the Zerman expedition were circumstances which should be taken into account in assessing the compensation to be awarded.³¹⁹ In the case of the whaling vessel *Canada* (1870) the damages claimed as prospective profit were not allowed, partly because the master had failed to act with the skill that was to be expected in the circumstances in which the accident occurred.³²⁰ In its decision in the *Wimbledon* case, the Permanent Court also took this circumstance into account and indirectly recognized it as a factor that would limit the duty to make reparation when it examined the conduct of the captain and found that if had been legally unexceptionable.³²¹ Finally, in the *Macedonian* case (1841), although the fault was imputable not to the individual but to the State of nationality, a similar position was taken. In disallowing the claim for interest, the arbitrator drew attention to the fact that "the Government of the United States had done nothing to hasten a settlement" for twenty years after the date of the incident.³²²

CONCLUSIONS

175. Before completing the present report, the Special Rapporteur wishes to put forward a number of conclusions, which will be stated in very general terms in order to avoid unnecessary repetition of the conclusions explicitly or implicitly contained in the previous sections.

176. The Special Rapporteur wishes once again to stress that the International Law Commission ought to depart from the traditional conception of "damage" or "injury", and hence of "reparation" itself.³²³ Apart from its obvious artificiality and the technical difficulties it involves, the traditional approach is plainly inconsistent, with international law in its present state of development and has in the past had inevitable political implications which the Commission should

³⁰⁹ Lapradelle and Politis, *op. cit.*, p. 893.

³¹⁰ In this connexion, see Cavaré, *Le droit international public positif* (1951), vol. II, p. 307.

³¹¹ See *Opinions of Commissioners* (1927), p. 323.

³¹² *Ibid.* (1928), p. 122.

³¹³ See Whiteman, *op. cit.*, vol. III, p. 1786.

³¹⁴ Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 17, p. 31. For other precedents see Schwarzenberger, *op. cit.*, pp. 557, 653 *et seq.*

³¹⁵ See *Yearbook of the International Law Commission, 1958*, vol. II, pp. 51 *et seq.*

³¹⁶ *Ibid.*, p. 68.

³¹⁷ See *Yearbook of the International Law Commission, 1956*, vol. II, p. 225. See also the replies of Denmark and Poland to point XIV of the questionnaire submitted to governments, *League of Nations publication, 1929.V.3*, pp. 147-148, 150.

³¹⁸ See Lapradelle and Politis, *op. cit.*, vol. I, p. 348.

³¹⁹ See Moore, *International Arbitrations . . .*, vol. III, p. 2768.

³²⁰ See La Fontaine, *op. cit.*, p. 133.

³²¹ Publications of the Permanent Court of International Justice, *Collection of Judgements*, Series A, No. 1, p. 31.

³²² Lapradelle and Politis, *op. cit.*, vol. II, p. 205.

³²³ See the Special Rapporteur's earlier reports, *Yearbook of the International Law Commission 1956*, vol. II, p. 192 (section 15) and p. 213 (section 28) and *Yearbook of the International Law Commission, 1958*, vol. II, p. 68 (section 20).

do its utmost to eliminate in the future.³²⁴ The "injury" or "damage" should be considered in terms of the subject in fact harmed — i.e., the alien — and reparation should be considered in terms of its real and only object — i.e., not as reparation "due to the State", but as reparation due to the individual in whose behalf diplomatic protection is being exercised. The departure from the traditional approach, although it would involve substantial changes, would not affect the notion of "moral and political" injury *stricto sensu*, nor would it preclude consideration of cases in which the consequences of the act or omission transcend the specific losses sustained by the individual alien. The expression "moral and political" injury applies to a category of injuries which is independent of and wholly unrelated to that of injuries caused to the person or property of aliens; the situation meant here, although ultimately bound up with the conception of "moral injury" caused "indirectly" to the State of nationality, is an exception that is justified by the nature of the interest affected.³²⁵

177. With regard to the character and measure of reparation for injuries caused to individuals, the view of the sub-committee of The Hague Conference that the principles had not crystallized sufficiently to permit codification seems still to be substantially true.³²⁶ It would be extremely difficult and in all probability fruitless to attempt a systematic formulation of the principles and rules that have been observed in the infinite variety of situations which arise in practice. It would, nevertheless, be feasible and desirable to formulate a number of general principles that have served to limit the extent of reparation or to define more precisely the forms or measures applicable in the case of injuries sustained by aliens.³²⁷

178. With regard to the principles limiting the duty

³²⁴ In this connexion, a recent finding of the International Court of Justice which appears to depart from the position traditionally taken by the Court is of interest: "One interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. *This interest is the basis for the present claim* and should determine the scope of the action brought before the Court by the Swiss Government . . ." *I.C.J. Reports, 1959*, p. 29.

³²⁵ See the earlier reports cited and the Special Rapporteur's course in *Recueil des cours de l'Académie de droit international* (1958, II), vol. 94, pp. 418 *et seq.*

³²⁶ League of Nations publication, 1930.V.17, p. 234.

³²⁷ In order to avoid the inconsistency referred to in the fourth report and in section 21 above, the term "reparation" should not be considered applicable in the case of acts or omissions causing damage to property, except where the acts or omissions are intrinsically contrary to international law.

to make reparation, in addition to the extenuating circumstances considered in the preliminary draft submitted to the Commission, the principle should be established that reparation may not result in unjust enrichment of the alien sustaining the injury, together with other limitations, related to this principle, such as the rule against double damages and "supplementary damages" where the latter are not fully justified by the gravity of the act or omission imputable to the respondent State. It is also desirable to rule out certain measures of reparation the admissibility of which has been questioned, including some forms of legal restitution and the award of unreasonable and excessive damages.

179. Measures of satisfaction should also be explicitly ruled out, as a matter of principle, for reasons that are in a sense even more weighty. In normal cases involving injury to the person or damage to the property of aliens modes of reparation which are solely conceivable in cases where the State itself is the subject of the injury cannot be regarded as admissible, in keeping with the new conception of "injury" and "reparation" advocated in these reports. Evident abuses have been committed in the past as a result of such measures,³²⁸ which have in fact tended only to create unnecessary friction and ill-feeling in international relations.³²⁹ Even in the case of responsibility for damage or injury to the State as such, traditional measures of satisfaction are less and less commonly employed and can in fact be said to be becoming gradually obsolete.³³⁰ This does not of course mean that the remedy envisaged in article 25 of the draft put forward by the Special Rapporteur — the right to demand that the respondent State take all necessary steps to avoid any repetition of acts of the kind imputed to it — would not be available in the case of acts or omissions whose consequences transcend the specific injury sustained by the alien. A remedy on these lines and with this purpose, rather than "satisfaction" properly so called, would provide a means of protecting the interests which in fact call for the protection of international law in cases involving responsibility of this kind.

³²⁸ In this connexion, see Personnaz, *La réparation du pré-judice* . . . , p. 289.

³²⁹ In this connexion, see the comments of Chou Vei at the Lausanne session of the *Institut de droit international, Annuaire* (1927), vol. 1, p. 519.

³³⁰ "On the other hand, the Court should break away from the familiar medieval procedure, which is not employed nowadays even in schools, such as apologies, flag saluting, etc. All this is reminiscent of *ultimata*, which are becoming more and more obsolete." Dissenting opinion of Judge Azevedo in the *Corfu Channel* case. *I.C.J. Reports, 1949*, p. 114.

ADDENDUM

Responsibility of the State for injuries caused in its territory
to the person or property of aliens: *Revised draft* *

Explanatory note

The members of the International Law Commission will readily understand why the Special Rapporteur has prepared a revision of the preliminary draft which he submitted with his second and third reports (A/CN.4/106 and 111). After submitting these reports the Special Rapporteur, in conformity with the Commission's instructions, continued his research into the subject of international responsibility, concentrating on those problems and aspects which are dealt with in his fourth, fifth and sixth reports (A/CN.4/119, 125 and 134). It was natural that, as his task came to an end, he should have considered it proper to revise the original preliminary draft in the light of the conclusions he had reached while preparing the last three reports. Had he not done so, his work would have remained incomplete and the contribution he has been endeavouring to make, during the last six years, to the Commission's study of this topic would have been very much smaller.

In order that the reader may be able to see in what respects the original preliminary draft has been amended, the Special Rapporteur has added a brief commentary to each of the articles of the revised text.

On reaching the end of his work, the Special Rapporteur would like to affirm once again the spirit in which his reports and the preliminary draft were prepared: his purpose was to take into account the profound changes which are occurring in international law, in so far as they are capable of affecting the traditional ideas and principles relating to responsibility. The only reason why, in this endeavour, he rejected notions or opinions for which acceptance is being sought in our time, is that he firmly believes that any notion or opinion which postulates extreme positions — whatever may be the underlying purpose or motive — is incompatible and irreconcilable with the idea of securing the recognition and adequate legal protection of all the legitimate interests involved. That has been the policy followed by the Commission hitherto and no doubt will continue to be its policy in the future.

* * *

Revised draft on international responsibility of the State for injuries
caused in its territory to the person or property of aliens

Title I

GENERAL PRINCIPLES

Chapter I

RIGHTS OF ALIENS AND CONSTITUENT ELEMENTS
OF RESPONSIBILITYArticle 1. — *Rights of aliens*

1. For the purpose of the application of the provisions of this draft, aliens enjoy the same rights and the same legal guarantees as nationals, but these rights and guarantees shall in no case be less than the "human rights and fundamental freedoms" recognized and defined in contemporary international instruments.

2. The "human rights and fundamental freedoms" referred to in the foregoing paragraph are those enumerated below:

(a) The right to life, liberty and security of person;

* Circulated in mimeographed form as document A/CN.4/34/Add.1, dated 11 December 1961.

(b) The right to own property;

(c) The right to apply to the courts of justice or to the competent organs of the State, by means of remedies and proceedings which offer adequate and effective redress for violations of the aforesaid rights and freedoms;

(d) The right to a public hearing, with proper safeguards, by the competent organs of the State, in the substantiation of any criminal charge or in the determination of rights and obligations under civil law;

(e) In criminal matters, the right of the accused to be presumed innocent until proved guilty; the right to be informed of the charge made against him in a language which he understands; the right to present his defence personally or to be defended by a counsel of his choice; the right not to be convicted of any punishable offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed; the right to be tried without delay or to be released.

3. The enjoyment and exercise of the rights and freedoms specified in paragraph 2 (a) and (b) are subject to such limitations or restrictions as the law expressly prescribes for reasons of internal security, the economic well-being of the nation, public order, health and morality, or to secure respect for the rights and freedoms of others.

Article 2. — *Constituent elements of responsibility*

1. For the purposes of this draft, the "international responsibility of the State for injuries caused in its territory to the person or property of aliens" involves the duty to make reparation for such injuries, if these are the consequence of some act or omission on the part of its organs or officials which contravenes the international obligations of the State.

2. The expression "international obligations of the State" shall be construed to mean, as specified in the relevant provisions of this draft, the obligations resulting from any of the sources of international law.

3. The expression "international obligations of the State" also includes the prohibition of the "abuse of rights", which shall be construed to mean any action contravening the rules of international law, whether conventional or general, which govern the exercise of the rights and competence of the State.

4. The State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation.

Title II

ACTS AND OMISSIONS GIVING RISE
TO RESPONSIBILITY

Chapter II

DENIAL OF JUSTICE AND OTHER SIMILAR ACTS AND OMISSIONS

Article 3. — *Acts and omissions involving denial of justice*

1. The State is responsible for the injuries caused to an alien by acts or omissions which involve a denial of justice.

2. For the purposes of the foregoing paragraph, a "denial of justice" shall be deemed to occur if the courts deprive the alien

of any one of the rights or safeguards specified in article 1, paragraph 2 (c), (d) and (e), of this draft.

3. For the same purposes, a "denial of justice" shall also be deemed to occur if a manifestly unjust decision is rendered with the evident intention of causing injury to the alien. However, judicial error, whatever the result of the decision, does not give rise to international responsibility on the part of the State.

4. Likewise, the alien shall be deemed to have suffered a denial of justice if a decision by a municipal or international court in his favour is not carried out, provided that the failure to carry out such decision is due to a clear intention to cause him injury.

Article 4. — Deprivation of liberty

1. The State is responsible for the injuries caused to an alien by reason of his arrest, detention or imprisonment, if carried out on grounds not provided for in the municipal law or in a manner manifestly incompatible with the procedure established for the purpose by municipal law.

2. Notwithstanding the provisions of the foregoing paragraph, the international responsibility of the State shall not be involved in cases where the detention order was based on *bona fide* suspicion, if, when the error was noticed, the alien was released.

Article 5. — Expulsion and other forms of interference with freedom of movement

1. The State is responsible for the injuries caused to an alien who has been expelled from the country, if the expulsion order was not based on grounds specified in municipal law or if, in the execution of the order, serious irregularities were committed in the procedure established by municipal law.

2. The State is also responsible for the injuries caused to an alien in cases where he was prevented from leaving the country or from moving freely within the country, if the act or omission of the authorities is manifestly arbitrary or unjustified.

Article 6. — Maltreatment and other acts of injury to the person

Maltreatment and other acts of inhumanity committed by the authorities against the person of an alien shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

Chapter III

NEGLIGENCE AND OTHER ACTS AND OMISSIONS IN CONNEXION WITH THE PROTECTION OF ALIENS

Article 7. — Negligence in the performance of the duty of protection

1. The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking the measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.

2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with resources available to the State.

3. The State is also responsible if the inexcusable negligence of the authorities in apprehending the individuals who committed the injurious act deprives the alien of the opportunity to bring a claim against the said individuals for compensation for the loss or injury or if he is deprived of such opportunity by virtue of a general or specific amnesty.

Article 8. — Other acts and omissions in connexion with the obligation to protect aliens

1. In the cases of responsibility referred to in the preceding article, the connivance, complicity or participation of the authorities in the injurious act of the individual shall constitute an aggravating circumstance for the purposes of an international claim under article 22, paragraph 2, of this draft.

2. Independently of the existence of any of the circumstances referred to in the foregoing paragraph, the State is likewise responsible, for the purpose aforesaid, if the authorities were manifestly and inexcusably negligent in the prosecution, trial and punishment of the persons guilty of the injurious act.

Chapter IV

MEASURES AFFECTING ACQUIRED RIGHTS

Article 9. — Measures of expropriation and nationalization

1. The State is responsible if it expropriates property of an alien and the expropriation is not in conformity with the provisions of the municipal law in force at the time when the property in question was acquired by the owner concerned.

2. In the case of nationalization or expropriation measures which are of a general nature and which are not directed against a particular person or against particular persons, the State is responsible if the measures are not taken on grounds of public interest, if they involve discrimination between nationals and aliens to the detriment of the latter in the matter of compensation for the property in question, or if unjustified irregularities which are prejudicial to aliens are committed in the interpretation or application of the said measures.

Article 10. — Non-performance of contractual obligations in general

1. The State is responsible for the non-performance of obligations stipulated in a contract entered into with an alien or in a concession granted to him, if the non-performance is not justified on grounds of public interest or of the economic necessity of the State, or if there is imputable to the State a "denial of justice" within the meaning of article 3 of this draft.

2. The foregoing provision shall not apply if the contract or concession contains a clause of the nature described in article 19, paragraph 2.

3. If the contract or concession is governed by international law, or by legal principles of an international character, the State is responsible by reason of the mere fact of the non-performance of the obligations stipulated in the said contract or concession.

Article 11. — Public debts

The State is responsible if it repudiates or cancels its public debts, if the measure is not justified on grounds of public interest or if it discriminates between nationals and aliens to the detriment of the latter.

Chapter V

IMPUTABILITY OF ACTS OR OMISSIONS

Article 12. — Acts and omissions of organs and officials in general

1. An act or omission which contravenes international law is imputable to the State if the organs or officials concerned acted within the limits of their competence.

2. An act or omission shall likewise be imputable to the State if the organs or officials concerned exceeded their competence but purported to be acting in their official capacity.

3. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if the act exceeding the competence of the officials or organs concerned was by its nature totally outside the scope of their functions and powers, even though they may to some extent have relied on their official position or used the means at their disposal by reason of that position.

4. Similarly, the act or omission shall not be imputable to the State if it was so manifestly outside the competence of the organ or official concerned that the alien should have been aware of the fact and could, in consequence, have avoided the injury.

5. For the purposes of the provisions of this article, the act or omission shall be proved in conformity with the municipal law of the State to which it is imputed.

Article 13. — Acts and omissions of the legislature

1. The provisions of the preceding article shall apply, *mutatis mutandis*, to the imputability of any legislative (or, as the case may be, constitutional) measures which are incompatible with international law and to the failure to adopt the measures which are necessary for the performance of the international obligations of the State.

2. Notwithstanding the provisions of the foregoing paragraph, the act or omission shall not be imputable to the State if, without amending its legislation (or its constitution), the State can avoid the injury or make reparation therefor and if it does so in due time.

Article 14. — Acts and omissions of political subdivisions

1. The acts and omissions of political subdivisions, whatever their internal organization may be and whatever degree of legislative, judicial or administrative autonomy they enjoy, shall be imputable to the State.

2. The imputability of acts or omissions of political subdivisions shall be determined in conformity with the provisions of the two preceding articles.

Article 15. — Acts and omissions of a third State or of an international organization

Acts and omissions of a third State or of an international organization shall be imputable to the State in whose territory they were committed only if the latter could have avoided the injurious act and did not exercise such diligence as was possible in the circumstances.

Article 16. — Acts and omissions of successful insurgents

The imputability of acts and omissions committed by insurgents during the conflict shall, if the insurrection is successful and a new government is installed, be determined in conformity with the provisions of articles 7 and 8 of this draft.

Article 17. — Exonerating and extenuating circumstances

1. An act or omission shall not be imputable to the State if it is the consequence of *force majeure* which makes it impossible for the State to perform the international obligation in question and which was not the consequence of an act or omission of its own organs or officials.

2. Likewise, an act shall not be imputable to the State if it is the consequence of a state of necessity involving a grave and imminent peril threatening some vital interest of the State, provided that the State did not provoke that peril and was unable to counteract it by other means and so to prevent the injury.

3. Similarly, the act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself.

4. *Force majeure*, state of necessity and the fault imputable to the alien, if not admissible as grounds for exoneration from responsibility, shall operate as extenuating circumstances for the purposes mentioned in article 26, paragraph 4, of this draft.

Title III

THE INTERNATIONAL CLAIM
AND THE REPARATION OF THE INJURY

Chapter VI

ADMISSIBILITY OF CLAIMS

Article 18. — Exhaustion of local remedies

1. An international claim brought for the purpose of obtaining reparation for injuries sustained by an alien, or for the purposes mentioned in article 27 of this draft, shall not be admissible until, in respect of each one of the grounds of the said claim, all the remedies and proceedings established by municipal law have been exhausted.

2. For the purposes of the provisions of the foregoing paragraph, local remedies shall be deemed to have been "exhausted" when the decision of the competent body or official that rendered it is final and without appeal.

3. Consequently, except in the cases of "denial of justice" referred to in article 3 of this draft, it shall not be admissible to plead, as an excuse for the failure to resort to all or any of the remedies under municipal law, that the organ or official concerned is not competent to deal with the case and to adjudicate the same or that it is useless to apply to the municipal courts on the alleged grounds that for technical or other reasons such remedies are ineffective.

4. The foregoing provisions shall not apply if the respondent State has expressly agreed with the State of nationality of the injured alien that recourse to any one or to all of the local remedies shall not be necessary.

5. If the respondent State and the alien have entered into an agreement of the nature of those mentioned in article 21 of this draft, the rule concerning the exhaustion of local remedies shall likewise not be applicable, unless the said agreement expressly lays down the observance of the said rule as a condition to be fulfilled before an international claim can be brought.

Article 19. — Waiver of diplomatic protection

1. Notwithstanding the provisions of the preceding article, if the States concerned have agreed to restrict the exercise of diplomatic protection for their respective nationals, an international claim shall not be admissible except in the cases and circumstances specified in the said agreement.

2. Similarly, in the case of the non-performance of obligations stipulated in a contract or concession, the international claim shall not be admissible if the alien concerned has waived the diplomatic protection of the State of his nationality and the circumstances are in conformity with the terms of the waiver.

3. An international claim shall likewise not be admissible if the alien concerned has spontaneously reached a settlement or arrangement with the local authorities concerning the reparation of the injury sustained by him.

4. The waiver of diplomatic protection and the settlements or arrangements reached by the alien with the local authorities shall not deprive the State of nationality of the right to bring an international claim in the circumstances and for the purposes described in article 22, paragraph 2, and article 27 of this draft.

Article 20. — Settlement of questions relating to the admissibility of claims

Disputes between the respondent State and the alien, or, as the case may be, between that State and the State of nationality, regarding any of the aspects relating to the admissibility of the international claim shall be submitted to the methods of settlement provided for in articles 21 and 22 in the form of a preliminary question and settled by means of a summary procedure.

Chapter VII

SUBMISSION OF THE INTERNATIONAL CLAIM

Article 21. — Right of the injured alien to bring a claim

1. The alien may submit an international claim to obtain reparation for the injury sustained by him to the body in which competence for this purpose has been vested by an agreement between the respondent State and the State of nationality or between the respondent State and the alien himself.

2. If the body mentioned in the foregoing paragraph was established by an agreement between the respondent State and the alien, the consent of the State of nationality shall not be necessary for the purpose of the submission of the international claim.

3. In the event of the death of the alien, the right to bring a claim may be exercised by his heirs or successors in title, unless they possessed or have acquired the nationality of the respondent State.

4. The right to bring claims to which this article refers shall not be exercisable by foreign juristic persons in which nationals of the respondent State hold the controlling interest.

Article 22. — Right of the State of nationality to bring a claim

1. The State of nationality may bring the international claim to obtain reparation for the injury sustained by the alien:

(a) If there does not exist an agreement of the type referred to in article 21, paragraph 1; or

(b) If the respondent State has expressly agreed that the State of nationality should substitute itself for the alien in his place and title for the purposes of the claim.

2. The State of nationality may, in addition, bring an international claim in the case and for the purposes mentioned in article 27 of this draft, irrespective of any agreement entered into by the injured alien with the respondent State.

Article 23. — Nationality of the claim

1. A State may exercise the right to bring a claim referred to in article 22 on condition that the alien possessed its nationality at the time of sustaining the injury and conserves that nationality until the claim is adjudicated.

2. In the event of the death of the alien, the exercise of the right of the State to bring a claim shall be subject to the same conditions.

3. A State may not bring a claim on behalf of an individual if the legal bond of nationality is not based on a genuine connexion between the two.

4. A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest.

5. In cases of dual or multiple nationality, the right to bring a claim shall be exercisable only by the State with which the alien has the stronger and more genuine legal and other links.

Article 24. — Inadmissible restrictions of the right to claim

1. The right of the State of nationality to bring a claim shall not be affected by an agreement between the respondent State and the alien if the latter's consent is vitiated by duress or any other form of coercion exerted upon him by the authorities of the respondent State.

2. The right to bring a claim shall likewise not be affected if the respondent State, subsequently to the act or omission imputed to it, imposed upon the alien its own nationality with the object of resisting the international claim.

Article 25. — Limitation of time affecting the right to bring a claim

1. Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted.

2. Notwithstanding the provisions of the preceding paragraph, the international claim shall be admissible if it is proved that the delay in its submission is due to reasons not connected with the will of the claimant.

Chapter VIII

NATURE AND MEASURE OF THE REPARATION

Article 26. — Restitution and pecuniary damages

1. The reparation of the injury caused to an alien may take the form of restitution in kind (*restitutio in integrum*) or of pecuniary damages, whichever may best serve to wipe out the consequences of the act or omission imputable to the respondent State.

2. Notwithstanding the provisions of the foregoing paragraph, the reparation shall not take the form of restitution if restitution would involve the repeal of a law, the annulment of a judicial decision or the non-application of an executive or administrative measure and it would be incompatible with or cause difficulties under the municipal law of the respondent State.

3. The amount of the pecuniary damages shall be determined in accordance with the nature of the injury caused to the person or property of the alien or, in the event of his death, of his heirs or successors in title. Consequently, irrespective of the nature of the reparation or of the purpose for which it is made, the pecuniary damages shall not result in the undue enrichment of the injured alien.

4. In the determination of the nature and measure of the reparation, the fault imputable to the injured alien and any of the other circumstances described as extenuating circumstances in article 17, paragraph 4, of this draft shall be taken into account.

Article 27. — Measures to prevent the repetition of the injurious act

1. Even in the case of an act or omission the consequences of which extend beyond the injury caused to the alien, a fact constituting an aggravating circumstance, the reparation shall not take a form of "satisfaction" to the State of nationality, which would be offensive to the honour and dignity of the respondent state.

2. Notwithstanding the provisions of the foregoing paragraph, in any such case as aforesaid the State of nationality shall have the right, without prejudice to the reparation due in respect of the injury sustained by the alien, to demand that the respondent State take the necessary steps to prevent the repetition of events of the nature of those imputed to that State.

Title I
GENERAL PRINCIPLES

Chapter I
RIGHTS OF ALIENS AND CONSTITUENT ELEMENTS
OF RESPONSIBILITY

Article 1. — Rights of aliens

Article 1 of the revised draft replaces articles 5 and 6 of the original draft. Like them, article 1 lays down the principle that aliens enjoy the same rights and are entitled to the same legal guarantees as nationals, but that these rights and guarantees may in no case be less than the "human rights and fundamental freedoms" recognized and defined in contemporary international instruments; nevertheless, the enjoyment and exercise of certain of these rights and freedoms are subject to the limitations or restrictions laid down expressly by law for any of the reasons mentioned in the article.

Ever since writing his first report (A/CN.4/96), the Special Rapporteur has stressed repeatedly the need to reconcile the traditional opposition and antagonism between the "international standard of justice" and the principle of the equality of nationals and aliens. For this purpose, he has suggested that an attempt should be made to reformulate both principles in a new rule incorporating the essential elements and serving the main purposes of both; in other words, to fuse them into a system based on the international recognition which has been accorded to human rights and fundamental freedoms. In the Special Rapporteur's opinion, this political and legal reality of the post-war world has virtually removed the opposition and antagonism which formerly divided the two principles; it would therefore be wrong to ignore the facts and to continue to wait until one of the principles prevails over the other.

Some members of the Commission have criticized the system on the grounds that neither in his capacity as a national nor in his capacity as an alien can the individual be regarded as a (direct) subject of international law; that human rights and fundamental freedoms are not yet recognized in positive international law; and that the definition or enunciation of these rights and freedoms belongs rather to a different topic of codification, that of the "status of aliens". The Special Rapporteur has had occasion to point out the weakness of these objections (A/CN.4/111, paras. 10-12). Since then, as he studied more thoroughly the various questions and principles connected with the international responsibility which the State may incur for injuries to the person or property of aliens, he has become more and more convinced that it is both necessary and desirable to retain the system described in the draft. The question is not merely by what standard acts or omissions imputable to the State are to be judged: for the purpose of the interpretation and application of the principles governing responsibility in each specific case it is also necessary to know what are the essential rights and freedoms of aliens, and the limitations or restrictions to which the enjoyment and exercise of these rights are subject for the reasons specified in municipal law.

Article 2. — Constituent elements of responsibility

The first two paragraphs of this article are identical with those appearing in article 1 of the original draft. They enumerate the constituent elements of international responsibility—viz., the act or omission contravening the international obligations of the State, the injury to the person or property of the alien and the imputability of the act or omission. In addition, the article defines the meaning of the expression "international obligations of the State", and a new paragraph 3 extends the meaning of the expression to cover the prohibition of the "abuse of rights", by which is meant any action contravening the rules of conventional or general international law governing the exercise of the rights and

competence of the State. As was explained in the fifth report (A/CN.4/125, paras. 70 and 71), the prohibition of "abuse of rights" may be regarded as implied in that expression, in view of the extent to which it has been recognized in diplomatic practice and international case-law, but the express provision in the paragraph has the advantage of defining in the draft itself the essential idea on which responsibility is based in these cases.

The article retains, in paragraph 4, the principle that the State may not plead any provisions of its municipal law for the purpose of repudiating the responsibility which arises out of the breach or non-observance of an international obligation. As will be seen below, this principle does not prevent the "imputability" of the act or omission from being determined in conformity with the municipal law (article 12, para. 5), nor does it mean that an act or omission of the legislature cannot be imputed to the state if the State can in some other way avoid the injury or make reparation therefor (article 13, para. 2).

Title II
ACTS AND OMISSIONS
GIVING RISE TO RESPONSIBILITY

Chapter II
DENIAL OF JUSTICE AND OTHER SIMILAR ACTS AND OMISSIONS

Article 3. — Acts and omissions involving denial of justice

As will be seen, the first three paragraphs of the article repeat, with only some drafting changes, the provisions of article 4 of the original draft, and consequently it is not necessary to add anything to the commentary in the second report (A/CN.4/106, chapter II, section 8). The sole innovation is the reference in the new paragraph 4 to the failure to carry out the decision rendered of a municipal or international court in favour of the alien. As is expressly stated in the paragraph, if the failure is due to a clear intention to cause injury to the alien there would seem to be no doubt that the act or omission preventing the execution of the decision involves a "denial of justice". Even though the appropriateness of its description as such may be debatable—as may also be the aptness of the definitions of other acts or omissions for which provision is made in some of the preceding paragraphs—it is undeniable that such an act or omission is capable of giving rise to the international responsibility of the State.

Article 4. — Deprivation of liberty

*Article 5. — Expulsion and other forms
of interference with freedom of movement*

None of the acts and omissions similar to the "denial of justice" was dealt with in the original draft. In a more detailed text, it is natural to deal with those which have arisen most frequently in practice and concerning which a large body of judicial precedents exists. The cases in question are those of the arrest, detention or imprisonment of aliens in circumstances involving the international responsibility of the State. Although there are not many precedents from arbitration concerning cases of expulsion and other interference with freedom of movement, these come within the general notion of "deprivation of liberty", which is not difficult to define, for the purposes of responsibility, by reference to other sources of international law.

*Article 6. — Maltreatment and other acts
of injury to the person*

This too is a new article, although the principle on which it is based is in no way foreign to the system of the original draft. The intention is simply to equate maltreatment and other acts of inhumanity to which aliens may be subjected by the authorities

with the circumstances aggravating international responsibility, for the purposes stated in article 6 itself. In other words, it is one of the cases in which the consequences of the act or omission transcend the injury causes to the alien and accordingly affect what was called the "general interest" in the first report (A/CN.4/96, chapter VII, section 25; A/CN.4/111, chapter VI, section 6). As will be seen, the general attitude adopted by courts and claims commissions in this matter justifies the inclusion of a provision in the draft intended to revise traditional practice and to adapt it to ideas more in keeping with the present state of development of international law.

Chapter III

NEGLIGENCE AND OTHER ACTS AND OMISSIONS IN CONNEXION WITH THE PROTECTION OF ALIENS

Article 7. — Negligence in the performance of the duties of protection

Paragraph 1 of the article amalgamates the provisions contained in articles 10 and 11 of the original draft, retaining the same criterion for determining in what cases the State incurs international responsibility by reason of the acts of private individuals which cause injury to an alien. For the reasons stated below, the paragraph deals only with the State's duties of prevention and hence only with the degree of diligence it should exercise, according to the circumstances, in order to avoid the occurrence of such acts. Although the codifications generally confine themselves to this somewhat vague and loose formula, the Special Rapporteur thought it desirable, in revising these provisions of the draft, to refer in the next paragraph to the two criteria most commonly taken into account in practice, viz., the extent to which the injurious act could have been foreseen and the maxim *diligentia quam in suis*.

Paragraph 3 of the article is concerned only with the duty to apprehend the guilty private individuals, and bases responsibility on a criterion entirely different from that generally appearing in the codifications, including the Special Rapporteur's original draft. This is the criterion laid down in the new Harvard draft convention (article 13),¹ under which the State is responsible in those cases only where the failure to apprehend the guilty persons deprives the injured alien of the opportunity to bring a claim against them for compensation for his injuries. Beyond any doubt this criterion is more logical and more equitable than the traditional one, which bases international responsibility on the mere fact of the lack of "due diligence"; for that reason it has been introduced into the draft, with the addition, which seems equally logical and equitable, of the case where the alien is deprived of this opportunity as a result of a general or specific amnesty.

Article 8. — Other acts and omissions in connexion with the obligation to protect aliens

Paragraph 1 of the article corresponds to article 14 of the original draft and like that article deals with the kind of behaviour on the part of the authorities which can and should be regarded as an aggravating circumstance for the purposes mentioned in the paragraph. It should be noted that the reference is not to negligence in connexion with the injurious acts of the private individuals but to acts or omissions that imply a degree of connivance, complicity or participation of the authorities which justifies the application of the rule established in the draft to this category of acts and omissions.

The same is true of the manifest and inexcusable negligence referred to in paragraph 2 of the article, even though the omission which in this case gives rise to the international responsibility of

the State does not have the particularly serious character of connivance, complicity and, above all, participation. But in view of the purposes for which responsibility is established — viz., to ensure that the respondent State takes the necessary measures to avoid the recurrence of omissions of this kind — the paragraph seems entirely justified. What is involved here is undoubtedly the manifest and inexcusable raw performance of the duty to do justice by punishing the wrongful act, and it should not be forgotten that under the traditional system, as was pointed out in the commentary on paragraph 3 of the preceding article, responsibility by virtue of the mere fact of negligence implied the duty to compensate the alien for the injury caused to him.

Chapter IV

MEASURES AFFECTING ACQUIRED RIGHTS

Some changes and additions have been introduced in this chapter which involve a substantial revision of some of the corresponding provisions of the original draft. These changes and additions are the result of further, more thorough research into the subject, and particularly into the ideas which have been gaining ground since the last war; although these ideas do not as a whole constitute a uniform movement and in some cases are even contradictory, they are unquestionably making a deep impact on traditional views. See the fourth report (A/CN.4/119) and also the fifth report, in which the extraterritorial effects of measures affecting acquired rights are considered and the revised texts appearing in the new draft are introduced (A/CN.4/125, A 1 and C 2 (a) and (b)).

Article 9. — Measures of expropriation and nationalization

Unlike the corresponding provision of the original draft, this article distinguishes between individual expropriation and general ("impersonal") nationalization or expropriation carried out as part of a programme of economic and social reform. The purpose of distinguishing between the two situations and of providing separate rules for each is fundamentally to subject individual and ordinary expropriations to the rules of municipal law in force at the time of acquisition of the property, and expropriations forming part of a nationalization measure to the rules laid down for the purpose by the expropriating State, without prejudice to the conditions or prerequisites specified in paragraph 2 of the article. As is fully explained in the fourth report, the problem is mainly what form of compensation should be paid to the foreign owners of the nationalized property. In this respect, there is no doubt that to continue to require the nationalizing State to pay an "adequate" or "just" (that is, equivalent to the market value of the property) "prompt and effective" compensation would be essentially incompatible with the exercise of the State's right to nationalize property, rights or undertakings within its jurisdiction (see fourth report, A/CN.4/119, chapter II, section III).

Article 10. — Non-performance of contractual obligations in general

Paragraph 1 of the article does not differ in substance from paragraphs 1 and 2 of article 7 of the original draft. Thus, in order to give rise to the international responsibility of the State for the repudiation or breach of the terms of a contract or concession, the act or omission must not be justified on grounds of public interest or of the economic necessity of the State, or must involve a "denial of justice". The former article 7, paragraph 2 (b), which explicitly prohibited discrimination between nationals and aliens to the detriment of the latter, has been deleted, in view of the fact that in practice these cases generally arise out of acts or omissions affecting specific persons. In any case, the responsibility of the State in the case of acts or omissions which may give rise to discrimination to the detriment of persons of foreign nationality

¹ *Research in International Law*, Harvard Law School, Nationality, Responsibility of States, Territorial Waters, Cambridge, Mass., 1929.

would be apparent by virtue of the principle of the equality of nationals and aliens embodied in article 1 of the draft.

Paragraph 2 corresponds to paragraph 3 of former article 7. As is explained in the third report (A/CN.4/111, chapter VII, section 11), the presence of the Calvo clause in the contract or concession would enable the respondent State to decline international responsibility even if some of the acts or omissions referred to in paragraph 1 of article 10 were imputable to it. Although international judicial precedents have not yet gone so far as to attribute precisely this validity and these effects to the Calvo clause, the real legal situation it creates makes it impossible, technically, for any "denial of justice" or any other act or omission which is illegal or arbitrary from the point of view of international law to arise.

A new provision has been incorporated in revised draft article 10, paragraph 3. Unlike contractual relations of the ordinary type which are governed by municipal law, the contracts or concessions now under consideration, by virtue of the stipulations which they themselves contain, are governed by international law or by legal principles of an international character. As was explained in the fourth report (A/CN.4/119, chapter III, section 29), where the matter was examined at some length, the legal position arising from such contracts or concessions fully justifies the application of the principle *pacta sunt servanda*, and the State is accordingly regarded as incurring international responsibility by the mere fact of non-performance.

Article 11. — Public debts

Ever since preparing the original draft articles, the Special Rapporteur has had some doubt about the need for the inclusion of an additional article setting out the specific conditions governing the international responsibility of the State for the repudiation or cancellation of its public debts. These doubts were occasioned by the fact that the preceding article, inasmuch as it refers to the non-performance of contractual obligations in general, might cover the cases in which the State repudiates or cancels this particular kind of contractual obligation, and further by the fact that, as Borchard has pointed out, "This distinction . . . is important, inasmuch as there is far less reason for governmental intervention to secure the payment of defaulted bonds of a foreign government than there is in the case of breaches of concession and similar contracts."² Accioly and other writers took the same view, after explaining why the likelihood of responsibility being incurred was nevertheless more remote than in the case of other contractual relations (see A/CN.4/106, chapter IV, section 13). This attitude appears entirely reasonable to the Special Rapporteur and the wording of the article — which is the same as that of article 8 of the original draft — is based on it.

Chapter V

IMPUTABILITY OF ACTS OR OMISSIONS

The original draft did not contain a separate chapter dealing with the conditions governing the imputability of acts and omissions [to the State]. Reference was made to the question in some of the articles, but it was not dealt with in the thorough and systematic manner now attempted by the Special Rapporteur.

Article 12. — Acts and omissions of organs and officials in general

Paragraphs 1, 2 and 4 of this article correspond to the three paragraphs of article 3 in the original draft, which incorporated the provisions of the drafts approved at the first reading by the third

² Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, The Banks Law Publishing Co., 1915, p. 282.

committee of the Conference for the Codification of International Law (The Hague, 1930). But the article includes two important additions. The purpose of the first, which appears in paragraph 3, is to distinguish between acts *ultra vires* that may give rise to the international responsibility of the State (paragraph 2) and situations in which, although the organs or officials may to some extent have relied on their official position or made use of the means available to them by virtue of that position, yet the very nature of the manner in which they exceeded their competence presupposes an act wholly outside their functions and powers. In cases of this kind, there is no difficulty in understanding why the act should not be imputable to the State as an act performed by an organ or official.

The second addition appears in paragraph 5 of the article; its sole purpose is to establish the criterion by which the act or omission is to be proved for the purpose of determining whether it is imputable to the State. In contradistinction to the views recently expressed by some writers, the draft provision lays down that the decision will be made in conformity with municipal law, this being the only law under which competence is conferred upon organs or officials and defined and determined. In this matter, moreover, the precedents of arbitration cases seem to support the Special Rapporteur's views.

Neither here nor elsewhere in this chapter is there any provision of a general nature dealing with the grounds for imputing the act to the State, in other words, with the question whether, in order to be imputable to the State, the act must have been deliberate and wilful, or whether, for the purpose of the imputability of the act or omission, the mere occurrence of an event which is objectively contrary to international law is sufficient. After considering the question at some length in his fifth report (A/CN.4/125, B II and C 1(b)), the Special Rapporteur came to the conclusion that, from the point of view of the method of codification, it is preferable to state specifically in each case whether subjective elements such as *culpa* or *dolus* have to be present, and this is the course which he has followed in the draft articles both in this and in other chapters of this title.

Article 13. — Acts and omissions of the legislature

Apart from drafting changes, this article is identical with the original article 2. As will be seen, neither enactments incompatible with international law nor legislative omissions are automatically and inevitably imputable to the State. If the State can avoid the injury or make reparation therefor, and does so without delay, the enactment or failure to enact will not be imputable to it. The importance of this second provision should not be underestimated, particularly in view of its relevance to the question of the "appropriateness" of certain forms of reparation, as will become apparent in connexion with chapter VIII of this draft.

Article 14. — Acts and omissions of political subdivisions

Although the subject was not dealt with in the original draft, the article does not require a lengthy commentary. It states a principle which, at least in modern times, is not in dispute. Whatever reason may be given to explain or to justify this principle, the essential point is that, after the doubts which existed in the past, it is today recognized that acts and omissions of political subdivisions which contravene the international obligations of the State are imputable to the State.

Article 15. — Acts and omissions of a third State or of an international organization

This is likewise a new article. By contrast with the previous case, here there is certainly no well-defined trend of opinion, still less an adequate body of precedents taken from practice. Nevertheless, the article as drafted provides a rule which would make it possible

to deal with the situations in question in conformity with the general principle applying in cases where the injury to an alien is not caused by an act or omission of the organs or officials of a State, but by the conduct of third parties. This principle is indeed all the more applicable here because the third parties are likely to be bodies over whose acts and omissions the State has very little or no control.

Article 16. — Acts and omissions of successful insurgents

The object of this article, which replaces article 12, paragraph 2, of the original draft, is that the imputability of the acts and omissions of insurgents in the course of civil strife should be determined by the same rules as those applicable under the draft for the purpose of determining in what circumstances negligence and other acts and omissions in connexion with the protection of aliens give rise to the international responsibility of the State. While admitting that the subject is beset by uncertainties, the Special Rapporteur thought that this was the most reasonable and practical rule.

Article 17. — Exonerating and extenuating circumstances

The main point here is that this article, unlike chapter VI of the original draft, makes no reference to "aggravating" circumstances; the reason is, as the reader will have noted, that these circumstances are referred to in other chapters and articles, in consequence of the rearrangement of the draft. Paragraphs 1 and 2 correspond to paragraph 1 of former article 13, but differ from it in that they deal separately with *force majeure* and state of necessity, the object being to set out with greater clarity and as precisely as possible the conditions under which each of these defences is admissible. Paragraphs 3 and 4 correspond, without any change of substance, to the last two paragraphs of former article 13.

Title III

THE INTERNATIONAL CLAIM
AND THE REPARATION OF THE INJURY

Chapter VI

ADMISSIBILITY OF CLAIMS

Article 18. — Exhaustion of local remedies

Certain changes have been made in the form and substance of this article, which corresponds to article 15 of the original draft. Paragraph 1 makes it clear that the requirement that all remedies must have been exhausted also applies to each of the grounds for the international claim. Paragraph 2 is unchanged. Paragraph 3 again is more explicit than the original draft as regards the reasons which are not admissible as excusing the failure to resort to all or any of the remedies, except that the reference to "inadequacy of the reparation for the injury" has been dropped because this case really constituted a "manifestly unjust decision" within the meaning of article 3.

Paragraph 4 corresponds to article 17 of the original draft concerning agreements between the respondent State and the State of nationality of the alien who has suffered the injury. In the fifth report, in the passages discussing the systems of direct settlement between the State and the foreign private individual, it was suggested that it should not be necessary to exhaust the local remedies, unless the agreement between the parties expressly so required as a condition for the submission of a claim on the international level (A/CN.4/125, A II, 41 and C 2 (c)). For if the essential purpose of the arbitration clause is precisely to empower the parties to submit the claim to the international tribunal when the dispute arises, what would be the sense of requiring recourse to municipal jurisdiction? Paragraph 5 of the article as now drafted reflects these views.

Article 19. — Waiver of diplomatic protection

Apart from some drafting changes intended to clarify the text, paragraphs 1 and 2 of this article are the same as the first two paragraphs of the former article 16. Paragraph 3, on the other hand, contains a new provision, the intention of which also is to bar an international claim if the alien has of his own free will reached a compromise or a settlement with the local authorities in connexion with the reparation of his injury. The case is similar to that where the alien has waived diplomatic protection (Calvo clause), and for that reason it is right in this case too that the international claim should be barred. The provisions of paragraph 4 also remain unchanged from those set out in the former paragraph 3, except that, for the same reasons, it takes into account the situation to which reference has just been made.

Article 20. — Settlement of questions regarding the admissibility of the claim

Except for a slight drafting change, this article is identical with article 18 of the original draft.

Chapter VII

SUBMISSION OF THE INTERNATIONAL CLAIM

Articles 21-25

The articles of this chapter remain as they were in chapter VIII of the original draft. The only differences are in article 22 (formerly 24), paragraph 2, in which certain drafting changes have been made in order to define more precisely one of the acts and omissions enabling the State of nationality to bring an international claim for the purposes set out in article 27; and in article 23 (formerly 21), where a new paragraph 3 has been added in order to incorporate the rule laid down by the International Court of Justice in the *Nottebohm* case.³

Chapter VIII

NATURE AND MEASURE OF THE REPARATION

Article 26. — Restitution and pecuniary damages

Actually, no change of substance has been introduced in paragraph 1 of this article. Only the last part has been re-drafted so as to reflect more precisely the idea that the object of the reparation should be to "wipe out" the consequences of the act or omission which contravened international law. For this purpose, the terminology used in the revised draft is based on a well-known passage in a judgement of the former Permanent Court of International Justice.

Paragraph 2, on the other hand, is entirely new; its aim is to draw attention to cases where restitution, as a mode of repairing the injury, would be inappropriate. If restitution would involve the repeal of a law, the annulment of a judicial decision or the non-application of an executive or administrative measure and it would be incompatible with or cause difficulties under the municipal law of the respondent State, the reparation of the injury should take another form: the payment of pecuniary damages. Because the essential purpose of reparation can always be achieved in this way, it would not be right to compel the respondent State to perform some act which is repugnant to its legislation or creates some other kind of difficulty for that State. Since the dispute is between private interests—those of the injured alien—and general and public interests—those of the respondent State—clearly, the only way of settling it is that laid down in the draft.

Paragraph 3 of the article contains a new clause, which was in fact implied in the first part of the paragraph. Whatever may be

³ *Nottebohm Case (second phase)*, *I.C.J. Reports* 1955, p. 26.

the nature or purpose of the pecuniary damages, the quantum of the damages should be strictly commensurate with the nature of the injury caused to the alien, or, as the paragraph puts it, the damages should not become a source of undue enrichment for him, a point which has been expressly recognized in arbitral decisions. Paragraph 4 lays down the same rule as the original draft, but is more explicit.

*Article 27. — Measures to prevent the repetition
of the injurious act*

Article 25 of the original draft appears in paragraph 2 of the new article and no change of substance has been made in it. Para-

graph 1, however, contains an additional rule which the Special Rapporteur considers to be fully justified in the light of the more detailed analysis of this and other aspects of reparation made in his sixth report (A/CN.4/134, *supra*). Under this provision, it will not be admissible — whatever may have been the consequences of the act or omission imputed to the respondent State, and however serious the act or omission may be — to use forms of reparation involving “satisfaction” to the State of nationality which offend the honour and dignity of the respondent State. The intention is, of course, to condemn certain practices followed in the past which are manifestly inconsistent with international law at the stage which it has now reached.

CONSULAR INTERCOURSE AND IMMUNITIES

[Agenda item 2]

DOCUMENT A/CN.4/137

Third report by J. Žourek, Special Rapporteur

ANALYSIS OF THE COMMENTS MADE BY THE GOVERNMENTS OF MEMBER STATES AND NEW PROPOSALS
SUBMITTED BY THE SPECIAL RAPPORTEUR IN THE LIGHT OF THOSE COMMENTS

[Original: French]

[13 April 1961]

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INTRODUCTION

1. At its twelfth session, the International Law Commission adopted sixty-five draft articles on consular intercourse and immunities, with provisional commentaries.¹ In conformity with articles 16 and 21 of its Statute, the Commission transmitted its draft to governments for their comments.

2. When the Commission's report on the work of its twelfth session was considered in the Sixth Committee of the General Assembly (fifteenth session), the draft articles on consular intercourse and immunities, though submitted to the Assembly for information only, gave rise to an exchange of views on the draft as a whole. The draft was favourably received and was described as being, on the whole, in keeping with the practice and requirements of States. In the course of the debate several delegations paid a tribute to the Commission's work on consular intercourse and immunities. As the articles were provisional and at that time awaiting the comments of governments, the delegations did not, as a rule, comment on the text of the articles. In some cases, however, their remarks, though purely provisional, also dealt with certain articles of the draft.

3. The great majority of delegations approved the International Law Commission's decision to prepare a draft which would provide a basis for the conclusion of a multilateral convention on the subject.²

4. By 1 April 1961, the date by which the Special Rapporteur had to finish his work, comments had been received from nine governments: those of Guatemala, Finland, Norway, Czechoslovakia, the Philippines, Yugoslavia, Denmark, Sweden and the Union of Soviet Socialist Republics (A/CN.4/136 and Add. 1 & 2).³

5. These comments indicate that the draft articles are on the whole regarded by the governments in question as an acceptable basis for the conclusion of an international instrument codifying consular law. With the exception of the Government of Guatemala, which is prepared to accept the Commission's draft as it stands, all the other governments make a number of comments on the various articles of the draft. To facilitate discussion in logical sequence, these comments may be divided into several groups. First, there are proposals or suggestions for the deletion of certain articles of the draft. A second, and much larger group, consists of proposed amendments or additions to the text as adopted by the Commission at its twelfth session. Then there are some comments containing proposals for the addition of new articles. Lastly, most of the comments contain particulars requested by the Commission regarding either proposed alternative provisions or the practice of States in respect of some points on which the Commission had not had much information at its disposal.

¹ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9 (A/4425), chapter II.*

² *Ibid.*, para 24.

³ The comments of these and of other governments are reproduced in annex I to the Commission's report on its thirteenth session; see below, pp. 129-170.

6. To facilitate the debate, the Special Rapporteur has summarized, in accordance with the established custom, the remarks made by delegations in the Sixth Committee of the General Assembly and the comments of governments. For more detail, the reader is referred to the summary records of the meetings of the Sixth Committee mentioned in this report,⁴ and to comments of governments.

7. As this draft contains several articles dealing with matters analogous to those dealt with in the draft articles on diplomatic intercourse and immunities (A/3859, chapter III), which, as this report is being written, are being discussed by the United Nations Conference on Diplomatic Intercourse and Immunities at Vienna, it would have been very desirable that the Special Rapporteur should have been able to wait until the final results of the Vienna Conference were known before submitting his final proposals. Since, however, the session of the International Law Commission is scheduled to begin a few days after the date on which the Vienna Conference is expected to close, the Rapporteur was unable, owing to overriding technical considerations, to await the final results of that conference.

Section I

PROPOSALS FOR THE DELETION OF CERTAIN ARTICLES

Article 2. — Establishment of consular relations

The *Government of Norway* proposes that article 2 be deleted. It considers that it is unnecessary to complicate the text of the proposed convention by the introduction of the expression "consular relations". It regards the expression as in the nature of a convenient figure of speech without precise meaning in international law. According to the Norwegian Government, the legal consequences follow from the unilateral or mutual consent to establish one or more specific consulates.

Article 6. — Communication and contact with nationals of the sending State

The *Czechoslovak Government* proposes in its comments that article 6 be omitted, pointing out that the powers of the consul to protect the interests of the nationals of the sending State are regulated in general terms by the provisions concerning consular functions. In the opinion of the Czechoslovak Government, this regulation is sufficient. The detailed regulation of questions referred to in draft article 6 is a matter falling within the exclusive competence of the internal legislation of the receiving State.

Article 18. — Occasional performance of diplomatic acts

1. *Norway*: The Norwegian Government regards this provision as wholly unnecessary.

2. *The Finnish Government*, on the other hand, notes with satisfaction that articles 18 and 19 restrict what

⁴ For these summary records, see *Official Records of the General Assembly, Fifteenth Session (Part I), Sixth Committee.*

it regards as the extremely broad provision of article 4, paragraph 1.

3. *Yugoslavia*: In the opinion of the Yugoslav Government, the question with which this article is concerned should be dealt with in the articles on diplomatic intercourse and immunities.

Article 19. — Grant of diplomatic status to consuls

The *Norwegian Government* takes the view that borderline cases should be regulated by *ad hoc* agreement and that it is useless to regulate such cases by the provisions of a multilateral convention.

Article 57. — Exemption from obligations in the matter of registration of aliens and residence and work permits

The *Danish Government* considers that this article should be removed from the draft.

Article 64. — Non-discrimination

In the opinion of the *Norwegian Government*, this article is superfluous and might give rise to misconstructions.

Section II

COMMENTS SUGGESTING AMENDMENTS TO THE PROVISIONS OF THE DRAFT ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES

The expression "consular relations"

1. In its comment suggesting the omission of article 2, the *Norwegian Government* proposes that, for the same reasons, the expression "consular relations" be deleted wherever it occurs in the draft (see under "article 2" in section I above).

2. It should be pointed out in the first place that the expression "consular relations" is used in the draft articles, in conformity with doctrine and with the practice of States, to describe the relationship in law which arises between two States by reason of the exercise of consular functions in the territory of one of them by organs of the other. If this relationship exists, it must be given a name. The problem would not be solved by omitting the descriptive expression, for the relationship would continue to exist as before. Besides, the draft merely repeats the language used in the list of topics which the Commission at its first session in 1949 selected for codification.⁵ The expression [in French: "relations consulaires"] was approved by the General Assembly of the United Nations and has been used constantly by the International Law Commission, as well as by the General Assembly,⁶ without encounter-

⁵ *Report of the International Law Commission on the work of its first session, Official Records of the General Assembly, Fourth Session, Supplement No. 10 (A/925), para. 16; see also Yearbook of the International Law Commission, 1949 (United Nations publication, Sales No. 57.V.1), p. 281. [The English term used in this list is "intercourse".]*

⁶ See, for example, General Assembly resolution 1504 (XV) of 12 December 1960 concerning the report of the International Law Commission on the work of its twelfth session [in English: "intercourse"].

ing marked opposition. For all these reasons, the Special Rapporteur cannot agree with the suggestion that the expression "consular relations" should be deleted wherever it occurs in the draft. If the Commission should take the view that the precise meaning of the expression should be defined in the text of the draft articles itself, perhaps a definition might be added to article 1 (Definitions).

Article 1. — Definitions

Sub-paragraph (e)

1. *Soviet Union*: In its comments, the Government of the Soviet Union proposes that sub-paragraph (e) should be amended to read:

"The expression 'consular archives' means all documents, official correspondence and the consulate library, as well as any article of furniture intended for their protection or safe-keeping;"

Sub-paragraph (f)

2. *Norway*: According to the comments of the Norwegian Government, the meaning given in the present draft to the term "consul" seems unnaturally restricted, for in common parlance the term encompasses all consular officials. In addition, it thinks it is of particularly doubtful utility to introduce a special term denoting a head of consular post. The Norwegian Government is furthermore of the opinion that the terminological system adopted is not followed consistently in the draft itself, for example, in article 10. Finally, it considers that the last sentence of the sub-paragraph should be deleted, for it does not seem to have any terminological import.

3. *Yugoslavia*: The Yugoslav Government considers that it would be desirable to say whether, from the point of view of consular privileges and immunities, the status of the consular agent referred to in sub-paragraph (f) of this article is the same as that of a consul.

Sub-paragraph (i)

4. *Norway*: The Norwegian Government observes that the last clause "and who is not a member of a diplomatic mission" seems unnecessary.

5. *Philippines*: In the comments submitted on behalf of the Philippine Government, some doubt is expressed concerning the definition of "consular official", in view of the position of persons who are attached to a diplomatic mission but perform consular functions.

6. *Yugoslavia*: The Yugoslav Government considers that, for the sake of completeness, a proper definition of the expression "sending State" and "receiving State", as set forth in paragraphs 7 and 8 of the commentary on article 3, might be inserted in the text of article 1.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. The Special Rapporteur cannot support the view that the term "consul" is used in an unnaturally restricted sense in the present draft. The definition of "consul" given in article 1 (f) is in keeping with

the definitions given in recent consular conventions. For example, the consular convention between Great Britain and Norway of 22 February 1951 defines "consular officer" as "any person who is granted an *exequatur* or other authorization (including a provisional authorization) to act in such capacity by the appropriate authorities of the territory; a consular officer may be a career officer (*consul missus*) or an honorary officer (*consul electus*);" (article 2, paragraph 6). Other consular conventions concluded by Great Britain use the same definition of consul: *cf.* the consular conventions concluded with France, on 31 December 1951 (article 2, paragraph 6); with Sweden, on 14 March 1952 (article 2, paragraph 6); with Greece, on 17 April 1953 (article 2, paragraph 6); with Mexico, on 20 March 1954 (article 2, paragraph 6); with Italy, on 1 June 1954 (article 2, paragraph 6); and with the Federal Republic of Germany, on 30 July 1956 (article 1, paragraph 6).

2. The consular convention concluded between the Soviet Union and the German Democratic Republic on 10 May 1957 defines the word "consul" as meaning consul-general, consul, vice-consul and consular agent (article 4, paragraph 1). Other recent consular conventions concluded by the Soviet Union define the term "consul" in the same way: *cf.* the consular conventions concluded with Hungary, on 24 August 1957 (article 4, paragraph 1); Romania, of 4 September 1957 (article 5, paragraph 1); Albania, on 18 September 1957 (article 5, paragraph 1); Czechoslovakia, on 5 October 1957 (article 1, paragraph 3); the Democratic People's Republic of Korea, on 16 December 1957 (article 5, paragraph 1); Bulgaria, on 16 December 1957 (article 5, paragraph 1); and the Democratic Republic of Viet-Nam, on 5 June 1959 (article 5, paragraph 1). Other conventions used the term "consul" in the same sense—e.g., that concluded between Czechoslovakia and the German Democratic Republic on 24 May 1957 (article 1).

3. The use of the expression "head of post" side by side with the term "consul" is fully justified by the practice of certain States. Not all consuls are heads of post. And it is the custom of some States to issue consular commissions not only to the consul who is appointed head of post, but also to those who are assigned to a consulate to work under the direction of the head of post. Accordingly, these States request the *exequatur* for any consul, even if he is not head of post. This practice seems unnecessary in the light of the view which the Commission adopted during the discussion of article 13 and which is expressed in paragraph 7 of the commentary on article 13. But States using this procedure cannot be prevented from continuing the practice if the receiving State consents thereto or even favours it. As long as this practice exists, it must be taken into account in the draft.

4. The last sentence of sub-paragraph (f), "A consul may be a career consul or an honorary consul" is not indispensable, since these terms are not defined in the article.

5. Inasmuch as consular functions are performed also by diplomatic missions within the scope of their

normal functions, it is necessary to specify in the definition of "consular official" in article 1 (i) that the definition is applicable strictly to consular functions exercised by a person who is not a member of a diplomatic mission. Otherwise, the definition would apply equally to members of the diplomatic staff who are employed in the performance of consular functions in a diplomatic mission. But the members of the diplomatic staff do not lose their diplomatic privileges and immunities by reason of performing acts which come within the scope of consular functions. The distribution of the work inside a diplomatic mission depends on the mission's internal organization and can have no effect on the legal status of the members of the mission's staff, so long as they still belong to it. If a diplomatic agent is appointed to a consulate, his status is governed by the additional article proposed by the Special Rapporteur in section III of this report.

6. In the light of the comments of governments on article 1 of and the discussions at the Vienna Conference, the Special Rapporteur proposes the following wording for article 1 (b), (e) and (f):

- (b) The expression "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of the form of ownership, used for the purposes of the consulate;
- (e) The expression "consular papers" means the official correspondence and all the documents of the consulate, and the consular archives and library, 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 the said functions.

7. The Special Rapporteur further proposes that the following definitions should be added to the present text of article 1:

- (m) The expression "sending State" means the State which appointed the consul and which the consulate represents;
- (n) The expression "receiving State" means the State in whose territory the consulate exercises its activities. In cases where the consular district embraces the whole or part of the territory of a third State, that State shall likewise be deemed to be a receiving State for the purposes of these articles;
- (o) The term "nationals" means both individuals and bodies corporate having the nationality of the State in question.

Article 2. — Establishment of consular relations

1. *Indonesia*: During the discussion of the Commission's report in the Sixth Committee of the United Nations General Assembly the Indonesian delegation expressed support for the inclusion in the article of the second paragraph proposed by the Special Rapporteur, as given in paragraph 3 of the commentary on article 2 (Summary record of the 660th meeting, paragraph 21).

2. *Ukraine*: The representative of the Ukrainian Soviet Socialist Republic made a comment to the same effect (657th meeting, paragraph 19).

3. *Soviet Union*: The comments of the Soviet Union propose the addition of a provision to the effect that the establishment of diplomatic relations includes the establishment of consular relations.

4. *Czechoslovakia*: The Czechoslovak Government makes a similar proposal in its comments.

PROPOSAL BY THE SPECIAL RAPPORTEUR

Article 2. — *Establishment of consular relations*

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

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

Commentary

1. The expression "consular relations" as used in this article and in the other articles of the present draft describes the relationship in law which comes into existence between two States by reason of the fact that consular functions are exercised by organs of one of the two States in the territory of the other. In most cases, this relationship is mutual, each of the two States concerned being represented in the other by an organ exercising consular functions. It sometimes happens, however, that only one of the two States exercises consular functions in the territory of the other. Moreover, since the establishment of consulates and the exercise of consular functions are governed by international law, a relationship in law comes into being between the sending State and the receiving State. (This is an expression sanctioned by long usage and it is for this reason that the Commission adopted it, although some members of the Commission would have preferred another.)

2. Paragraph 1, which states a rule of customary international law, emphasizes that the establishment of consular relations must be based on the consent of the States concerned. This is a fundamental rule of all consular law. The consent may, of course, be either express or implied.

3. Consular relations may be established between States which do not maintain diplomatic relations with each other. In this case, the consular relations are often the only official relations between the two States.

4. Since in modern times the normal functions of diplomatic missions include all the consular functions, the establishment of diplomatic relations implies *ipso facto* the establishment of consular relations. This rule is expressed in paragraph 2 of the article. States which have established diplomatic relations are consequently free to exercise all the functions covered by the definition of consular functions given in article 4 of the present draft, without having to enter into a special agreement for this purpose. This is standard practice. In many cases, a consular section is organized within the diplomatic mission, but this is an internal question within the competence of the sending State.

5. The manner in which consular functions are exercisable by a diplomatic mission is of course subject to the rules applying to diplomatic missions in the country

concerned. Thus, the diplomatic mission will have to approach the local authorities through the Ministry of Foreign Affairs, unless the receiving State authorizes direct contact with the local authorities either in a specific case or generally. For example, in January 1958, the Government of the United States of America addressed to all the diplomatic missions in Washington a circular announcing that it would recognize the members of diplomatic missions who exercise consular functions as qualified to act in both capacities.

6. In some States, on the other hand, the officials of diplomatic missions are debarred from approaching the local authorities direct unless they hold an *exequatur* issued by the receiving State. It should be emphasized that in cases of this kind the receiving State's consent is required, not for the establishment of consular relations — as has sometimes been wrongly affirmed — but as a condition which must be fulfilled before the officials of diplomatic missions can enter into direct contact with the local authorities, including the courts.

7. It follows from the foregoing that in countries in which diplomatic agents responsible for consular business are not allowed to approach the local authorities, the diplomatic missions will in fact be unable to discharge those consular functions for the exercise of which direct contact with the local authorities is essential, as for example in certain matters concerning shipping.

8. The State may, of course, prefer to entrust to a consulate the exercise of consular functions in a State with which it maintains diplomatic relations. For this purpose, the consent of the receiving State is indispensable, as is clear from the provisions of article 3.

9. Paragraph 2 of the article is of both theoretical and practical importance. It is commonly admitted that the severance of diplomatic relations does not *ipso facto* involve the severance of consular relations. The Commission itself has confirmed this rule by approving article 26 of the present draft. Unless it was agreed that the establishment of diplomatic relations includes the establishment of consular relations, how could the latter survive the former? To apply the expression "consular relations" only to instances in which those relations are conducted by consulates would lead to inadmissible inequalities in cases where one of the States possesses a consulate in the other's territory, while that other State includes the exercise of consular functions within the ordinary duties of its diplomatic mission. It is an unacceptable proposition that in such cases the consulate should continue its work, but that the exercise of consular functions by the diplomatic mission should be interrupted by the severance of diplomatic relations.

10. If the severance of diplomatic relations should be ordered as a sanction by the Security Council under Article 41 of the Charter of the United Nations, consular relations would be maintained, regardless of whether they were previously conducted by consulates or by diplomatic missions.

11. Another consequence of the rule laid down in paragraph 2 is that if one of the States between which diplomatic relations exist decides to establish a consulate in the territory of the other, it does not need to

conclude an agreement relating to the establishment of consular relations under article 2, but only the agreement concerning the establishment of the consulate under article 3 of the draft.

12. No State is bound to establish consular relations with another State, unless it has undertaken to do so by a previous international agreement. Nevertheless, the interdependence of nations and the obligation to develop friendly relations between them, which is one of the purposes of the United Nations, make the establishment of consular relations desirable and in certain circumstances indispensable.

Article 3. — Establishment of a consulate

1. *Finland*: The Finnish Government observes that there may be serious doubt as to the desirability of the restrictive provision in paragraph 5 of this article. It adds that this is a question which concerns the sending State most closely, if not exclusively.

2. *Soviet Union*: The comments of the Soviet Union propose that paragraph 5 of this article be deleted.

PROPOSAL BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes that paragraph 5 of this article be deleted.

Article 4. — Consular functions

1. *Indonesia*: During the discussions in the Sixth Committee at the fifteenth session of the General Assembly, the Indonesian delegation expressed the view that the term "nationals" appearing in paragraph 1 (a) of this article should not apply to bodies corporate. In support of this view it observed that the basis used for determining the nationality of a corporate body differed from country to country. It further considered that paragraph 1 (c) of the article should be amended so as to take into account the laws and regulations of the receiving State, which often prescribe specific procedures for the solemnization of marriages and other administrative functions (summary record of the 660th meeting, paragraph 23).

2. *Ukraine*: The Ukrainian delegation in the Sixth Committee said that paragraph 1 (b) was not sufficiently detailed, and that there should be, as proposed by the Special Rapporteur, an enumeration of the functions of a consul which are internationally recognized (657th meeting, paragraph 19).

3. *Finland*: The Finnish Government expresses a preference for a general (concise) definition of the consular functions. It observes in its comments that paragraph 1 of this article contains a provision that is extremely broad. Noting that according to articles 18 and 19 of the draft a consul may perform diplomatic functions only to the extent permitted by the receiving State or in accordance with a special agreement, it expresses the view that some further general restrictions would seem desirable.

4. *Norway*: The Norwegian Government prefers the general definition appearing in article 4, but suggests

that it should be amended or supplemented in several respects. This government considers that:

(a) The group of persons to whom a consulate is entitled to give its protection under sub-paragraphs (a) and (b) should be extended to cover stateless persons having their domicile in the sending State;

(b) The words "and to their crews" should be added at the end of paragraph 1 (d);

(c) The provision of sub-paragraph (b) is formulated in terms that are too vague; it refers in this connexion to the commentary on the corresponding provision (paragraph I, 2) of the Special Rapporteur's alternative text. In the opinion of the Norwegian Government many of the consular functions mentioned in that commentary are so important that it ought to be made perfectly clear that they are covered by the article; this applies particularly to sub-paragraphs (b), (d), and (e) of the commentary;

(d) A sub-paragraph drafted along the lines of paragraph II, 7, of the Special Rapporteur's alternative text should be added;

(e) A sub-paragraph drafted along the lines of paragraph III, 10, of the Special Rapporteur's alternative text should be added;

(f) A sub-paragraph modelled upon paragraph V, 17, of the more detailed text prepared by the Special Rapporteur should be added at the end of paragraph 1 of the article.

5. *Czechoslovakia*: The Czechoslovak Government is of the opinion that in drawing up the final text of article 4 the International Law Commission should include, in addition to a general definition, a list of examples of consular functions.

6. *Philippines*: The interpretation placed on paragraph 1 of this article in the comments presented on behalf of the Government of the Philippines is that the paragraph does not actually confer any rights, since the only sources of consular powers which it mentions are bilateral agreements and domestic law. Accordingly, the Government proposes that the paragraph be amended so as to make it a direct source of consular rights.

7. *Yugoslavia*: The Yugoslav Government prefers the first version of this article, which comprises a general definition of consular functions. Pointing out that, as a result of the internal distribution of powers in the receiving State, the consul is often unable to deal with the local authorities in the exercise of many of his functions, it expresses the view that the words "or with the central authorities in connexion with consular matters which in the first instance normally fall within their competence" should be added at the end of article 4, paragraph 2, after the expression "with the local authorities".

8. *Sweden*: The Swedish Government considers it improbable that an international community of more than ninety States can reach agreement on an enumerative definition of any practical value, and considers that the only realistic approach is to be contented with a quite general definition, like that contained in paragraph 1 of the variant proposed by the Special Rapporteur.

9. The comments of the *Governments of Yugoslavia and Denmark* also contain remarks concerning the variant of article 4, which is reproduced in the commentary on this article.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The protection of nationals has always been understood as applying both to individuals and to bodies corporate. This view is confirmed by numerous consular conventions, including the following: Great Britain-Greece, of 17 April 1953 (article 2, paragraph 4); USSR-Romania, of 4 September 1957 (article 14, paragraph 1); USSR-Austria, of 28 February 1959 (article 15, paragraph 1); Czechoslovakia-People's Republic of China, of 7 May 1960 (article 11, paragraph 1). Admittedly, the provisions of municipal law concerning the mode of determining the nationality of companies and associations are not uniform, nor are the learned authorities agreed on the mode of determining the nationality of bodies corporate. Under the law of some countries, the nationality is determined by the head office of the body corporate, while under the law of others the place of incorporation is decisive, the company being deemed to have the nationality of the State in which it was formally constituted. Under the law of yet others the idea of an ostensible nationality is ruled out and the decisive test is who effectively controls the company, with the consequence that the company's nationality coincides in effect with that of its members or directors. But the existence of these differences is not a sufficient reason for saying that the consular functions may be exercised only in respect of individuals, as was suggested by the Indonesian delegation in the Sixth Committee of the General Assembly. Neither article 4 of the draft nor the commentary on this article gives a ruling on this controversial question, nor for that matter do they settle the question of the conflict of nationalities. If these questions should form the subject of a dispute, it ought to be settled by one of the pacific means for the settlement of international disputes. Accordingly, article 4 in no way prejudices the manner in which States regulate the question of the nationality either of individuals or of bodies corporate, and hence the scope of the article cannot be restricted.

2. Nor, on the other hand, can the scope of the consular functions be so broadened that stateless persons domiciled in the sending State are included among the persons to whom the consular protection may be extended as of right. There is no support for such a broadening of their scope in general international law. Consular protection (like diplomatic protection, for that matter) is always concerned with the nationals of the sending State. Possession of that State's nationality is an essential condition which must be fulfilled in order that the State can provide diplomatic and consular protection. The correctness of this view is confirmed, incidentally, by the fact that the legal status of stateless persons had to be settled by a special convention, that of September 1954. But that convention is operative as between the contracting parties only.

3. It should be emphasized that the purpose of article 4 is to codify customary international law. Once

their wording has been accepted, the rules laid down in the article will undoubtedly constitute a direct source of the rights and duties of States and not merely an indirect source referring to existing agreements and to the municipal law of the sending State. Moreover, paragraph 1 of this article mentions not only the functions mentioned in the relevant agreements in force and those vested in consuls by the sending State, but also *the functions provided for in the present articles*. Hence, it is quite unnecessary to amend the present wording of the article for this purpose.

4. As regards the type of definition to be used in this article, most of the comments received so far express a preference for a general definition, but they contain clear evidence that governments would like this general definition to be supplemented by an illustrative enumeration of the most important functions exercised by consuls. Having regard to this, the Special Rapporteur proposes that the final text of article 4 be worded as follows:

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. The principal functions ordinarily exercised by a consul are:

(a) *To protect the interests of the nationals of the sending State, and the interests of the sending State itself, and in particular,*

(aa) *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;*

(bb) *To safeguard, in case of need, the rights and interests of the nationals of the sending State (article 4(a));*

(cc) *To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to the local authorities for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for persons lacking full capacity who are nationals of the sending State;*

(b) *To help and assist nationals of the sending State and, in particular,*

(aa) *To communicate with the nationals of the sending State who are in the territory of the receiving State and to give them such advice as they may require;*

(bb) *To act as their interpreter in their dealings with the authorities or to appoint and interpreter for this purpose;*

(cc) *To put nationals who arrive from the sending State into touch with commercial, cultural and other circles, according to their wishes;*

(dd) *To provide financial assistance to nationals in need and, where appropriate, to arrange for their repatriation;*

(c) *To act as notary and as registrar of births, marriages and deaths and to exercise other functions of an administrative nature and, in particular,*

(aa) *To receive and certify any declarations which nationals of the sending State may have to make;*

(bb) *To draw up, attest and receive for safe custody wills and deeds-poll executed by nationals of the sending State and indentures to which nationals of the sending State are parties, provided that they do not relate to immovable property situated in the receiving State or to rights in rem attaching to such property;*

(cc) *To legalize, authenticate or certify signatures and documents, and to certify or translate documents;*

(*dd*) To record and transcribe documents relating to births, marriages and deaths, without prejudice to the obligation of the declarants to make whatever declarations are necessary in pursuance of the laws of the receiving State;

(*ee*) To receive for safe custody money and securities belonging to nationals of the sending State;

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

(*gg*) To certify documents indicating the origin or source of goods, commercial invoices and like documents;

(*hh*) 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;

(*d*) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State, and to their crews, and in particular,

(*aa*) To examine and stamp ships' papers;

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

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

(*dd*) 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;

(*ee*) To assist members of the crews of ships, boats and aircraft in any business they may have to transact with the local authorities;

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

3. Subject to the exceptions specially provided for in the present articles or in the relevant agreements in force, a consul in the exercise of his functions may deal with the authorities which are competent under the legislation of the receiving State.

Article 5. — Obligations of the receiving State in certain special cases

1. *Yugoslavia*: The scope of sub-paragraph (*c*) should be extended to include aircraft of the sending State.

2. *Soviet Union*: Comment to the same effect.

3. *Philippines*: In its comments the Philippine Government raises the question whether the provision of sub-paragraph (*b*) is permissive or mandatory. Specifically, it asks whether proceedings in such cases, without the consul's being notified, are valid, voidable or impugnable in the absence of such notice.

* Passage based partly on a Netherlands Government's proposal (see annex I to the Commission's report on its 13th session, *infra*). However, whereas the Netherlands text [original: English] speaks of "taking of evidence" the Special Rapporteur's clause [original: French] speaks of *commissions rogatoires*. A better English rendering of the Special Rapporteur's text would be: "(*hh*) to serve judicial documents or execute letters rogatory on behalf of..." [Editor's note.]

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. What is the legal effect of the failure to give the notice stipulated in sub-paragraph (*b*) on proceedings instituted in a court or before some other authority of the receiving State for the appointment of a guardian or trustee for a national of the sending State? To answer this question correctly one must remember that, if the draft articles are accepted by States in the form of a multilateral convention, the failure to give this notice would constitute a non-observance of an international obligation on the part of the State whose organ was responsible for such failure. In the event of its rights being prejudiced in this way, the sending State would no doubt have a good case for applying for the voidance of the proceedings instituted without its being notified, for the failure to give the notice had the effect of depriving that State of the opportunity of asserting its rights during the proceedings and of taking steps on behalf of its national. For the purpose of the voidance of the order or decision in question, the procedure laid down by the law of the receiving State would, of course, have to be followed.

2. Sub-paragraph (*c*) should be drafted to read:

(*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, or if an aircraft registered in the sending State is involved in an accident in the territory or in the territorial sea of the receiving State, to inform the consulate nearest to the scene of the occurrence, without delay.

Article 6. — Communication and contact with nationals of the sending State

1. *Norway*: Principal objections to the text raised by the Government of Norway:

(*a*) The freedoms provided for in paragraph 1 are too extensive;

(*b*) These freedoms are made illusory by the important and ill-defined reservations in paragraph 2;

(*c*) It might be advisable to extend the application of the rule in order to make it applicable in all cases of forced detention (quarantine, mental institutions, etc.); this would seem particularly appropriate in regard to the members of the crews of vessels flying the flag of the sending State, whatever their nationality.

The Norwegian Government proposes that the article be re-drafted with a view to establishing clear and binding norms.

2. *Denmark*: The Danish Government interprets paragraph 2 as authorizing the receiving State to restrict the consul's freedom to converse with the prisoner, if considerations of national security or relations with foreign Powers or special considerations render this necessary.

Article 8. — Classes of heads of consular posts

1. *Norway*: Norwegian law does not differentiate between "consular agents" and other groups of consular

officials. Norway does not employ consular agents and there are no special rules governing the method of their appointment.

2. *Yugoslavia* observes that a point to be clarified is whether consular agents belong to the same class as consuls or constitute a special category of consular officials.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. Under the present terms of article 8, consular agents form one of the classes of heads of consular posts. They may, however, like consuls and vice-consuls, be assigned to other posts in a consulate-general, consulate or vice-consulate, in which they would then work under the direction and responsibility of a consul-general, consul or vice-consul, as the case may be. Perhaps an explanatory remark on this point might be included in the commentary on the article.

2. The Special Rapporteur proposes no change in the text of this article.

Article 10. — Competence to appoint and recognize consuls

1. *Norway*: Terminological consistency would seem to require that the word "consul" be replaced by the expression "heads of consular post".

The Norwegian Government sees no compelling reason for including these provisions in the draft. In its opinion, it would seem unwise to create any mutual "droit de regard" in this respect.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The word "consuls" was chosen purposely so as to cover also cases in which the sending State issues a consular commission to, and requests the *exequatur* for, a consul who is not appointed head of post.

2. This article merely says that it is the internal law of the sending State which governs the competence to appoint consuls and the manner of exercising this right; similarly, it provides that it is the internal law (of the receiving State) which determines the competence to grant recognition to consuls and the form of such recognition. It could hardly be otherwise. The article does not create a mutual "droit de regard". The rules laid down in this article are of considerable importance, for mistaken opinions have been expressed on the point in the past. These rules, which introduce a desirable clarification, will make it possible in future to avoid unjustified claims that might cause friction between States.

3. The Special Rapporteur proposes no change in this article.

Article 13. — The exequatur

1. *Czechoslovakia*: The Czechoslovak Government proposes that the first sentence of paragraph 7 of the commentary on this article be inserted in the body of the article.

2. *Finland*: Referring to paragraph 7 of the commentary, the Finnish Government asks whether, in cases where the sending State requests the *exequatur* for consular officials other than the head of post, the officials in question may enter upon their duties before obtaining the *exequatur*.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. If the sending State requests the *exequatur* for consular officials other than the head of post, these officials may enter upon their duties before obtaining the *exequatur*, provided that the head of post has already obtained the *exequatur*. The explanation is that, from the point of view of international law, the request for an *exequatur* for a consular official working under the direction of a head of post who had already obtained the *exequatur* is an optional and supplementary measure which should not affect the legal status of such an official. It should be noted that the present article speaks only of heads of consular post.

2. The Special Rapporteur proposes that article 13 should be drafted to read:

Article 13. — The exequatur

1. Without prejudice to the provisions of articles 14 and 16, heads of consular post 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*.

2. The grant of the *exequatur* to the head of consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility.

Article 15. — Obligation to notify the authorities of the consular district

Yugoslavia: The Yugoslav Government suggests that paragraph 2 of the commentary on this article be inserted in the body of the article itself.

PROPOSAL BY THE SPECIAL RAPPORTEUR

Add to the present article a second paragraph worded as follows:

2. Should the government of the receiving State omit to fulfil the obligations provided for in paragraph 1 of this article, the consul may himself present his consular commission and his *exequatur* to the higher authorities of his district.

The text of the present article will then become paragraph 1.

Article 16. — Acting head of post

1. *Indonesia*: During the discussion of the Commission's report in the Sixth Committee of the General Assembly, the delegation of Indonesia expressed the opinion that only consular officials, and not all members of the consular staff, should be eligible for appointment as acting head of post (summary record of the 660th meeting, paragraph 24).

2. *Finland*: If article 13 is adopted, it would seem desirable to give the receiving State the right to refuse

to accept a person considered unacceptable as acting head of post.

3. *Yugoslavia*: The Yugoslav Government proposes that the Commission should consider whether, and in what cases, provisional recognition would be required even for the acting head of post, especially in cases where the acting head of a consular post is to serve in that capacity for a long period.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. It does not seem to be in the interests of the efficient operation of consulates to lay down the rule that the sending State must invariably choose the acting head of post from among the consular officials. It will no doubt do so whenever there is a consular official available locally. That may not be the case, however, especially if the consulate is a very small one. In such cases, and particularly if the consulate is to be under an acting head for a short time only, the possibility of selecting the acting head from among the consulate employees may provide a very practical solution. It may be observed that this solution is provided for in the Havana Convention of 1928 regarding consular agents (article 9). Lastly, the acting head of post may, as pointed out in paragraph 3 of the commentary on this article, be selected even from among the officials of a diplomatic mission. For all these reasons, it would not be advisable to alter paragraph 1 of the article.

2. Since the acting head of post holds office on a temporary basis, there is no need to make his entry on duty conditional on recognition by the receiving State. To apply the recognition procedure in such cases would mean in effect that the "acting head of post" would be prevented from "acting". Very often the acting head of post has to be appointed very quickly, as for example in case of the departure of the head of post. For this reason, the consular conventions refrain from stipulating recognition for acting heads of post. Furthermore, the interests of the receiving State are fully protected by the provisions of article 23, which gives that State the right at any time to declare a member of the consular staff unacceptable.

3. The Special Rapporteur does not propose any change in the present article.

Article 20. — Withdrawal of exequatur

Finland: As regards the circumstances in which the receiving State may request the consul's recall (paragraph 1), the Government of Finland submits for consideration the question whether this provision should be broadened so as to give wider discretion to the receiving State.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur refers to the explanations he gave during the discussion of this article.⁷ For

⁷ *Yearbook of the International Law Commission, 1959*, vol. I, pp. 166 *et seq.*; and 1960, vol. I, pp. 10 *et seq.* and 291 concerning the present article; see also the commentary.

reasons given during the discussion, no change in the article is proposed.

Article 22. — Size of the staff

Yugoslavia: According to the Yugoslav Government, the receiving State should decide on the number of consular staff it is willing to receive in its territory. In case of dispute, the matter should be referred to arbitration.

OBSERVATION BY THE SPECIAL RAPPORTEUR

1. Under the text of the article as it stands, the receiving State should first, if it considers the consulate's staff too large, try to reach an agreement with the sending State. If it does not succeed, it is entitled to restrict the size of the staff assigned to the consulate of the sending State, but at the same time it is obliged to take into account not only the conditions in the consular district, but the needs of the particular consulate. In other words, it must apply objective criteria, and any restriction must be within the bounds of what is reasonable and normal.

2. The suggestion that the system described in this article be replaced by a system which would give the receiving State an absolute right to restrict the size of the consular staff is incompatible with the requirement that the interests of both States concerned should be taken into account. The absence of any objective criterion would make negotiations between the two States concerned extremely difficult, and if, in case of a dispute between them, they agreed to submit the dispute to an international body, that body would have no objective criteria on which to base its decision. For these reasons, the Special Rapporteur proposes no change in the article.

Article 23. — Persons deemed unacceptable

1. *Greece*: The Greek delegation to the fifteenth session of the General Assembly stated in the Sixth Committee that this article gives it particular satisfaction (662nd meeting, paragraph 17).

2. *Yugoslavia*: The Yugoslav Government considers that it would not be desirable to stipulate that the sending State must be informed whenever a member of the consulate is deemed unacceptable. In the opinion of that government, information of this kind could be more detrimental to good relations between the States than the absence of such information.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes no change in this article.

Article 25. — Modes of termination

Norway: The Norwegian Government is of the opinion that this article is inadequately drafted, and it does not see the use of the article. It criticizes the article on the grounds that the present formulation leaves out of account the fact that one or more consulates are often abolished while others are maintained.

PROPOSALS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes the following wording:

Article 25. — Modes of terminating the functions of members of the consulate

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 closure of its consulate by the sending State;
- (d) The severance of consular relations.

2. Except in the case referred to in sub-paragraph (b) of the preceding paragraph, the functions of the members of the consular staff shall be terminated on the same grounds. In addition, their functions shall cease if the receiving State gives notice under article 23, paragraph 2, of these articles, that it considers them to be terminated.

Article 26. — Maintenance of consular relations in the event of the severance of diplomatic relations

1. *Yugoslavia*: The Yugoslav Government considers it desirable to stress that in the event of the severance of diplomatic relations there is no interruption of consular relations, and that the consular sections of diplomatic missions then continue to function as consulates. It adds that in such cases it is necessary to make contact possible between consulates and the representatives of the protecting Power.

2. *Norway*: The Norwegian Government sees no reason for including a provision to this effect in the draft.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that the rule laid down in article 26 should be stated in more explicit language. He therefore proposes that the article should be drafted to read:

Maintenance of consular relations in the event of the severance of diplomatic relations

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

2. In the event of the severance of diplomatic relations, the consulates, and the consular sections of the diplomatic missions, of the two States concerned shall continue to exercise their functions. In such cases, the consular sections shall act as consulates.

3. In the case provided for in the preceding paragraph, the receiving State shall permit and protect communications between the consular offices referred to in the said paragraph and the diplomatic mission of the protecting Power.

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

Norway: The Norwegian Government's comments state that paragraph 3 is not clear. This government considers that the expression "discharged locally" will have to be clarified in order to make it possible to comment upon the substance of the paragraph.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The expression "discharged locally by the sending State" is a technical term which means "dismissed on the spot by the sending State". It refers, firstly, to the cases in which the sending State dismisses on the spot members of the consulate whom it recruited locally and who often, but not invariably, have the nationality of the receiving State. Secondly, it refers to cases in which the sending State discharges locally, even though he has its nationality, a member of the consulate who has committed an offence under the ordinary law which the sending State regards as incompatible with the status of member of a consulate.

2. The meaning of the expression "discharged locally" will be explained in the commentary. There is no need to change the text of the article.

CONSULAR PRIVILEGES AND IMMUNITIES

GENERAL REMARKS

1. At the time when the report of the International Law Commission on the work of its twelfth session was being discussed in the Sixth Committee of the General Assembly, the Greek delegation expressed the opinion that any privileges and immunities to be granted to consuls and honorary consuls should be based on the principle of reciprocity (662nd meeting, paragraph 17).

2. It should be pointed out in the first place that many consular privileges and immunities are based on customary international law. Examples of these are the use of the national flag and of the State coat-of-arms, the inviolability of the consular premises and archives, and of the documents and official correspondence of the consulate, the freedom of communication of the consulate, the levying of consular fees and charges and the exemption from taxes and dues. Every State has a duty to respect the provisions in question, and the idea of reciprocity is irrelevant.

3. Even in the case of provisions constituting wholly or partly a progressive development of international law—the draft does not distinguish the provisions which do from those which do not—the Commission, after due consideration, dropped the idea of a reciprocity clause. It took the view that all the provisions would be equally binding on all the contracting parties with the consequence that the parties would all be on a footing of equality, which would make a reciprocity clause unnecessary.

4. The Commission applied the reciprocity concept to those consular privileges and immunities only *which are granted in addition* to those provided for in the present articles (article 64, paragraph 2, of the present draft).

5. For the reasons stated above, the Special Rapporteur considers that the Commission is unable to base the chapter relating to consular privileges and immunities on the principle of reciprocity.

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

1. *Norway*: If it is the intention to provide for a right to use a consular flag besides, or instead of, the national flag, it ought to be made clear in the text of the article and not only in the commentary.

2. *Yugoslavia*: It would be desirable to specify whether the acting head of post has the right to fly the national flag on his personal means of transport.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. Under article 16, paragraph 2, of the draft, the competent authorities are to admit the acting head of post, while he is in charge of the consular post, to the benefit of the present articles and of the relevant agreements in force *on the same basis as the head of the consular post concerned*. It follows that the acting head of post also has the right to fly the national flag on his personal means of transport. The Special Rapporteur thinks that the reference to the acting head of post in paragraph 4 of the commentary on this article might be expanded by the addition of the explanation just given.

2. If the Commission should agree that a reference to the consular flag should be introduced into the body of the article, the text should be amended to read:

*Article 29. — Use of the national flag, the consular flag
and the State coat-of-arms*

1. The consulate shall have the right to fly the national flag and the consular flag on the building occupied by the consulate and within its precincts.

2. The consulate shall in addition have the right 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.

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

Article 30. — Accommodation

Norway: The Norwegian Government considers that the legal import of the expression "has the right to procure" is difficult to understand; and that the second sentence should be made applicable also to the head of the consular post and to the employees of the consulate.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The expression "has the right to procure" was selected so as to cover all the forms of tenure possible under the law of the receiving State: ownership, lease, precarious tenancy, etc.

2. The Commission was unwilling to extend the obligation provided for in this article to the residence of members of the consular staff, for it considered that such a duty would be too onerous for the receiving State (see paragraph 1 of the commentary on this article). It should be recalled that the draft articles

on diplomatic intercourse and immunities (A/3859, chapter III) contain no such obligation in respect of the heads and members of diplomatic missions. If, however, the Commission should wish to extend the scope of the article so as to include the head of consular post and the members of the consular staff within its terms, a second paragraph worded as follows might be added:

It shall also assist the consulates of the sending State, if necessary, in finding adequate accommodation for the members of the consulate.

Article 31. — Inviolability of the consular premises

1. *Norway*: The Norwegian Government considers that the second sentence of paragraph 1 is far too categorical, for it would preclude even a courtesy call. Secondly, the Government considers that appropriate exceptions should be included to provide for the case of fire or other disaster and for cases where the local authorities have reasonable cause to believe that a crime of violence has been, or is about to be, committed in the consular premises. Lastly, it thinks that, in cases where the consent of the head of the consular post is refused, the agents of the receiving State should nevertheless be entitled to enter the premises, provided that they have secured prior authorization from the Ministry for Foreign Affairs.

2. *Yugoslavia*: It would be useful to make provision for authorization to be granted, either by the head of the consular post or by some other duly authorized person, to representatives of the authorities of the receiving State to enter the consular premises in case of fire or similar emergency.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

During the discussion of this article, the Commission carefully examined proposals for exceptions to the rule in the cases mentioned in the above comments. After thorough discussion, it decline to allow exceptions, a majority of its members being of the opinion that any exception might lead to abuses and would substantially weaken the rule. The Commission was of the opinion that in any cases where the head of consular post thought it necessary for the agents of the receiving State to enter the consular premises, he would not fail to give the consent provided for in this article. For these reasons, the Special Rapporteur does not consider it desirable to change the text of the present article, and he proposes no amendment.

*Article 32. — Exemption from taxation in respect
of the consular premises*

1. *Ghana*: During the debate on the Commission's report at the fifteenth session of the General Assembly, the delegation of Ghana in the Sixth Committee expressed the view that it should be specified whether the exceptions were to be regarded as rights or as privileges (659th meeting, paragraph 23).

2. *Norway*: The Norwegian Government draws attention to the difference between the commentary on

this article and the commentary on the corresponding article of the draft on diplomatic intercourse (article 21). It is opposed to giving the exemption provided for in article 32 the effect *in rem* which is suggested in the Commission's commentary.

3. *Denmark*: In its comments, the Danish Government makes a reservation regarding exemption from taxation in cases where the consular premises are only leased. As regards exemption from dues, it considers that the sending State should be exempted only from dues chargeable on the purchase of real property, and not when it is merely a question of a lease.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. This article repeats *mutatis mutandis* the text of article 21 of the draft articles on diplomatic intercourse and immunities. As regards the scope of the text, the Commission wished to make it clear that the exemption contemplated in this article is an exemption *in rem*, for otherwise the exemption would be nugatory where there is a contract of sale or lease, because, as explained in paragraph 2 of the commentary, the owner would then, by means of the contract, debit the sending State with the taxes and dues payable on the consular premises and the intended purpose of the exemption would in practice be defeated.

2. If it should prove that most governments are not prepared to grant the exemption provided for in this article, then the Commission would have to consider the possibility of restricting the article to premises owned by the sending State or by the head of post.

3. The decision of the United Nations Conference on Diplomatic Intercourse and Immunities regarding article 21 of the diplomatic draft will give the Commission some guidance. The Special Rapporteur proposes no change, reserving the right to submit a re-draft of this article at the Commission's forthcoming session.

Article 33. — Inviolability of the consular archives, and documents and official correspondence of the consulate

Yugoslavia: In its comments, the Yugoslav Government suggests that this article would be more complete if the definitions of inviolable articles were incorporated separately in the body of the provision.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

If the Commission accepts the definition of "consular papers" proposed by the Special Rapporteur in article 1, then the present article should read:

Inviolability of the consular papers

The consular papers shall be inviolable, wherever they are.

Definitions of official correspondence, consular archives and documents of the consulate would then have to be added to the definitions in article 1.

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 or by an international organization.

The expression "consular archives" means all the chancery papers, the consulate library and any article of furniture intended for their protection or safe keeping.

The term "documents" means any handwritten or printed paper used by the consulate, other than the official correspondence.

Article 35. — Freedom of movement

Yugoslavia: The Yugoslav Government considers that the draft should state clearly that the consul may be denied admission to prohibited zones even if they are situated within his consular district and his intention to enter them is based on the need to exercise his consular functions.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that the present text of the article should be interpreted in the sense indicated by the Yugoslav comments and that there is no need to add anything.

Article 36. — Freedom of communication

1. *Ghana*: The delegation of Ghana in the Sixth Committee of the General Assembly observed that it should be specified whether this article is to be regarded as conferring rights or privileges (659th meeting, paragraph 23).

2. *Denmark*: The Danish Government would prefer that the freedom of communication for consulates provided for in paragraph 1 of the present article should be restricted, so that, apart from maintaining contact with the government of the sending State and that State's diplomatic missions accredited to the receiving State, a consulate would be free to communicate only with consulates of the sending State situated in the same receiving State.

The Danish Government would consider it desirable if a rule could be added to paragraph 3 along the following lines:

In special cases, however, the authorities of the receiving State may request that a sealed courier bag should be opened by a consular official in their presence so as to ensure that it contains nothing but official correspondence or articles intended for official use.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur would point out that what the present article defines are rights belonging to the sending State. Since freedom of communication is a fundamental rule of consular law, it would be most undesirable to weaken the rule by exceptions which might lead to annoyance. For this reason it is better to keep the present text of the article.

Article 37. — Communication with the authorities of the receiving State

Yugoslavia: The Yugoslav Government considers that a passage on the following lines might be added to paragraph 2:

... or such communication is indispensable in connexion with consular functions and relates to the competence of the central authorities to rule in first instance on the scope of the consular activity.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The article as it stands represents a compromise between two different points of view disclosed by discussion in the Commission. Under the article the question which authorities the consuls may apply to is determined by the legislation of each State. Hence, it does not rule out an approach to the central authorities, *even in cases in which those authorities decide not in first instance* but in an appellate or reviewing capacity. Though he agrees in principle with the substance of the proposed addition, the Special Rapporteur prefers, because the provision is a compromise, that for the time being at least the wording adopted by the Commission should stand.

Article 38. — Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

This article leaves aside for the time being the question to what extent documents executed at a consulate between private persons are exempt from the taxes and dues levied by the law of the receiving State. The commentary on this article (paragraph 4) cites the opinion that the said taxes or dues should be charged on such acts in those cases only where the acts are intended to produce legal effects in the receiving State. Not only has this opinion not met with any objections, but the Finnish and Danish Governments, in their comments, express agreement with it. Accordingly, the Special Rapporteur proposes that a third paragraph in the following terms should be added to the present text of the article:

3. Documents executed at the consulate between private persons shall be exempt from the taxes and dues chargeable under the law of the receiving State, unless the documents are to produce direct legal effects in that State.

Article 40. — Personal inviolability

1. *Indonesia:* The delegation of Indonesia, speaking in the Sixth Committee of the General Assembly, suggested that the second sentence of paragraph 4 should be re-drafted to read:

Should the latter be himself the object of the said measures, the receiving State shall notify the sending State through the usual diplomatic channels.

[Summary record of the 660th meeting, paragraph 26.]

2. *Finland:* The Finnish Government expresses its preference for the alternative wording given in paragraph 1

and considers that the inviolability granted by paragraph 2 is too wide and should be narrowed down substantially.

3. *Norway:* The Norwegian Government proposes that paragraph 2 be deleted, criticizes the drafting of paragraph 3 and expresses the view that the text of the paragraph does not support the interpretation placed upon it in paragraph 17 of the commentary. It sees no reason why the consul should have the choice of being represented by his attorney. The granting of such a privilege in connexion with criminal proceedings would hardly accord with the corresponding rule in article 42, paragraph 2, of the draft.

4. *Czechoslovakia:* The Czechoslovak Government considers the criterion based on the length of the sentence unsuitable; it expresses a preference for the alternative wording given in paragraph 1 and proposes that paragraph 2 be amended accordingly.

5. *Yugoslavia:* In its comments, the Yugoslav Government suggests that the article should provide that the consul may not be imprisoned except in a case where he has committed an offence punishable by a minimum sentence of five years' imprisonment. In addition, it considers that the article ought to stipulate that the sending State has the duty to place on trial an official to whom the penalty could not be applied in the receiving State because of his immunity.

6. *Denmark:* The Danish Government does not consider that there are sufficient grounds for the inclusion of paragraph 2 of this article in the convention.

7. *Sweden:* Though it expresses no objection to the article itself, the Swedish Government considers that the reasons given in the commentary for maintaining paragraph 2 are open to question.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

In the light of the comments of governments, the Special Rapporteur proposes that the final text of this article should read:

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, unless they commit a serious offence.

2. Except in the case specified in paragraph 1 above, 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 imprisonment for a serious offence.

3. [This paragraph remains unchanged.]

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 sending State through the appropriate diplomatic channel.

Article 41. — Immunity from jurisdiction

1. *Indonesia*: During the debate on the Commission's report on its twelfth session at the last session of the General Assembly, the Indonesian delegation speaking in the Sixth Committee observed that it would be most desirable if the Commission, in preparing its final draft, gave special attention to the question how the line is to be drawn between the official acts and the private acts of the consular official (660th meeting, paragraph 27).

2. *Finland*: The Finnish Government supports the article unreservedly.

3. *Norway*: The Norwegian Government is of the opinion that the expression "in respect of acts performed in the exercise of their functions" is not sufficiently clear. It points out that article 50 uses the expression "official acts" and, relying on paragraph 2 of the commentary on the present article, holds that the expression used in this article is synonymous with "official acts". It considers that the text of the article should be revised.

4. *Philippines*: The comments of the Philippine Government draw attention to the question who is to determine whether an act has been performed in the exercise of the consular functions and what criteria are to be applied for this purpose.

5. *Yugoslavia*: The Yugoslav Government suggests that the word "consular" be inserted before the word "functions".

6. *Denmark*: The Danish Government considers that it would be desirable to insert in the draft, in connexion with the rule on immunity from jurisdiction, a provision concerning liability to pay compensation for damage caused by motor vehicles. It suggests the following text:

All motor vehicles, vessels and aircraft owned by members of the consulate shall be insured by policies against third-party risks. Such insurance shall be made in conformity with any requirements that may be imposed by the law of the receiving State.

The preceding provisions shall not be deemed to preclude a member of the consulate from being held liable in a civil action by a third party claiming damage in respect of injuries sustained as a result of an accident involving a motor vehicle, vessel or aircraft under his control. In connexion with such an action, members of the consulate shall not be entitled to refuse to produce any document or to give evidence.

7. *Sweden*: The Swedish Government considers that there is no real reason for establishing any discrimination between official acts performed by consuls who are nationals of the receiving State and those performed by consuls who are not nationals of that State.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The general criterion for deciding whether an act was performed in the exercise of the consular functions is the delimitation of those functions (article 4). It is not possible, however, to give precise criteria for application to borderline cases. The decision will depend on the circumstances, and each case will therefore have to be judged on its merits.

2. Both the sending State and the receiving State are competent to interpret the terms in question. Any difference of opinion will have to be resolved by one of the peaceful means for the settlement of international disputes (Charter of the United Nations, Article 33).

3. As regards the compulsory insurance of a member of the consulate for liability vis-à-vis third parties for damage caused by motor vehicles, the Special Rapporteur is of the opinion that this question, which is dealt with in some of the consular conventions, could more easily be settled by bilateral conventions.

4. In the light of the above comments, the Special Rapporteur proposes that the article should be re-drafted to read:

Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State so far as acts coming within their consular functions are concerned.

Article 42. — Liability to give evidence

1. The delegation of *Ghana*, speaking in the Sixth Committee, proposed that the word "liable" should be replaced by the word "competent" (659th meeting, paragraph 23).

2. *Norway*: The Norwegian Government considers paragraph 1 unnecessary.

3. *Philippines*: The word "liable" in the first sentence of paragraph 1 is negated by the passage "no coercive measure may be applied" in the second sentence.

4. *Yugoslavia*: The Yugoslav Government considers:

(a) That a provision should be included to the effect that the consul may, instead of giving evidence at his office or residence, submit a written declaration;

(b) That it would be desirable to insert in this article a rule stipulating that, in a case where a consul refuses to give evidence on the grounds that the evidence is connected with the exercise of his functions, the receiving State may request the sending State to authorize the consul to give evidence and to release him from official secrecy if the sending State does not consider this secrecy to be of essential importance to its interests;

(c) That it would be desirable to provide that the consul is not obliged to testify under oath.

5. *Denmark*: The Danish Government does not consider that there are sufficient grounds for the inclusion in the convention of the rule formulated in the second sentence of paragraph 1.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The waiver of immunity will be dealt with in a separate article (see section III).

2. Paragraphs 1 and 2 of this article should be worded as follows:

1. Members of the consulate may be called upon 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 or accept a written statement from him.

Article 43. — Exemptions from obligations in the matter of registration of aliens and residence and work permits

1. *Finland*: In the opinion of the Finnish Government, the provision of article 43 should be limited to work performed in the consulate instead of being extended to every type of work.

2. *Norway*: The proposed exemptions should be granted only to members of the consulate and their families. The Norwegian Government does not see any sufficient reason for extending them to the private staff. This government further considers that the exemption in regard to work permits should not apply to members of the consulate and their families who carry on a gainful private activity outside the consulate.

PROPOSAL BY THE SPECIAL RAPPORTEUR

Members of the consulate, members of their families, and their private staff, other than those who carry on a gainful private activity outside the consulate, shall be exempt from all obligations under the legislation of the receiving State in the matter of the registration of aliens, residence permits and work permits.

Article 45. — Exemption from taxation

1. *Ghana*: The delegation of Ghana at the fifteenth session of the General Assembly stated that it should be specified whether the exceptions provided for in this article are to be regarded as rights or as privileges (659th meeting, paragraph 23).

2. *Indonesia*: The Indonesian delegation to the General Assembly proposed that these exemptions should be granted only to consular officials (660th meeting, paragraph 25).

3. *Norway*: The Norwegian Government thinks that the tax exemptions provided for in this article go too far. It considers that members of the consulate other than consular officials should be accorded exemption only from dues and taxes on the wages they receive for their services. It further considers that paragraph 1 (b) should be so drafted as to cover all kinds of property, and not only immovable property.

4. *Yugoslavia*: In the opinion of the Yugoslav Government, it should be stated that the consul is liable to taxation on capital invested for gainful purposes or deposited in commercial banks.

5. *Denmark*: In the case of persons who are not nationals of the receiving State, but who, at the time of their engagement on the consular staff, were fully taxable in that State, exemption from taxation should, in the opinion of the Danish Government, cover only the salary receivable from the consulate.

6. *Sweden*: The Swedish Government would like the article to define the expression "members of their families".

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. Taking into account the comments of governments and the discussions at the Vienna Conference on a similar article in the draft on diplomatic intercourse and immunities, the Special Rapporteur proposes that subparagraphs (a) and (d) of the article should be re-drafted to read:

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

(d) Taxes and dues on income having its source in the receiving State, and taxes on capital invested in commercial or financial undertakings in the receiving State.

2. Since the expression "members of their families" or an equivalent expression is used in many articles (e.g., articles 24, 27, 43, 44, 45, 48, 49, 50, 51, 52, 57, 59), it would be more appropriate, should the Commission consider a definition desirable, to define this expression in article 1. The definition might be worded as follows:

The expression "member of the family" of a consular official or of an employee of the consulate means the spouse, children and other dependent relatives.

Article 46. — Exemption from customs duties

1. *Ghana*: On this article, the delegation of Ghana at the fifteenth session of the General Assembly made the same observation in the Sixth Committee as on article 45 (659th meeting, paragraph 23).

2. *Indonesia*: The Indonesian delegation at the fifteenth session of the General Assembly recommended that the article should apply only to consular officials (660th meeting, paragraph 25).

3. *Norway*: The Norwegian Government is of the opinion that the exemption provided for in subparagraph (b) should be granted to consular officials only. As it stands, the exemption is more generous than the exemption suggested for diplomats, since it includes also the service staff.

4. *Yugoslavia*: The Yugoslav Government proposes that the words "and [foreign] motor vehicles" should be added in subparagraph (b) of this article.

It should be specified that, if objects imported duty-free are sold, customs duty must be paid or that the sale of such goods may only take place in conformity with the customs regulations of the receiving State.

5. *Denmark*: According to the Danish Government, the exemption should be enjoyed only by career consuls who are not nationals of the receiving State and who are not carrying on a gainful occupation in that State.

6. *Sweden*: The proposed text accords exemption also to employees of the consulate, whereas the corresponding category is excluded from this privilege in the draft articles on diplomatic intercourse and immunities. In the opinion of the Swedish Government, members of a consulate should never enjoy more extensive privileges than members of a diplomatic mission.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The Commission included the phrase "in accordance with the provisions of its legislation" in order to allow for the practice of States which specify by domestic regulations how and on what conditions exemption from custom duties is granted (see paragraph 3 of the commentary on this article). This clause also gives the States the power to specify the conditions on which articles imported duty-free may be sold.

2. Taking into account the comments of governments and the decisions of the Vienna Conference on article 34 of the draft on diplomatic intercourse, the Special Rapporteur proposes that the present article should be re-drafted to read:

The receiving State shall, in accordance with the laws and regulations which it may have adopted, permit entry of and grant exemption from the customs duties, taxes and charges which might be payable at the time of customs clearance (other than charges for storage and cartage or similar charges) on articles intended:

- (a) For the official use of a consulate of the sending State;
- (b) For the personal use of consular officials, including articles intended for their installation, and motor vehicles.

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. *Norway*: The Norwegian Government makes several comments on this article.

(a) The wording is too abstruse for immediate and easy interpretation. It should be revised.

(b) The document would be easier to read and apply if references to article 50 were inserted in all the causes affected by the exemptions for which that article provides.

(c) The privileges and immunities provided for in this article are too restricted. Members of the consulate who are nationals of the receiving State should at least be excused from producing official correspondence and documents relating to the exercise of their functions (see article 42, paragraph 3).

(d) A provision similar to that of article 37 of the draft on diplomatic intercourse should be added:

However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the consulate.

2. *Philippines*: The Government of the Philippines, transmitting the comments of the Committee set up to study the Commission's draft articles, observes:

(a) That paragraph 1 of this article seems to imply that only consular officials may perform consular functions; and that members of the consulate, under paragraph 2, perform non-consular functions;

(b) That the immunity from jurisdiction under article 50 seems to depend on the performance of consular functions, irrespective of the nationality of the consular official performing those functions;

(c) That this article seems untenable when viewed in the light of article 1, which gives a definition of consular officials that includes even members of the consulate; here also, as in the case of article 41, the problem arises which persons or organizations may determine whether an act is a consular function and what criteria should be applied for this purpose.

3. *Yugoslavia*: It should be specified which persons are to be considered members of the consul's family.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The draft articles would certainly be much easier to interpret and apply if cross-references to the present article could be added in every article affected. But, apart from the fact that it is quite unusual in the technique of treaty-drafting, such a system of cross-references would make the text very clumsy. The Special Rapporteur could, of course, include in the final commentary on each of the articles to which the exemption provided for in article 50 applies a statement to the effect that the article does not apply to nationals of the receiving State. Perhaps the best solution would be to include in article 1, which has to be consulted for the purpose of interpreting each of the articles, a suitable statement to the effect that consular officials who are nationals of the receiving State enjoy immunity from jurisdiction only in respect of acts coming within their duties. In this way, any person asked to interpret any of the provisions of the convention would realize that, so far as consular privileges and immunities are concerned, nationals of the receiving State have a different status.

2. Governments would hardly be likely to accept the suggestion that the personal immunities referred to in this article should be extended. In so far as the object of the suggestion is to secure the inviolability of the official correspondence and official documents, it should be noted that this inviolability is fully safeguarded in all cases by article 33 of the present draft.

3. For the definition of "members of their families", see the observations on article 45, above.

4. The Special Rapporteur proposes that the first sentence of article 50 should be re-drafted to read:

Consular officials who are nationals of the receiving state shall enjoy immunity from jurisdiction only in respect of acts coming within their consular functions.

Article 52. — Obligations of third States

1. *Finland*: The scope of paragraph 1 should be narrowed down substantially.

2. *Norway*: The draft ought to settle in an affirmative sense the question whether or not a third State is under a duty to grant consular officials free passage through its territory. Paragraph 3 seems to have settled this question so far as other members of the consulate and members of their families are concerned.

3. *Philippines*: The comment made on articles 41 and 50 would seem to apply with as much weight to paragraphs 1 and 3 of article 52.

4. *Yugoslavia*: This article does not apply to a consul's private visits to third States.

PROPOSALS BY THE SPECIAL RAPPORTEUR

It is proposed that paragraphs 1 and 3 should be re-drafted to read:

Paragraph 1

If a consular official passes through or is in the territory of a third State while proceeding to take up or return to his post, or when returning to his own country, the third State shall accord to him the personal inviolability provided for by article 40 above, and all other immunities which are provided for by the present articles and which are required to ensure his transit or return."

Paragraph 3

In circumstances similar to those specified in paragraph 1 above, third States shall not hinder the transit through their territories of other members of the consulate and their families.

Article 53. — Respect of the laws and regulations of the receiving State

Yugoslavia: It is indispensable to insert in this article a provision to the effect that consuls have no right to provide asylum.

OBSERVATION BY THE SPECIAL RAPPORTEUR

Paragraph 3 of the commentary on this article explains that consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities. If the Commission should decide on an additional clause, perhaps a second sentence in these terms might be added in paragraph 2:

In particular, they may not be used as an asylum for persons prosecuted or convicted by the authorities of the receiving State.

It should be noted, however, that the corresponding article (article 39) of the Vienna Convention on Diplomatic Relations does not contain a specific provision to this effect.

HONORARY CONSULS

GENERAL COMMENTS

1. *The delegation of Greece* at the fifteenth session of the United Nations General Assembly fully approved of the decision to omit any definition of honorary consuls from chapter III, being of the opinion that the matter was sufficiently covered by article 1(f) (662nd meeting, paragraph 17).

2. *The Norwegian Government*, on the other hand, suggests that a definition of honorary consuls should be adopted.

3. As regards the privileges and immunities of honorary consuls, the *Norwegian Government* thinks there is no reason to discriminate between honorary consuls who are, and those who are not, nationals of the receiving State.

4. *The delegation of the Ukrainian Soviet Socialist Republic* at the fifteenth session of the General Assembly said that the privileges and immunities of honorary consuls under chapter III were much greater than those which they actually enjoyed in practice (657th meeting, paragraph 19).

5. *The delegation of Indonesia* at the fifteenth session of the General Assembly said it fully shared the Special Rapporteur's opinion that the privileges and immunities granted to honorary consuls in chapter III far exceeded those granted to them in the practice of many States (660th meeting, paragraph 28).

6. *The Czechoslovak Government* does not wish to comment on chapter III of the draft as it considers the institution of honorary consuls unsatisfactory from the point of view of the present level of contacts between States.

Applicability of article 31 to honorary consuls

The Commission decided to defer its decision as to whether article 31 concerning the inviolability of consular premises was applicable to honorary consuls until governments had commented on the matter (*cf.* paragraph 5 of the commentary on article 54 of the draft). *The Governments of Finland, Norway and Denmark* are of the opinion that article 31 should not apply to honorary consuls. The *Yugoslav Government* considers that, in the case of honorary consuls, article 31 can only apply to premises intended solely for the exercise of consular functions.

Article 54. — Legal status of honorary consuls

1. *Finland*: Proposes that the reference to article 42, paragraph 2, be deleted.

2. *Norway*: The Norwegian Government says that the system of references and cross-references will inevitably lead to difficulties of interpretation, particularly in the case of article 54, paragraph 3. It considers that it would be better to spell out in chapter III all the provisions which apply to honorary consuls, even at the risk of repetition. Lastly, it considers that article 32 should not be made applicable to the premises of honorary consulates.

PROPOSALS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes:

(a) That the reference to article 42, paragraph 2, be replaced by a reference to paragraph 3 of the same article;

(b) That the references to articles 32 and 50 in paragraph 2 of the present article be deleted;

(c) That paragraph 3 of the present article be deleted;

(d) That the substance of the rule laid down in article 50 should be reproduced in article 54.

Article 54 would then read as follows:

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

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

3. Honorary consuls who are nationals of the receiving State shall enjoy immunity from jurisdiction only in respect of acts coming within their consular functions.

Article 59. — Exemption from personal services and contributions

In the comments of the *Yugoslav Government*, it is suggested that paragraph 2 of the commentary, which explains that this article does not apply to nationals of the receiving State, should be inserted in the body of the article as sub-paragraph (c).

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

While recognizing that an express provision excluding nationals of the receiving State from the benefit of this article might be thought particularly necessary, the Special Rapporteur considers that it would be impossible to include a clause to that effect in this article alone, inasmuch as nationals of the receiving State are debarred from the benefit of all the articles of chapter III. Furthermore, the revised text proposed by the Special Rapporteur for article 54 makes such an express stipulation less necessary.

Article 60. — Liability to give evidence

Philippines: The members of the committee which prepared the comments make the same reservations regarding this article as in the case of articles 41, 50 and 52.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes no change in this article.

Article 64. — Non-discrimination

The Norwegian Government regards this article as superfluous and open to misconstruction.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that it is desirable though not indispensable, to express the principle of non-discrimination in the form proposed.

Article 65. — Relationship between the present articles and bilateral conventions

1. During the Sixth Committee's discussion of the Commission's report at the fifteenth session of the General Assembly, the delegations of the United Kingdom (652nd meeting, paragraph 5), Austria (658th meeting, paragraph 3) and France (658th meeting, paragraph 23) expressed a preference for the second version of this article, whereas those of Italy (656th meeting,

paragraph 16), Argentina (657th meeting, paragraph 11) and Portugal (659th meeting, paragraph 9) preferred the first. The delegations of Japan (655th meeting, paragraph 15) and Iraq (661st meeting, paragraph 12) were in favour of a different formulation, on the lines of that given in paragraph 2 of the commentary. The delegation of Ghana (659th meeting, paragraph 23) took up a position which seems very close to that of the two delegations last mentioned.

2. Of the governments which have commented on the draft articles on consular intercourse and immunities, those of *Norway*, the *Soviet Union* and *Czechoslovakia* express a preference for the second version.

3. In its comments, the Government of the *Philippines* states that its attitude towards this article will depend on the extent to which its comments meet with acceptance.

4. The Yugoslav Government considers the first text as the more acceptable, but suggests that the following clause should be added: "provided that they do not affect the minimum guarantees offered by this convention." Alternatively, it could be stressed that future conventions may be concluded provided that they are not, at least, in conflict with the basic principles of this convention.

5. The Netherlands delegation to the fifteenth session of the General Assembly expressed regret that by presenting alternative texts on a point which ought to be settled by the Commission, the Commission had shown signs of indecision (659th meeting, paragraph 16).

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. Up to the present, the second text has been more favourably received than the first. The Special Rapporteur therefore proposes that it be adopted. This choice is supported by practical considerations, for the first text would encounter considerable difficulties. In the first place, it would mean that any State wishing to ratify or accede to the convention would have to review all its bilateral consular conventions and to ascertain whether the States with which it was bound by those conventions wish to become parties to the multilateral convention. Then, it would have to enter into negotiations with those of the States in question which wish to maintain the existing bilateral conventions in force. For States which in the past have concluded a number of conventions on the subject of consular intercourse and immunities, this obligation would involve a considerable amount of work. Apart from this, there is a risk attached to such negotiations, for any State may later change its mind and decide that it no longer wishes to maintain in force a convention concerning which it had previously taken a contrary view. Moreover, provisions relating to consular intercourse and immunities are very often incorporated in conventions dealing with other subjects: establishment conventions, treaties of friendship, commercial treaties, treaties concerning juridical relations in civil and penal matters, etc. If the clause in question was interpreted as covering these cases also, States would be obliged

to review their whole system of international agreements in order to find out whether the international treaties to which they are parties contain provisions dealing with consular intercourse and immunities. This would involve even more preliminary research, would delay the ratification of the convention and would entail the danger that a provision might be overlooked and consequently abrogated without any real intention on the part of the contracting States to abrogate it.

2. It has been asked whether not only bilateral, but also multilateral conventions should be kept in force. The Special Rapporteur does not think so. The multilateral convention being drafted by the Commission is a codification of the essential rules of consular law, and its principal object is the progressive unification of consular law. This object would be unattainable if other multilateral conventions were to be kept in force, for either those other multilateral conventions contain provisions similar to those in the general convention, in which case they are unnecessary, or else they contain provisions which differ from those of the general convention, and in that case they would seriously hamper the unification of the rules concerning consular intercourse and immunities.

Section III

ADDITIONAL ARTICLES PROPOSED

Article 4 a. — Power to represent nationals of the sending State

1. At the twelfth session of the Commission, the Special Rapporteur proposed an additional article concerning the power of consuls to represent the nationals of the sending State (text in paragraph 12 of the commentary on article 4 of the present draft).⁸ After an exchange of views on this question, the Commission decided to await the comments of governments, without taking any decision for the time being.

2. In their comments, several governments have expressed their views on this proposal. The Danish Government adopts a negative attitude. The Governments of Norway and Yugoslavia agree that the consul should be entitled to represent nationals of the sending State in matters connected with the settlement of estates. The Government of Finland proposes that the powers of the consul should be restricted to safeguarding the rights and interests of nationals of the sending State. The Government of the Soviet Union is in favour of the provision proposed by the Special Rapporteur.

3. The Special Rapporteur proposes the following text for the article in question, which might be inserted immediately after article 4 of the draft:

With the object of safeguarding the rights and interests of nationals of the sending State, 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

⁸ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9 (A/4425), chapter II.*

of representing such nationals in cases in which, owing to their absence or for any other reason, they are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the nationals in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

Article 52 a. — Members of diplomatic missions responsible for the exercise of consular functions

4. In its comments, the Soviet Union proposes that an article in the following terms should be included in the present draft:

1. The provisions of these articles regarding the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions and of whose appointment the Ministry of Foreign Affairs of the receiving State has been notified by the diplomatic mission concerned.

2. The diplomatic privileges and immunities to which any such persons may be entitled shall not be affected by their carrying out consular functions.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

5. Analogous provisions occur in many consular conventions, among which the following at least may be mentioned by way of example: Soviet Union - Albania, of 18 September 1957 (article 26); Soviet Union - Federal Republic of Germany, of 25 April 1958 (article 35); Soviet Union - Austria, of 28 February 1959 (article 32); Bulgaria - Romania, of 23 April 1959 (article 21); and Czechoslovakia - People's Republic of China, of 7 May 1960 (article 20).

The inclusion of the new article proposed by the Soviet Union would have the great advantage of unifying the practice of States in a matter in which such unification seems particularly desirable.

The Special Rapporteur proposes that the new article should be inserted after article 52 of the present draft.

Members of diplomatic missions assigned to a consulate

6. The Czechoslovak Government proposes that a provision should be included in the draft to the effect that a member of the diplomatic mission who is assigned to a consulate of the sending State retains his diplomatic privileges and immunities.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

7. The case mentioned in the comments of the Czechoslovak Government is covered by the new article proposed in paragraph 4 above. An express clause might be added either in the commentary or in the body of the article.

Article 50 a. — Waiver of immunity from jurisdiction

8. In the opinion of the Governments of Norway and Yugoslavia, the draft should contain a provision enabling the authorities of the sending State to waive

the immunities provided for in article 40 (Norway and Yugoslavia) and in articles 41 and 42 (Norway).

PROPOSAL BY THE SPECIAL RAPPORTEUR

9. The Special Rapporteur proposes that a new article in the following terms should be inserted after article 50:

Article 50 a. — Waiver of immunity from jurisdiction

1. The sending State may waive the immunity from jurisdiction of consuls and of members of the consular staff.

2. The waiver shall in all cases be express. It shall be communicated through the appropriate diplomatic channel.

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

Article 1 a. — Right to maintain consular relations with other States

10. The Czechoslovak Government considers that a provision to the effect that every State has the right to maintain consular relations with other States should be included in the draft.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

11. In his first report (A/CN.4/108), the Special Rapporteur included a provision to the effect that every State has the right to establish consular relations with foreign States.⁹ In deference to the objections of some members of the Commission to the term "right", the initial text was re-drafted as follows: "Every sovereign State is free to establish consular relations with foreign States."¹⁰ The late Professor Scelle then proposed another wording: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected."¹¹ Since several members of the Commission were opposed to the inclusion of such a provision, mainly on the grounds that no corresponding provision occurred in the draft articles on diplomatic intercourse and immunities, the Special Rapporteur withdrew his proposal, expressing regret that the draft would as a consequence be incomplete. Being of the opinion that, if interpreted in the context of the other articles of the draft and particularly articles 2 and 3, the above-mentioned article on the right to maintain consular relations expresses a commonly accepted customary rule, the Special Rapporteur is prepared to include this article in the present draft.

Section IV

INFORMATION PROVIDED BY GOVERNMENTS

In response to the Commission's request for certain information (see report on the twelfth session), some of the government comments received contain information on the practice of States. For example, as regards the class of consular agents, the Governments of Norway and Sweden have given particulars which are discussed above in connexion with article 8. The same governments, commenting on article 12, state that a fresh consular commission is necessary for every appointment, even if the consul is assigned to another post in the territory of the receiving State. The Finnish Government confirms that the rule laid down in article 62 regarding precedence is observed in Finland.

Section V

MISCELLANEOUS QUESTIONS

1. During the debate on the Commission's report at the fifteenth session of the General Assembly, some delegations thought that the draft articles on consular intercourse and immunities should be preceded by a historical introduction. If the Commission agrees that the final report should be supplemented in this way, the Special Rapporteur would be prepared to submit a draft introduction following broadly the lines of chapter I of his first report.¹²

2. At the same session of the General Assembly the Indonesian delegation expressed full agreement with the Special Rapporteur's suggestion for a special chapter establishing the optional character of the institution of honorary consuls (660th meeting, paragraph 28).

3. The Israel delegation to the same session of the General Assembly expressed the opinion that the International Law Commission should include in the draft its suggestions regarding the final clauses, including a reservations clause, in keeping with its own recommendation of 1951 (A/1858, paragraph 33)¹³ and General Assembly resolutions 598 (VI) and 1452 (XIV) (663rd meeting, paragraph 9).

4. Lastly, the Canadian delegation to the same session of the General Assembly, while finding the Commission's report very satisfactory, said that the Canadian Government would hardly be able to accept the draft articles on consular intercourse and immunities, as they contained no federal clause or reservations clause, such as occurs in several international conventions (656th meeting, paragraph 11).

⁹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), p. 83.

¹⁰ *Yearbook of the International Law Commission, 1959*, vol. I (United Nations publication, Sales No. 59.V.1, vol. I), 496th meeting, paragraph 17.

¹¹ *Ibid.*, paragraph 26.

¹² *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), pp. 72 *et seq.*

¹³ *Ibid.*, 1951, vol. II (United Nations publication, Sales No. 51.V.6, vol. II), p. 130.

PLANNING OF FUTURE WORK OF THE COMMISSION

[Agenda item 6]

DOCUMENT A/CN.4/138

Resolution 1505 (XV) adopted by the General Assembly regarding future work in the field of the codification and progressive development of international law

NOTE BY THE SECRETARIAT

[Original: English]

[8 May 1961]

1. The General Assembly, in the course of its fifteenth session, at the 943rd plenary meeting on 12 December 1960, adopted resolution 1505 (XV) on future work in the field of the codification and progressive development of international law. According to the terms of the resolution, the General Assembly decided to place the question on the agenda of its sixteenth session; the Assembly also invited the Member States to submit their views or suggestions on the matter. The resolution reads in full as follows:

The General Assembly,

Bearing in mind the purposes and principles of the United Nations,

Considering that the conditions prevailing in the world today give increased importance to the role of international law, and its strict and undeviating observance by all governments, in strengthening international peace, developing friendly and co-operative relations among the nations, settling of disputes by peaceful means and advancing economic and social progress throughout the world,

Recalling its resolution 1236 (XII) of 14 December 1957 and 1301 (XIII) of 10 December 1958,

Mindful of paragraph 1 of Article 13 of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Considering the extent of the progress made by the International Law Commission in the codification of topics listed in paragraph 16 of the report covering its first session,¹

Expressing its appreciation to the Commission for the work it has accomplished in the field of the codification and progressive development of international law,

Considering that many new trends in the field of international relations have an impact on the development of international law,

Considering that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a

broader approach may be called for in the consideration of any of these topics,

Deeming it necessary therefore to reconsider the Commission's programme of work in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among States,

1. *Decides* to place the question entitled "Future work in the field of the codification and progressive development of international law" on the provisional agenda of its sixteenth session in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law;

2. *Invites* Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they may have on this question for consideration by the General Assembly.

2. The resolution was adopted on the recommendation of the Sixth Committee, which discussed the matter in connexion with its consideration of the Report of the International Law Commission on its twelfth session. The Sixth Committee's deliberations on the matter are recorded in its summary records,² and summarized in its report.³

3. The question of inviting the Commission itself to undertake a study of the matter was raised. The debate as to which organ should be entrusted with this task was summarized in the Sixth Committee's report as follows:⁴

45. In the course of the discussion most representatives came to the conclusion that the principle that many new trends in the field of international relations had an impact on the development of international law — whose role had consequently increased in importance — should be taken as a basis for ascertaining whether new topics susceptible of codification or conducive to progressive development had arisen, and that the best course of action would be to revise the International Law Commission's work programme

² *Official Records of the General Assembly, Fifteenth Session, Sixth Committee*, 649th to 672nd meetings.

³ *Ibid.*, *Fifteenth Session, Annexes*, agenda item 65, document A/4605, sections II and III.

⁴ *Ibid.*, paras. 45-49.

¹ *Yearbook of the International Law Commission, 1949*.

in the light of recent developments in international law and with due regard to the need for promoting friendly relations and co-operation among States.

46. There were, however, differences of opinion as to the method to be adopted in order to achieve that end.

47. A large number of representatives held the view that it was imperative to establish a special committee, since the preparation of a new list of topics for codification raised political problems which it was preferable to entrust to government representatives and not to experts such as the members of the International Law Commission, without thereby implying the slightest criticism of the International Law Commission. Moreover, as the Commission already had a very heavy agenda, to ask it to select new topics for codification would mean seriously delaying the study of other questions.

48. Another large group of representatives thought, on the contrary, that the International Law Commission was better qualified to perform that task, by virtue of articles 16-24 of its statute, and that it would be inappropriate to set up a special committee which would duplicate the Commission's work and whose establishment might imply a lack of confidence in the Commission. Despite its heavy agenda, the Commission was perfectly capable of undertaking this new task, which would not occupy more than a few meetings.

49. In the course of the discussion, agreement was achieved between the two points of view, to the effect that the General Assembly, at its sixteenth session, should study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification. The Member States would be invited to submit their views or suggestions for consideration by the Assembly.

CO-OPERATION WITH OTHER BODIES

[Agenda item 5]

DOCUMENT A/CN.4/139

Report on the fourth session of the Asian-African Legal Consultative Committee

BY F. V. GARCÍA-AMADOR, OBSERVER FOR THE COMMISSION

[Original: English & Spanish]

[30 May 1961]

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INTRODUCTION

At its twelfth session, the International Law Commission decided unanimously to accept the invitation of the Asian-African Legal Consultative Committee to send an observer to the Committee's fourth session.¹ Noting that the topic of State responsibility was on the agenda of that session, a topic which was also to be studied by the Commission at its next session, the latter decided to designate Mr. F. V. García-Amador, its Special Rapporteur for that subject, as observer at the Committee's fourth session.

In fulfilment of his mandate, the observer attended the session in question, which took place in Tokyo, Japan, from 15 to 25 February 1961. This report contains an account of the proceedings of this fourth session, especially in regard to topics in the field of international law which form part of the Commission's programme of work. In addition, it gives a short account of the Committee's activities prior to the Tokyo session.

ESTABLISHMENT AND COMPOSITION OF THE COMMITTEE

The Committee was established — with the title, "Asian Legal Consultative Committee" — in November 1956 by the Governments of Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. On the suggestion of the Prime Minister of India, which the other member countries accepted, the statutes of the Committee were

¹ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9 (A/4425), chapter IV, paragraph 43.*

amended to enable countries from the African continent to become members as from April 1958. As a result, the Committee's title was changed to its present one. On the formation of the United Arab Republic, this State became a founder member in place of Syria. Sudan was admitted to membership with effect from 1 October 1958, Pakistan with effect from 1 January 1959 and Morocco at the fourth session.

Under article 3 of its statutes, the Committee is to function for an initial period of five years, which terminates on 14 November 1961. By a resolution adopted at the fourth session member governments were recommended, in view of the work already accomplished by the Committee and the further work still pending, and in view of the Committee's valuable role in promoting Asian-African co-operation, to make it a permanent body or at all events to extend its term for a further five years, at the end of which period the question would be reconsidered.

The representatives of the States members of the Committee attending the fourth session were:

Burma

Member and leader of the delegation: Hon. U Myint Thein, Chief Justice of the Union of Burma
Alternate member: U Nyun Tin, Legal Adviser to the Municipal Corporation of Rangoon
Adviser: U Soe Tin, Secretary to the Government of Burma, Ministry of Foreign Affairs
Adviser: U Kyaw Thaung, Assistant Attorney-General

Ceylon

Member and leader of the delegation: Senator the Hon. Mr. Sam P. C. Fernando, Minister of Justice
 Alternate member: Mr. E. R. S. R. Coomaraswamy, Advocate
 Adviser: Mr. R. S. Wanasundera, Crown Counsel, Attorney-General's Department

India

Member and leader of the delegation: Mr. M. C. Setalvad, Attorney-General for India
 Alternate member: Hon. Mr. Justice S. K. Das, Judge, Supreme Court of India
 Alternate member: Mr. B. N. Lokur, Secretary to the Government of India, Ministry of Law
 Adviser: Mr. P. K. Banerjee, Counsellor, Embassy of India in Japan
 Secretary: Mr. A. G. Asrani, Third Secretary, Embassy of India in Japan

Indonesia

Member and leader of the delegation: Hon. Mr. R. Wirjono Prodjodikoro, Chief Justice of the Republic of Indonesia
 Alternate member: Dr. S. H. Tajibnapis, Acting Chief of Legal Division, Department of Foreign Affairs
 Adviser: Mr. Mochtar Kusumaatmadja, Professor of International Law, Bandung University
 Secretary: Mr. Utarso, Second Secretary, Embassy of Indonesia, Tokyo

Iraq

Member and leader of the delegation: H.E. Mr. Abdul Amir Al-Egaili, Attorney-General and Chief Public Prosecutor, Iraq
 Alternate member: Dr. Hassan Al-Rawi, Director-General, Legal Department, Ministry of Foreign Affairs
 Adviser: Mr. Abdul Malik Al-Zaibeq, First Secretary, Embassy of Iraq in Japan

Japan

Member and leader of the delegation: Dr. Kenzo Takayanagi, President, Cabinet Commission on Constitutional Reforms, Japan
 Alternate member: Mr. Kumao Nishimura, Judge, Permanent Court of Arbitration
 Adviser: Dr. Zengo Ohira, Professor of Law, Hitotsubashi University
 Adviser: Dr. Toshio Mitsudo, Counsellor, Embassy of Japan, New Delhi
 Adviser: Mr. Yoshiho Yasuhara, Counsellor, Criminal Affairs Bureau, Ministry of Justice
 Adviser: Mr. Jiro Muraoka, Public Prosecutor, Civil Affairs Bureau, Ministry of Justice

Adviser: Mr. Chikara Ikegami, Public Prosecutor, Immigration Bureau, Ministry of Justice

Adviser: Mr. Motto Ogiso, Chief of Legal Affairs Section, Ministry of Foreign Affairs, Japan

Adviser: Mr. Hirohiko Otsuka, Legal Affairs Section, Ministry of Foreign Affairs, Japan

Pakistan

Member and leader of the delegation: Mr. A. T. Mustapha, Barrister-at-law
 Adviser: Mr. K. A. Aziz Khan, Third Secretary, Embassy of Pakistan

Sudan

Not represented

United Arab Republic

Member and leader of the delegation: H.E. Hafez Sabek, Attorney-General of the United Arab Republic

Alternate member: Dr. Ezz El-Din Abdullah, Dean, Faculty of Law, University of Ein Shams

Adviser: Dr. Jabir Abdul Rahman, Professor, Faculty of Law, University of Cairo

Adviser: Mr. Mohammed Hafiz Genem, Professor of Public International Law, University of Ein Shams

Adviser: Mr. Gamal El Nomani, Ministry of Justice

Adviser: Mr. Nazar El Kayyali, Advocate

In addition, the Governments of Cambodia and Ghana were represented by observers.

The Committee elected the leader of the Japanese delegation as President, and leader of the Indonesian delegation as Vice-President for the session.

Mr. B. Sen acted as General Secretary of the Conference and Secretary of the Committee, Mr. T. Mitsudo as liaison officer with the Government of Japan and chief organizational officer, and Mr. H. Otsuka as conference officer.

FUNCTIONS AND ORGANIZATION

Under article 3 of its statutes, the Committee has the following functions:

- (a) To examine questions that are under consideration by the International Law Commission and to arrange for the views of the Committee to be placed before the said commission;
- (b) To consider legal problems that may be referred to the Committee by any of the participating countries and to make such recommendations to governments as may be thought fit;
- (c) To exchange views and information on legal matters of common concern; and
- (d) To communicate, with the consent of the governments of the participating countries, the points of

view of the Committee on international legal problems referred to it, to the United Nations, other institutions and international organizations.

It is the first and last of these functions which are of special interest to the United Nations and the International Law Commission. The Commission's statute explicitly recognizes the advisability of consultation with intergovernmental organizations whose task is the codification of international law (article 26, paragraph 4). This point will be mentioned again elsewhere in this report.

The Committee normally meets once a year in the different member countries. The first session was held at New Delhi (1957); the second at Cairo (1958); the third at Colombo (1960) and the fourth at Tokyo (1961). At the most recent session, it was decided that the fifth session should be held at Rangoon, Burma, in January 1962.

Since its establishment, the Committee has had a permanent secretariat at New Delhi, which is responsible both for administrative matters and for preparing studies and documents relating to the topics on the Committee's programme. Each State appoints a member of its diplomatic mission to act as liaison officer with the secretariat, and to co-operate with it. At the Committee's request, the Government of India offered the services of Mr. B. Sen, Legal Adviser to the Ministry of External Affairs, as honorary secretary. In response to repeated requests by the Committee, Mr. Sen has continued to hold this office since the first session.

In accordance with its statutes (article 7) and statutory rules, the Committee may enter into arrangements for consultations with other organizations and bodies. In this respect, the Committee has maintained close relations, especially for the purpose of exchanging documents, with the United Nations, certain of the specialized agencies, the Inter-American Council of Jurists and the League of Arab States. In keeping with the nature of these activities, the Committee has been represented by observers at meetings of these organizations and bodies.

In response to the invitation addressed to it by the International Law Commission, which I had the honour to convey to the Committee on the Commission's instructions, Mr. Hafez Sabek, Attorney-General of the United Arab Republic and leader of its delegation, was designated at the Tokyo session to represent the Committee as an observer at the Commission's thirteenth session.

THE THREE PREVIOUS SESSIONS

Since its establishment, the Committee has had an extensive programme of work. At its first session (1957), the following topics were submitted for its consideration: Functions, privileges and immunities of diplomatic envoys and agents, including questions regarding the enactment of legislation to provide for diplomatic immunities; principles governing the extradition of offenders taking refuge in the territory of another State, including questions relating to the desirability of concluding extradition treaties and simplifying the procedure

for extradition; the law relating to the regime of the high seas, including questions relating to the rights to the sea-bed and sub-soil; status of aliens, including questions relating to the responsibility of States in respect to the treatment of foreign nationals; restrictions on the immunity of States in respect of commercial transactions entered into by or on behalf of States and by state trading corporations; the law of the territorial sea; questions relating to dual nationality; ionospheric sovereignty; questions relating to the reciprocal enforcement of foreign decrees in matrimonial matters and questions relating to free legal aid. During the session almost all the agenda items were discussed, although it proved impossible to prepare drafts or reports on any of them.

At its second session (1958), the Committee concentrated on the following subjects: diplomatic immunities, extradition, immunity of States in respect of commercial transactions, dual nationality, and status of aliens. At the close of that session the Committee submitted to member governments a report on diplomatic immunities and another on immunity of States in respect of commercial transactions.

At its third session (1960) the Committee considered the comments received from governments on the two aforesaid reports and made certain changes in the report on diplomatic immunities. It discussed in greater detail the legal status of aliens and extradition and prepared provisional draft articles on each of these two topics. For the first it took as the basis of discussion the memorandum prepared by the secretariat and for the second a draft multilateral agreement submitted by the Government of the United Arab Republic and another memorandum prepared by the secretariat. In addition, the Committee held a general discussion on questions relating to dual nationality and on the International Law Commission's report on arbitral procedure (A/3859, chapter II). At the same session it was decided that the question of the legality of nuclear tests and the legal aspects of certain economic questions — viz., conflicts of law regarding international contracts of sale and double taxation — should be placed on the agenda of the following session.

THE TOKYO SESSION

At its fourth session, the Committee considered the topics held over for study and decision from the earlier sessions. In some instances, it confined itself to settling the procedure to be followed in the future consideration of the topics in question. In other cases, however, it decided that its consideration of particular topics was concluded and removed them from its programme of work. In the other cases it prepared final texts of what had previously been provisional drafts.

The subject of consular immunities and privileges falls in the first group. In view of the stage reached in the International Law Commission's work on the subject, the Committee decided to place it on the agenda for its next session, when the Commission's draft is to form the basis for discussion, and requested the secretariat to communicate any necessary background material.

Similarly, in view of the stage reached in the International Law Commission's work on the law of treaties, it requested the Secretariat to collect background material and prepare commentaries concerning this topic in order that it might be included in the agenda for the fifth or sixth session. With regard to the immunities and privileges of the Committee, consideration of which had been repeatedly postponed at the request of member governments which wished to study the subject more thoroughly, the Committee decided that the draft articles should be referred to the fifth session for a final decision.

As regards the topic of conflicts of law concerning international contracts of sale, the Committee decided to study only the case-law relating to transfers of corporeal movable property and to request the secretariat to ask governments for particulars of municipal law, to prepare a report thereon and to circulate it to governments in good time for the problem to be discussed at the 1962 session. The Committee adopted a like decision on the subject of double taxation: the Secretariat is to ask member governments for the texts of laws and agreements concluded by them on the subject of double taxation and on that basis to continue its preparatory work with a view to facilitating the Committee's future discussions. In contemplation of the future study of the topic of double nationality the Committee decided to ask the delegation of the United Arab Republic to prepare a revised text of its draft agreement in the light of the comments received from governments.

At the Tokyo session, the Committee paid special attention to the question of the legality of nuclear tests. All the delegations made statements in which they thoroughly examined the different aspects of the question. Although unanimous in condemning such tests, by reason of the serious damage which they are capable of causing, the Committee confined itself to declaring the question as one of the utmost urgency, and to including it, as item 1, in the agenda of the fifth session. In keeping with the same resolution, it was decided that the Secretariat should continue its study of the subject and to invite governments to transmit their comments on the list of topics which it had drawn up. It was likewise decided that the statements made by delegations should be circulated to governments so that they could express their views on the legal aspects raised during the discussion.

Furthermore, the Committee decided to consider its work with respect to other subjects which had been included in its programme of work (free legal aid and questions concerning the recognition of foreign decrees in matrimonial matters) as completed. In the case of both these topics, the Committee decided to publish the Rapporteur's report, together with the annexed documents, and submit them to governments, and to remove both topics from its programme of work. The question of the extradition of fugitives from justice was also removed from the Committee's agenda. During the fourth session, the existing draft relating to this matter was revised and the final report to be submitted by the secretariat to governments was drawn up. The Committee's other decisions are discussed below in the next section.

STATUS OF ALIENS, AND STATE RESPONSIBILITY

On the basis of the material referred to above, the topic of the status of aliens had been the subject of a general debate at the Committee's second session. It had been decided, with an express recognition of the importance of the subject, that the subject would be studied more thoroughly and that the Secretariat should collect the necessary working material and submit its report in the form of draft articles at the ensuing session. At Colombo the Committee differentiated the aspects relating to the diplomatic protection of citizens abroad and the responsibility of the State for maltreatment of aliens from the other aspects of the status of aliens, on the grounds that the first two were not related to the substantive rights of aliens in the matter of their status and treatment. At the same session, as noted earlier, the Committee approved provisional draft articles on the second aspect and invited the comments of governments. On this basis it drew up the final report, which contains the draft articles reproduced in annex I hereto.

At the Tokyo session, procedural resolutions on this subject were also adopted. At an early stage in the proceedings it was decided that the topic of State responsibility should be considered within the context of the topic of the status of aliens. When the report just mentioned was adopted, it was decided that the Secretariat should prepare the relevant commentaries on the draft articles for transmission to governments together with the report. In a subsequent and final resolution it was decided: (1) to include in the agenda of the fifth session the topic of State responsibility and the diplomatic protection of citizens abroad; (2) that the Secretariat should revise the draft articles appearing in its memorandum on the subject, if possible in conformity with the principles contained in the articles relating to the status of aliens approved at the present session; and (3) that, together with the memorandum prepared by the secretariat, the Harvard Law School's draft of 1960 on the subject, any provisional draft articles adopted by the International Law Commission, and the draft prepared by Mr. F. V. García-Amador, the Commission's Special Rapporteur, should be submitted to the Committee for consideration at its next session.

In connexion with the foregoing, it is interesting to note that the Committee has decided to take private studies and draft articles as the basis for its discussion of this subject. In doing so it has followed an old-established practice of official organizations which has proved exceptionally valuable in the progressive development of international law and its codification. In conformity with its statute, the International Law Commission has likewise made extensive use of such studies and drafts.

During the discussion of the topic the Committee did me the honour of inviting me to make a statement on the different problems and aspects of the international responsibility of the State, particularly in the light of recent developments. It was, of course, made clear that I would make the statement in my personal capacity and in no wise as a member of the International Law Commission and Special Rapporteur for the topic. It was subsequently decided that my statement, made under

those conditions, should be circulated to the members of the Committee and included in the documentation of the fifth session.

IMPORTANCE OF THE COMMITTEE

As I had occasion to state at the Tokyo session, in the present transitional stage of international law, the peoples of Africa and Asia are called upon to make a contribution to the inescapable task and goal of adapting that law to the new needs and interests of the international community, and their contribution could be as valuable as that made by the Latin American countries in a different period. (See full text of the statement in annex 2.) This historical parallel is proof of the importance of the Asian-African Committee. Even though the problems and situation which we face today are not precisely the same it cannot be denied that the Committee has a valuable part to play.

The parallel between the two regional movements is also obvious from the point of view of the risk of indulging in excessive and unjustified regionalism or from that of the risk of adopting ultra-nationalist positions which are negative and self-defeating and would be even more detrimental to the genuine interests of the peoples forming part of a regional system. Such positions would be neither compatible nor consistent with the interdependence which characterizes the world in which we live. In the western hemisphere that danger has been successfully avoided because, in considering the needs and interests of our countries, we have so far been able to look after them without disregarding the overriding considerations of interdependence.

The work so far done by the Committee seems to indicate that it is following the same lines. In this connexion, it is interesting to note the philosophy underlying its draft on the legal status of aliens, the final text of which was approved at Tokyo and is reproduced in annex 1 hereto. According to the Secretariat's report on the Colombo session, the Committee's provisional recommendations can be said to contain new concepts on the law on the subject. The Committee rejected the theory of "minimum standard of treatment" for foreigners, which had been developed during the nineteenth century, and recommended the concept of "equality of treatment" with the nationals of a State. The Committee's views appear to be based on the fact that in the modern society the doctrine of the minimum standard of treatment has become somewhat outmoded. In the course of the discussion the view which found favour was that, in the context of the United Nations Charter and the Declaration of Human Rights, every State was expected to accord fair treatment to its own nationals, which should be taken into account in the formulation of the principles concerning the treatment of foreigners.² It is clear from the foregoing that the concept on which the authors of the draft articles based themselves is that the domestic legislation concerning

the treatment of aliens should in essence conform to the internationally recognized human rights and fundamental freedoms.

For all these reasons it is to be regretted that the International Law Commission, by a recent decision, decided not to send an observer to the Committee's session which is to be held at Rangoon in February 1962, thus breaking the continuity of the co-operative relationship established between the two bodies.³ The fact that the election of the members of the Commission will take place this autumn and that the Commission will not meet again until after the Committee's fifth session makes it admittedly somewhat difficult to appoint an observer but it is in no wise an insuperable obstacle. I trust, therefore, that the Commission will reconsider its decision before the end of its present session, as I am convinced that it will be possible to find a formula permitting of a suitable solution of the problem. One possible course might be to authorize the Chairman to designate, in consultation with the persons elected members of the Commission, one of their number, a national of some African or Asian country, as observer.⁴

It is likewise regrettable that the Chairman of the Commission should have said, at the same meeting that "he did not think that the Commission could establish the principle of regular representation, in view of the considerable expense involved, which was, moreover, all the less justified in view of the extensive exchange of material. Every case should therefore be decided on its own merits and in the light of such possibilities as sending members who happened to be near the place of the session" (of the regional body).

Before I conclude this short report, I should like once again to thank the International Law Commission for the great honour which it conferred on me in designating me observer at the fourth session of the Asian-African Legal Consultative Committee, thus giving me an opportunity to be present at the deliberations of such distinguished jurists. For those of us who are devoting ourselves to the study and practice of international law there are few experiences as valuable as this.

May I also once again express my sincere gratitude to the Committee for its exceedingly great courtesy towards me and to the Government of Japan for its many and constant acts of kindness during my stay at Tokyo.

ANNEX 1

Principles concerning admission and treatment of aliens
(adopted by the Asian-African Legal Consultative Committee
at its fourth session)

Article 1. — Definition of the term "alien"

An alien is a person who is not a citizen or national of the State concerned.

³ *Yearbook of the International Law Commission, 1961, 597th meeting.*

⁴ At its 621st meeting (*ibid.*), the Commission decided to request its Chairman (or, if he should be unable to attend, another member of the commission to be designated by him, or its secretary) to act as its observer at the fifth session of the Asian-African Legal Consultative Committee [Editor's note].

² Asian-African Legal Consultative Committee, Third Session, Colombo, 20 January to 4 February 1960; issued by the secretariat of the Asian-African Legal Consultative Committee, New Delhi, India, pp. 83-84.

Note: In a Commonwealth country, the status of the nationals of other Commonwealth countries shall be governed by the provisions of its laws, regulations and orders.

Article 2

(1) The admission of aliens into a State shall be at the discretion of that State.

(2) A State may

- (i) Prescribe conditions for entry of aliens into its territory;
- (ii) Except in special circumstances, refuse admission into its territory of aliens who do not possess travel documents to its satisfaction;
- (iii) Make a distinction between aliens seeking admission for temporary sojourn and aliens seeking admission for permanent residence in its territory; and
- (iv) Restrict or prohibit temporarily the entry into its territory of all or any class of aliens in its national or public interest.

Note: (1) The delegation of Japan is of the view that in sub-clause (iv) of clause 2 of this article, the words "armed conflicts or national emergency" should be substituted in place of the words "national or public interest". (2) The delegation of Indonesia stated that it preferred clause 2 of article 2 as adopted by the Committee at its third session at Colombo.⁵

Article 3

A State shall not refuse to an alien entry into its territory on the ground only of his race, religion, sex or colour.

Article 4

Admission into the territory of a State may be refused to an alien

- (i) Who is in a condition of vagabondage, beggary or vagrancy;
- (ii) Who is of unsound mind or is mentally defective;
- (iii) Who is suffering from a loathsome, incurable or contagious disease of a kind likely to be prejudicial to public health;
- (iv) Who is a stowaway, a habitual narcotic user, an unlawful dealer in opium or narcotics, a prostitute, a procurer or a person living on the earnings of prostitution;
- (v) Who is an indigent person or a person who has no adequate means of supporting himself or has no sufficient guarantee to support him at the place of his destination;
- (vi) Who is reasonably suspected to have committed or is being tried or has been prosecuted for serious infractions of law abroad;
- (vii) Who is reasonably believed to have committed an extraditable offence abroad or is convicted of such an offence abroad;
- (viii) Who has been expelled or deported from another State; and
- (ix) Whose entry or presence is likely to affect prejudicially its national or public interest.

Article 5

A State may admit an alien seeking entry into its territory for the purpose of transit, tourism or study, on the condition that he is forbidden from making his residence in its territory permanent.

Article 6

A State shall have the right to offer or provide asylum in its territory to political refugees or to political offenders on such conditions as the State may stipulate as being appropriate in the circumstances.

⁵ See Asian-African Legal Consultative Committee, *op. cit.*, p. 152.

Article 7

(1) Subject to the conditions imposed for his admission into the State, and subject also to the local laws, regulations and orders, an alien shall have the right

- (i) To move freely throughout the territory of the State; and
- (ii) To reside in any part of the territory of the State.

(2) The State may, however, require an alien to comply with provisions as to registration or reporting or otherwise so as to regulate or restrict the right of movement and residence as it may consider appropriate in any special circumstances or in the national or public interest.

Note: The delegation of Indonesia expressed a preference for the text adopted at the Colombo Session in clause 1 of this article.

Article 8

Subject to local laws, regulations and orders, an alien shall have the right

- (i) To freedom from arbitrary arrest;
- (ii) To freedom to profess and practise his own religion;
- (iii) To have protection of the executive and police authorities of the State;
- (iv) To have access to the courts of law; and
- (v) To have legal assistance.

Note: (a) The delegation of Ceylon was of the view that in clause (ii) the expression "to freedom of religious belief and practice" should be substituted; (b) the delegations of Burma and Indonesia suggested retention of clause 2 of the draft adopted at the Colombo session, which provides that: "Aliens shall enjoy on a basis of equality with nationals protection of the local laws." The delegations of Iraq and Japan had no objection to the retention of this clause.

Article 9

A State may prohibit or regulate professional or business activities or any other employment of aliens within its territory.

Note: The delegation of Iraq was of the view that the words "shall be free to" should be inserted in place of the word "may". The delegation of Pakistan wished to keep its position open.

Article 10

An alien shall not be entitled to any political rights, including the right of suffrage, nor shall he be entitled to engage himself in political activities, except as otherwise provided by local laws, regulations and orders.

Article 11

Subject to local laws, regulations and orders and subject also to the conditions imposed for his admission into the State, an alien shall have the right to acquire, hold and dispose of property.

Note: The delegation of Indonesia, whilst accepting the provisions of this article, stated that according to the new laws of Indonesia aliens cannot acquire title to property though they can hold property.

Article 12

(1) The State shall, however, have the right to acquire, expropriate or nationalize the property of an alien. Compensation shall be paid for such acquisition, expropriation or nationalization in accordance with local laws, regulations and orders.

(2) The State shall also have the right to dispose of or otherwise lawfully deal with the property of an alien under orders of expulsion or deportation.

Note: (i) The delegation of Japan did not accept the provisions of this article. According to its view "just compensation" should be paid for all acquisition, nationalization or expropriation and not "compensation in accordance with local laws, regulations, and orders." The delegation could not accept the provisions of clause 2 as such a provision would be contrary to the laws of Japan. (ii) The delegation of Indonesia reserved its position on clause 2 of this article. (iii) The delegation of Pakistan stated that, though it accepted the provisions of this article, the view of the delegation was that acquisition, nationalization or expropriation should be in the national interest or for a public purpose.

Article 13

(1) An alien shall be liable to payment of taxes and duties in accordance with the laws and regulations of the State.

(2) An alien shall not be subjected to forced loans which are unjust or discriminatory.

Note: (i) Clause 1 of this article was accepted by all delegations except that of Japan. The delegation of Japan wished a proviso to that clause to be inserted to read as follows: "provided that the State shall not discriminate between aliens and nationals in levying the taxes and duties." (ii) Clause 2 was accepted by the delegations of Burma, India, Indonesia and Iraq.

The delegate of Ceylon wished the words "or discriminatory" to be deleted.

The delegate of Japan wished the clause to be drafted as: "An alien shall not be subjected to forced loans."

The delegate of Pakistan suggested the following draft: "An alien shall not be subjected to loans in violation of the laws, regulations and orders applicable to him."

The delegate of the United Arab Republic was of the view that the draft should be as follows: "An alien shall not be subjected to unjust forced loans."

Article 14

(1) Aliens may be required to perform police, fire-brigade or militia duty for the protection of life and property in cases of emergency or imminent need.

(2) Aliens shall not be compelled to enlist themselves in the armed forces of the State.

(3) Aliens may, however, voluntarily enlist themselves in the armed forces of the State with the express consent of their home State which may be withdrawn at any time.

(4) Aliens may voluntarily enlist themselves in the police or fire-brigade service on the same conditions as nationals.

Note: The delegation of Indonesia reserved its position on the whole article. The delegation of Iraq reserved its position on clause 3 of this article. The delegation of Japan wished clause 3 of this article to be deleted.

Article 15

(1) A State shall have the right in accordance with its local laws, regulations and orders to impose such restrictions as it may deem necessary on an alien leaving its territory.

(2) Such restrictions on an alien leaving the State may include any exit visa or tax clearance certificate to be procured by the alien from the authorities concerned.

(3) Subject to the local laws, regulations and orders a state shall permit an alien leaving its territory to take his personal effects with him.

Note: (i) The delegate of Pakistan reserved his position on clause 3. (ii) The delegates of Ceylon and the United Arab Republic wished the following clause to be retained in this article: "An

alien who has fulfilled all his local obligations in the State of residence shall not be prevented from departing from the State of residence."

Article 16

(1) A State shall have the right to order expulsion or deportation of an undesirable alien in accordance with its local laws, regulations and orders.

(2) The State shall, unless the circumstances warrant otherwise, allow an alien under orders of expulsion or deportation reasonable time to wind up his personal and other affairs.

(3) If an alien under orders of expulsion or deportation fails to leave the State within the time allowed, or, after leaving the State, returns to the State without its permission, he may be expelled or deported by force, besides being subjected to arrest, detention and punishment in accordance with local laws, regulations and orders.

Article 17

A State shall not refuse to receive its nationals expelled or deported from the territory of another State.

Note: The delegate of Pakistan suggested the addition of the word "normally" before the word "refuse".

Article 18

Where the provisions of a treaty or convention between any of the signatory States conflict with the principles set forth herein, the provisions of such treaty or convention shall prevail as between those States.

ANNEX 2

Statement by Mr. Francisco V. García-Amador, observer for the International Law Commission

Mr. Chairman:

Allow me, first of all, to tell you and the distinguished members of the Asian-African Legal Consultative Committee that I feel deeply honoured by the mission which the International Law Commission has entrusted to me and by the opportunity that mission affords me to be present at your deliberations. It is only natural that, having devoted half my life to the study and teaching of international law and having during the last few years taken part in the work and efforts of the United Nations and the Organization of American States to promote its development and codification, I should take a special interest in the appearance of a new regional body which can make a valuable contribution to the task and goal we have in common.

I should like, Mr. Chairman, to dwell for a moment on the observation I have just made. As a Latin American I represent, in the International Law Commission, another group of countries — a regional system — which at one stage of its history made a deep impact on the prevailing notions and principles of international law. As the distinguished members of the Committee know, the notions and principles in question were those which more particularly affected the interests of the small and weak countries. Although the problems before us today are not precisely the same, it cannot be denied that, in the transitional period through which international law is obviously passing, the peoples of Asia and Africa are called upon to make a no less valuable contribution to the inescapable task and goal of adapting that law to the new needs and interests of the international community. No one who has observed the course of events over the last fifteen years can fail to see the potential reality revealed by the historical parallel to which I have drawn attention.

Mr. Chairman, it has been a source of justifiable satisfaction for my colleagues in the Commission to see that one of the pur-

poses for which your Committee was established, as its statute specifically states, is to examine the questions which the Commission is considering and to bring its views to the Commission's attention. With respect to the latter purpose, I take pleasure in informing you that in similar situations the Commission has not only given the greatest attention to the opinions and points of view of regional bodies but has kept them very much in mind in taking its decisions. With regard to the first purpose I mentioned, after having concentrated its activity on the law of the sea and other subjects, the Commission will, as from this year's session, give detailed consideration to the principles of international law governing State responsibility. For that reason, and because the topic is on the agenda of the Committee's current session, I should like, with your permission, to make a few brief comments.

The international responsibility of the State has always been one of the most complex, if not the most complex, of subjects, especially from the point of view of codification. To the difficulties of the past have now been added those created by the profound transformation which the traditional system of international law is experiencing, precisely as regards those concepts and postulates most directly connected with the principles which have governed the various aspects of responsibility. From this point of view, it would be unrealistic to embark on the "codification" pure and simple of these principles and to ignore the need to revise them in the light of the new trends in contemporary international law which are daily becoming more evident. In other words, to use the expression with which we have become familiar since

the United Nations resumed these activities, the major problem with which this subject confronts us, as was largely the case with the law of the sea, is that of the "progressive development" of the principles of international law governing State responsibility.

Thus, Mr. Chairman, the opinions of regional bodies can play an important role when the question of promoting the development and codification of international law on a world scale is under consideration. It is through these opinions that the organs of the United Nations may become aware, better than by any other means, of the trends which really reflect the new needs and legitimate interests of the countries composing the United Nations. *In this respect the experience of the past is very significant and it should serve as the Committee's greatest incentive in carrying out its work.*

In only remains for me, Mr. Chairman, to express the gratitude of the International Law Commission for the Committee's invitation to send an observer to this session. Upon the Commission's explicit instructions I also have the pleasure to invite the Committee to send an observer to the Commission's sessions. This formalization of the co-operative relationship between the two bodies will further the achievement of the goals to which I have referred.

In thanking you, Mr. Chairman, and the distinguished members of the Committee for the time they have taken from their work to listen to me, I should like to say again how honoured and glad I am at this opportunity to be with you.

DOCUMENT A/CN.4/140

Letter, dated 26 June 1961, addressed to the Chairman of the International Law Commission by Mr. Hafez Sabek, observer for the Asian-African Legal Consultative Committee

[Original: English]

[4 July 1961]

Just a few lines to thank you, Mr Chairman and the distinguished members of the Commission, for your sincere welcome to me as observer for the Asian-African Legal Consultative Committee.

I would like also to thank Mr. García-Amador for his valuable report (A/CN.4/139), and to express my personal remarks on two questions mentioned in this report, since I am obliged to leave Geneva now and thus shall not be present when the Commission takes the said report for consideration.

As regards the first question which relates to the invitation extended to the Commission to be represented by an observer at the fifth session of our Committee, I wish to draw the attention of the distinguished members of the Commission to the fact that our Committee attaches very great importance to the attendance of a member of the Commission at its sessions not only for the great benefit which such attendance realizes, but also as a symbol for the co-operation existing between our two scientific bodies. I still hope that the Commission may reconsider this matter again and will find any way out to be represented by a member at the fifth session of our Committee.

As regards the second question, which relates to State responsibility for maltreatment of aliens, I would like to make a few comments on certain points included

in the said report which may lead to some misunderstanding. The Committee was able in its fourth session to draw up its final report on the subject of "status of aliens" in the form of draft articles containing principles concerning admission and treatment of aliens. It has decided to separate the item of State responsibility from that subject and to consider it independently at its fifth session.

The draft adopted by the Committee is based on the existing rules of international law. The Committee, however, took into consideration the following:

- (a) The necessity of the progressive development of international law to meet the needs of the newly independent States in Asia and Africa;
- (b) The anxiety of the aforesaid States to eradicate all the vestiges of colonialism and to liberate themselves from all manifestations of foreign domination;
- (c) The economic situation of the aforesaid States and the privileges acquired by aliens when these States were under domination.

The Committee, taking all this into consideration, decided to grant to aliens equitable treatment under conditions which will not hamper the development and progress of those States. It did not, however, accept

the principle of absolute equality of aliens and nationals. It has established a minimum standard of treatment to be respected in favour of aliens, who must not in any way hope for more rights than nationals and have no reason to complain if the State, for some economic or social reasons grants to aliens in certain cases less rights than to nationals, so long as their basic rights as defined in that standard of treatment are ensured.

The Committee also has not accepted the theory of prior compensation nor that of full compensation to aliens in the case of the acquisition, expropriation or nationalization of their property. It has not provided any other conditions or limitations for that, save the payment of compensation, the amount of which is to be governed only by local laws, regulations and orders.

(Signed) Hafez SABEK

DOCUMENT A/CN.4/L.94

Communication regarding matters of interest to the International Law Commission discussed at the United Nations Conference on Diplomatic Intercourse and Immunities

[Original: English]

[26 April 1961]

I. TRIBUTE TO THE INTERNATIONAL LAW COMMISSION

1. At its twelfth plenary meeting, on 18 April 1961,¹ the Conference unanimously adopted a draft resolution submitted by the United Arab Republic² expressing a tribute to the International Law Commission. The resolution reads as follows:³

The United Nations Conference on Diplomatic Intercourse and Immunities,

Having adopted the Vienna Convention on Diplomatic Relations on the basis of draft articles prepared by the International Law Commission,

Resolves to express its deep gratitude to the International Law Commission for its outstanding contribution to the codification and development of the rules of international law on diplomatic intercourse and immunities.

II. SPECIAL MISSIONS

2. At its twenty-third meeting, on 21 March 1961,⁴ the Committee of the Whole of the Conference appointed a sub-committee to study the question of special missions which had been referred to the Conference by the General Assembly in its resolution 1504 (XV) of 12 December 1960.

3. The Sub-Committee on Special Missions held three meetings, and thereafter submitted a report⁵ to the Committee of the Whole recommending that the subject be referred back by the General Assembly to the International Law Commission for further study. At its thirty-ninth meeting, on 5 April 1961,⁶ the Committee of the Whole adopted the sub-committee's report, and requested the drafting committee to pre-

pare a resolution for submission to the Conference containing the recommendations of the sub-committee.

4. At its fourth plenary meeting, on 12 April 1961,⁷ the Conference unanimously adopted the resolution on special missions prepared by the drafting committee⁸ in accordance with the foregoing instructions. The resolution reads as follows:⁹

The United Nations Conference on Diplomatic Intercourse and Immunities,

Recalling that the General Assembly of the United Nations, by its resolution 1504 (XV) of 12 December 1960, referred to the Conference the draft articles on special missions contained in chapter III of the report of the International Law Commission covering the work of its twelfth session,

Recognizing the importance of the subject of special missions,

Taking note of the comments of the International Law Commission that the draft articles on special missions constituted only a preliminary survey and that the time at its disposal had not permitted the Commission to undertake a thorough study of the matter,

Considering the limited time available to the Conference to study the subject in full,

Recommends to the General Assembly of the United Nations that it refer to the International Law Commission further study of the subject of special missions in the light of the Vienna Convention on Diplomatic Relations adopted at the present Conference.

III. QUESTION OF PRECEDENCE OF HEADS OF INTERNATIONAL ORGANIZATIONS

5. At the twenty-third meeting of the Committee of the Whole, on 22 March 1961, the representative of the Philippines (Mr. Regala) referred¹⁰ to the question of the precedence of heads of international organizations in connexion with article 13 of the draft articles on diplomatic intercourse and immunities prepared by

¹ For the summary record, see Official Records of the Conference, vol. I.

² Document A/CONF.20/L.22, reprinted, *ibid.*, vol. II.

³ Document A/CONF.20/10/Add.1, reprinted, *ibid.*, vol. II.

⁴ For the summary record, see *ibid.*, vol. I.

⁵ Document A/CONF.20/C.1/L.315, reprinted, *ibid.*, vol. II.

⁶ For the summary record see *ibid.*, vol. I.

⁷ For the summary record, see *ibid.*, vol. I.

⁸ Document A/CONF.20/L.2/Add.2, reprinted, *ibid.*, vol. II.

⁹ Document A/CONF.20/10/Add.1, reprinted, *ibid.*, vol. II.

¹⁰ For the summary record, see *ibid.*, vol. I.

the International Law Commission (A/3859, chapter III). This draft article concerned the division of heads of mission into classes and certain rules of precedence.

6. He noted that the International Law Commission had been requested by General Assembly resolution 1289 (XIII) to study relations between States and international organizations. However, many aspects of this subject were closely related to the problems discussed at the Conference. As an illustration of this point, Mr. Regala referred to the diplomatic status accorded to heads of some international organizations

in the host country, either as a matter of practice or under specific agreements. What was the status of the heads of these organizations vis-à-vis the diplomatic representatives accredited in the host country?

7. Mr. Regala believed that a multilateral approach to this problem would be in the interests of uniformity and of ensuring as wide an acceptance as possible of any rule so established. However, he would not press at this stage for the inclusion of express mention of the precedence of heads of international organizations in the convention being prepared by the Conference.

REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/4843

Report of the International Law Commission
covering the work of its thirteenth session, 1 May - 7 July 1961

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Chapter I

ORGANIZATION OF THE SESSION

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

I. Membership and attendance

2. The Commission consists of the following members:

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

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

II. Officers

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

Chairman: Mr. Grigory I. Tunkin;

First Vice-Chairman: Mr. Roberto Ago;

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

Rapporteur: Mr. Ahmed Matine-Daftary.

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

III. Agenda

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

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

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

Chapter II

CONSULAR INTERCOURSE AND IMMUNITIES

I. Introduction

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

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

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

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

12. The topic was retained on the agenda for the Commission's ninth session. The Special Rapporteur submitted a report (A/CN.4/108), but in view of its

work on other topics, the Commission was unable to examine this report.⁴

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

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

15. The Commission also decided, because of the similarity of this topic to that of diplomatic intercourse and immunities which had been debated at two previous sessions, to adopt an accelerated procedure for its work

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

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

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

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

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

⁶ *Ibid.*, paras. 57 and 61.

on this topic. Lastly, it decided to ask all the members who might wish to propose amendments to the existing draft presented by the Special Rapporteur to come to the session prepared to put in their principal amendments in writing within a week, or at most ten days, of its opening.⁷

16. The Special Rapporteur for this topic, Mr. Jaroslav Žourek, having been prevented by his duties as *ad hoc* judge on the International Court of Justice from attending the meetings of the Commission during the first few weeks of the eleventh session, the Commission was not able to take up the consideration of the draft articles on consular intercourse and immunities until after his arrival in Geneva, starting from the fifth week. At its 496th to 499th, 505th to 551th, 513th, 514th, 516th to 518th and 523rd to 525th meetings, the Commission considered articles 1 to 17 of the draft and three additional articles submitted by the Special Rapporteur. It decided that at its next session, in 1960, it would give top priority to "Consular intercourse and immunities" in order to be able to complete the first draft of this topic and submit it to governments for comments.⁸

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

18. At the twelfth session, the Commission devoted to this topic its 528th to 543rd, 545th to 564th, 570th to 576th, 578th and 579th meetings, taking as a basis for discussion the two reports and the sixty draft articles submitted by the Special Rapporteur. In view of the Commission's decisions concerning the extent to which the articles concerning career consuls should be applicable to honorary consuls, it proved necessary to insert more detailed provisions in the chapter dealing with honorary consuls, and consequently, to add a number of new articles. The Commission provisionally adopted sixty-five articles together with commentaries. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the draft to governments, through the Secretary-General, for their comments.⁹

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

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

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

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

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

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

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

26. At its present session, the Commission discussed the text of the provisional draft at its 582nd to 596th,

⁷ *Ibid.*, para. 64.

⁸ *Ibid.*, *Fourteenth Session, Supplement No. 9* (A/4169), paras. 7, 29 and 30.

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

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

¹¹ *Ibid.*, para. 24.

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

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

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

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

III. General considerations

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

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

30. An international convention admittedly establishes rules binding the contracting parties only, and based on reciprocity; but it must be remembered that these rules become generalized through the conclusion of

other similar conventions containing identical or similar provisions, and also through the operation of the most-favoured-nation clause. The Special Rapporteur's analysis of these conventions revealed the existence of rules widely applied by States, which, if incorporated in a draft codification, may be expected to obtain the support of many States.

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

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

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

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

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

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

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

(c) Chapter III contains the provisions governing the facilities, privileges and immunities accorded to the sending State in respect of *honorary consular officials*;

¹³ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), p. 80, para. 80.

¹⁴ *Ibid.*, para. 84.

for the purposes of facilities, privileges and immunities, *career consular officials who carry on a private gainful occupation* (article 56) are placed on a footing of equality with honorary consular officials.

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

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

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

"The States parties to the present convention,

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

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

¹⁵ The text of this draft preamble reads as follows:

"The States parties to this convention,

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

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

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

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

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

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

"Have agreed as follows:"

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

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

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

"Have agreed as follows:"

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

IV. Draft articles on consular relations, and commentaries

Article 1. — Definitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

(7) As some governments in their comments drew attention to the desirability of defining the family of a member of the consulate, the Special Rapporteur had included in the draft of article 1 a clause defining this expression as meaning, for the purposes of these articles, the spouse and unmarried children who are not engaged

in any occupation and who are living in the home of a member of the consulate. The Drafting Committee proposed the following definition: "Member of the family of a member of the consulate means the spouse and the unmarried children not of full age, who live in his home." The Commission was divided with respect to the insertion of a definition of "family" in the draft and also as to the scope of the definition submitted by the Drafting Committee, which several members found too restrictive. Eventually, inasmuch as the United Nations Conference on Diplomatic Intercourse and Immunities had been unable to reach agreement on this point, the Commission decided by a majority not to include a definition of member of the family of a member of the consulate in the draft.

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

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

CHAPTER I. CONSULAR RELATIONS IN GENERAL

SECTION I: ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

Article 2. — *Establishment of consular relations*

1. The establishment of consular relations between States takes place by mutual consent.
2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.
3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

Commentary

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

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

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

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

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

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

Article 3. — Exercise of consular functions

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

Commentary

(1) Paragraph 2 of article 2 of this draft lays down that the consent given to the establishment of diplomatic relations implies, unless otherwise stated, consent to the establishment of consular relations. The rule laid down in the present article corresponds to the general practice according to which diplomatic missions exercise consular functions. The rule in question was recently confirmed by

article 3, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, which provides that "nothing in the present Convention shall be constructed as preventing the performance of consular functions by a diplomatic mission".

(2) It follows that, in modern times, consular functions may be exercised by consulates or by diplomatic missions. If the sending State has no consulates in the receiving State the competence of the diplomatic mission in consular affairs covers automatically the entire territory of the receiving State. If the sending State has consulates in the territory in question, the exercise of consular functions by the diplomatic mission is limited as a general rule to that part of the territory of the receiving State which is outside the consular district or districts allotted to the consulates of the sending State. Hence, only in the exceptional cases where the sending State has in the receiving State consulates whose consular districts cover the whole territory of the State in question will the diplomatic mission not exercise consular functions. But even in such cases the sending State may reserve certain consular activities to its diplomatic mission. For example, questions of special importance or the issue of visas on diplomatic passports are sometimes reserved to the diplomatic missions in the case under discussion.

Article 4. — Establishment of a consulate

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

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

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

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

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

Commentary

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

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

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

(4) The Commission has not thought it necessary to write into this article the conditions under which an agreement for the establishment of a consulate may be amended. It has merely stated in paragraph 3, in order to protect the interests of the receiving State, that the sending State may not change the seat of the consulate, 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.

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

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

(7) As distinct from the case mentioned in the preceding paragraph which refers to the establishment of a vice-consulate or a consular agency — i.e., of a new consular post — the purpose of paragraph 5 is to regulate

those cases in which the consulate desires, for reasons of practical convenience, to establish outside the seat of the consulate an office which constitutes part of the consulate.

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

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

Article 5. — Consular functions

Consular functions consist more especially of:

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

(4) Although the majority of the governments which sent in comments on the Commission's draft expressed a preference for the general definition, nevertheless several

of them, as also several representatives at the fifteenth session of the General Assembly, expressed the wish that the definition should be supplemented by an enumeration of the principal and most important functions.

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

(6) The Commission adopted several of the Special Rapporteur's proposals and broadened the definition of the consular functions, which enumerates by way of example — as is clearly reflected in the words "more especially" in the introductory phrase — the most important consular functions recognized by international law.

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

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

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

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

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

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

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

¹⁶ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), pp. 91 to 92, article 13.

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

¹⁸ A/CN.4/137, pp. 15 *et seq.*

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

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

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

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

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

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

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

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

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

(14) Paragraph (g), which provides for the safeguarding of the interests of the nationals of the sending State in matters of succession *mortis causa*, recognizes the right of the consul, in accordance with the law of the receiving State, to take all measures necessary to ensure the conservation of the estate. He may, accordingly, represent, without producing a power of attorney, the heirs and legatees or their successors in title until such time as the person concerned undertakes the defence of his own interests or appoints an attorney. By virtue of this provision, consuls have the power to appear before the courts or to approach the appropriate authorities of the receiving State with a view to collecting, safeguarding or arranging for an inventory of the assets, and to

propose to the authorities of the receiving State all measures necessary to discover the whereabouts of the assets constituting the estate. The consul may, when the inventory of the assets is being drawn up, take steps in connexion with the valuation of the assets left by the deceased, the appointment of an administrator and all legal acts necessary for the preservation, administration and disposal of the assets by the authorities of the receiving State. The consular conventions frequently contain provisions conferring upon consuls, in matters of succession, rights that are much more extensive and, in particular, the right to administer the estate. As the previous agreements concluded between the States which will become parties to the convention are to remain in force pursuant to article 71, the provisions of those agreements will apply in the first instance to the cases under consideration.

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

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

(17) The function referred to in paragraph (i) is a general one which relates to all cases where the nationals

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

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

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

Civil Procedure, and this rule was reproduced in the similar convention of 1954 (article 15).

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

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

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

(23) One of the consul's important functions in connexion with shipping is to extend necessary assistance to vessels, boats and aircraft having the nationality of the sending State and to their crews. This function is provided for in paragraph (l) of this article. In the exercise of this function, a consul may go personally on board a vessel as soon as it has been admitted to *pratique*, examine the ship's papers, take statements concerning the voyage, the vessel's destination and any incidents which occurred during the voyage (log book) and, in general, facilitate the ship's or boat's entry into port and its departure. He may also receive protests, draw up manifests, and, where applicable, conduct investigations into any incidents which occurred and, for this purpose, interrogate the master and the members of the crew. The consul or a member of the consulate may appear before the local authorities with the master or members of the crew to extend to them any assistance, and especially to obtain any legal assistance they need, to act as interpreter in any business they may have to transact or in any applications they have to make, for example, to local courts and authorities. Consuls may also take action to enforce the maritime laws and regulations of the sending State. They also play an important part in the salvage of vessels and boats of the sending State. If such a vessel or boat runs aground in the territorial sea or internal waters of the receiving State, the competent authorities are to inform the consulate nearest to the scene of the occurrence without delay, in accordance with article 37. If the owner, manager-operator or master is unable to take the necessary

steps, consuls are empowered, under paragraph (1) of this article, to take all necessary steps to safeguard the rights of the persons concerned.

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

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

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

Article 6. — Exercise of consular functions in a third State

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

Commentary

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

Article 7. — Exercise of consular functions on behalf of a third State

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

Commentary

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

(2) The law of a large number of countries makes provision for the exercise of consular functions on behalf of a third State, subject to the authorization either of the head of State or of the government or of the minister for foreign affairs.

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

Article 8. — Appointment and admission of heads of consular posts

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

Commentary

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

Article 9. — Classes of heads of consular posts

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

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

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

Commentary

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

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

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

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

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

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

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

Article 10. — The consular commission

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

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

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

Commentary

(1) As a general rule, the head of a consular post is furnished with an official document known as "consular commission" (variously known in French as *lettre de provision*, *lettre patente* or *commission consulaire*).

Vice-consuls and consular agents are furnished with a similar instrument which bears a different name — *brevet*, *décret*, *patente* or *licence*.

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

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

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

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

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

Article 11. — The exequatur

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

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

Commentary

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

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

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

Exequaturs may be granted in the form of:

(a) A decree by the head of the State, signed by him and countersigned by the minister for foreign affairs, the original being issued to the head of consular post;

(b) A decree signed as above, but only a copy of which, certified by the minister for foreign affairs, is issued to the head of consular post;

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

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

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

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

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

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

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

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

Article 12. — Formalities of appointment and admission

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

Commentary

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

(2) The mistaken opinion has sometimes been voiced that only heads of State are competent to appoint consuls, and some claims have even been based on these opinions. Accordingly, it seemed desirable to state in

this article that the modes of appointing heads of consular posts are determined by the law and usage of the sending State; for this purpose the term "formalities" should be construed as meaning also the determination of the organ of the State competent to appoint heads of consular posts. Such a rule, by removing all possibility of differences of view on the point, will prevent friction that may harm good relations between States.

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

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

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

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

Article 13. — Provisional admission

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

Commentary

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

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

(3) Certain bilateral conventions go even further, and permit a kind of automatic recognition, stipulating that consuls appointed heads of posts shall be provisionally admitted as of right to the exercise of their functions and to the benefit of the provisions of the convention unless the receiving State objects. These conventions provide for the grant of provisional admission by means

of a special act only in cases where this is necessary. The Commission considered that the formula used in the article was more suitable for a multilateral convention such as is contemplated by the present draft.

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

Article 14. — Obligation to notify the authorities of the consular district

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

Commentary

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

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

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

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

Article 15. — Temporary exercise of the functions of head of a consular post

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

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

3. The competent authorities shall afford assistance and protection to the acting head of post and admit him, while he is in charge of the post, to the benefit of the present articles on the same basis as the head of the consular post concerned.

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

Commentary

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

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

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

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

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

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

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

(8) Paragraph 4 of article 15 deals with the case where a member of the diplomatic staff is designated acting head of post. As the secondment of a member of the diplomatic mission is necessarily temporary, the Commission considered, in the light of the practice of States,

that the exercise of consular functions does not in this case affect the diplomatic status of the person in question.

Article 16. — Precedence

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

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

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

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

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

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

Commentary

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

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

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

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

*Article 17. — Performance of diplomatic acts
by the head of a consular post*

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

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

Commentary

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

(2) Article 19 read as follows:

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

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

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

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

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

*Article 18. — Appointment of the same person by two or more
States as head of a consular post*

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

Commentary

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

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

Article 19. — Appointment of the consular staff

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

Article 20. — Size of the staff

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

Commentary

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

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

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

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

Article 21. — Order of precedence as between the officials of a consulate

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

Commentary

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

Article 22. — Appointment of nationals of the receiving State

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

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

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

Commentary

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

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

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

(3) At the present session, the Commission decided to draft the article in more explicit terms and to follow article 8 of the 1961 Vienna Convention on Diplomatic Relations, although several members of the Commission would have preferred to keep the wording adopted in 1960. In conformity with the Commission's decision, the article states explicitly that consular officials should in principle have the nationality of the sending State. Paragraph 2 reproduces the terms of the article as it appears in the 1960 draft, with the difference that, in order to bring the text into line with paragraph 1 of article 8 of the Vienna Convention, the word "express" was omitted and the phrase "which may be withdrawn at any time" added. Lastly, paragraph 3 of this article, consistent with article 8, paragraph 3, of the Vienna Convention on Diplomatic Relations, recognizes the receiving State's right to make the appointment of consular officials who are nationals of a third State and not also nationals of the sending State conditional on its consent.

Article 23. — Withdrawal of exequatur — Persons deemed unacceptable

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

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

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

Commentary

(1) This article combines the provisions contained in two separate articles in the draft adopted at the previous session, namely, article 20 concerning the with-

drawal of the *exequatur* and article 23 specifying the conditions under which the receiving State may declare a member of the consular staff not acceptable. This article therefore defines what are the rights of the receiving State if the conduct of the head of a consular post or a member of the consular staff gives rise to serious grounds for complaint.

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

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

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

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

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

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

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

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

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

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

Article 24. — Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff

1. The ministry for foreign affairs of the receiving State, or the authority designated by that ministry, shall be notified of:

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

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

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

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

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

Commentary

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

(a) The appointment of members of the consulate;

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

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

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

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

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

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

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

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

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

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

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

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

SECTION II: END OF CONSULAR FUNCTIONS

Article 25. — Modes of termination of the functions of a member of the consulate

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

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

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

Commentary

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

Article 26. — Right to leave the territory of the receiving State and facilitation of departure

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

Commentary

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

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

Article 27. — Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances

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

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

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

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

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

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

Commentary

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

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

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

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

SECTION I: FACILITIES, PRIVILEGES AND IMMUNITIES
RELATING TO A CONSULATE

Article 28. — Use of the national flag and of the State coat-of-arms

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

Commentary

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

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

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

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

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

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

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

Article 29. — Accommodation

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

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

Commentary

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

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

Article 30. — Inviolability of the consular premises

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

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

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

Commentary

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

that the appurtenances should be governed by rules different from those applicable to the building to which they are attached.

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

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

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

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

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

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

(8) The principle of the inviolability of the consular premises is recognized in numerous consular conventions, including the following: Cuba-Netherlands, 31 December 1913 (article 5); Albania-France, 5 February 1920 (article 6); Czechoslovakia-Italy, 1 March 1924 (article 9); Greece-Spain, 23 September 1926 (article 9); Poland-Yugoslavia, 6 March 1927 (article VIII); Germany-Turkey, 28 May 1929 (article 6); Costa Rica-United States of America, 12 January 1948 (article VI); Philippines-Spain, 20 May 1948 (article IX, paragraph 2); the consular conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (article 10, paragraph 4); with France on 31 December 1951 (article 11, paragraph 1), with Sweden on 14 March 1952 (article 10, paragraph 4), with Greece on 17 April 1953 (article 10, paragraph 3), with Mexico on 20 March 1954 (article 10,

paragraph 3) and with the Federal Republic of Germany on 30 July 1956 (article 8, paragraph 3); the conventions concluded by the Union of Soviet Socialist Republics with the Hungarian People's Republic on 24 August 1957 (article 12, paragraph 2), with the Mongolian People's Republic on 28 August 1957 (article 13, paragraph 2), with the Romanian People's Republic on 4 September 1957 (article 9, paragraph 2), with the People's Republic of Albania on 18 September 1957 (article 3, paragraph 2), with the People's Republic of Bulgaria on 16 December 1957 (article 13, paragraph 2), with the Federal Republic of Germany on 25 April 1958 (article 14, paragraph 3), with Austria on 28 February 1959 (article 13, paragraph 2), with the Democratic Republic of Viet-Nam on 5 June 1959 (article 13, paragraph 2) and with the People's Republic of China on 23 June 1959 (article 13, paragraph 2); the consular convention of 23 May 1957 between Czechoslovakia and the German Democratic Republic (article 5, paragraph 2); and the Havana Convention of 1928 regarding consular agents (article 18). Although some of these conventions allow certain exceptions to the rule of inviolability, in that they allow the police or other territorial authorities to enter the consular premises in pursuance of an order of the courts under certain conditions, even without the consent of the head of post or in cases where his consent is presumed, as in the case of fire or other disasters or where a crime is committed on the consular premises, nevertheless many conventions lay down the rule of inviolability and admit of no exception whatsoever. As the inviolability of consular premises has the same importance for the exercise of consular functions as the inviolability of the premises of a diplomatic mission for that of diplomatic functions, the majority of the Commission was of the opinion that, in this matter, the text adopted at the Vienna Conference should be followed.

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

Article 31. — Exemption from taxation of consular premises

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

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

Commentary

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

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

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

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

Article 32. — Inviolability of the consular archives and documents

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

Commentary

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

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

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

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

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

(6) The papers of the consulate enjoy inviolability even before the *exequatur* or special authorization is

issued to the consul, for the inviolability is an immunity granted to the sending State and not to the consular official personally.

Article 33. — Facilities for the work of the consulate

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

Commentary

(1) This article, which follows the terms of article 25 of the 1961 Vienna Convention on Diplomatic Relations, was inserted because the consulate needs the assistance of the government and authorities of the receiving State, both during its installation and in the exercise of its functions. Consuls could not successfully carry out any of the functions enumerated by way of example in article 5 without the assistance of the authorities of the receiving State. The obligation which this article imposes on the receiving State is moreover in its own interests, for the smooth functioning of the consulate helps to develop consular intercourse between the two States concerned.

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

Article 34. — Freedom of movement

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

Commentary

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

Article 35. — Freedom of communication

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

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

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

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

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

6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft.

Commentary

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

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

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

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

(5) The consular bag referred to in paragraph 1 of the article may be defined as a bag (sack, box, wallet, envelope or any sort of package) containing the official

correspondence, documents or articles intended for official purposes or all these together. The consular bag must not be opened or detained. This rule, set forth in paragraph 3, is the logical corollary of the rule providing for the inviolability of the consulate's official correspondence, archives and documents which is the subject of article 32 and of paragraph 2 of article 35 of the draft. As is specified in paragraph 4, consular bags must bear visible external marks of their character — i.e., they must bear an inscription or other external mark so that they can be identified as consular bags.

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

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

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

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

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

Article 36. — Communication and contact with nationals of the sending State

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

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

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

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

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

Commentary

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

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

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

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

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

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

(c) Lastly, the receiving State must permit the consular official to visit a national of the sending State who is in custody, prison or detention in his consular district, to converse with him, and to arrange for his legal representation. This provision is designed to cover cases where a national of the sending State has been placed

in custody pending trial, and criminal proceedings have been instituted against him; cases where the national has been sentenced, but the judgement is still open to appeal or cassation; and also cases where the judgement convicting the national has become final. This provision applies also to other forms of detention (quarantine, detention in a mental institution).

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

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

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

Article 37. — Obligations of the receiving State

The receiving State shall have the duty:

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

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

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

Commentary

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

(2) In case of the death of a national of the sending State, the obligation to inform the consulate of the

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

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

Article 38. — Communication with the authorities of the receiving State

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

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

Commentary

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

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

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

(4) The text of the article represents a compromise between the two points of view. It leaves it for each receiving State to determine what are the competent

authorities which may be addressed by consular officials in the exercise of their functions, and yet it does not exclude recourse to central authorities. The text gives consular officials the right to apply to the authority which, in accordance with the law of the receiving State, is competent in a specific case. Nevertheless, at the same time it reserves under paragraph 2 of this article the right to regulate the procedure of this communication, in the absence of an international agreement, in accordance with the municipal law and usage of the receiving State.

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

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

*Article 39. — Levying of fees and charges
and exemption of such fees and charges from dues and taxes*

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

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

Commentary

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

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

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

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

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

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

Article 40. — *Special protection and respect due
to consular officials*

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

Commentary

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

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

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

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

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

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

(7) The rule codified in this article is embodied in many consular conventions, including, amongst recent ones, the conventions concluded by the United Kingdom of Great Britain and Northern Ireland with Norway on 22 February 1951 (article 5, paragraph 2), with Greece on 17 April 1953 (article 5, paragraph 2), with Mexico on 20 March 1954 (article 5, paragraph 2) and with

Italy on 1 June 1954 (article 5, paragraph 2); and the convention concluded by the Soviet Union with the Federal Republic of Germany on 25 April 1958 (article 7), and with the People's Republic of China on 23 June 1959 (article 5).

Article 41. — *Personal inviolability of consular officials*

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 42. — Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings

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

Commentary

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

Article 43. — Immunity from jurisdiction

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

Commentary

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

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

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

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

Article 44. — Liability to give evidence

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

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

3. Members of the consulate are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto.

Commentary

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

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

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

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

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

general principle which should be applied both in cases which are covered by the second rule and in cases in which the consular official is to appear before the court.

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

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

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

Article 45. — Waiver of immunities

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

2. The waiver shall in all cases be express.

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

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

Commentary

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

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

(3) Inasmuch as members of the consulate are amenable to the jurisdiction of the judicial and administrative authorities of the receiving State in respect of all acts other than acts performed in the course of duty,

the rule laid down in paragraph 3 of this article applies only in cases where a member of the consulate appears as plaintiff before the courts of the receiving State in a matter where he might enjoy immunity from jurisdiction.

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

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

Article 46. — Exemption from obligations in the matter of registration of aliens and residence and work permits

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

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

Commentary

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

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

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

(4) The exemption from the obligations in the matter of work permits which is provided for in paragraph 2 applies only to cases where the members of a consulate wish to employ in their service a person who has the nationality of the sending State or of a third State. In some countries the legislation concerning the employment of foreign labour requires the employer or the employee to obtain a work permit. The purpose of para-

graph 2 of this article is to exempt members of the consulate and members of the private staff from the obligations which the law of the receiving State might impose on them in such a case.

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

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

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

Article 47. — Social security exemption

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

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

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

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

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

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

Commentary

(1) This exemption from social security regulations is justified on practical grounds. If whenever in the course of his career a member of the consulate was posted to consulates in different countries he ceased to be subject to the social security legislation of the sending State (health insurance, old age insurance, disability insurance, etc.), and if on each such occasion he were

expected to comply with the provisions of legislation different from that of the sending State, considerable difficulties would result for the official or employee concerned. It is thus in the interests of all States to grant the exemption specified in this article, in order that the members of the consulate may continue to be subject to their national social security laws without any break in continuity.

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

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

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

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

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

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

Article 48. — Exemption from taxation

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

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

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

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

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

(e) Charges levied for specific services rendered;

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

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

Commentary

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

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

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

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

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

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

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

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

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

Article 49. — Exemption from customs duties

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

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

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

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

Commentary

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

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

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

(4) The present article does not apply:

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

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

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

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

Article 50. — Estate of a member of the consulate or of a member of his family

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

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

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

Commentary

As in the case of a member of a diplomatic mission, the exemption of the movable property of a member of the consulate or of a member of his family forming part of his household from estate, succession or inheritance duties is fully justified, because the persons in question

came to the receiving State to discharge a public function in the interests of the sending State. For the same reason, the free export of the movable property of the deceased, with the exception of any such property which was acquired in the country and the export of which was prohibited at the time of his death, is justified. At the present session the text of this was brought into line with the text of article 39, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

Article 51. — Exemption from personal services and contributions

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

Commentary

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

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

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

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

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

Article 52. — Question of the acquisition of the nationality of the receiving State

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

Commentary

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

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

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

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

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

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

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

Article 53. — Beginning and end of consular privileges and immunities

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

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

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

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

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

Commentary

(1) In substance, this article is modelled on the provisions applicable to persons entitled to diplomatic privileges and immunities by virtue of article 39 of the

1961 Vienna Convention on Diplomatic Relations. In the opinion of the Commission, it is important that the date when consular privileges and immunities begin, and the date on which they come to an end, should be fixed.

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

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

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

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

Article 54. — Obligations of third States

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

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

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

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

Commentary

(1) This article does not settle the question whether a third State should grant passage through its territory

to consular officials, employees and their families. It merely specifies the obligations of third States during the actual course of the passage of such persons through their territory.

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

- (a) Who pass through its territory, or
- (b) Who are in its territory in order to:

- (i) Proceed to take up their posts, or
- (ii) Return to their posts, or
- (iii) Return to their own country.

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

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

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

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

Article 55. — Respect for the laws and regulations of the receiving State

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

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

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

Commentary

(1) Paragraph 1 of this article lays down the fundamental rule that it is the duty of any person who enjoys consular privileges and immunities to respect the laws and regulations of their receiving State, save in so far as he is exempted from their application by an express provision of this draft or of some other relevant

international agreement. Thus, for example, the laws imposing a personal contribution, and the social security laws, are not applicable to members of the consulate who are not nationals of the receiving State.

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

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

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

Article 56. — Special provisions applicable to career consular officials who carry on a private gainful occupation

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

Commentary

(1) A study of consular regulations has shown, and the comments of governments have confirmed, that some States permit their career consular officials to carry on a private gainful occupation. If the practice of States is examined, it will be seen that, in the matter of privileges and immunities, States are not prepared to accord to this category of consular official the same treatment as to other career consular officials who are employed

full-time in the exercise of their functions. This is understandable, for these consular officials, although belonging to the regular consular service, are in fact in a position analogous to that of honorary consuls, who, at least in the great majority of cases, also carry on a private gainful occupation. In the matter of consular privileges and immunities, the officials in question are mostly assimilated to honorary consuls by municipal law. It was in the light of this practice that the Commission, at its present session, adopted this article, which is intended to regulate the legal status of this category of consular official.

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

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

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

INTRODUCTION

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

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

“A consul may be:

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

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

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

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

Article 57. — Regime applicable to honorary consular officials

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

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

Commentary

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

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

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

Article 58. — Inviolability of the consular premises

The premises of a consulate headed by an honorary consul shall be inviolable, provided that they are used exclusively for the

exercise of consular functions. In this case, the agents of the receiving State may not enter the premises except with the consent of the head of post.

Commentary

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

Article 59. — Exemption from taxation of consular premises

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

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

Commentary

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

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

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

Article 60. — Inviolability of consular archives and documents

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

Commentary

The consular archives and documents of a consulate headed by an honorary consul enjoy inviolability provided that they are kept separate from the private correspondence of the honorary consul and of persons working with him, from the goods which may be in his possession and from the books and documents relating to the profession

or trade which he may carry on. This last condition is necessary, because honorary consular officials very often carry on a private gainful occupation.

Article 61. — Special protection

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

Commentary

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

Article 62. — Exemption from obligations in the matter of registration of aliens and residence permits

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

Commentary

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

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

Article 63. — Exemption from taxation

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

Commentary

The majority of the members of the Commission considered that the provision contained in this article, though it goes beyond the general practice of States, should be included so as to avoid the difficulties which would be raised by the taxation of income derived from a foreign State, and because the remuneration and emoluments in question are paid by a foreign State. Nevertheless, it should be noted that by article 69 this provision does not apply to honorary consular officials who are nationals of the receiving State.

Article 64. — Exemption from personal services and contributions

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

Commentary

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

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

Article 65. — Obligations of third States

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

Commentary

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

Article 66. — Respect for the laws and regulations of the receiving State

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

Commentary

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

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

Article 67. — Optional character of the institution of honorary consular officials

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

Commentary

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

CHAPTER IV. GENERAL PROVISIONS

Article 68.—Exercise of consular functions by diplomatic missions

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

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

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

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

Commentary

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

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

(3) Paragraph 3 of this article corresponds to article 41, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, under which all official business with the receiving State which is entrusted to the diplomatic mission is to be conducted with or through that State's ministry for foreign affairs or such other ministry as may be agreed. Paragraph 3 admits the possibility of direct communication in consular matters with authorities other than the ministry for foreign affairs in those cases only where the local law or usages so permit.

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

Article 69.—Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State

1. Except in so far as additional privileges and immunities may be granted by the receiving State, consular officials who are nationals of the receiving State shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided for in

article 44, paragraph 3, of these articles. So far as these officials are concerned, the receiving State shall likewise be bound by the obligation laid down in article 42.

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

Commentary

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

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

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

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

(5) The grant of this immunity from jurisdiction to consular officials who are nationals of the receiving State can be justified on two grounds. First, the official acts performed by officials in the exercise of their functions are acts of the sending State. It can therefore be stated that the immunity in question is not a simple personal immunity of the consular official, but rather an immunity attaching to the foreign State as such. Secondly, as the consent of the receiving State is required for the appointment of a national of that State as a consular official (article 22), it can be argued that the receiving State's consent implies consent to the official in question having

the minimum immunity he needs in order to be able to exercise his functions. That minimum is the immunity from jurisdiction granted in respect of official acts. The receiving State may, of course, of its own accord grant the consular officials in question any other privileges and immunities.

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

Article 70. — Non-discrimination

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

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

Commentary

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

(2) Paragraph 2 relates to the case where the receiving State grants privileges and immunities more extensive

than those provided for in the present articles. The receiving State is, of course, free to grant such greater advantages on the basis of reciprocity.

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

Article 71. — Relationship between the present articles and conventions or other international agreements

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

Commentary

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

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

Chapter III

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

I. Law of treaties

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

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

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

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

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

II. Planning of the future work of the Commission

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

41. Although it had not been requested to submit its views on the matter, the Commission considered that it would be desirable for its members to place their opinions on record for the use of the Sixth Committee of the General Assembly. The records of the discussions held in the Sixth Committee on the subject at the fifteenth session of the General Assembly were available

to the members of the Commission. A general discussion of the matter was accordingly held at the 614th, 615th and 616th meetings. Attention is invited to the summary records of the Commission containing the full discussion on this question.

III. Co-operation with other bodies

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

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

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

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

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

IV. Date and place of the next session

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

V. Representation at the sixteenth session of the General Assembly

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

ANNEX I

Comments by governments^a on the draft articles concerning consular intercourse and immunities adopted by the International Law Commission at its twelfth session, in 1960^b

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1. BELGIUM

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

[Original: French]

INTRODUCTION

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

^a Originally circulated as document A/CN.4/136 and Add.1-11.

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

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

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

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

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

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

Article 1

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

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

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

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

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

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

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

The Belgian Government accordingly suggests:

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

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

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

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

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

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

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

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

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

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

"The expression 'sending State' means the contracting party which appoints the consul;

"The expression 'receiving State' means the contracting party in whose territory the consul exercises his functions;"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 1: Definitions

For the purposes of this draft:

(a) The expression "sending State" means the contracting party which appoints the consul;

(b) The expression "receiving State" means the contracting party in whose territory the consul exercises his functions;

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 2

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

Article 3

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

Article 4

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

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

The new text would consequently read as follows:

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

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

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

The new paragraph 2 would be worded as follows:

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

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

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

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

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

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

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

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

Article 5

Sub-paragraph (a) of this article deals with the subject of the estate of a deceased national of the sending State, but not

with the question of the consul's intervention in the case of the death of a national of the receiving State who leaves an estate in which a national of the sending State has an interest.

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

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

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

Article 6

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

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

Paragraph 1 (c) should then read as follows:

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

Article 8

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

1. *Appointment*

Article 48, paragraph 2, of the royal order of 15 July 1920 governing the organization of the consular corps, and article 29, paragraph 4, of the royal order of 14 January 1954 on the organization and operation of the ministry of foreign affairs and external trade contain the following provision:

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

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

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

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

2. *Powers*

Consular agents have only limited powers.

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

"Consular agents act under the responsibility of the appointing consul. They may not discharge the functions of registrar of births, marriages and deaths, notary or magistrate except by virtue of powers expressly delegated in respect of each document

by, and under the responsibility of, their immediate superior; the documents which such an agent receives, in his capacity of registrar or notary, by virtue of a delegation of powers by the appointing consul must contain a reference to this delegation of powers and mention the reason for the delegation. The consular agent may in no case delegate these powers himself. He is competent to legalize signatures, carry out the usual clearance formalities for merchant ships and act as arbitrator in the cases specified in articles 17 and 18 of the Act of 31 December 1851. With regard to all matters arising in connexion with his functions, he shall apply to the consul on whose behalf he is acting."

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

"Article 17

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

"Article 18

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

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

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

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

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

Article 9

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

Article 10

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

The closing passage of paragraph 1 should therefore read:

"... is governed by the internal law and usages of the sending State."

2. Since the problems to which article 10 relates are also dealt with in articles 12 *et seq.*, the text of paragraph 2 should be amended to read:

"2. Competence to grant recognition to consuls, and, except as otherwise provided by the present articles, the form of such recognition, are governed by..."

Article 11

The rule stated in this article is unknown in Belgium.

Accordingly, the Belgian Government would prefer a more elastic formula to express the idea underlying the article.

The new text should therefore read:

"The appointment of consuls from amongst the nationals of the receiving State may be declared by that State to be subject to its express consent."

Article 12

1. The heads of consular post referred to in paragraph 1 are not all furnished with full powers in the form of a consular commission or similar document.

Consular agents who are in charge of a consular agency are also heads of post and, at least under Belgian law, are not furnished with full powers in the form of a consular commission or similar instrument.

2. As pointed out above with reference to article 9, the same expressions should be used to express the same ideas in all articles of the draft.

In paragraph 1, therefore, the expression "the State appointing them" should be replaced by "the sending State", which is the accepted expression in consular law.

3. Paragraph 1 says that heads of consular posts shall be furnished "with full powers".

This phrase is not quite accurate, since the consul exercises only the functions conferred upon him by the sending State within the limits of internal law, treaty law and public international law.

4. In paragraph 2, the expression "the State appointing a consul" should be replaced by the expression "the sending State"; and the expression "the State on whose territory the consul is to exercise his functions" by the expression "the receiving State".

5. Paragraph 2 should provide for the communication to the government of the receiving State not only of the consular commission but also of the "similar instrument".

6. In the French text of paragraph 2, the present tense and not the future should be used.

In the light of these comments, paragraph 2 should be amended to read:

"2. The sending State shall communicate the commission or similar instrument through the diplomatic or other appropriate channel to the government of the receiving State."

7. The Belgian Government is of the opinion that paragraph 3 of this article might be amended to read as follows:

"3. If the receiving State so agrees, the commission or other similar instrument may be replaced..."

8. In paragraph 3 of the commentary, the Commission asks for information as to whether a consul appointed to another post must be furnished with a new commission, even if the new post is in the territory of the same State.

The Belgian Government wishes to report that this is the policy followed in Belgium.

Furthermore, under the provisions of Belgian law, a head of consular post is furnished with a new commission:

- (a) If he is promoted to a higher grade and the rank of the post is raised at the same time, or
- (b) If his consular district is modified, or
- (c) If the head office of the consulate is transferred.

Article 13

For the sake of terminological consistency, the phrase "of the State in which they are to exercise them" should be replaced by the phrase "of the receiving State".

Article 15

The Belgian Government considers that, in the French text it would be more accurate to say "s'acquitter des devoirs de sa charge" than "... du devoir de sa charge".

Article 16

1. In the French text, the expression "chef de consulat" (head of consulate) is used in paragraph 1 because it would be difficult, in the context of this article, to use the expression mentioned in article 1.

Nevertheless, the Belgian Government proposes that, for the sake of consistency, the following wording, which uses the expression mentioned in article 1 of the draft, should be adopted:

"1. If the head of consular post is unable to carry out his functions, or if the position is vacant, the direction of the consulate . . ."

This wording keeps strictly to the expression "head of consular post" included in the definitions given in article 1.

2. The Belgian Government has no objections to the first part of paragraph 2, but must make some reservations regarding the second part.

Under Belgian internal law, the acting head of post is not entitled to the tax privileges mentioned in articles 45, 46 and 47 of the draft if he does not fulfil the conditions laid down in those articles.

Article 17

1. The rule stated in paragraph 2 does not exist in Belgian internal law. The only deciding factor in this connexion is the granting of the *exequatour*.

2. The words "leurs lettres de provision" at the end of paragraph 3 in the French text should be corrected to "leur lettre de provision."

3. The rule in paragraph 3 does not take into account the position of consuls who are not heads of posts, in whose case, since they are not, under Belgian internal law at any rate, furnished with a commission or similar instrument, a simple notice of appointment is sufficient.

The Belgian Government therefore suggests that the end of paragraph 3 should be amended to read as follows: "the order of precedence as between them shall be determined according to the date on which their commission or similar instrument was presented or on which notice was given of their appointment."

The idea of the notice of appointment having thus been introduced, the text of the paragraph will cover the possibility mentioned in article 12, paragraph 3.

4. The Belgian Government considers that the rule laid down in paragraph 4 should be applicable even where there is a difference of class.

The present text should, therefore, be amended to read:

"Heads of post, whatever their class, have precedence . . ."

Article 19

The Belgian Government is opposed to the provisions of this article and is afraid that a new category of consuls with a hybrid status might be established.

The introduction of this complication seems the less justified since it is only very rarely that cases of the kind envisaged occur in practice.

If, however, there were to be a majority in favour of this article, the Belgian Government would be prepared to accept such a provision in a spirit of compromise, provided that no new rank of consul-general-*chargé d'affaires* is created. It would like the second half of the article to be amended as follows: "in which case he shall enjoy diplomatic privileges and immunities."

Article 21

1. For the sake of conformity with the amendments proposed to article 1, the Belgian Government suggests the following wording for article 21:

"Subject to the provisions of articles 11, 22 and 23, the sending State may freely appoint consuls who are not heads of post and the employees of the consulate."

The Belgian Government further considers that employees of the consulate may make use of this title only if they are authorized by the receiving State to exercise their functions. The following clause should therefore be added to the text: ". . . and employees of the consulate, who, on notification of their appointment, are authorized to exercise their functions."

Article 22

The Belgian Government would like this article to be deleted.

The question with which it deals is governed exclusively by the internal law of States and should be settled by bilateral agreement between the States concerned in a spirit of mutual understanding.

Article 25

1. To concord with the definitions given in article 1, the beginning of paragraph 1 of this article should read as follows:

"1. The functions of the head of consular post shall be . . ."

2. The Belgian Government considers that two fairly frequent causes of cessation—resignation and death—should be added to the modes of termination.

The new paragraph might therefore be worded as follows:

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

"(a) His resignation or death;

"(b) His recall or discharge;

"(c) The withdrawal of his *exequatour*; and

"(d) The severance of consular relations."

3. In view of the amendments to paragraph 1, the first sentence of paragraph 2 should read:

"2. Except in the case referred to in paragraph 1(c) of this article, the functions of consuls other than heads of post shall be terminated on the same grounds. In addition . . ."

Article 27

1. The Belgian Government considers that the expression "as soon as they are ready to leave" used in paragraph 2 does not altogether serve the purpose described in paragraph 2 of the commentary.

The text would probably be more adequate if the paragraph were amended to read:

"2. The receiving State shall grant to all the persons referred to in paragraph 1 of this article the necessary facilities for leaving its territory, and shall protect them up to the moment of their departure, which shall take place within a reasonable period. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects."

2. The Belgian Government believes that paragraph 3 might be amended to read as follows:

"3. The provisions of paragraph 2 of this article shall not apply where a member of the consulate who has been locally appointed or engaged by the sending State is discharged."

Article 29

It should be mentioned in paragraph 1 of this article that it is the coat-of-arms of the sending State which is meant.

Article 31

1. The Belgian Government considers that a provision relating to expropriation might usefully be included in article 31.

A new paragraph might stipulate that:

“The consular premises may be expropriated only for reasons of national defence or public utility and in return for adequate compensation.”

2. This article should also cover the case where inviolability is claimed for purposes unconnected with the exercise of the consular functions.

A paragraph worded as follows might therefore be included:

“If documents and articles relating to a gainful private activity carried on by a consul or by a member of the consulate, or the goods which are the object of that activity, are deposited in the consular premises, the consul or member of the consulate shall take the necessary steps to ensure that the application of the laws in force in the receiving State relating to such gainful private activity is in no way hindered by the operation of the provisions of the present article.”

Article 32

1. In Belgium, exemption from the land tax and from the related national emergency tax is subject to the condition that the premises belong to a foreign State. This condition may be deemed to be fulfilled if a building is acquired by a head of post who is recognized as acting on behalf of the sending State, which thus becomes the owner. The principle is, therefore, that the exemption may be granted only to the foreign State.

Furthermore, article 45, paragraph 1 (b), seems to deal satisfactorily with cases in which immovable property used for the purposes of the consulate has been acquired in the name of the head of post but on behalf of the sending State.

Lastly, an exemption from the taxes chargeable on the acquisition of immovable property cannot possibly be granted in cases where the property belongs to an individual, whoever he may be. In such cases also, the head of post should be acting on behalf of the sending State.

2. The words “or the countervalue of local public improvements” should be added at the end of this article.

This expression would cover, for example, the improvement of the street, of public lighting, the installation of water mains, sewerage, etc.

3. The Belgian Government suggests that a similar tax exemption might be provided in respect of the furnishings of the consular premises, to which reference is also made in article 31, paragraph 3.

A paragraph 2 on this subject might read as follows:

“The sending State shall enjoy a similar exemption in respect of the ownership or possession of the furnishings of the consular premises.”

Article 36

1. In paragraph 6 of the commentary, the Commission indicates that it has insufficient information concerning the practice of States in the matter of communications.

On this subject, the Belgian Government wishes to say that under Belgian law neither consuls nor diplomatic missions enjoy preferential rates for the sending of correspondence or telegrams or the use of telephones.

2. The Belgian Government feels it should draw attention to the fact that the principle expressed in paragraph 2 of this article is not absolute.

According to usage, the authorities of the receiving State may open the consular bags if they have serious reasons for their action, but they must do so in the presence of an authorized representative of the sending State.

The Belgian Government would like this usage to be mentioned in the commentary on article 36, as was done in the case of article 25 of the draft articles on diplomatic intercourse and immunities.

Article 37

1. The Belgian Government considers that the well-established principle of international law referred to in paragraph 1 of the commentary — that consuls, in the exercise of their functions, may apply only to the local authorities, i.e., to the authorities of their consular district — should be repeated in the body of the article.

The Belgian Government wishes to point out in this connexion that under Belgian consular law consuls are never entitled to approach either the central authorities or local authorities outside their consular district, except in the case referred to in paragraph 2 of the article.

2. The Belgian Government considers that the procedure to be observed by consuls in communicating with the authorities of the receiving State, referred to in paragraph 3, is a matter within the exclusive jurisdiction of the receiving State and does not come under international law.

This paragraph should therefore be deleted.

Article 38

In response to the request for information made in paragraph 4 of the commentary on this article, the Belgian Government wishes to say that only instruments executed at the consulate between private persons and intended to produce effects in the receiving State are liable to the taxes and dues provided for by the legislation of the receiving State.

Article 40

1. In paragraph 1, the expression “pending trial” applies both to “arrest” and to “detention”, so as to exclude administrative arrest (maximum 24 hours), to which even consuls are liable if the circumstances arise.

2. The Belgian Government prefers the text of paragraph 1 as it stands to the alternative given in square brackets.

3. It should be explained that the expression “an offence punishable by a maximum sentence of not less than five years’ imprisonment” in paragraph 1 includes offences punishable by a maximum term of five years’ imprisonment but referred to a correctional court (and hence punishable by a shorter term).

4. The Belgian Government would like the words “at least two years” in paragraph 2 to be deleted. The two-year limit is unknown in Belgian law, and the execution of a final sentence is always possible.

The Belgian Government further suggests that the end of this paragraph should be amended slightly to read: “... save in execution of a final sentence of ‘principal’ imprisonment.”

In this way the eventualities mentioned in paragraph 14 (c) of the commentary on this article are ruled out, and in particular arrest for the purpose of executing a sentence of “subsidiary” imprisonment imposed for failure to obey an order to pay damages, especially in traffic cases.

5. The Belgian Government thinks the expression “any other restriction upon their personal freedom” used in paragraph 2

may rule out custody and protection in case of insanity. It must not be made impossible to adopt such measures in the case of consular officials.

Article 42

The Belgian Government considers that the word "office" at the end of paragraph 2 of this article should be replaced by the accepted expression "the consulate"

Article 43

1. The Belgian Government is prepared to agree to the provisions of this article, provided, however, that the exemption in question is granted only to those members of the families of members of the consulate who do not carry on any gainful private activity.

2. The Belgian Government would add that in Belgium the only private persons who qualify for the exemption referred to in the present article are those employed exclusively in the service of consuls.

Article 45

1. If the suggestions made in the Belgian Government's comments on article 32 are adopted, the phrase "subject to the provisions of article 32" should be deleted in paragraph 1 (f).

2. The words "or as the countervalue of local public improvements" should be added at the end of paragraph 1 (e).

3. The Belgian Government considers that provision should be made in this article for the case in which a member of the consulate carries on a gainful private activity and at the same time works in the consulate. The phraseology employed in article 58 might usefully be taken as a model for a paragraph worded as follows:

"Even if they carry on a gainful private activity, members of the consulate shall be exempt from taxes and dues on the remuneration and emoluments which they receive from the sending State in payment of the work they perform in the exercise of their consular functions."

Article 47

The Belgian Government wishes to point out that sub-paragraph (a) of this article conflicts with a provision of Belgian law under which money and securities passing to heirs resident abroad may not, in principle, be transferred before a deposit has been made to guarantee payment of the duties payable in Belgium on the estate of a person who had the status of inhabitant of the kingdom.

Article 48

The Belgian Government is prepared to accept sub-paragraph (a), although in consequence it will have to modify its practice so far as members of the families of members of the consulate are concerned.

It cannot go beyond that, however, and would like members of the private staff to be excluded from the benefit of this article.

Article 50

1. The Belgian Government considers that paragraph 1 ought to provide that all the members of the consulate should enjoy immunity from jurisdiction in respect of official acts performed in the exercise of their functions.

In practice, the consular functions are exercised in part by subordinate staff, as for example when an administrative document is drawn up.

Paragraph 1 should therefore read as follows:

"1. Members of the consulate who are nationals of the receiving State . . ."

This is the more important since in most cases it will be exceptional for consuls, apart from honorary consuls, to be nationals of the receiving State, whereas the subordinate staff will often be recruited locally.

2. Provision should also be made in paragraph 1 for the immunity provided for in article 42, i.e., the immunity from liability to give evidence.

The following should therefore be added to the first sentence of paragraph 1: ". . . the exercise of their functions, and they may refuse to give evidence on matters connected with the exercise of their functions and to produce the correspondence and official documents relating thereto."

3. The amendments proposed in 1 and 2 above would involve the deletion of the first words of paragraph 2, which would then begin with the words: "Members of the families of members of the consulate, members of the private staff, . . ."

Article 51

1. The Belgian Government wishes to point out that the provision appearing at the end of paragraph 1 is not in keeping with the practice followed in Belgium. In this country the commencement of the consular privileges and immunities of a member of a consulate who is already in the territory dates not from the time when notice of his appointment is given to the Ministry of Foreign Affairs or a similar authority, but from the time of recognition by the receiving State.

It seems logical that the receiving State should first have to signify its agreement, since the persons concerned are in many cases nationals of that State.

2. In paragraph 3, provision should be made for the cessation of privileges and immunities in the case of persons who remain in the territory of the receiving State.

For this purpose the following sentence might be added after the first sentence of paragraph 3:

"If such persons remain in the territory of the receiving State, their privileges and immunities shall cease at the same time as their functions as members of the consulate."

Article 53

Paragraph 2 refers to consular functions. Since, however, this convention deals only with consular immunities and relations, it was rightly considered that the expression "consular functions" should not be defined.

It would therefore be preferable to amend this paragraph slightly so as to make it read as follows:

"2. The consular premises shall be used exclusively for the purposes of the exercise of the consular functions as specified in the present articles or in other rules of international law."

Article 54

1. The Belgian Government suggests that article 45 should be added to the list of references in paragraph 2, as was proposed in the comments on that article, and deleted from the list of references in article 54, paragraph 3.

In consequence of this amendment article 58 would become superfluous.

2. In reply to the question asked in paragraph 5 of the commentary on article 54, the Belgian Government wishes to state that the consular premises of a career consulate and those of an honorary consulate are treated in exactly the same way.

In the case of an honorary consulate, however, a house search is permitted if ordered by the court and authorized by the ministry of foreign affairs of the receiving State.

Article 55

1. The Belgian Government wishes to point out that the article seems to ignore the fact that in an honorary consulate there are, in addition to the honorary consul himself, members of the consulate working on the same terms, i.e., without salary.

Accordingly a formula should be worked out which provides that the private correspondence, not only of the honorary consul but also of all other members of the consulate, including, for example, the consulate's secretary, should be kept separate from the consular archives.

2. Similarly, it might be useful to mention not only the books and documents relating to a gainful private activity, but also the goods involved.

The clause might therefore read as follows:

"... and from the books, documents and goods connected with any gainful private activity..."

Article 57

The Belgian Government wishes to make the same comments as on article 43.

Furthermore, it is not sure that the phrase "outside the consulate", which occurs here for the first time, ought to be used.

Under Belgian law, if a member of the family of the honorary consul, or of the consular staff of the honorary consulate, carries on a gainful private activity, even at the consulate (e.g., as private chauffeur of the honorary consul), he will be treated in the same way as any member of the private staff and will not be eligible for the exemptions provided for in article 57.

Article 58

The Belgian Government considers that this article might be omitted, provided, however, that the amendments suggested *ad* article 54 are accepted.

Article 59

1. There are no provisions of Belgian law corresponding to the terms of sub-paragraph (a).

Only the honorary consuls themselves are entitled to the exemption referred to in this sub-paragraph, and it should be pointed out that in Belgium even members of the families of career consuls do not enjoy the exemption in question.

2. The comments in 1 above apply also the exemption referred to in sub-paragraph (b).

3. As regards requisitioning more particularly, Belgian law provides that only those honorary consuls are exempt who fulfil the following conditions:

- (a) They must be nationals of the sending State, and
- (b) They must not carry on a gainful private activity.

Article 60

The Belgian Government considers that the provisions of this article do not add anything to the stipulations of article 42.

Moreover, since the article does not mention members of the consulate who carry on a gainful private activity, persons in this category might claim the benefit of the provisions of article 42 and in that way would secure better treatment than the honorary consuls themselves.

Perhaps article 60 should be deleted and article 42 amended accordingly.

In fact, on a careful reading the provisions of paragraphs 1 and 2 of article 42 seem to be applicable both to honorary consuls and career consuls.

All that would be necessary would be to add a short passage to paragraph 1:

"... no coercive measure may be applied with respect to them unless they carry on a gainful private activity."

Article 42 would then have to be included, without distinguishing between the paragraphs, among the references given in article 54, paragraph 2, and deleted from the list given in article 54, paragraph 3.

Article 61

In the opinion of the Belgian Government, a study of this article seems to indicate that article 53, paragraphs 2 and 3, should be applicable to honorary consuls and should therefore be included in the list of references given in article 54, paragraph 2, leaving paragraph 1 of article 53 in the list of references given in article 54, paragraph 3. Article 61 itself would remain unchanged.

Article 62

The Belgian Government is of the opinion that this article should not be mentioned among those enumerated in article 54, paragraph 3, since the subject with which it deals is governed by chapter 1 of the draft convention referred to in article 54, paragraph 1.

Article 54, paragraph 3, would then have to be amended as follows: "... articles 55 to 61 shall apply to honorary consuls."

Article 65

The Belgian Government expresses its preference for the second text and considers that a statement should be included either in the preamble or in the convention itself to the effect that the convention reproduces only the fundamental and universally accepted principles of international consular law which are applicable in the absence of any regional or bilateral agreement.

2. CHILE

*Transmitted by a note verbale dated 25 April 1961
from the Permanent Mission of Chile to the United Nations*

[Original: Spanish]

In general, the provisional draft articles on consular intercourse and immunities prepared by the United Nations International Law Commission are in keeping with the practice of the Chilean Government and with the case-law of Chile's courts. The draft satisfies needs arising from the general development of international relations by giving not only the rules generally recognized by international law, but also many new provisions intended to settle questions or problems not provided for in existing conventions or agreements. These new rules are skilfully conceived, are based on much research, and reflect the lessons of past experience.

With regard to this second point, the comments given below follow the sequence of the Commission's report, or simply the "report", as it is called in the report of the International Law Commission on the work of its twelfth session (document A/CN.4/132, of 7 July 1960). (The second point mentioned in this paragraph is concerned with the question whether the articles are in keeping with the Chilean Government's views and practice in consular matters).

"Article 2: Establishment of consular relations"

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

The Special Rapporteur had proposed, as stated in paragraph 3 of the commentary on the article, that a second paragraph

reading as follows should be added: "The establishment of diplomatic relations includes the establishment of consular relations."

The Government of Chile considers that there would be no advantage in accepting the proposed addition, and no disadvantage in rejecting it. Accordingly, it seems advisable that States should retain complete freedom to maintain diplomatic and consular relations simultaneously or either diplomatic or consular relations separately, as their political or economic interests may indicate.

"Article 4: Consular functions"

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

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

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

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

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

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

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

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

During the discussion of this article, the Commission considered at length whether a general definition of the consular functions should be adopted or whether it would be preferable to replace the definition by an enumeration of the various consular functions (Report, commentary to article 4). The Government of Chile considers that a general definition would be preferable to an enumeration of functions which could hardly be complete.

"Article 11: Appointment of nationals of the receiving State"

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

In the Spanish text, the expression "más que" in the phrase "más que con el consentimiento expreso de éste" should be replaced by "salvo".

"Article 23: Persons deemed unacceptable"

"1. The receiving State may at any time notify the sending State that a 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 within the consulate.

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

The words "not acceptable" in paragraph 1 should be replaced by the words *persona non grata*, which is the phrase generally used in international law.

"Article 24: Notification of the arrival and departure of members of the consulate, members of their families and members of the private staff"

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

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

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

"(c) The arrival and final departure of members of the private staff in the employ of persons referred to in 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."

The Chilean Government would like some explanation of the expression "después de su destinación al consulado" ("after their appointment to the consulate") in paragraph 1 (a). As it stands, it is meaningless. Unless, therefore, some explanation is given to justify its use, the expression should be deleted.

"Article 25: Modes of termination"

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

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

"(b) The withdrawal of his *exequatur*;

"(c) The severance of consular relations.

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

The words "or discharge" in paragraph 1 (a) should be deleted, since for international purposes "recall" is sufficient, whatever may be the reason for it (discharge, retirement, transfer, etc.). Discharge is an administrative penalty the effects of which are governed by the internal law of each State, and there is no point in giving it international effects which would tend to displace the effects of recall.

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

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

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

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

For the reasons given in the comments on article 25, it would be advisable to delete article 27, paragraph 3, which imposes an international penalty on an official who has been discharged.

There seems to be no reason in justice why an official who is discharged should suffer—besides the penalties to which he is liable under the administrative regulations of his country—this additional penalty, which affects, moreover, the members of his family, who are in no way responsible for the acts of the culpable official.

“ Article 32: Exemption from taxation in respect of the consular premises

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

The text reproduced above is not consistent with paragraph 2 of the commentary on the article. The article says textually that “ *The sending State and the head of post* shall be exempt from all taxes and dues . . . in respect of the consular premises, whether owned or leased . . . ”

Paragraph 2 of the commentary, on the other hand, says that the exemption affects “ *the actual building* ” acquired or leased by the sending State ” or by the head of consular post, for otherwise the owner could charge the tax to the sending State or to the head of post under the contract of sale or lease.

If this interpretation is correct, the text of article 32 should be amended so as to bring it into line with paragraph 2 of the commentary. For this purpose, the article might be re-drafted to read: “ Consular premises owned or leased by the sending State or by the head of post shall be exempt from all taxes levied by the receiving State or by any territorial or local authority, other than taxes or dues which represent payment for specific services rendered.”

“ Article 37: Communication with the authorities of the receiving State

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

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

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

Paragraph 1 provides that in the exercise of their functions consuls may address the authorities which are competent under the law of the receiving State.

Paragraph 2 prohibits consuls from addressing the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.

It may, however, happen that in the receiving State the ministry of foreign affairs is the competent authority to which paragraph 1 refers, and, as such, may be approached by the consul. The Government of Chile considers that if the decisive criterion is to be what the local law provides, then the provisions of that law ought to govern the consul's relations with the authorities of the receiving State; consequently, paragraph 2 of the article should be deleted.

“ Article 40: Personal inviolability

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

than five years' imprisonment [alternatively: “ except in the case of a grave offence].”

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

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

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

The Chilean Government considers that the text of paragraph 1 should be accepted as it stands, and that the alternative, “ except in the case of a grave offence ” should be deleted. The phrase “ grave offence ” is vague and open to conflicting interpretations, whereas the definition of the penalty in terms of years of imprisonment provides an objective and stable basis for the application of the rule which the paragraph contains.

The rest of the article does not call for comment.

“ Article 42: Liability to give evidence

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

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

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

According to the generally accepted principles regarding the immunity of consular officials from jurisdiction, the immunity is applicable only in respect of the exercise of the consular functions. Article 41 of the draft also accepts this principle.

Consequently, in matters not related to the exercise of his functions, a consular official is subject to the ordinary jurisdiction of the receiving State. Hence there is no reason why a consular official should be able to decline to give evidence in an ordinary matter that is unconnected with the exercise of the consular functions. Furthermore, since the authorities of the receiving State are under the obligation to facilitate and not to hamper the exercise of the consular functions, they will in each case, according to the circumstances, take such action as the law permits to comply with this obligation by arranging for the evidence to be given in a way that does not interfere with the consular functions.

The Chilean Government therefore considers that paragraphs 1 and 2 should be deleted, since they conflict with the principle that, except in respect of acts forming part of their functions, consular officials should be subject to the ordinary jurisdiction of the receiving State.

The provisions of paragraph 3, on the other hand, are acceptable, for they follow logically from the immunity by which the acts of consular officials are protected.

The last sentence of paragraph 3 should be deleted, for if, in declining to give evidence in the case in question, the official exercises a right, he cannot of course be penalized or subjected to coercive action in any way on account of the decision he has taken.

“ Article 45: Exemption from taxation

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

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

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

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

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

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

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

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

Paragraph 1 (a) provides that officials must pay indirect taxes “incorporated in the price of goods or services.”

The indirect tax may be included in the price of goods or services so as to form a total, or the total price may be shown as consisting of the price of the goods or services plus the amount of the tax. Whether the tax is included in the price or is shown separately, it is still an indirect tax and, as such, is payable by whoever buys the goods or requests the services.

The Chilean Government therefore considers that the concluding phrase “incorporated in the price of goods or services” should be deleted.

In paragraph 1 (b), the word “private” in the expression “private immovable property” is unnecessary. The drafting of the Spanish text might be improved if the expression “que radiquen” were replaced by the word “situados”.

The following sentence should be added at the end of paragraph 2: “This provision shall not apply to persons who are nationals of the receiving State.” This sentence, which appears in paragraph 5 of the commentary on this article, would undoubtedly be worth including in the text, so as to remove all doubt.

“ Article 49: Question of the acquisition of the nationality of the receiving State

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

In order to avoid any possible conflict between this provision and the provisions of the Chilean Constitution regarding nationality, a reservation would have to be made to the effect that Chile will apply this article without prejudice to the provisions of article 3 of its political constitution.

“ Article 51: Beginning and end of consular privileges and immunities

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

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

“ 3. When the functions of a member of the consulate come to an end, his privileges and immunities, and those of the members of his household, shall normally cease at the moment when the persons in question leave the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The privileges and immunities of a member of the consulate who is discharged by the sending State shall come to an end on the date on which the discharge takes 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.”

In paragraphs 1 and 2 of the Spanish text, the expression “en cuanto penetra al territorio” should be replaced by the expression “desde que entran en el territorio”. The idea usually conveyed by the word “penetrar” is that of one body entering another by force of violence, and the word “entrar” should therefore be used instead.

In paragraph 3, the Chilean Government suggests that the penultimate sentence, relating to the cessation of the privileges and immunities of officials who have been discharged, should be deleted. As has already been pointed out in connexion with article 25, discharge is a purely administrative penalty, which is applied differently under the law of different countries. There seems to be no strictly legal reason why the effects of this penalty should be internationalized.

In international law, discharge is the penalty which the State concerned has considered adequate for the act or omission in question; and since the act or omission is thereby punished according to law, the addition of another penalty hardly seems equitable. Furthermore, this administrative penalty does not necessarily or generally imply that an offence under the ordinary law has been committed; and hence it does not seem necessary to treat the consular officials involved with such severity. Lastly, it should be pointed out that the draft convention on diplomatic intercourse and immunities, now being discussed at Vienna, contains no similar provision applicable to diplomatic officials who have suffered the administrative penalty of discharge.

“ Article 58: Exemption from taxation

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

The Chilean Government suggests that the following sentence be added to this article: “This provision shall not apply to honorary consuls who are nationals of the receiving State.” This clarification is given in the commentary, but it could usefully be included in the body of the article itself.

Article 59: Exemption from personal services and contributions

"The receiving State shall

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

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

For the reason given in the comments on article 58, the Chilean Government suggests that the following sentence be added to this provision also: "This article shall not apply to persons who are nationals of the receiving State."

Article 60: Liability to give evidence

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

The Chilean Government suggests that this article should be re-drafted to read: "An honorary consul may decline to give evidence, and to produce official correspondence and documents, in the course of judicial or administrative proceedings which relate to matters connected with the exercise of his functions."

The last sentence in the text of the draft is deleted because, if the consul is exercising a right given to him by law, he cannot be liable to any penalty for exercising a right which the law itself has granted.

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

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

Second text:

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

The Chilean Government prefers the first text, for it abrogates previous bilateral conventions unless the Parties thereto specifically agree to maintain them in force.

The second text, on the other hand, leaves the existing bilateral conventions in force.

3. CHINA

Transmitted by a letter dated 22 March 1961 from the Director of the Office of the Permanent Mission of China to the United Nations

[Original: English]

Article 3

It seems advisable to add the word "prior" before the word "consent" in paragraphs 1, 3, 4 and 5.

Article 4

The additional article (a consul's power of representation) proposed by the Special Rapporteur in paragraph 12 of the commentary should be inserted in this article.

Article 22

It is proposed that this article be deleted.

Article 35

The article should be amended to read as follows:

"The receiving State shall ensure to all members of the consulate, freedom of movement and travel in its territory.

"Nevertheless, the receiving State may, for reasons of national security, issue laws and regulations prohibiting or regulating entry into specifically indicated places, provided that this indication be not so extensive as to render freedom of movement and travel illusory."

Article 36

The words "and the official seal" should be inserted between the words "of their character" and the words "may only contain" in paragraph 3.

Article 42

It is proposed to add the following additional paragraph to this article:

"A member of the consulate shall not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths, nor shall he decline to produce the documents relating thereto."

Article 60

The following new paragraph should be added to this article:

"The honorary consul shall not decline to give evidence concerning events which came to his notice in his capacity as registrar of births, marriages and deaths, nor shall he decline to produce documents relating thereto."

Article 65A

An article should be added to the draft providing for the settlement of disputes arising out of the interpretation or application of the convention.

4. CZECHOSLOVAKIA

Transmitted by a note verbale dated 9 March 1961 from the Permanent Mission of Czechoslovakia to the United Nations

[Original: English]

1. The Czechoslovak Government is of the opinion that the draft articles should contain provisions to the effect that any State has the right to maintain consular relations with other States.

2. For the purpose of completeness the Czechoslovak Government recommends the inclusion in the draft of a provision which would expressly state that the establishment of diplomatic relations involves also the establishment of consular intercourse.

3. The Czechoslovak Government is of the opinion that in drawing up the final text of article 4 the International Law Commission should, in addition to a general definition, incorporate in this article also a detailed list of examples of consular functions.

4. The powers of the consul to protect the interests of the nationals of the sending State are in general terms regulated by the provisions on consular functions. This regulation is sufficient in the view of the Czechoslovak Government. Detailed regulation of questions referred to in article 6 of the draft is a matter falling within the exclusive competence of the internal legislation of the receiving State and, consequently, the Czechoslovak Government proposes that the provisions of article 6 be omitted from the draft.

5. The Czechoslovak Government proposes to include in article 13 of the draft the provision contained in the Commission's commentary that the grant of the *exequatur* to a consul appointed as head of a consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility.

6. As regards the provisions of paragraphs 1 and 2 of article 40, the Czechoslovak Government considers the criterion based on the amount of punishment for criminal offences and on the length of the sentence as unsuitable, because it differs in penal legislations of individual States and, in addition to it, it is subject to changes. Therefore, the Czechoslovak Government is in favour of the adoption of the second alternative of paragraph 1 of article 40 and for amending accordingly paragraph 2 of the same article.

7. The Czechoslovak Government proposes to include in the draft a provision under which a member of the diplomatic mission when assigned to a consulate of such State shall retain his diplomatic privileges and immunities.

8. The Czechoslovak Government considers as acceptable the second text of article 65 concerning the relation of the proposed articles to bilateral conventions, according to which the provisions of the draft shall not affect bilateral conventions concerning consular intercourse and immunities concluded previously between the contracting parties and shall not prevent the conclusion of such conventions in the future.

9. As regards chapter III of the draft (articles 54-63), the Czechoslovak Government does not wish to comment on it as it considers the institution of honorary consuls as unsatisfactory from the point of view of the present level of contacts between States, and consequently does not send or receive honorary consuls.

5. DENMARK

Transmitted by a letter dated 17 March 1961 from the Deputy Permanent Representative of Denmark to the United Nations

[Original: English]

Article 4

The Danish Government is of the opinion that it will be difficult to visualize the consequences of so far reaching a regulation as in article 4, paragraph 1 "such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State" and the corresponding rule in the variant prepared by the Special Rapporteur.

Article 4: Variant drafted by the Special Rapporteur — I, 2: Assistance to ships

The Danish Government assumes that the rule is only applicable to civil cases (point (e) in the commentary). It furthermore assumes that the authorities of the receiving State are only under obligation to give the master of a ship an opportunity to inform the consul and to do this early enough to enable the consul to be present on board the ship, unless this is impossible due to the urgent nature of the legal action (point (h) in the commentary). Finally it is assumed that the convention is not to result in curtailment of the powers which the legislation of the receiving State endows upon its authorities as regards the direction of salvage operations within its territory (point (j) of the commentary).

II, 6: Guardianship, etc.

It is presumed that the rules do not imply that special obligations towards the consuls of foreign countries are to be imposed upon guardians who are under the supervision of the authorities of the receiving State.

II, 7

The Danish Government would regard it as preferable that the right of consuls to represent an heir or legatee during the settlement of an estate in the receiving State, without producing a power of attorney, be expressly limited to cases in which the said heir or legatee is not a resident of the receiving State, nor staying there at the time of the settlement of the estate.

III, 9

Denmark only recognizes the validity of marriages solemnized before foreign consuls in Denmark if an agreement has been concluded thereon with the consul's home country.

III, 10

The Danish Government is of the opinion that a general rule on the functions of consuls as regards the serving of judicial documents and taking of evidence should not be included in a universal convention on consular functions, since the question is closely related with other matters concerning international legal assistance in court cases, and should therefore not be settled in a uniform manner in respect to all countries. Particular consideration should be given to whether the judicial authorities of the receiving State are empowered to grant legal assistance, or excluded therefrom, to the authorities of other countries. In all circumstances the functions of a consul in this respect ought hardly to include criminal cases.

IV, 11 and 12

The Danish Government presumes that the functions do not imply that the authorities of the receiving State are under obligation to recognize the validity of documents drawn up or attested by the consul, beyond what is due according to the usual rules.

The Special Rapporteur's additional article

The Danish Government would not be prepared to approve such a rule which would authorize a consul to appear in special cases before the courts and other authorities on behalf of absent nationals without producing a power of attorney.

Article 6

The Danish Government understands the proviso in paragraph 2 to mean that it can authorize the receiving State to restrict the consul's freedom to converse with the prisoner when considerations of national security or relations with foreign powers or special consideration for same might otherwise require it.

Article 32

The Danish Government feels compelled to make a reservation as regards exemption from taxation if the consular premises are not owned by, but only leased by, the sending State. Similarly, the sending State is exempted from dues chargeable on the purchase of real property but not when it is only a question of a lease contract.

Article 36, paragraph 1

The Danish Government would prefer that the freedom of communication for consulates be restricted so that, besides maintaining contact with the Government of the sending State and that State's diplomatic missions accredited to the receiving State, they shall only be free to communicate with consulates of the sending State situated in the same receiving State.

Article 36, paragraph 3

The Danish Government would consider it desirable if a rule could be added to paragraph 3 along the following lines:

In special cases, however, the authorities of the receiving State may request that a sealed courier bag should be opened by a consular official in their presence so as to ensure that it contains nothing but official correspondence or articles intended for official use.

*Article 40, paragraph 2 and article 42,
paragraph 1, point 2*

The Danish Government does not consider that there are sufficient grounds for the inclusion of such rules in the convention.

Article 41

The Danish Government would consider it desirable if in connexion with the rule on immunity from the jurisdiction of the receiving State a rule could be inserted on the liability to pay compensation by the driver of motor vehicles, etc., along the following lines:

All motor vehicles, vessels and aircraft, owned by members of the consulate, shall be insured by policies against third party risks. Such insurance shall be made in conformity with any requirements that may be imposed by the law of the receiving State.

The preceding provisions shall not be deemed to preclude members of the consulate from being held liable in a civil action by a third party claiming damages in respect of injury sustained as a result of an accident involving a motor vehicle, vessel or aircraft under his control. In connexion with such an action members of the consulate shall not be entitled to refuse to produce any document or to give evidence.

Article 45

The Danish Government is of the opinion that for persons who are not nationals of the receiving State, but who at the time of their engagement on the consular staff were fully taxable in the receiving State, exemption from taxation should only cover the salary receivable from the consulate.

Article 46

It is the opinion of the Danish Government, furthermore, that exemption from customs duties should only be enjoyed by career consuls (consuls-general, consuls and vice-consuls) who are not nationals of the receiving State and who are not carrying on a gainful private activity there. Exemption from customs duties shall apply to articles imported personally or purchased from an importer who has declared the articles with the customs.

Articles 54 and 57

The Danish Government finds it unsatisfactory to allow the rule in article 31 on the inviolability of consular premises to be applicable to honorary consuls. Similarly, it would consider it desirable if article 57 on the exemption from obligations in the matter of registration of aliens and residents and work permits for honorary consuls be omitted from the convention.

6. FINLAND

*Transmitted by a letter dated 26 January 1961 from the
Permanent Representative of Finland to the United Nations*

[Original: English]

The Government of Finland have noted with satisfaction that the draft on consular intercourse and immunities, prepared by the International Law Commission, is both a codification and a development of the law concerning consuls. The Government consider the draft to be a valuable basis for the preparation of a convention on the subject.

With regard to particular articles the Government of Finland make the following observations:

Article 3, paragraph 5, provides that the consent of the receiving State is necessary in order that a consul might at the same time exercise consular functions in another State. Although a similar restriction relating to the accrediting of the head of a diplomatic mission to several States is contained in the draft articles on diplomatic intercourse and immunities, serious doubt might be raised as to its desirability with regard to diplomatic representatives and, with even greater cause, to consuls. This is a matter with which the sending State is most closely, or even exclusively concerned. A great number of States do not find it possible to maintain consular representatives in every country and they may find it necessary to entrust a consul with functions in several States. If the carrying out of consular tasks suffers from an arrangement of this kind, it is mainly the interests of the sending State and its citizens, and not the receiving State, which have to suffer from it.

Article 4, paragraph 1, contains an extremely broad provision concerning consular functions to the effect that a consul may exercise any functions entrusted to him by the sending State so long as these can be exercised without breach of the law of the receiving State. Although according to articles 18 and 19 of the draft a consul may only perform diplomatic functions to the extent permitted by the receiving State or in accordance with a special agreement, some further general restrictions would seem desirable. The Government notes with satisfaction, however, that the draft refrains from enumerating all possible tasks of a consul, and limits itself to his principal functions.

In paragraph 12 of the commentary to article 4 the International Law Commission requests the comments of governments on the proposal of the Special Rapporteur that an additional article be included in the draft concerning the right of a consul to appear, without a power of attorney, before the courts and other authorities of the receiving State for the purpose of representing nationals of the sending State who are absent or for any other reason unable to defend their rights and interests in due time. It is no doubt necessary to entrust consuls with powers of representation, but the Government of Finland consider it eminently desirable to restrict these powers to a right of representation for the exclusive purpose of preserving rights and interests.

In paragraph 4 of the commentary to article 8 the International Law Commission requests governments for information concerning consular agents. The Government of Finland do not appoint consular agents and are therefore not in a position to give any comments on this matter.

In paragraph 3 of the commentary to article 12 the Commission requests information on prevailing practice concerning the making out of consular commissions in respect of each appointment. According to the practice in Finland, a consular commission must be made out for each post separately.

Article 13 provides that only heads of consular posts require an *exequatur*. Paragraph 7 of the commentary to that article contains the statement that nothing prevents the sending State from requesting in addition an *exequatur* for other consular officials with the rank of consul. The question arises whether such consuls may enter upon their duties without having obtained final recognition of the receiving State by way of an *exequatur*. Many countries seem to require a personal *exequatur*. Paragraph 9 of the commentary rightly states that governments should not be obliged to communicate the reasons for their refusal of *exequaturs* to the government concerned. This case may be compared with the question of granting *agrément* to heads of mission.

Article 16 grants an acting head of post the same rights as the head of the consulate, and a mere notification to the competent authorities of the receiving State is sufficient to grant him those rights. If the provision of article 13 that only the regular head

of post requires an *exequatur* is accepted, it would seem desirable to give the receiving State the right to refuse to accept somebody considered unacceptable as acting head of post, particularly as the provision on unacceptable persons contained in article 23 is exclusively concerned with those belonging to the consular staff, with respect to whom the receiving State is rightly given the power to notify the sending State that a member of the consular staff is not acceptable.

According to article 20, paragraph 1, an *exequatur* may be withdrawn only where the conduct of a consul gives serious grounds for complaint. It is undoubtedly true that, as mentioned in paragraph 3 of the commentary to this article, an arbitrary withdrawal of an *exequatur* might cause serious prejudice to the sending State. Nevertheless, considering that the maintaining of consular relations is founded on a voluntary basis and since it is normally unlikely that an *exequatur* is withdrawn without valid reason, the Government of Finland submit for consideration whether this should be broadened so as to give wider discretion to the receiving State. If that State abuses its right to withdraw an *exequatur*, the sending State might consider withdrawing *exequaturs* granted to consuls of the former State as a retaliatory measure. In its present drafting the article requires that the reasons of withdrawal be stated, in which case discussion might ensue on whether those reasons have been of sufficient weight to justify withdrawal of the *exequatur*.

In paragraph 4 of the commentary to article 38 the International Law Commission requests governments to supply information on the levying of taxes and dues by the receiving State on acts executed at a consulate situated in that State. In Finland, such taxes or dues may only be levied if documents drawn up at consulates are presented to Finnish authorities for the purpose of producing legal effect in Finland. If, however, legal acts are performed at a consulate with the intention to employ the documents outside Finland, no such dues may be levied.

The extensive and important section III of chapter II, dealing with the personal privileges and immunities of consuls, contains certain articles which the Government of Finland consider should be given further examination.

The provision of article 40, paragraph 1, on the exemption of consuls from arrest or detention pending trial is founded, according to paragraphs 4 and 11 of the commentary to that article, on State practice as evidenced in consular conventions. It is however, evident that a great many States, including Finland, have not made this extension of the personal inviolability of consuls. In the opinion of the Government of Finland the personal inviolability of consuls in this respect should not extend beyond relatively insignificant acts, and for this reason the alternative suggested by the International Law Commission in article 40, paragraph 1, is preferable to the present draft article.

For these reasons, the Government further consider that paragraph 2 of article 40 grants too wide inviolability and should be narrowed down substantially. This observation applies with even greater strength to article 52, paragraph 1, concerning obligations of third States.

The Government of Finland give their entire support to the principle embodied in article 41 that members of a consulate shall be exempt from the jurisdiction of the receiving State in respect of acts performed in the exercise of their functions.

The provision of article 43 exempting members of a consulate, members of their families and their private staff from work permits should be limited to work performed in the consulate instead of extending it to every type of work.

With respect to article 54 on the legal status of honorary consuls, the Government consider it appropriate to leave out the reference to article 42, paragraph 1, since it is evident from article 60 that the exemption of consuls from the liability to give evidence is limited to the case mentioned in article 42, paragraph 3.

In paragraph 5 of the commentary to article 54 the International Law Commission requests governments to supply information concerning the granting of the privilege of inviolability of consular premises to honorary consuls. A somewhat restricted practice in Finland on this matter tends to extend inviolability to the actual office premises of the consulate.

In the commentary to article 62 on precedence, information is requested on State practice in this respect. In Finland the rules proposed by the International Law Commission are observed.

7. GUATEMALA

Transmitted by a letter dated 26 January 1961 from the Acting Permanent Representative of Guatemala to the United Nations

[Original: Spanish]

The aforesaid draft contains 65 articles, with commentaries by the International Law Commission, embodying the best practices developed by States in the matter of consular intercourse and immunities.

The draft has been very carefully edited and does not conflict with the generally accepted principles of international law on the subject.

Provided that there is no question of introducing substantial changes in the course of the conference, the draft, as prepared by the International Law Commission, would be acceptable to Guatemala.

8. INDONESIA

Transmitted by a letter dated 28 April 1961 from the Permanent Representative of the Republic of Indonesia to the United Nations

[Original: English]

I have the honour to inform you that the Government of Indonesia welcomes the efforts made by the United Nations and, in particular, the International Law Commission to codify customary rules and provisions that have been generally recognized and applied to consular relations between States.

However, the Government of the Republic of Indonesia deems it necessary to present its observations on the draft articles on Consular Intercourse and Immunities in view of the fact that some of the articles are not entirely in conformity with changes in the constitutional and political development of Indonesia, as well as the development of its foreign relations.

The observations that the Indonesian Government wishes to make are as follows:

Article 4: In conformity with Indonesian legislation, the Indonesian Government interprets the term "nationals" in this article as comprising both persons and bodies corporate.

Article 8: The Indonesian Government would like to make a reservation on this article to the effect that it does not recognize "consular agents" as "heads of post" since the former classification is not known in the Indonesian Foreign Service. Furthermore, there is apparently no identical and universal interpretation of the designation "consular agents".

Article 11: To prevent the appointment as consular officials of nationals of "third States" not acceptable to the receiving States, the Indonesian Government wishes to see included the additional restriction that not only "nationals of the receiving State" but also "nationals of a third State" may be appointed as consular officials only with the "express consent of the receiving State".

Article 14: Considering that "the benefits of the present articles and of the relevant agreements in force" are merely consequences

of the provisional recognition, it is deemed necessary to reaffirm that fact by inserting the words "in pursuance thereof" after the conjunction "and" and before the preposition "to".

Article 53: Considering that up to now the development of international law generally, and for its greater part, has been and still is determined by developments in the western world, although contemporary international political conditions in the light of the development of the newly independent Asian and African countries can no longer justify this fact, the Indonesian Government wishes to reserve its right in respect to the interpretation of the "other rules of international law" envisaged in paragraph 2 of this article.

9. JAPAN

*Transmitted by a note verbale dated 28 April 1961
from the Permanent Mission of Japan to the United Nations*

[Original: English]

I. General observations

The Government of Japan is deeply appreciative of the contribution made by the International Law Commission in drawing up the draft articles concerning consular intercourse and immunities.

The Government wishes to reserve its position, however, with regard to whether these draft articles should be adopted as another multilateral convention similar, in character, to the Vienna Convention on Diplomatic Relations or as a model rule for a consular convention between two countries to be concluded in the future.

II. Article by article observations

1. Article 1

It is suggested that the words "and the land ancillary thereto" be inserted before "used..." in paragraph (b) of this article.

2. Article 3

It is proposed that the following new paragraph be added in this article:

"The sending State may establish and maintain consulates in the receiving State at any place where any third State maintains a consulate."

It is suggested that the provision of commentary 3 be included as a new paragraph in this article.

3. Article 4

It is suggested that the word "boat" appearing in paragraph 1 (d) of this article be deleted as the word "vessel" in the same paragraph contains the meaning of "boat".

4. Article 5

It is suggested that the words "to send a copy of the death certificate to" be replaced by "to inform of his death" in paragraph (a) of this article.

5. Article 6

It is suggested that paragraph 1 (b) of this article be modified as follows:

"If a national of the sending State is committed to custody pending trial or to prison, the competent authorities shall, at his request, inform the competent consul of that State without undue delay."

6. Article 8

As regards the commentary 4 to this article, the Government of Japan has not adopted the system of a consular agent.

7. Article 16

It is suggested that paragraph 1 of this article be modified as follows:

"1. If the position of head of post is vacant, or if the head of post is unable to carry on his functions, an acting head of post shall act provisionally as head of post.

"The name of the acting head of post shall be notified, either by the head of post or, in case he is unable to do so, by the sending State to the receiving State. In cases where no consular official is present at the post, a member of the administrative or technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the post."

8. Article 31

It is proposed that the following provision be added at the end of paragraph 1 of this article:

"or, if such consent cannot be obtained, pursuant to appropriate writ or process and with the consent of the minister for foreign affairs or any other minister concerned of the receiving State.

"The consent of the head of post may, however, be assumed in the event of fire or other disaster or if the police or other authorities concerned have reasonable cause to believe that a crime involving violence to persons or property is about to be, or is being, or has been, committed in the consular premises."

9. Article 36

It is proposed that the words "all appropriate means" be replaced by "all public means" in paragraph 1 and that paragraph 2 be modified as follows:

"2. The bags, when they are certified by the responsible officer of the sending State as containing official correspondence only, shall not be opened or detained."

10. Article 40

It is suggested that paragraphs 1 and 2 be deleted and, instead, the following new paragraph be adopted as paragraph 1.

"1. Consular officials shall not be liable to arrest, detention pending trial or prosecution, except in the case of an offence punishable by a maximum sentence of not less than one year's imprisonment."

11. Article 43

It is proposed that the words "private staff" be deleted.

12. Article 45

It is proposed that paragraph 1 be modified as follows:

"1. Consular officials, and members of administrative or technical staff who are nationals of the sending State and not of the receiving State, provided they..."

It is desirable that paragraph 1 (a) be replaced by "excise taxes including sales taxes."

Paragraph 2 should be deleted.

13. Article 46

It is suggested that the present article be named paragraph 1 and that the words "members of the consulate" in the former part of this article and "members of the consulate" in paragraph (b) be replaced respectively by "consular officials".

It is also suggested that a new paragraph be added as follows:

"2. Members of the administrative or technical staff who are nationals of the sending State and not of the receiving State, provided they do not carry on any gainful activity, shall enjoy the privileges specified in paragraph 1 of this article, in respect of articles imported at the time of first installation."

14. Article 47

It is suggested that the former part of this article be modified as follows:

"In the event of the death of a consular official or a member of the administrative or technical staff who was a national of the sending State and not of the receiving State and did not carry on..."

It is desirable to have paragraph (b) modified as follows:

"(b) Shall not levy estate, succession or inheritance duties on movable property situated in its territory and held by him in connection with the exercise of his function as a member of the consulate.

15. Article 48

It is proposed that the words "are nationals of the sending State and" be inserted after "private staff who" in paragraph (a) of this article.

16. Article 56

It is proposed that the following words be added at the end of this article:

"in cases where the life or dignity of an honorary consul was jeopardized by reason of his exercising an official function on behalf of the sending State."

17. Article 57

This article is undesirable.

18. Article 59

It is proposed that the contents of the commentary 2 to this article be included in this article.

19. Article 65

The Government of Japan wishes to reserve its position with regard to this article.

10. NETHERLANDS

Transmitted by a note verbale dated 13 April 1961 from the Permanent Mission of the Netherlands to the United Nations

[Original: English]

A. Introductory remarks

There is great similarity between this topic and that of diplomatic intercourse and immunities. The results of the United Nations Conference on Diplomatic Intercourse and Immunities, now in session in Vienna, will no doubt affect the drafting of some of the articles on consular intercourse and immunities. Consequently on a number of questions in the consular draft no definite opinion can be stated until the results of the Vienna conference are known.

The Netherlands Government, like the International Law Commission itself, assumes that the draft articles will form the basis of a convention. The ILC's commentary on the draft articles will of course not be included in the final text of a convention. However, the commentary occasionally contains principles that, in the Netherlands Government's view, should be transferred to the draft itself and eventually be incorporated in the convention. The following comments therefore contain a number of suggestions to that effect. Also, incidental comments are made on the commentary.

B. Articles

Article 1: Definitions

Paragraph (b). Buildings or parts of buildings used for consular purposes should be granted inviolability and exemption from taxation only when there is strict separation between consular

and non-consular offices as envisaged in article 53 (3). It is therefore suggested that "consular premises" in paragraph (b) be defined as "any building or part of a building used exclusively for the official services of a consulate." It is recalled that the consular archives already enjoy protection under other provisions (article 1 (e) in conjunction with articles 33 and 55).

Paragraph (e). The definition of consular archives would seem to be too narrow. The following text is proposed: "the term 'consular archives' shall be deemed to include correspondence, documents, papers, books, records, registers, cash, stamps, seals, filing cabinets, safes and cipher equipment."

Paragraph (f). The definition is not clear. If the head of a consulate is meant, as seems likely in view of article 9 and in view of the reference to articles 13 and 14 which are concerned with the heads of consular posts, the definition is at variance with the one contained in paragraph (g). If, on the other hand, the meaning is "anyone appointed to do consular work" it would seem to be superfluous in view of paragraph (i). It is therefore proposed that paragraph (f) be deleted and that the term "consul" be used only as an indication of the rank, just as the classification in article 13 of the draft on diplomatic intercourse and immunities solely indicates the rank (e.g., ambassador, envoy, etc.). Throughout the following comments it is assumed that the definition will be omitted. Whenever necessary, it will be suggested that the term "consul" be replaced by another term.

Paragraph (i). After deletion of paragraph (f) this paragraph should read as follows: "The expression 'consular official' means any person, including the head of post, duly appointed by the sending State to exercise consular functions in the receiving State and authorized by the receiving State to exercise those functions. A consular official may be a career consular official or an honorary consular official."

The articles should also be applicable to diplomatic personnel who concurrently exercise consular functions.

The ILC has correctly drawn a distinction between diplomatic and consular functions by not assuming that a diplomatic official would be entitled to perform consular duties and thereby possess consular status without having been properly appointed and recognized.

Paragraph (j). The commentaries on the articles being eliminated from the final text, paragraph (j) could be deleted, since the expression "employee of the consulate" does not occur in the articles except in article 1.

Paragraph (k). If paragraph (j) were deleted, paragraph (k) would have to read as follows: "The expression 'members of the consular staff' means the consular officials (other than the head of post) and all persons performing administrative or technical work in a consulate or belonging to the service staff."

The definitions contained in paragraphs 7 and 8 of the commentary on article 3 should be added to the definitions of article 1.

Article 2: Establishment of consular relations

Contrary to the Special Rapporteur's proposal that diplomatic relations should include consular relations, it is suggested that under prevailing international law the establishment of diplomatic relations does not automatically include the establishment of consular relations. Neither does the establishment of diplomatic relations involve the consent of the receiving State with regard to the exercise, by diplomatic officials, of such consular functions as do not fall within the traditional scope of diplomatic activities.

Article 3: Establishment of a consulate

In paragraph 2 the term "mutual consent" should be used instead of "mutual agreement", following the terminology used in article 2.

In paragraph 4 and paragraph 5 "a consular official" should be substituted for "a consul" and "the consul". Following the suggestion made in paragraph 3 of the commentary a new paragraph should be added to article 3 along these lines: "6. The consent of the receiving State is also required if a consulate desires to open an office in a town other than that in which it is itself established."

Arguing that the agreement for the establishment of consular relations "is in a broad sense an international treaty", paragraph 4 of the commentary states that for the termination of consular relations the same rules apply as for the termination of a treaty. Since it is customary that consular relations, unlike treaties, may under particular circumstances be unilaterally terminated, the comparison would seem incorrect.

Article 4: Consular functions

Article 4 should mention the general functions which will be exercised by consular officials, unless the parties agree otherwise. The parties must be free both to limit and to extend these functions. The following text is suggested: "To the extent to which they are vested in him by the sending State a consular official exercises the following functions unless the sending State and the receiving State have agreed otherwise."

After paragraph (c) a new paragraph should be inserted along the following lines: "To serve judicial documents or to take evidence on behalf of courts of the sending State."

In paragraph (d), the words "and boats" should be deleted. The term "vessels" covers all nautical craft.

Paragraph 2 of article 4 seems superfluous in view of article 37.

In the commentary on this article it should be stated that "agree" means both a formal agreement and an informal arrangement between two States.

Article 5: Obligations of the receiving State in certain special cases

Articles 5 and 6 are somewhat out of context and would be better placed together with articles 34 *et seq.*

Paragraph (c) should be supplemented by a corresponding arrangement for aircraft.

Article 6: Communication and contact with nationals of the sending State

The expression "without undue delay" in paragraph 1 (b) is too vague and should be supplemented by the words "and in any case within one month." Furthermore, the words "committed to custody pending trial or to prison" in the same paragraph are not sufficiently comprehensive, since they do not cover persons doing forced labour or committed to a lunatic asylum. Better wording would be: "committed to any form of arrest or detention." In the following sentence there should be a consequential amendment to the same effect. On this point the commentary should explain that every form of deprivation of liberty by the authorities is intended.

As a consequence of the suggested amendment to article 1 the following further amendments are proposed:

Paragraph 1 (a): "access to the competent consul, and the consul..." should be replaced by "access to the competent consulate, and the officials of that consulate..."

Paragraph 1 (b): "consul" should be twice replaced by "consulate;" his "district" by "its district".

Paragraph 1 (c): "The consul" should be replaced by "A consular official".

Article 7: Carrying out of consular functions on behalf of a third State

"Consul" should be replaced by "consular official", even in case the definition of "consul" in article 1 is maintained.

Article 8: Classes of heads of consular posts

The information on consular agents, requested in paragraph 4 of the commentary, is attached [as an annex to these observations].

Article 9: Acquisition of consular status

This article should be replaced by the following:

"1. A head of a consular post must be appointed by the competent authority of the sending State as consul-general, consul, vice-consul or consular agent;

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

The present text gives a definition which one would expect to find in article 1. Moreover, it would not be correct if throughout the draft articles the word "consul" would mean somebody who has already been recognized in that capacity by the receiving State. In article 10, for instance, this is obviously not the case.

Article 10: Competence to appoint and recognize consuls

Because articles 21 and 22 govern the appointment of consular staff the word "consuls" should be replaced by "heads of consular posts". Furthermore, the expression "internal law" should be replaced by "municipal law".

Article 11: Appointment of nationals of the receiving State

The following new wording is proposed:

"The receiving State may require that the appointment of consular officials from its own nationals be subject to its prior consent."

Article 12: The consular commission

Paragraph 1: The opening words should be replaced by "The head of a consular post". In the fifth line "the full name of the consul" should be replaced by "his full name".

Paragraph 2: "Consul" should be replaced in the first line by "head of consular post" and in the fourth line by "he". Instead of "the State on whose territory the consul (he) is to exercise his functions", the words "the receiving State" may be used.

Paragraph 3: "Consul" should read "head of consular post".

Article 14: Provisional recognition

The words: "the head of a consular post" should be replaced by "a consular official".

Article 15: Obligation to notify the authorities of the consular district

"Consul" in this article is no doubt intended to mean the head of a consular post. The provision should, however, apply to all consular officials. It is therefore suggested that "consul" be replaced by "consular official".

Article 16: Acting head of post

The appointment of acting heads of post may be difficult due to lack of personnel (one-man posts or to the inconvenience of temporarily transferring personnel from other posts. The sending State may therefore prefer to close the consulate temporarily. Thus the words "shall be temporarily assumed" in the third line of the article should read: "may be temporarily assumed". "Consular post" should be replaced by "consulate".

Article 17: Precedence

"Consuls" should be replaced by "consular officials".

Articles 18 and 19

"A consul" should be replaced by "the head of a consular post".

Article 20 (Withdrawal of exequatur)

The following new text is suggested:

"The receiving State may withdraw an *exequatur* if for grave reasons a consular official ceases to be an acceptable person. For such reasons it may revoke the admission of members of the consular staff other than consular officials, whether accorded tacitly or by express authorization.

"The receiving State shall, however, take such a decision only if the sending State does not comply within a reasonable time with a request to terminate the appointment of the consular official concerned."

It does not seem necessary to require that an explanation be given for the withdrawal of an *exequatur*.

Article 22: Size of the staff

The words "and normal" should be omitted. The point is whether or not the size is "reasonable". The word "normal" might introduce an element of comparison with other posts, or with the size of the same post in the past.

The proposition made in paragraph 3 of the commentary of first trying to reach an agreement could be incorporated into the article itself.

Article 23: Persons deemed unacceptable

This article may be omitted if the suggestion regarding article 20 is followed.

Article 24: Notification of the arrival and departure

Since under article 51 the receiving State is obliged to grant privileges and immunities from the moment of entry into the country it is recommended to state clearly that the sending State must inform the receiving State prior to the arrival of the consular official.

Article 27: Right to leave the territory of the receiving State

Paragraph 3: The words "discharged locally" need further explanation.

Article 30: Accommodation

"Internal law" should be replaced by the usual expression "municipal law".

Article 33: Inviolability of the consular archives

The words "the documents" seem superfluous, since the documents are covered by "archives". If for the definition of "consular archives" the text were to be followed as proposed above for article 1 (e), the words "documents" and "official correspondence of the consulate" would have to be omitted since they would be covered by the words "consular archives".

From the use of the word "documents" in article 36, paragraph 3, it moreover becomes clear that the definition of "documents" in paragraph 3 of the commentary may lead to confusion.

Article 37: Communication with the authorities of the receiving State

"Consuls" should read "consular officials".

Article 39: Special protection and respect due to consuls

"Consuls" should read "consular officials".

The last sentence of paragraph 3 of the commentary on this article should be deleted. This sentence creates the impression that the receiving State must grant protection against press cam-

paigns by preventive measures. This is often constitutionally impossible, and would moreover not seem desirable. With regard to the press, preventive measures should not be required.

Article 40: Personal inviolability

The alternative version of paragraph 1 is preferable. Maximum sentences vary so greatly in the various legislations that the first alternative text must lead to an unfair system. It is true that, in the second alternative, there will also be a difference of opinion regarding what must be understood by a "grave crime". But in this case consultation between the States concerned and if necessary appeal to a third party are possible to answer the question whether a crime is serious or not.

"Gainful private activity" should read "private commercial or professional activity". Restriction of the immunity is necessary only where those activities are concerned.

The system embodied in paragraph 2 of article 40 is not entirely satisfactory. In so far as this provision does not admit the execution of a sentence providing for imprisonment for a term of less than two years it has the disadvantage of taking away—in respect of the persons enjoying the inviolability—a great deal of the effective force of several types of regulations such as traffic regulations which do not envisage penal sanctions of such magnitude. On the other hand, modern views on penology and rehabilitation have resulted in a tendency to deal with foreign offenders in such a way that long prison sentences can be served in the state of origin. It is therefore suggested that paragraph 2 of article 40 could perhaps better be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official. In such consultation allowance could be made for the interest of the consulate and—with respect to sentences of less than two years' imprisonment—for the possibility that the sending State may prevent the execution by recalling the consular official concerned, for the purpose of trying him before its own courts or of taking other measures against him.

Article 42: Liability to give evidence

The rule formulated in the last sentence of paragraph 3 of the commentary should be added to paragraph 3 of the article. In some countries it may be desirable for the users of consular deeds that a consular official testifies to the authenticity of deeds executed by him. It should be made clear, however, that this does not mean that the consular official is liable to give further details of the background of the instruments or to divulge information which has come to his knowledge in the course of executing the deeds.

Article 43: Exemption from obligations in the matter of registration of aliens and residence and work permits

This article is intended to provide that no work permit is required for the performance of the official work. Under the present wording of the article, however, the exemption would also apply to the exercise of non-consular activities.

Article 44: Social security exemption

It would seem preferable to substitute the words "social security measures" for "social security system". Some States, in particular federal States, have more than one social security system.

Article 47: Estate of a member of the consulate or of a member of his family

In this article again "gainful private activity" should read "private commercial or professional activity".

Article 48: Exemption from personal services and contributions

There is no ground for the difference between this article and the corresponding article 33 of the draft convention on diplomatic intercourse and immunities. The argument that a consulate might suffer if a member of the private staff were subject to the obligations mentioned in the article is equally valid for an embassy, particularly since there are many small embassies and large consulates. It is therefore proposed that the words "and members of the private staff who are in the sole employ of the consulate" be deleted.

Article 50: Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

The article should state that nationals of the receiving State are entitled to refuse to give evidence, in so far as official acts of the consulate are concerned. The text of the first sentence of the first paragraph of the article could be amended as follows: "The personal privileges and immunities provided for in section III of chapter II and in chapter III shall not apply to members of the consulate who are nationals of the receiving State. However, such members of the consulate shall enjoy immunity from jurisdiction and from liability to give evidence in respect of acts performed in the exercise of their functions."

Article 52: Obligations of third States

The significance of this article is greatly reduced by the first paragraph of the commentary. Eventually it should be decided whether or not a third State is obliged to grant passage. The rule to be adopted in the convention on diplomatic intercourse and immunities may serve as an example.

Article 53: Respect for the laws and regulations of the receiving State

If the definition of consular premises in article 1 is amended as suggested above, there should be a consequential change in the third paragraph of this article to be read as follows:

"3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in the same building as the consular premises, provided that the premises of such offices are separate from those used by the consulate."

Article 54: Legal status of honorary consuls

The draft does not contain a definition of "honorary consul". As usage varies greatly in the different countries, the ILC considered it difficult to give such a definition and it preferred to leave the question of whether or not a consular official is honorary to the decision of the States concerned. While this view would seem to be agreeable, the following is pointed out. Junior career consuls may be placed under an honorary consul-general while honorary officials may work under a career consul. The function of honorary and non-honorary consuls is identical and the significance of their official acts is the same for the States concerned. Even though an honorary consul may exercise important private activities, this does not alter the nature of his consular work. The status of honorary or non-honorary must therefore be regarded as a personal quality of the consular official, which does not affect the status of his official actions and still less that of the consulate.

Chapter III should therefore be confined to special rules for honorary consular officials. Articles 31 and 33 deal with the consulate as such and should therefore apply equally to consulates under an honorary official. If the proposal made above under article 1 were accepted both "consular premises" and "consular archives" would refer to those used exclusively for the consulate.

Rooms belonging to consular officials (whether honorary or not) but used for other purposes are consequently excluded.

The words "honorary consular officials" should be substituted for "honorary consul(s)" in the title and in the article.

Article 55: Inviolability of the consular archives

This article may be omitted if, on the strength of the comments made above under article 54, article 33 were to be mentioned in paragraph 2 of article 54 instead of in paragraph 3.

Article 56: Special protection

The English text: "In keeping with his official position" is less clear than the French: "requis par sa position officielle".

"Honorary consular official" should be substituted for "honorary consul".

Articles 57 and 58

"Honorary consul" should read "honorary consular official".

Article 59: Exemption from personal services and contributions

The words "honorary consuls, other" and the comma after "officials" should be omitted.

Article 60: Liability to give evidence

"Honorary consul" should read "honorary consular official".

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

The question may be asked whether the prohibition contained in this article does not go too far. An honorary consular official will not always be able to avoid advantages accruing to him in his business as a result of his official position. What should be forbidden is the abuse of consular status to acquire personal advantages. This can be effected by putting the word "unjust" or "unreasonable" before "advantages." "Honorary consul" should read "honorary consular official".

Article 62: Precedence

"Honorary consuls" should read "honorary consular officials"; "career consuls" should read "career consular officials".

Article 63: Optional character of the institution of honorary consuls

Both in the article and in the title "honorary consular officials" should be substituted for "honorary consuls".

Article 64: Non-discrimination

To avoid the impression that the rules are also applicable to consular staff of States that are not parties to the convention the last word of the first paragraph ("States") should be replaced by "the parties to the present convention".

Article 65: Relationship between the present articles and bilateral conventions

The second text is preferred for the following reasons:

(a) The conclusion of a special agreement between the parties presumed in the first text may lead to a postponement of ratification of the convention;

(b) As long as it is uncertain whether the other party to a bilateral convention also wishes to become a party to the convention it may be difficult to open negotiations for a special agreement. If the other party nevertheless does become a party to the convention it may perhaps be too late for the State that has become a party earlier to save the bilateral convention;

(c) Bilateral conventions often regulate more than the question dealt with in the draft convention.

The principle stated in paragraph 2 of the commentary, correct though it may be in theory, cannot be realized in practice.

Instead of "bilateral", the words "bilateral and multi-lateral" should be used in the article, to ensure the continued existence of regional conventions.

ANNEX

Information as requested in paragraph 4 of the commentary on article 8:

Consular agents in the Kingdom of the Netherlands

Consular agents from the following countries are residing in the Netherlands, Surinam and The Netherlands Antilles:

Cuba: An honorary consular agent on the island of Aruba (Netherlands Antilles);

France: Consular agents in Arnhem, Dordrecht, Groningen, Haarlem, 's-Hertogenbosch, Maastricht, Nijmegen, Terneuzen, Utrecht, Vlissingen, IJmuiden (Netherlands), Paramaribo (Surinam) and Willemstad (Netherlands Antilles); with the exception of the consular agent in Utrecht all are honorary officials; the consular agent in Paramaribo is serving under a career consul;

India: A consular agent in The Hague who is a career official and head of the Consular Section of the Indian Embassy;

Italy: A consular agent on the island of Aruba (Netherlands Antilles) who is a career official;

Switzerland: A consular agent on the island of Aruba (Netherlands Antilles), who is a career official with the personal title of vice-consul.

These consular agents are all admitted and recognized either on a provisional or on a permanent basis. According to generally applied rules this admission and recognition are granted in the form of a royal decree if the commission is issued by the head of the State; in other cases the admission and recognition are based on a royal authorization.

The commissions of these consular agents contain no restrictions with respect to the exercise of their consular powers.

11. NORWAY

Transmitted by a letter dated 30 January 1961 from the Deputy Permanent Representative of Norway to the United Nations

[Original: English]

The Norwegian comments are stated below in relation to the respective articles of the draft which are most immediately concerned. Where comments relate to more than one article suitable cross-references are made.

Article 1

The Norwegian Government would like to make the following suggestions:

Ad(f): The meaning given to the term "consul" seems unnecessarily restricted. In common parlance the term encompasses all consular officials and it might easily lead to misconstructions and confusion if the term were to be used in a different sense.

It also seems of particularly doubtful utility to introduce a special term denoting a head of consular post who has been recognized, finally or provisionally (in conformity with article 13 or 14) by the receiving State. The use of such highly technical terms does not facilitate the reading and interpretation of the document.

Attention is also called to the fact that the adopted terminological system is not consistently followed in the draft itself. If the definition given of the term "consul" is to be maintained, terminological consistency would seem to require that the word "consuls" be replaced by the expression "heads of consular posts" in article 10.

The last sentence of the sub-paragraph should be deleted. It does not seem to have any real terminological import. The extent to which provisions relating to "consuls" also apply to "honorary consuls" is, or should be made, sufficiently clear in article 54.

Reference is also made to the Norwegian comments made below in regard to article 9.

Ad(i): The last line, reading "and who is not a member of a diplomatic mission", seems unnecessary.

Article 2

In the opinion of the Norwegian Government it is unnecessary to complicate the text of the proposed convention by the introduction of the term "consular relations". The term seems to be something in the nature of a convenient figure of speech without precise meaning in international law. Legal consequences follow from unilateral or mutual consent to establish one or more specific consulates and not from mutual consent to establish "consular relations".

The Norwegian Government is therefore of the opinion that the provision in article 2 of the draft should be deleted. The necessary consequential changes should be made in the following articles which use the term "consular relations".

Article 4

In view of the fact that there are important differences between the functions of the various consulates, particularly as between consulates which do and such as do not include sea-ports within their consular districts, and that these functions are constantly being developed and extended, it seems desirable that the consular functions should not be too restrictively defined in the draft.

On the basis of these general considerations the Norwegian Government is inclined to prefer the draft submitted by the Commission to the more detailed, enumerative definition submitted by the Special Rapporteur. The latter draft could easily on many points lend itself to unfortunate antithetical interpretations. It would seem, however, that the Commission's definition would gain by being amended so as to make sure that it covers the customary consular functions which are specified in the other draft and also some such functions which are mentioned only in the commentary to that draft.

The Norwegian Government would like to propose the following amendments:

It would seem natural to extend the group of persons to which a consulate is entitled to give protection, help and assistance so as to cover not only "nationals of the sending State" (see paragraph 1 (a) and (b)), but also stateless persons who have their domicile in the sending State.

To paragraph 1 (d) should be added the words "and to their crews". The purpose of this proposal would be to take due account of the fact that it is customary for consuls to give assistance to members of the crews of vessels, boats, and aircraft of the sending State irrespective of such persons' nationality.

Apart from this specific proposal concerning sub-paragraph (d), it also seems to the Norwegian Government that this provision is formulated in too vague and general terms. Reference is made in this connexion to the commentary to the corresponding provision (I,2) of the Rapporteur's alternative text. It would seem to the Norwegian Government that many of the customary consular functions mentioned in this commentary are so important that it ought to be made perfectly clear that they are covered by

the article. This applies particularly to sub-paragraphs (b), (d) and (e) of that commentary.

The Norwegian Government would further propose that there be added a sub-paragraph, drafted along the lines of paragraph II, 7, of the Rapporteur's alternative text, which would give consuls the functions of representing heirs and legatees who are nationals of the sending State in decedents' estates within the receiving State. This representational function ought also to be regulated by a separate article of the draft. Reference is made in this connexion to paragraph 12 of the Commission's commentary. The Norwegian Government does not believe, however, that it would be advisable to extend this representational right beyond the field of decedents' estates.

In the opinion of the Norwegian Government, there should also be added a sub-paragraph drafted along the lines of paragraph III, 10, of the Rapporteur's alternative text, in order to affirm the customary right of consuls to serve judicial documents and take evidence on behalf of the courts of the sending State.

The Norwegian Government would finally like to suggest that the following sub-paragraph should be added at the end of paragraph 1:

"A consul may also perform other functions, provided that their performance is not prohibited by the laws of the receiving State."

This sub-paragraph is modelled upon paragraph V, 17, in the more detailed text prepared by the Rapporteur.

Article 6

The provisions of this very important article do not seem to be satisfactorily drafted.

The "freedoms" provided for in paragraph 1 of the article are too extensive inasmuch as they fail to take proper account of the many situations in which the police authorities of the receiving State have legitimate reasons for preventing free communications between a prisoner and the outside world.

It seems, on the other hand, that these "freedoms" are made illusory by the important and ill-defined reservations in paragraph 2.

In the opinion of the Norwegian Government it would be impossible to determine, on the basis of the present formulation of article 6, in what situations and on what conditions a consul has a *right* to communicate with or to visit imprisoned nationals. It is therefore suggested that the article should be re-drafted with a view to establishing clear and binding norms.

It is also suggested for consideration that it might be advisable to extend the application of the rule relating to detained persons in order to make it applicable in all cases of forced detention (quarantine, mental institutions etc.). This would seem particularly appropriate in regard to the members of the crews of vessels flying the flag of the sending State and the rule should, in this case, perhaps apply irrespective of the crew member's nationality.

Article 8

In reply to the question raised in paragraph 4 of the Commission's commentary the Norwegian Government wishes to state that it does not employ "consular agents" in the Norwegian service, and that it has no rules governing the method of their appointment. Norway does not, as a receiving State, differentiate between "consular agents" and other groups of consular officials.

Article 9

The Norwegian Government is not convinced by the reasons given in paragraph 2 of the commentary that it is necessary to include this provision in the draft. The purpose stated would seem to be adequately achieved by the definition given under paragraph (f) in article 1. Two different definitions of one and the same term can only lead to doubt and confusion.

Reference is made to the Norwegian comments to article 1 (f).

Article 10

The Norwegian Government sees no compelling reason for including these provisions in the draft. The stated principles seem clearly implicit in the use throughout the draft of the terms "the sending State" and "the receiving State". The functioning and acting of States are normally governed by their internal laws and it would seem unwise to give the contracting parties any mutual *droit de regard* in this respect.

Article 12

In reply to the question raised in paragraph 3 of the Commission's commentary, the Norwegian Government wishes to state that it agrees that a new consular commission must be made out if a consul is appointed to another post within the same State. The Norwegian Government believes, but is unable to affirm, that this rule is in accordance with the prevailing practice. The question has not arisen in regard to foreign consuls in Norway or in regard to Norwegian consuls abroad.

Article 18

This provision seems wholly unnecessary and the formulation of the rule is, at all events, open to serious objections. Provided the receiving State gives its permission, there seems to be no reason why the consul should not be at liberty to perform diplomatic acts irrespective of whether or not the sending State has a diplomatic mission in the country. Nor is there any reason why such acts should only be allowed on "an occasional basis". It must be the concern of the sending State to see to it that its consuls do not unduly encroach upon the domain of its diplomatic missions.

The correct rule would seem to flow naturally from the juridical character of the draft, which is made clear in article 65.

Article 19

In the opinion of the Norwegian Government atypical borderline cases where a mission partakes both of a consular mission and of a diplomatic mission will, at all events, have to be regulated by *ad hoc* agreement between the sending and the receiving States, and there does not seem to be any utility in trying to regulate such cases by the provisions of a multilateral convention.

Article 25

This article seems inadequately drafted and it is difficult to understand why it should be necessary to include a general provision of the proposed kind. The modes of termination which apply to the functions of heads of consular posts and of other consular officials would seem to be quite adequately set forth in the preceding articles.

As far as paragraph 1 (c) is concerned, reference is made to the Norwegian Government's comments to article 2. In this case the use of the term "consular relations" is particularly unfortunate. It is the termination of the consular mission at which the consular officials in question are employed which is the sole relevant fact in this context. Such a termination might easily occur without any "severance of consular relations". The present formulation of the article leaves out of account the fact that in the consular relationship between two States one or more consulates are often abolished while others are maintained.

Article 26

The Norwegian Government sees no reason for including a provision to the proposed effect. It does not seem necessary to state that the severance of diplomatic relations has no automatic effect in regard to such consular missions as the two States involved may have established within each other's countries. As far as the use of the term "consular relations" is concerned, reference is made to the Norwegian comments in regard to article 2.

Article 27

Paragraph 3 is not clear. The expression "discharged locally" would have to be clarified in order to make it possible to comment upon the substance of this paragraph.

Article 28

In accordance with the view stated under article 2, the Norwegian Government would like to propose that article 28 be re-drafted in such a way that the use of the ill-defined term "consular relations" could be avoided.

Article 29

If it is the intention to provide for a right to use a consular flag beside, or instead of, the national flag, this ought to be made clear in the text of the article and not only in the commentary. No reasonable interpretation of the term "national flag" could be made to include a consular flag.

Article 30

The legal import of the expression: "has the right to procure" in the first sentence of this article is difficult to understand. The sentence as a whole does not seem to create any clearly ascertainable right and might as well be deleted. The provision in the second sentence should, in the opinion of the Norwegian Government, be made applicable also to the head of the consular post and to the employees of the consulate.

Article 31

The second sentence of paragraph 1 seems far too categorically drafted. In its present formulation this provision would preclude even a courtesy call by an agent of the receiving State.

Appropriate exceptions should also be included to provide for cases of fires or other disasters and for cases where the local authorities have reasonable cause to believe that a crime of violence has been, or is about to be, committed in the consular premises.

In cases where the consent of the head of the consular post is refused, or cannot be obtained, the agents of the receiving State should nevertheless be entitled to enter the premises pursuant to appropriate writ or process provided they have secured prior authorization from the minister for foreign affairs of the receiving State.

Article 32

In paragraph 2 of the Commission's commentary it is stated that the exemption provided for in this article is an exemption *in rem* affecting the actual building acquired or leased by the sending State. This interpretation does not seem to be warranted by the wording of the article.

Attention is called in this connexion to the corresponding article (21) of the Commission's draft on diplomatic intercourse and immunities with commentary. It will be seen that article 32 of the present draft is closely modelled on, and in all relevant respects identical with, article 21 of the previous draft. In the Commission's commentary to article 21 of the previous draft, however, it is stated: "The provision does not apply to the case where the owner of leased premises specifies in the lease that such taxes are to be defrayed by the mission."

It is very difficult to understand how two texts, which are in all material respects identical, could be given completely different interpretations.

As far as the question of substance is concerned, the Norwegian Government is opposed to giving the exemption provided for in article 32 the effect *in rem* which is suggested in the Commission's commentary.

Article 38

Under paragraph 4 of the commentary, the Commission requests information from governments concerning their law and practice in regard to the levying of taxes and dues on "acts performed at consulates between private persons". The Norwegian Government, for its part, has some difficulty in complying with this request inasmuch as it is not clear to it exactly what kind of "acts" the Commission envisages. It would seem natural, however, to grant exemption from taxes and dues in regard to such of the acts performed at consulates between private persons *which it is customary to perform at consulates*, and which are not intended to produce legal effects within the receiving State.

Article 40

The provision proposed in paragraph 2 is not warranted by the generally accepted rules of international law and the Norwegian Government would not deem it necessary or desirable from the point of view of the progressive development of international law. It seems to accord a far too liberal immunity to consular officials. The Norwegian Government would therefore prefer to see it deleted.

Paragraph 3 is unfortunately drafted. The words "except in the case referred to in paragraph 1 of this article" seem to relieve the receiving State of any obligation not to "hamper the exercise of the consular function" in cases where a consular official is prosecuted for an offence "punishable by a maximum sentence of not less than five years' imprisonment."

Under paragraph 17 of the commentary to paragraph 3, it is stated in relation to the words "must appear before the competent authorities", that "the consular official is not required to appear in person and may be represented by his attorney". This interpretation has no basis in the relevant words of the paragraph itself and the Norwegian Government sees no reason why the consular official should be given such a choice. The granting of such a privilege in connexion with criminal proceedings would hardly accord with the corresponding rule in article 42,2 of the draft.

There ought to be incorporated into the draft a provision enabling the proper authorities of the sending State to waive the immunities dealt with in this article. The same also applies to the immunities provided for in articles 41 and 42. Reference is made in this connexion to article 30 of the Commission's draft on diplomatic intercourse and immunities. It would seem just as necessary to have clear rules on this point in regard to consulates as in regard to diplomatic missions.

Article 41

The expression "in respect of acts performed in the exercise of their functions" is not sufficiently clear.

The similar provision of article 50 uses the expression "in respect of *official* acts performed in the exercise of their functions" and it is stated in paragraph 3 of the commentary to this article that "the present article, unlike article 41, uses the expression 'official acts', the scope of which is more restricted than that of the expression used in article 41". Paragraph 2 of the commentary to article 41, however, seems to indicate that the expression used in that article is synonymous with "official acts". The terminology used in these two articles seems too abstruse to permit ready and easy interpretation of the texts and should be revised.

Reference is made to the last paragraph of the Norwegian comments to article 40.

Article 42

The Norwegian Government sees no reason for including the provisions of paragraph 1.

The rule stated in the first sentence would seem to follow *e contrario* from the other articles in this section of the draft. The rule stated in the second sentence is not warranted by generally accepted principles of international law or by reasonable considerations having to do with the progressive development of international law. The requirements of juridical stringency and precision would seem to exclude the possibility of introducing a "liability" with which the persons concerned could freely and without risk decline to comply.

Reference is made to the last paragraph of the Norwegian comments to article 40.

Article 43

The exemptions proposed in this article should, in the opinion of the Norwegian Government, be granted only to members of the consulate and their families. There does not seem to be sufficient reason to extend these exemptions to their private staff.

It is also suggested that the exemption in regard to work permits should not apply to such members of the consulate and their families who carry on a gainful private activity outside the consulate (see in this connexion article 57 of the Commission's draft).

Article 45

In the opinion of the Norwegian Government, the tax exemptions provided for in this article go too far.

Contrary to what is said in the Commission's commentary, they even extend farther than the corresponding exemptions in the draft on diplomatic intercourse and immunities. According to article 36,2 of that draft the tax exemption granted to "members of the service staff" only applies to "the emoluments they receive by reason of their employment." Paragraph (h) of article 1 in the present draft, read in conjunction with paragraphs (k) and (j), makes it clear that the term "members of the consulate" includes "the service staff".

It is submitted that "members of the consulate" other than "consular officials" should be accorded exemption only from dues and taxes on the wages they receive for their services.

The provision of paragraph 1, sub-paragraph (b) should be drafted so as to cover all kinds of property, not only *immovable* property. There does not seem to be any valid reason why a consular official should be exempt from capital tax on private assets such as shares of stock and bonds, which have their *status* in the receiving State.

Article 46

In the opinion of the Norwegian Government, the exemption from customs duties which is proposed in this article extends too far.

Here again (see the Norwegian comments under article 45), the Commission has been more generous in its proposal regarding consulates than it was in its previous draft on diplomatic intercourse and immunities. In article 34, 1 (b) of that draft the exemption from customs duties is limited to "diplomatic agents or members of their families belonging to their households". In the present article the exemption is extended to "*members of the consulate* and members of their families belonging to their households". The latter expression, according to the definitions given in article 1, includes the "service staff", while the corresponding group falls outside the term "diplomatic agents" in the previous draft.

The Norwegian Government is opposed to the extension of the exemption provided for in article 46 (b) to other members of the consulate than "consular officials".

Article 50

It would make it easier to read and apply the document if the provisions which are affected by the exemptions in article 50 had appropriate references to this article.

In the opinion of the Norwegian Government the privileges and immunities which are proposed to be granted to members of the consulate who are nationals of the receiving State are somewhat too restricted. It seems for instance that such members of the consulate should at least be excused from producing official correspondence and documents relating to the exercise of their functions (see article 42, 3).

In the corresponding article of the Commission's draft on diplomatic intercourse and immunities, article 37, the following provision is added:

"However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the mission."

A similar provision ought to be added to article 50 of the present draft.

In regard to the expression "official acts" reference is made to the second paragraph of the Norwegian comments to article 41.

As far as "honorary consuls" are concerned, reference is made to the third paragraph of the Norwegian comments to article 54.

Article 52

In the opinion of the Norwegian Government, the draft ought to settle in an affirmative sense the question of whether or not a third State is under a duty to grant free passage through its territory to consular officials, employees and their families in transit between the sending and receiving countries.

In its present form paragraph 3 of the article seems to have settled this question in an affirmative sense as far as "other members of the consulate or of members of their families" are concerned. This is hardly the intention, but the words "shall not hinder the transit through their territories" are at least open to this construction.

Article 54

Chapter III, concerning honorary consuls, is very important from the point of view of the Norwegian Government. It is very difficult to comment upon its various provisions, however, in view of the fact that the Commission has so far given no definition of the term "honorary consul".

In the opinion of the Norwegian Government the determining criterion for the distinction between "consuls" and "honorary consuls" ought to be that the latter are authorized to engage in commerce or other gainful occupation in the receiving State. If this criterion is adopted it would become unnecessary to make applicable to "consular officials" the proviso in articles 40, 45, 1, 46 and 47 in regard to members of the consulate who carry on a "gainful private activity".

The Norwegian Government is further of the opinion that there is no reason, where "honorary consuls" are concerned, to discriminate in the field of privileges and immunities between honorary consuls who are and such as are not nationals of the receiving State.

The system adopted in article 54 seems very unsatisfactory. It would seem far better, even if it leads to extensive repetition of provisions contained in the preceding articles relating to consuls, to spell out clearly in chapter III all the provisions which apply to honorary consuls. The system of references and cross references will inevitably lead to difficulties of interpretation. This applies particularly to article 54,3.

In regard to article 54,2 it is suggested that article 32 should not be made applicable to the premises of honorary consulates.

In reply to the question raised in paragraph 5 of the Commission's comments to article 54, the Norwegian Government wishes to state that in Norway the premises used by an honorary consul for the purposes of exercising consular functions are not vested with inviolability.

Article 62

In reply to the question raised in the Commission's commentary to this article, the Norwegian Government wishes to state that the rule of precedence which is proposed in this article is in conformity with the prevailing practice in Norway.

Article 64

It is difficult to see any valid reasons for including the provisions of this article. They seem, at best, superfluous and might give rise to misconstructions.

When the two paragraphs of the article are read in conjunction, it appears clearly that discrimination *per se* is unobjectionable. The less favoured State can only object if the privileges and immunities accorded to its consuls are less extensive than those laid down in the preceding articles. In this case, however, it is the non-compliance with these articles, not the discrimination, which affords the basis for a complaint.

Article 65

This article raises important problems having to do with the juridical character of the document.

It is stated in paragraph 24 of the Commission's "General Considerations" that the draft is prepared "on the assumption that it would form the basis of a convention". This assumption is restated in paragraph 1 (a) of the Commission's commentary to article 65. The Norwegian Government agrees with this assumption and has based its comments upon it.

If this premise is accepted, the problem dealt with in article 65 is reduced to the question which arises when two or more (but less than all) the parties to a convention agree to, or have previously agreed to, undertakings *inter se* which are inconsistent with the convention.

It becomes necessary, however, to assess still more precisely the juridical character of the draft. Is it the intention that the convention should have such a character (a) that two or more of the parties may not agree to depart from its provisions without the consent of all the remaining parties, (b) that it only imposes a *minimum* standard which none of the parties is at liberty to disregard without the consent of all the remaining parties, or (c) that it merely imposes rules which will apply to the extent that other rules are not agreed to as between two or more of the parties?

The Norwegian Government agrees with the majority of the Commission that the third proposal would be most appropriate and sees no reason why any of the two other possibilities should be seriously considered.

As far as the choice between the first and the second text is concerned, the Norwegian Government prefers the latter. A very difficult task would be imposed upon the contracting parties if, before the conclusion of the proposed convention they had to go through their pre-existing agreements with the same parties in order to determine which of their inconsistent provisions they wanted to maintain in force by special agreement. There would be a serious risk that some such provisions might be overlooked and that they would consequently be abrogated by inadvertence.

Both of the alternative texts proposed by the Commission speak of other "bilateral conventions concerning consular intercourse and immunities... between the contracting parties". The Norwegian Government, for its part, sees no reason why the provision should be made applicable only to *bilateral* conventions. The same general considerations would seem to apply equally to

multilateral conventions and agreements whatever the name. It would also seem that problems arise only in regard to other conventions which contain provisions at variance with those of the present draft and not in regard to all other conventions "concerning consular intercourse and immunities".

12. PHILIPPINES

Transmitted by a letter dated 1 February 1961 from the Deputy Permanent Representative of the Philippines to the United Nations

[Original: English]

General observations:

The Committee [which was established to study the draft articles] found the draft generally acceptable. The individual assessment of each office may be summarized thus:

Administration: "The provisions of the draft articles affecting administration have been found to be properly predicated on the generally accepted international principles and practices and the body of rules usually incorporated in consular conventions like those which the Philippines has with the United States of America, Spain and Greece."

Consular Affairs: "I believe the provisions of this draft of consular intercourse and immunities are acceptable to us."

Economic Affairs: "The commentaries... are clear and to the point and this office finds no necessity for further comments."

Political Affairs: "In the main, however, the above-mentioned articles are not inconsistent with, nor do they contravene, any existing policy of the government vis-à-vis the political relations of the Philippines with other countries or affecting our national security and dignity. The articles, furthermore, reflect adherence to the principles of customary international law and usage on the points treated, and are in substantial conformity with Philippine consular regulations and practice as evolved during the almost decade and a half of independent national existence."

Comments:

The Committee, however, would like to invite the secretary's attention to its comments on the following articles: Art. 1 (para. (i)); Art. 4; Art. 5 (para. (b)); Art. 41; Art. 42 (para. 1); Art. 50; Art. 52; Art. 54; Art. 60; and Art. 65.

Article 1, paragraph (i): Definitions

Article 1 supplies the definitions and states that for purposes of the draft,

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

The members of the Committee entertained certain doubts on the definition of "consular official", particularly in relation to situations where persons are attached to a diplomatic mission but who perform consular functions. The query was whether, in situations of this sort, the distinguishing factor is official attachment to the post or the nature of the function performed. This is particularly important when viewed in relation to the enjoyment by such official of immunities and privileges, i.e., tax exemption, immunity from arrest, liability, generally exemption from local jurisdiction, where the enjoyment or non-enjoyment of the aforementioned may depend on whether said official is a consular or diplomatic official.

Article 4: Consular functions

"1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force, and also such functions vested in him by the sending

State as can be exercised without breach of the law of the receiving State. The principal functions ordinarily exercised by consuls are: (enumeration)"

It is to be noted that, apart from what are provided for in (a) bilateral agreements and (b) the powers conferred by the sending State exercisable without breach of the laws of the receiving State, article 4 confers no other authority. Specifically, it is the view of the Committee members that the phrase "the principal functions ordinarily exercised by consuls are:" is no more than just a statement or a declaration and cannot, in situations where countries have no bilateral agreements or have domestic laws which do not touch on consular functions, be a source of consular power invocable under this Convention.

It is, therefore, suggested that some sort of a rewording be made in the language of article 4 in order that it may actually confer consular powers apart from those exercisable thereunder.

Article 5, paragraph (b): Obligations of the receiving State in certain special cases

"The receiving State shall have the duty

"(a) . . .

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

"(c) . . ."

Paragraph (b) needs clarification particularly on whether the duty contemplated thereunder is permissive or mandatory. This is particularly significant in relation to situations where, in a guardianship or similar action brought before a court in a foreign State, guardianship papers have been released and effected without notice being given to the appropriate consular officer one of whose nationals is a party interested. The pertinent question is: Are the proceedings valid, voidable, or impugnable in the absence of said notice?

Article 41 Immunity from jurisdiction

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

The Committee members envisioned certain difficulties which may arise in the application of article 41, such as:

(1) As the very basis for non-amenability to local jurisdiction is non-interference with consular functions, the question that arises is: *Who* or *which* determines "acts performed in the exercise of these functions"?

(2) Assuming that by agreement the *who* and *which* may be located, what will be the criteria which may serve as their bases in determining whether an act is one that is "performed in the exercise of consular functions" or otherwise?

The difficulty under the second hypothesis becomes the more apparent when considered in the light of article 4, which includes under the heading of "consular functions" even those of an administrative nature.

It is also noted in the commentaries appearing under article 41 that nationals of the receiving States are excluded from the term "members of the consulate". Considered again in relation with article 4 is it not very probable that one who is appointed a member of the consulate but who is a national of the receiving State may perform functions even of an administrative nature?

Article 42, paragraph 1: Liability to give evidence

"1. Members of the consulate are liable to attend as witnesses in the course of judicial or administrative proceedings. Never-

theless, if they should decline to do so, no coercive measure may be applied with respect to them."

While the Committee members have no substantial objection over said provision, this observation is nevertheless being made by way of suggesting a change in mere phraseology. Specifically, it is the Committee members' view that the word "liable" appearing in the first sentence of paragraph 1 is negated by the phrase "no coercive measure may be applied" appearing in the second sentence of the same paragraph.

Article 50: Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

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

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

The Committee members are of the impression that article 50, paragraph 1, seems to insinuate that only consular officials may perform consular functions and that members of the consulate, under paragraph 2, perform non-consular functions. It is also their impression that the immunity from jurisdiction under article 50 attaches by reason of the performance of consular functions, irrespective of the nationality of the consular official performing said function.

It is their view that article 50 seems untenable when viewed in the light of article 1, which defines consular officials to include even members of the consulate, corroborated by the provisions of article 4 regarding consular functions of an administrative character performable by members of the consulate but are of the nature of consular functions. So also, as is the difficulty under article 41, the problem arises as to *who* or *which* may determine consular functions and assuming the *who* and *which* to have been located, the criteria upon which they may base their determinations of whether an act is a consular function or otherwise.

Article 52: Obligations of third States

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

"2. . . .

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

"4. . . ."

It is to be noted under article 52 that a distinction has been made between a consular official under paragraph 1 and a mere member of the consulate under paragraph 3, suggesting that while personal inviolability attaches to the former, the latter enjoys no more than a mere privilege of not being hindered while in the territory of another country in the course of transit.

The same observations made under articles 41 and 50 would seem to apply with as much weight to paragraphs 1 and 3 under this article. In view of the definition of consular official under article 1 in relation with the enumeration of consular functions under article 4, both articles considered, confusion is lent to the distinction.

Article 54: Legal status of honorary consuls

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

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

It is noted that article 41 similarly applies to honorary consuls. The same objections raised under article 41 in connexion with career consuls are similarly raised under article 54 in relation to honorary consuls.

Indeed, the reasons for the distinction between a consular and non-consular act become the more compelling under article 54, since generally honorary consuls engage in private gainful occupation.

While it is appreciated that with respect to career consuls under article 41, there is reason to presume that when a career consul acts, his acts are to be taken as consular acts unless otherwise shown, the fact that honorary consuls engage generally in gainful occupation give grounds for the non-application of the same presumption to that effect.

Article 60: Liability to give evidence

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

The Committee members have the same reservation under article 60 as they had under articles 41, 50 and 52. Specifically, what functions are to be classified as consular, and otherwise? *Who* and *which* may determine the question?

Article 65: Relationship between the present articles and bilateral conventions

"[First text]

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

"[Second text]

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

It is noted that article 65 contains two variants. It is the feeling of the Committee members that whether the Philippine Government shall prefer one variant to the other will depend on whether the observations made under present draft articles are accepted or not. In other words, if the reservations made are accepted, it is suggested that the Philippine Government adopt that variant which subordinates bilateral agreements to this Convention; *a fortiori*, the adoption of the other variant otherwise.

13. POLAND

Transmitted by a letter dated 6 April 1961 from the Permanent Representative of Poland to the United Nations

[Original: English]

The Government of the Polish People's Republic is of the opinion that the draft articles on consular intercourse and immunities prepared by the International Law Commission contribute a

great deal to the progressive development of international law and its codification. Most of the provisions contained in the draft articles having been universally accepted in the practice followed by States, their codification is both feasible and desirable.

The general idea of the draft and the majority of the articles contained therein give rise to no objections; however, it would be advisable to introduce some modifications into a few of the articles.

It is of fundamental importance to determine what are the basic principles of the draft articles on consular intercourse and immunities in their entirety. Since the intention of the draft is to establish a basis for a multilateral convention, such a convention would have to contain a detailed definition of the functions of a consul. Therefore, it is preferable to accept the second variant of article 4 which includes a more exhaustive enumeration of these functions.

Article 4 ought to be somewhat altered and supplemented; in particular, under paragraph 1 it should also invest the consul with the right of judicatory action (court summons) process serving inheritance cases. Neither is it exact to regard the actions of a notary as being of an administrative nature, which is implied under article 4, subparagraph 1 (c).

There are also some objections as to paragraph 2 of article 4. Considering that the relations between a consulate and the authorities of the receiving State are defined under article 37 of the draft, the said paragraph 2 of article 4 seems to be redundant. Moreover, it unnecessarily introduces a clause which, contrary to the generally accepted practice, restricts the possibilities of a consul communicating with any authorities of the receiving State located outside his district.

The Government of the Polish People's Republic deems it necessary to insert under article 4 the additional paragraph as proposed by the Special Rapporteur in section 12 of the commentary. Its terms are the logical consequence of the essential function of a consul — to wit, to protect *ex officio* the interests of the nationals of the sending State in the territory of the receiving State (article 4, subparagraph 1 (a)). Such provisions are usually contained in most of the existing bilateral consular conventions.

As it has become an increasingly frequent practice to vest the exercise of consular functions in special sections of the respective diplomatic missions, the Government of the Polish People's Republic considers it necessary to insert, after article 1, a new article which might read as follows:

"The provisions concerning the rights and duties of a consul shall accordingly apply to the official of a diplomatic mission who exercises consular functions, provided that the respective authorities of the receiving State have been duly notified. Such persons shall exercise consular functions without prejudice to their diplomatic privileges and immunities."

As the International Law Commission has asked, in section (4) of the commentary to article 8, for information on appointment of consular agents, the Government of the Polish People's Republic informs the Commission that the institution of consular agents or consular agencies is disappearing from the consular practice of Poland.

As regards article 13, under Polish Law the *exequatur* can be granted only to the head of a consular post (Law of June 17, 1959, regulating certain consular matters: the Official Gazette *Dziennik Ustaw* for 1959, No. 36, Pos. 225, and decision of the Council of State of 9 September 1959, concerning the authorization of the minister of foreign affairs to issue the consular commission and to grant the *exequatur*: *Monitor Polski* for 1959, No. 90, Pos. 485).

The stipulation of article 22 of the draft, which authorizes the receiving State to set unilateral limitations on the size of the consular staff, is unsubstantiated. In fact, it enables the authorities

of the receiving State to interfere with the work of the consulate of the sending State and to narrow it down at will, which runs counter to the prevailing practice.

Article 27 should explicitly stipulate that the provisions relating to the right to leave the territory of the receiving State in case of an international crisis do not apply to the employees of the consulate who are nationals of the receiving State. It seems that article 50 of the draft, mentioned under section 4 of the commentary to article 27, pertains solely to chapter II of the draft.

The draft says nothing about exempting the consulate from any payments in kind levied by the receiving State. A relevant stipulation might be inserted in article 32 or thereunder. Such an exemption would be in line with the existing practice and with the obligation of the receiving State to ensure the consulate the best possible conditions of work. Similar stipulations ought to be introduced also in article 48 of the draft.

The provisions of article 33 should be amended to apply as well to the correspondence addressed to the consulate by private persons. Section 4 of the commentary to article 33 fails to mention such correspondence.

It is hard to agree with the view expressed in section 2 of the commentary to article 43 that the practice of issuing special cards to members of a consulate is of a "purely technical character". The importance of the matter is borne out by the fact that the issuance of documents certifying the status of members of the consulate and of their families is stipulated in a number of consular conventions concluded recently. As revealed by the practice of States the absence of such special cards may expose the members of a consulate to unforeseen obstacles in the exercise of their duties on the part of local authorities of the receiving State.

The Government of the Polish People's Republic prefers the second text of article 65. It is more acceptable in case a multi-lateral convention is concluded since it does not infringe upon the existing bilateral consular conventions which so often reflect the specific relationship between different countries.

14. SPAIN

*Transmitted by a note verbale dated 28 April 1961
from the Permanent Mission of Spain to the United Nations*

[Original: Spanish]

This report will deal only with those articles of the draft which depart from the rules that Spain considers it possible and appropriate to accept; it will not mention the other articles to which the Spanish Government has no objection.

In accordance with the practice commonly observed in the consular conventions concluded since the Second World War, article 1 of the draft is devoted to definitions. The Spanish Government has the following comments to make on some of them:

(i) In sub-paragraph (b), the word "official" should be inserted before the word "purposes", since only premises used for the official purposes of the consulate should be regarded as the consular premises.

(ii) In sub-paragraph (d), the word "foreign" before "consul" should be deleted since in many countries the *exequatur* is granted to honorary consuls who are nationals of the receiving State.

(iii) The definition of "employee of the consulate" given in sub-paragraph (j) is too broad, and the expression should in our opinion be applied only to those employees of the consulate who perform technical or administrative tasks. The definition might be worded as follows: "The expression 'employee of the consulate' means any person who, not being a consul, performs auxiliary duties at a consulate, provided that his name has been notified to the appropriate authorities of the receiving State.

This expression shall not, however, mean drivers or other persons employed exclusively on domestic tasks or on maintenance work at the consulate."

If the definition of "employee of the consulate" is amended and restricted in this way, the definitions of "members of the consulate" and "members of the consular staff" given in article 1 will also have to be adjusted, since employees of the consulate are included in these categories.

(iv) The definition of "private staff" in sub-paragraph 1 should also be restricted so as to mean only staff in the private and exclusive service of a career consul.

(v) It would have been useful to include definitions of various other expressions, such as "sending State", "receiving State", "grave offence", "vessel", etc. etc.

(vi) There is one expression which, though it does not occur in the consular conventions recently concluded, Spain has been trying to introduce into the draft agreements which it is negotiating on this subject with various European countries. This expression, which we believe to be of positive value, is, in Spanish, "Oficial de cancelleria". It might be rendered in English by "consular officer" and in French by "agent de chancellerie".

If we inquire into the matter thoroughly, we shall see that, even if it excludes personnel employed on purely domestic tasks, the expression "employee of the consulate" as used in the draft under discussion is, as we pointed out above, excessively broad because, side by side with employees of the consulate who are nationals of the receiving State and who are in no way debarred from engaging in other gainful activities different from those on which they are employed at the consulate, there will obviously be, at the same time, another category of employees at the consulate who are nationals of the sending State, from which they receive a regular salary, and who are not free to engage in any gainful professional activity other than the official tasks they perform at the consulate.

Employees in the first of these two groups might be called "employees of the consulate" and those in the second "consular officers". Employees of the consulate in this sense are not usually granted any advantage or privilege, whereas "consular officers" are granted privileges and immunities very similar to those granted to the consul himself.

To distinguish and define these two classes of employee would be of undoubted advantage and would help to clarify these problems of consular law by improving the system of classification.

We suggest that the following definition should be considered:

"The expression 'consular officer' means any employee of the consulate who fulfils the following conditions, that is to say:

"(1) He must be a national of the sending State;

"(2) He must not be authorized to carry on a gainful private activity in the receiving State; and

"(3) He must be in receipt of a regular remuneration from the sending State."

Article 2 does not call for comment. It should, however, be pointed out that the additional paragraph 2 proposed by the Special Rapporteur, which provides that the establishment of diplomatic relations includes the establishment of consular relations, is unnecessary; there is little point in a clause having this implication.

For article 4, two texts are presented, one comprehensive and the other shorter and consequently more general. The general definition is considered preferable in Spain, for, by appearing to be exhaustive, the other definition might give rise to doubts concerning particular consular functions found to have been omitted from the definition.

Article 5 contains a series of heterogeneous, though acceptable, provisions. It might be desirable to present them in more systematic form.

Article 12 provides that heads of consular posts shall be furnished by the sending State with "full powers". This statement is, of course, exaggerated, since what the consuls receive are the powers necessary for the performance of their functions. There is no objection to the rest of the article, provided that the language is rectified in this respect.

The provisions of article 16 on the acting head of consular post are altogether acceptable, but it should be pointed out that, as in the conventions which Spain is negotiating with various countries, the general principle that the acting head of post enjoys the same status as the consul whom he replaces should be subject to the condition that the acting head of post may not enjoy the rights, privileges and immunities the enjoyment of which is subject to specific conditions which he does not satisfy (as for example, where the acting head of post is a national of the receiving State, whereas the consul was a national of the sending State).

An article should be added recognizing the now common practice whereby, with the consent of the receiving State, the sending State appoints one or more members of its diplomatic mission to discharge consular, as well as diplomatic, functions in the capital.

Article 20 might include a reference to article 51, which guarantees that the consul's rights and privileges will be respected until he leaves the country, a question which, in article 20, is at present dealt with only in the commentary.

In article 24, the term "family" should be clearly defined so as to avoid the conflicts and ambiguities of interpretation of all kinds to which this and other articles of the draft might otherwise give rise.

In this connexion it might be suggested that the "family" should be understood as consisting of the wife and the minor children who are dependent on the head of the family. Similarly, it would be necessary to provide that the private staff whose arrival and final departure have to be notified under paragraph 1 (c) of the article includes only those members of the private staff who are not nationals of the receiving State and who are employed exclusively in the service of career consuls.

As is rightly stated in paragraph 4 of the commentary, and in accordance with the provisions of article 50 of the draft, article 27 does not, of course, apply to persons who are nationals of the receiving State, although, for the sake of greater clarity — and we stress this point not only in the present context but in relation to many other parts of the draft — we would prefer this reference to article 50, which affects so many provisions of the draft, to be made, not in the commentary, but in the text itself.

And, of course, our observations on the definitions of "employee of the consulate" and "private staff" given in article 1 should be taken into account; these expressions should be used in the restricted sense attached to them in our comments.

Likewise, the "rights" given to the "private staff" by article 27 clearly can only be granted to persons who, besides being employed exclusively in the service of the career consul, are not nationals of the receiving State.

The terms of article 28 are excessively broad, since, especially in the case of the severance of relations, the obligation of the receiving State should be confined to respect for the consular archives.

Similarly, the inviolability granted to the consular premises by article 31 is too broad. It would be advisable to add that, even without the consent of the head of post, the local authorities may, in exceptional cases, enter the consular premises, provided that they produce for this purpose the appropriate court order together with the authorization of the ministry of foreign affairs of the receiving State.

Article 36 raises the problem of the freedom of communication of foreign consulates.

The draft extends this freedom to the consulate's communications, by means including the use of consular bags and cipher,

not only with its government and the embassy and other consulates of its country established in the territory of the receiving State, but also with its country's diplomatic and consular missions anywhere. This extension of the right of communication is at variance with the principle of the treaties to which Spain is a party, and which provide that direct and secret communication of this kind is allowed, in principle, only with the government of the sending State and with its diplomatic mission and consulates in the territory of the receiving State.

A provision might be added under which it would be possible to verify that the consular bags contain only official correspondence and documents, e.g., permission to open the bags, in cases of serious suspicion, in the presence of a duly authorized official of the consulate.

In article 40, paragraph 1, we prefer the formula, suggested by the text itself: "Except in the case of an offence punishable by a heavy penalty."

We have no objections to articles 41, 42, and 43, provided that the stipulations of article 50 of the draft are taken into account generally and provided that the narrower definitions of "employee of the consulate" and "private staff" suggested in the comments on article 1 are accepted. The privilege of giving evidence at his own residence, to which article 42, paragraph 2, refers, should, it seems, be granted to career consuls only.

Article 45 (Exemption from taxation) should apply only to career consuls and to those employees of the consulate (according to our suggestion, they would be called "consular officers") who, under the direction of a consul, carry out an administrative, technical or similar task at a consulate of the sending State and who, being nationals of the sending State, do not carry on in the receiving State any gainful activity other than their official duties, for which they receive a regular salary. The words "and members of their families" in paragraph 1 should be deleted. The whole of paragraph 2 should also be deleted.

Article 46 (Exemption from customs duties) is acceptable, even in its present broad and vague wording, with the limitation and safeguard embodied in the text, which provides that "the receiving State shall, in accordance with the provisions of its legislation, grant . . ."

Furthermore, the article stipulates that the exemption is to be granted to members of the consulate "who do not carry on any gainful private activity." It is noted that paragraph (4) (b), of the commentary on this article states that, by virtue of article 50, the exemption from customs duties does not apply to members of the consulate who are nationals of the receiving State. In effect, therefore, article 46 applies only to the persons mentioned in this government's comments on article 45.

Article 48 should apply to the persons mentioned in this government's comments on article 45.

Article 49 affects the persons mentioned in article 45 and their wives and minor children.

Article 50, which is fully acceptable and to which it is necessary to refer so often in the other articles of the draft, is very important.

Article 50 ought to be cited and referred to frequently in the provisions of the draft; this government does not agree with the practice of citing the article in the commentaries.

Article 51 is consistent with present international practice, except for the last sentence of paragraph 3, which provides that in respect of acts performed by members of the consulate in the exercise of their functions, immunity from jurisdiction continues to subsist without limitation of time. This statement conflicts with present customary law, not only in consular but also in diplomatic relations. It is well known that if a person returns to a country without the diplomatic status which he had enjoyed during his former residence there, proceedings may be instituted against him which at that time were barred by the privilege of immunity from jurisdiction.

Article 52 represents an innovation rather than a codification. At the present stage of development of the international community, the rule laid down in this article is perhaps rather premature and actually open to objection on political grounds.

There is no objection to paragraphs 1 and 2 of article 53. Paragraph 3, on the other hand, is somewhat confusing. It says that offices of other institutions or agencies may be installed in the consular premises, provided that the premises assigned to such offices are separate from those used by the consulate; in that event the said offices are deemed not to form part of the consular premises.

As at present drafted, this provision is absolutely incompatible and at variance with the definition of "consular premises" given in article 1 (b). Perhaps what is meant is that the offices of such institutions or agencies may be situated in the same building or, using the word in a general sense, premises, as the consular premises; but they cannot, of course, be situated in the consular premises in the technical and precise sense given to that expression in article 1. The wording of paragraph 3 of this article should therefore be revised.

It seems advisable to enter a reservation regarding paragraph 2 of article 54. This paragraph enumerates the articles of chapters II and IV of the draft which are applicable to honorary consuls. The reservation concerns the application of articles 32, 42 paragraph 2, and 52 to honorary consuls.

There is no objection to article 55, which provides for the inviolability of the archives, documents and official correspondence of a consulate headed by an honorary consul, provided that they are kept properly separated from the honorary consul's private correspondence, books and documents.

There is no objection to article 57 (Exemption from obligations in the matter of registration of aliens and residence and work permits), provided that the exemption is confined, as stated in the commentary, to honorary consuls and members of their families who do not carry on a gainful private activity outside the consulate.

Similarly, the provisions of article 58 are acceptable, if the honorary consul is not a national of the receiving State.

Article 59 would be acceptable if confined to honorary consuls who are not nationals of the receiving State and if its benefits did not extend to members of the families of honorary consuls.

Lastly, two texts are offered for article 65, concerning the relationship between the draft and bilateral conventions. The first text is based on the idea that existing bilateral conventions would be abrogated by the entry into force of the multilateral consular convention.

The second text, on the other hand, would leave the previously concluded bilateral conventions in force.

Since a convention based on these articles would necessarily be of a general nature, it seems advisable to give the preference to the second text, under which the more detailed regulation of consular matters in existing bilateral conventions would not be affected by the inevitably more restrictive provisions of a multilateral convention.

15. SWEDEN

Transmitted by a letter dated 14 March 1961 from the Acting Deputy Head of the Legal Department of the Royal Ministry for Foreign Affairs

[Original: English]

The Swedish Government has studied with interest the draft articles now presented by the Commission and has found that they form a suitable basis for the codification and the development of international law on the subject of consular intercourse

and immunities. It is generally left to the future parties to the convention to decide whether they shall establish consular relations and to agree on the seat and the district of their consulates and, to a considerable extent, on the status, rights and privileges of the consuls and their functions. It can therefore be said that the main value of a future convention in this field lies in the fact that it offers a model text for bilateral consular conventions and at the same time subsidiary provisions where consular relations exist between States which have not concluded a formal convention to this effect or which have a convention not containing more detailed provisions.

On the whole, the Swedish Government can approve the draft articles of the Commission but must naturally reserve any final position with regard to their contents. Proposals for minor changes in the drafting of the various articles would, it is felt, preferably be advanced at a later stage of the preparatory work on the draft convention, and the Swedish Government will at this juncture limit itself to submitting the following observations in relation to the below-mentioned articles:

Article 4: Consular functions

The purpose of a convention on consular intercourse and immunities should apparently be to create rights for the sending State and its consular officials and to determine the corresponding obligations for the receiving State. Thus it follows that there should be no place in such a convention for articles solely containing desiderata, recommendations or advice of a general nature.

In addition, the functions of consular officials are set forth in instructions and regulations promulgated by the sending State; the extent to which the consular official is able to carry out these functions is dependent upon the relevant legislation and practice of the receiving State and the additional contractual obligations accepted by it. Looking at these facts from another angle, it can be said that the receiving State must not — by referring to the internal instructions of the sending State — require a consular official of the latter State to exercise certain functions or otherwise take steps to a certain end, for instance on the pretext of the consular official's duty to help and assist his own nationals, to refuse public assistance or medical care to a destitute or sick alien.

The wording of article 4 of the draft convention in either version does not always meet the two requirements just mentioned.

When weighing the two variants of article 4 against each other, it can be maintained that long experience has shown substantial difficulties to exist when hammering out the text of articles on consular functions for insertion in bilateral consular conventions. Evidently, it must be far more complicated, or sometimes even quite impossible, for a body of more than ninety States to reach agreement in this sphere on texts that will be of a practical value and not only contain highly watered-down texts or recommendations in general terms. If, on the other hand, elaborate clear-cut definitions are inserted in the Convention, numerous reservations can be expected, thus depriving the articles of their inherent significance. These considerations lead the Swedish Government to the conclusion that the only realistic approach in this field is to abandon all attempts at producing texts on the consular functions copied from the corresponding texts of bilateral conventions and to be contented with a broad definition on the lines of article 4, paragraph 1, the second variant:

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

Article 8: Classes of heads of consular posts

The class of "consular agents" is in principle not recognized by the Swedish Foreign Service. However, for some time past consular agents have in a few exceptional cases been appointed by Sweden. Their position is very similar to the status of an honorary vice-consul, but the essential difference lies in the fact that they merely represent a consul at a place other than the seat of the consulate but within the same consular district. They are appointed not by the consul but in exactly the same manner as vice-consuls. There is no desire on the part of Sweden for the retention of consular agents as a special class, and reference to this expression could therefore advantageously be omitted in the Convention.

Article 12: The consular commission

A consular commission is made out by Sweden for each appointment of a consul, even in the case that the new appointment only signifies a change in the consular district within the receiving State.

Article 40: Personal inviolability

According to paragraph 2 of this article, a consular official shall not be committed to prison save in the execution of a final sentence of at least two years' imprisonment. In the commentary to this rule the exemption from imposition of punishment is based upon two considerations, to wit (i) the functioning of the consulate should not be interrupted, and (ii) in many countries a suspended sentence may be awarded. These two reasons for the exemption here referred to may be questioned because, in the first place, it is unlikely that a person who has been sentenced to imprisonment in the receiving State is retained by the sending State in his position as consul, and, secondly, that a suspended sentence can in certain circumstances be revoked and another sanction imposed, while it can be inferred from the commentary that the punishment should be entirely cancelled.

Article 41: Immunity from jurisdiction

Section 2 of the commentary points out that the immunity from jurisdiction is granted consuls not as a personal immunity for them but as an immunity that the sending State possesses and consequently is limited to official acts. This being so, there is no real reason for establishing any discrimination between official acts performed by consuls who are nationals of the receiving State and consuls who are not such nationals, a distinction that seems to have been made in articles 41 and 50. Article 50 dealing with the former category of consuls uses the expression "official acts performed in the exercise of their functions", whereas the word "official" does not figure in article 41, although the commentary indicates that the immunity set forth in this article exclusively comprises official acts.

Article 45: Exemption from taxation

As is the case with the corresponding article of the draft convention on diplomatic intercourse and immunities, this article on tax exemption contains no limitations of the expression "members of their families". Under Swedish legislation on this point tax exemption is accorded the wife of a consular official and his children under the age of eighteen years, provided that the children live with him and are not Swedish nationals. A corresponding definition in this article seems desirable in order to avoid too extensive an interpretation of the expression "members of their families".

Article 46: Exemption from customs duties

Section 2 of the commentary to this article states that the Commission decided to include in this article provisions on exemption from customs duties for members of a consulate identical to the

provisions suggested in the draft articles on diplomatic intercourse and immunities. As drafted, article 46 accords, however, exemption from customs duties also to employees of the consulate, whereas the corresponding category is excluded from this privilege in the draft articles on diplomatic intercourse and immunities. In the opinion of the Swedish Government, members of a consulate should never enjoy more extensive privileges than members of a diplomatic mission.

16. SWITZERLAND

Transmitted by a letter dated 29 May 1961 from the Permanent Observer of Switzerland to the United Nations

[Original: French]

The competent authorities of the Swiss Confederation have carefully studied the draft articles on consular intercourse and immunities prepared by the United Nations International Law Commission and are happy to have this opportunity to state their views on the draft. In view of the importance which Switzerland attaches to its consular relations with other States, the Swiss authorities follow with the greatest interest the work of the United Nations in codifying the law of nations. They hope that the preparation of a final convention will be entrusted to a diplomatic conference of plenipotentiaries in which Switzerland will be able to take part.

The Swiss authorities consider that the principal purpose of the present codification of the law of consular intercourse should be to formulate, in satisfactory terms, the rules at present applicable, the law being allowed to evolve in bilateral and multilateral relations. Accordingly, the convention should confine itself to laying down a minimum of rights and duties, leaving the States concerned free to stipulate *inter se* other rights and duties by means of international conventions.

The draft articles are largely in keeping with this idea. In the opinion of the Swiss authorities, they represent a useful basis for the preparation of a general convention on consular intercourse. Some provisions of the text, however, depart greatly from Swiss practice; in so far as they affect questions of principle, these provisions are therefore hardly acceptable to the Swiss authorities.

Unlike other States, Switzerland has not concluded any bilateral consular treaties in recent years. Apart from general provisions contained in treaties of friendship, establishment and commerce, Swiss practice is based mainly on customary law, which in turn is based on the principle of reciprocity. For this reason the Swiss authorities consider that the future convention should contain a general provision stipulating that questions not expressly settled by the convention continue to be governed by customary law.

Article 1

(a): The draft uses the terms "consulate" and "consul" in two different senses. Such definitions, which might lead to misunderstandings, should be avoided. It would be advisable to introduce here the expression "consular post", which might also be used in other articles.

In Swiss practice, consular agencies are not consular posts in the full sense of the term. They are not in direct contact with the government of the sending State; they are merely organs intended to assist consular posts in the discharge of their duties. They have no consular district of their own; the scope of their activities is limited to a part only of the district of the consular post to which they are subordinate. Consequently, consular agents are not heads of consular posts. The functions they exercise are limited, and they enjoy no privileges. No consular commissions are issued to them and they are not granted the *exequatur* of the receiving State. Consular agencies should therefore not be referred to in the convention, and the States concerned should be left to settle the admission of consular agencies and agents and the definition of their legal status by bilateral conventions.

(f) and (g): To avoid the difficulties which may arise out of the double meaning of the term "consul", as used in the draft articles, the expression "head of consular post" should be defined at the outset in (f); this definition might be worded as follows:

"(f) The expression 'head of consular post' means any person appointed by the sending State to be in charge of a consular post as consul-general, consul or vice-consul and authorized to exercise those functions in conformity with articles 13 or 14 of this draft."

This definition would be more accurate than the present text, for articles 13 and 14 concerning the *exequatur* and provisional recognition to which this definition refers, apply merely to heads of posts (see paragraph 7 of the commentary on article 13).

(i): The expression "senior consular officials" which is current in the practice of many States, including Switzerland, should be introduced after the definition of head of post; it denotes the members of consular posts who, though not heads of posts, exercise consular functions and have a consular title. Senior consular officials might be defined as follows:

"The expression 'senior consular official' means any person, other than a head of post, who is duly appointed by the sending State to exercise consular functions in the receiving State and who bears a consular title such as deputy consul-general, consul, deputy consul or vice-consul."

Article 2

In conformity with the Special Rapporteur's proposal reproduced in paragraph 3 of the commentary, a second paragraph of article 2 should provide that the establishment of diplomatic relations includes the establishment of consular relations. Such a provision would be in keeping with general practice, under which diplomatic missions may exercise consular functions in cases where the sending State has no consular posts in the receiving State or where the districts of existing consular posts do not cover the whole of the receiving State's territory. This would not, however, settle the question whether the head of the diplomatic mission or the member of the mission who heads the consular section of that mission requires an *exequatur*. Under Swiss practice an *exequatur* is not necessary in such cases.

Article 4

In view of the very great diversity of State practice, it seems impossible to enumerate, in a general convention, all consular functions in detail. Hence, only a restrictive enumeration of broad categories of functions can be considered. The text of paragraph 1 is accordingly preferable to the detailed variant reproduced in paragraph 11 of the commentary.

(a): The reference to the protection of the interests of the sending State may lead to misunderstandings, for this is more properly one of the diplomatic functions. It is self-evident that the consul always acts in the interests of the sending State. This reference should therefore be deleted or spelt out in restrictive terms.

(c): The consul's function as registrar is permissible only if registries of births, marriages and deaths do not exist in the receiving State or if that State permits the exercise of such functions by consuls even though it has its own registries. The condition that there must be no conflict between consular functions and the law of the receiving State applies in this case, too. (In this connexion, see, in paragraph 9 of the detailed list of consular functions, the express proviso concerning the consul's right to solemnize marriages). The exercise of other administrative functions should also be subject to this condition. (For the details, see the comments below on the list of consular functions.)

(f): Like his other functions, the consul's function of acquainting himself with the economic, commercial and cultural life of

his district can be exercised only subject to the law of the receiving State, in particular, to the provisions of the penal code regarding the protection of the security of the State.

Detailed list of consular functions (paragraph (11) of the commentary): Apart from the general reservation set forth above, the following observations are relevant to this definition.

Clause 6: In connexion with the appointment of guardians or trustees for nationals of the sending State, the consul is not qualified to submit nomination to the court for the office of guardian or trustee; at most he may recommend such persons to the judge. Nor should the consul have the power to supervise the guardianship or trusteeship. Such supervision would constitute interference in the domestic affairs of the receiving State. In the case of Switzerland, such a provision is the more superfluous as Swiss law gives the authorities of the country of origin of foreign nationals the possibility (subject to reciprocity) to exercise the guardianship or trusteeship.

Clause 7: The right to represent heirs and legatees in cases connected with succession without production of a power of attorney can be recognized only on condition that such representation is in accordance with the wishes of the persons concerned.

Clause 10: Under Swiss law, acts relating to judicial assistance are official acts which can be performed only by the competent authorities of the receiving State. For this reason Switzerland has not concluded any agreement granting such powers to consuls. A provision under which consuls may perform acts of judicial assistance would be acceptable to Switzerland only if subject to the condition that the express consent of the receiving State is necessary.

Clause 13: The consul's right to receive for safe custody articles and documents belonging to nationals of the sending State does not apply in the case of articles and documents which have played a part in the commission of criminal offences. Should such a provision be inserted in the convention, it would have to be qualified by a specific proviso, unless it is clearly laid down that the general saving clause regarding respect for the law of the receiving State covers this point.

Clause 14: The consul's competence to further the cultural interests of the sending State should be defined restrictively, in order to avoid improper interference in the domestic affairs of the receiving State.

Clause 16: See the observation above under (f) concerning the protection of the security of the State.

Clause 17: This general provision goes too far. To empower the consul to perform any additional functions the performance of which is not prohibited by the laws of the receiving State would invite malpractices. It would be more correct to refer merely, as in clause 1, to the functions the exercise of which is compatible with the laws of the receiving State.

Additional article to be inserted after article 4 (Proposal by the Special Rapporteur in paragraph 12 of the commentary): This provision, under which the consul may provisionally represent nationals of the sending State before the courts and other authorities of the receiving State until the persons in question have appointed an attorney or have themselves assumed their defence, should, perhaps, be supplemented by a provision stating that the consul's participation in proceedings in such circumstances does not *per se* satisfy the condition that both sides must have had an opportunity to present their case.

Article 4

Paragraph 2: The final passage of this provision should be re-drafted to read more clearly: "... a consul... may deal only with the regional and local authorities." In Switzerland consuls deal mainly with the cantonal authorities.

Article 5

(b) The duty of the receiving State to notify the consul of cases where the appointment of a guardian or trustee appears to be in the interests of a national of the sending State appears acceptable, provided that the notification does not prejudice the competence of the receiving State as regards the execution of such measures.

(c) It would be advisable to provide that the receiving State must notify the consular post not only where a vessel of the sending State is wrecked or runs aground, but also in case of any accident involving aircraft registered in the sending State (see article 4, paragraph 1 (d)).

Article 6

(a): This provision should state clearly that the consul's right of access to the nationals of the sending State may not be exercised against the freely expressed wishes of the persons concerned.

(b): Cases where it is necessary to hold a person *incomunicado* for a certain period for the purposes of the criminal investigation should be expressly referred to in the provision itself and not in the commentary (paragraph 7), as is now the case. Moreover, the duty of the receiving State to inform the consul of the arrest or imprisonment of a national of the sending State should be limited to cases where the person arrested or imprisoned expressly desires such a communication to be made.

(c): The consul's right to visit a national of the sending State who is detained or imprisoned should be limited, as suggested under (a) above, by a clause providing that such right may not be exercised against the freely expressed wishes of the person concerned. Moreover, as regards persons detained for the purposes of a criminal investigation, the right of the examining magistrate to authorize visits in the light of the requirements of the investigation should be referred to in the text of the convention itself and not in the commentary (paragraph 5). The general reservation in paragraph 2 — viz., that the freedoms referred to in paragraph 1 shall be exercised in conformity with the laws and regulations of the receiving State is too heavily qualified by the proviso immediately thereafter — viz., that the said laws and regulations must not nullify these freedoms.

Article 8

As indicated above in connexion with article 1, Swiss practice does not regard consular agents as heads of consular posts. Under this practice, consular agents are appointed by the competent authorities of the sending State. They are merely recognized by the Federal Political Department; a federal *exequatur* is not issued to them. They have no jurisdiction of their own and are the representatives, in the district in which they discharge their functions, of the authority which appointed them. As a rule, they enjoy no privileges.

Article 9

This provision is not very clear because, as mentioned earlier in connexion with article 1, no clear distinction is drawn between the head of a consular post and a consular official who, though not head of a post, has a consular title.

Article 12

The three paragraphs of this article clearly relate to heads of consular posts, for none but heads of posts are furnished with consular commissions. This point is not made sufficiently clear in the text, the word "consul" being used in different senses in the draft articles.

In Swiss practice, heads of consular posts are furnished with a new consular commission and a new *exequatur* whenever a change is made in the consular district; the same applies whenever a change occurs in the rank of the head of post.

Article 13

This article regulates the recognition of the head of the consular post only. An express provision relating to the recognition of consular officials other than heads of posts is missing. The commentary (paragraph 7) merely points out that these officials do not require an *exequatur* and that notification by the head of post is sufficient in their case. This point should be dealt with in a special provision. It should also be made clear that officials other than heads of posts do not enjoy privileges and immunities until the receiving State has recognized them after due notification (see the comments on articles 23 and 51).

Article 14

It is not correct to say (as does the commentary, paragraph 4) that the provisional recognition of the head of a consular post imposes on the receiving State the duty to accord all the privileges and immunities provided for in the draft articles. Such a statement might lead to difficulties if the *exequatur* should be refused; this would happen particularly where exemption from customs duties has been granted provisionally. It would therefore be sufficient to say:

"Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, he will enjoy the customary immunities in respect of acts connected with his functions."

Article 16

Paragraph 1: This article should mention the authorities competent to appoint the acting head of a consular post.

Paragraph 2: Inasmuch as the acting head discharges his functions on a temporary basis, there appears to be no justification for according to him all the privileges of the titular head of post.

Article 17

Paragraph 2: The date of provisional recognition should not automatically determine the precedence of the head of post. The receiving State should be left free to determine the order of precedence of heads of consular posts either in accordance with the date of provisional recognition or with that of the grant of the *exequatur*.

Paragraph 3: Since the commission is frequently presented after the grant of the *exequatur*, the date of such presentation should not be used to determine the order of precedence; it would be better to provide as follows:

"If several heads of posts obtained the *exequatur* or provisional recognition on the same date, the order of precedence as between them shall be determined according to the date of the application for the *exequatur*."

Paragraph 5: Acting heads of posts should, like acting "chargé d'affaires", rank, as between themselves, not according to the order of precedence of the titular head of post, but according to the date of the notification of their entry on duty as acting heads of posts.

Article 19

Where the head of a consular post bears the title of consul-general-*chargé d'affaires*, each State should be free to make the grant of diplomatic status to such a head of post subject to the condition that he resides at the place where the seat of the government is established (as is the case for heads of diplomatic missions).

Article 23

It should be expressly provided that if the receiving State regards a consular official as not acceptable, it shall not be required to state the reasons for its decision.

It is not sufficient — as does paragraph 2 of the commentary — that a member of the staff of a consular post may be declared not acceptable before his arrival in the receiving State, since the person in question may enter the territory of the receiving State or take up his duties at the moment of notification. A provision should therefore be included to the effect that consular officials do not enjoy privileges and immunities until the receiving State has approved their appointment after due notification (see the comments on articles 13 and 61).

Article 27

Private staff should be excluded from the benefit of paragraphs 1 and 2. Such staff enjoy no privileges in Switzerland.

Article 29

The right of the consulate to fly the national flag should be limited in view of the difficulties which the receiving State may experience in carrying out its obligation to protect the flag.

Paragraph 1 should accordingly be qualified as follows:

“The consulate shall have the right to fly the national flag in conformity with the usage of the receiving State and to display . . .”

Paragraph 2 should be deleted; the right to fly the national flag on personal means of transport should be limited to heads of diplomatic missions.

Articles 30 and 31

Like article 22 covering the size of the consular staff, the articles on accommodation and the inviolability of consular premises should contain a provision for an appropriate limitation as regards the premises having regard to circumstances and conditions in the consular district and to the needs of the consulate.

Article 35

The convention should stipulate freedom of movement for members of consular posts in respect of the consular district only. This freedom may be extended to cover the rest of the territory of the receiving State, subject to reciprocity.

Article 36

To accord to consular posts an unlimited right to use the diplomatic bag and diplomatic couriers seems unjustified. If the sending State has a diplomatic mission in the receiving State, the official correspondence of consular posts should be routed through that mission. At the very least, the use of the diplomatic bag and of diplomatic couriers should be subject to reciprocity.

Article 40

Swiss practice does not recognize the personal inviolability of consuls. However, such inviolability might be admitted in principle for heads of consular posts and conceivably also for consular officials who, though not heads of posts, have a consular title. But the system provided for by the convention is extremely complicated and may lead to glaring inequalities of treatment according to the national laws concerned.

Paragraph 1: This provision denies the benefit of personal inviolability in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment. An itemized provision appears preferable to the variant referring to “a grave crime”. However, in view of the diversity of criminal law, the expression “sentence of imprisonment” should be replaced by a more general expression such as “sentence involving deprivation of liberty”.

Under Swiss criminal law, many offences which constitute “grave crimes” are punishable by imprisonment (the maximum

term of which is three years) and not by rigorous confinement (réclusion*). In the light of the principles of Swiss law, the decisive criterion would be a sentence of three, not of five, years' imprisonment. If such a change cannot be made, the Swiss authorities would prefer the variant: “except in the case of a grave crime.”

Article 42

Paragraph 1: Only heads of consular posts and consular officials who, though not heads of posts, have a consular title should be exempt from coercive measures if they decline to attend as witnesses.

Paragraph 2: Provision should be made for the possibility of written testimony, subject of course to the proviso that such testimony is permitted by the law of the receiving State.

Article 43

With regard to exemption from obligations in the matter of the registration of aliens, residence and work permits, the circle of members of the family should be limited. In addition, it would be desirable to specify in what circumstances the members of the family are deemed to form part of the household.

Furthermore, private staff should be excluded from the exemption granted under this article.

Article 45

The general tax exemption granted by this article should not be accorded to employees of the consulate who perform only administrative and technical duties.

The commentary should explain that the tax exemption may also be accorded in the form of reimbursement.

The circle of members of the family benefiting from tax exemption should be limited to the spouse and the children under age and, in exceptional cases, to other relatives forming part of the official's household. This remark also applies to all the other articles which accord privileges and immunities to members of the family.

(a) This provision is too restrictive; it should cover all indirect taxes, whether they are incorporated in the price of goods or services or added to that price.

Article 46

(b) The exemption from customs duties should be limited to heads of consular posts and to consular officials who, though not heads of posts, have a consular title.

As regards the members of the family, see article 45.

Article 47

As regards the members of the family, see article 45.

Article 48

As regards the members of the family, see article 45. The domestic staff should be excluded from the benefit of this article.

Article 49

In so far as this article relates to the case of a woman member of the consulate who marries a national of the receiving State, it conflicts with the Swiss constitutional principle of the unity of the family (article 54 of the Federal Constitution), under which a foreign woman who marries a Swiss national acquires her husband's nationality by her marriage. The Swiss authorities therefore propose that the words “except in the case of marriage” should be inserted in article 49.

* “Réclusion” may be ordered for a term of five to ten years [Translator's note].

Article 51

Paragraphs 1 and 2 should be amplified by a provision to the effect that new members of the consulate should in all cases, whether they arrive in the receiving State or are already in that State, enjoy privileges and immunities from the time when the receiving State has approved their appointment and not from the time their appointment was notified to that State (see comments on articles 13 and 23).

Article 52

The obligations of third States with regard to consular officials passing through their territory on their way to their duty station or on returning to their country should be limited to cases of direct transit by the shortest route.

Article 54 et seq.

The regulations set forth in chapter III on honorary consuls appear acceptable in their essentials. They are not, however, adequate in so far as they do not differentiate clearly between the personal position of honorary heads of consular posts and other honorary consular officials who, though not heads of posts, have a consular title, on the one hand, and the position of a consular post headed by an honorary consul, on the other.

In Swiss practice, the legal status of a consular post, in all matters relating to the exercise of functions, does not depend on whether the head of the post is a career consul or an honorary consul. This distinction is important only from the personal point of view, as the draft articles very properly provide.

Article 54

In conformity with the above comment, this article should more properly be entitled: "Legal status of honorary consuls and of consulates in the charge of honorary consuls".

Article 31 relating to the inviolability of consular premises and article 53, paragraphs 2 and 3, which prohibit the improper use of consular premises, should be included among the provisions referred to in article 54. Article 54, paragraphs 2 and 3, which clearly lay down the limits within which consular premises may be used, are most important in the case of honorary consuls who carry on a gainful private activity. Inasmuch as it is possible to take account of this particular situation under article 31, read in conjunction with article 53, there would be no need, if these two provisions were made applicable by article 54, for a special article on the inviolability of the premises of a consulate headed by an honorary consul on the lines of article 55 concerning the inviolability of archives.

Article 55

To cover the case where the honorary consul does not occupy premises used exclusively for consular purposes, this provision should be amplified in the following manner:

"The consular archives, the documents and the official correspondence, and also any articles intended for the official use of a consulate headed by an honorary consul shall be inviolable . . ."

Article 57

In Switzerland, honorary consuls must comply with the obligations in the matter of registration of aliens, residence permits, and work permits. These obligations can hardly be waived in the case of honorary consuls.

Article 58

This provision should specify more clearly that the tax exemption of honorary consuls applies only to the appropriate reimbursement of expenses incurred but not to any salary which may be

paid by the sending State, for this salary can only with difficulty be distinguished, for taxation purposes, from income derived from a private gainful activity.

In any case, as the commentary points out, honorary consuls who are nationals of the receiving State should not be exempt from taxation.

Article 62

In Switzerland, no distinction is made between career consuls and honorary consuls in the matter of precedence. The system provided for by the convention, however, appears to be preferable.

Article 65

The Swiss authorities prefer the second text, which, while leaving the parties free to conclude further bilateral conventions concerning consular intercourse and immunities, automatically maintains in force the existing bilateral consular conventions.

17. UNION OF SOVIET SOCIALIST REPUBLICS

Transmitted by a note verbale dated 24 March 1961 from the Permanent Mission of the Union of Soviet Socialist Republics to the United Nations

[Original: Russian]

The competent USSR authorities have the following comments to make on the draft articles on consular intercourse and immunities prepared by the International Law Commission at its twelfth session:

1. Article 1, in which the terms and expressions used in the draft are defined, needs to be made more specific. In particular sub-paragraph (e) should be worded as follows:

"The expression 'consular archives' means all documents, official correspondence and the consulate library, as well as any article of furniture intended for their protection or safe-keeping."

2. Article 2 states that the establishment of consular relations takes place by mutual consent of the States concerned. The article should state, further, that the establishment of diplomatic relations includes the establishment of consular relations.

3. Article 3 (5) states that the consent of the receiving State is required if the consul is at the same time to exercise consular functions in another State.

This paragraph should be excluded from the draft.

4. The Special Rapporteur proposed an additional article on the right of a consul to appear *ex officio* on behalf of nationals and bodies corporate of the sending State before the courts and other authorities of the receiving State until the persons or bodies in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

This article should be included in the draft.

5. Article 5 (c) states that the receiving State shall have the duty to inform the consulate if a vessel flying the flag of the sending State is wrecked or runs aground. This paragraph should be extended, *mutatis mutandis*, to cover aircraft.

6. Of the two variants of article 65, which deals with the relationship between these articles and bilateral conventions, the second is preferred.

7. A new article should be included in the draft in the following terms:

"1. The provisions of these articles regarding the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions and of whose appointment the ministry of foreign affairs of the receiving State has been notified by the diplomatic mission concerned.

"2. The diplomatic privileges and immunities to which any such persons may be entitled shall not be affected by their carrying out consular functions."

8. The above comments on the draft articles on consular intercourse and immunities are not exhaustive. The competent USSR authorities reserve the right to put forward additional comments and suggestions at an appropriate time.

18. UNITED STATES OF AMERICA

Transmitted by a note verbale dated 6 April 1961 from the Permanent Representative of the United States of America to the United Nations

[Original: English]

General

The Government of the United States is of the opinion that the International Law Commission should be commended for its work on the subject of consular intercourse and immunities, as reflected in chapter III of the report covering the work of its twelfth session (A/4425). The draft articles, with commentary, formulated by the Commission indicate generally the areas in which the practice of governments is sufficiently uniform to warrant its codification or incorporation in a treaty, and also the areas in which, while present practice varies, it is desirable that uniform rules be formulated.

Governments have long recognized the value of treaty provisions as a means of regulating the conduct of consular relations and the status of consular personnel. A general multilateral convention containing provisions on the most important matters and on which governments generally agree, would be desirable.

The United States offers the following general observations on the draft articles on consular intercourse and immunities:

1. Many provisions correspond to provisions in the draft articles on diplomatic intercourse and immunities adopted by the Commission at its tenth session (A/3859), to be considered by the Conference of Vienna convened March 2-April 15, 1961. It is assumed that the Commission will be guided by the decisions of the Conference, to the extent that such decisions may be applicable. In particular, language agreed to at Vienna should be incorporated in corresponding consular provisions, except where changes appear warranted by the differences in status and duties of diplomatic and consular officers. In no case should the revised draft articles grant to consular officers or employees personal privileges, exemptions and immunities in excess of those accorded diplomatic officers and employees.

2. The draft articles should cover only those matters essential to the effective functioning of a consular establishment and the comfort and security of its personnel. Differences between governments which involve domestic law and local practice applicable to the rights and duties of consular officers usually may be resolved more easily in bilateral agreements than in multilateral agreements.

3. The draft articles appear to place too much emphasis on "heads of consular posts". The phrase might be replaced by "officers of consular posts" or "consular officers", except when it is necessary to single out the principal officer. The position of head of a consular post is not really comparable with that of head of a diplomatic mission. An American ambassador, minister or chargé is the official representative of his government and members of the mission merely assist him in the performance of his functions. In contrast, the head of a consular post, at least under American law, possesses no more authority in certain substantive matters than subordinate consular officers on his staff. American consular officers are individually responsible for the proper performance of their statutory duties. The Secretary of State, the chief of the diplomatic mission, and the principal

officer at the consular post may advise an American consular officer, but they may not direct or require him to perform or omit to perform certain acts.

The post of principal officer at a consular establishment thus has significance only with respect to matters of precedence and rank, and the exercise of supervisory responsibilities. Matters of precedence and rank are believed best left for regulation in accordance with local custom. Their supervisory responsibilities are essentially a matter of internal administration.

4. The draft articles should not distinguish the status of permanent residents from that of nationals of the receiving State. Persons in the receiving State as immigrants or stateless persons recruited locally should enjoy no more favourable status than nationals of the receiving State in which they reside.

5. The Commission's proposals as to exemption of consular officers from territorial jurisdiction are interesting, and merit consideration. It is pointed out, however, that the activities of consular officers affect private rights to a degree not usually permitted in the case of diplomatic officers. Moreover, consular officers often reside in remote places where they are beyond the watchful eyes of the chief of their diplomatic mission and the foreign office of the receiving State, and where the local authorities and the press may be ignorant of the standards of conduct to be expected of them. The fact that they are generally subject to local jurisdiction has perhaps contributed to their general good behaviour.

The Commission might also undertake to suggest a more precise rule as to the categories of persons exempt from territorial jurisdiction, and the circumstances under which such persons are to be exempt. If the exemption is for the benefit of the sending State — e.g., protection of archives — neither rank nor nationality nor place of residence should be a factor.

6. Immunity on the grounds that the action involves "official acts" should be limited to cases where the sending State assumes responsibility for the act, with provision for waiver of immunity, or lack of immunity in other cases. A consul who may embezzle money entrusted to him in his official capacity by private persons or by courts for transmission to his absent countryman, should be subject to a civil suit for recovery. Perhaps, if the sending State is unwilling to assume responsibility for his act, he should be subject to criminal prosecution in certain cases.

7. The draft articles show overlapping problems of sovereign immunity and consular immunity. Are all consular acts to be considered "governmental" in nature? What about consular officers from state-trading countries who engage in commercial transactions of the sort which would normally be litigated in the courts? May receiving States adhering to the restrictive theory of sovereign immunity determine on a case-to-case basis whether a given function of a consular establishment was a private rather than a public activity of a foreign sovereign — thus making the immunity from jurisdiction illusory?

8. The commentary contains much material which, if intended to have binding effect, should be embodied in the substance of the articles to which it relates.

The United States offers the following additional comments with respect to certain specific provisions:

Article 1

(a) It is suggested that "or" be deleted, and a comma inserted therefor, and that the words "or other consular establishment" be added after "agency". This will allow for the variations in nomenclature which inevitably develop over the years.

(d) The term "exequatur" has not been used by the United States as "the act whereby the receiving State grants to the foreign consul final recognition", but has been limited to apply only to documents of recognition bearing the signature of the head of

the receiving State which have been issued to foreign consular officers on the basis of a commission of appointment signed by the head of the sending State. Certificates of recognition bearing the signature of the Secretary of State are issued on the basis of other documentary evidence of appointment. Nevertheless, there may be merit in defining *exequatur* as final authorization, whatever the form, to exercise consular functions, and eliminating the necessity of heads of state having personally to sign commissions of officers granted *exequaturs*.

(f) The United States would prefer omission of the hyphens.

(g) In lieu of "consulate" insert "consular establishment". The head of the post must have been accorded recognition by the receiving State as a consular officer.

(h) This paragraph might be combined with paragraphs (j) and (k), with clarifications, as there seems to be some overlapping.

(i) The United States objects to this provision. Most governments now accord dual accreditation to certain persons as members of diplomatic missions and also as consular officers. The United States also recognizes in a consular capacity a few members of permanent delegations to the United Nations, where the total representation in the United States of the government concerned is small, and denial of dual accreditation, under the circumstances, would result in undue hardship.

The term "consular officer" may appropriately be used in a generic sense.

Article 2

The United States agrees that consular relations may be established (or maintained) between States which do not maintain diplomatic relations. It disagrees, however, with any statement to the effect that the establishment of diplomatic relations automatically includes establishment of consular relations.

Article 3

The seat of the consular post and the limits of the district should be determined by mutual agreement. The agreement as to the seat and the initial district should probably be express. Agreement as to subsequent changes in limits of the district might be through notification from the sending State, to be considered final in the absence of objection by the receiving State.

Paragraph 3, read literally, provides that a sending State may not close a consular post without the agreement of the receiving State. As no such result is intended, the paragraph should be revised.

The proposal, in paragraph 4, that a consul may exercise functions elsewhere than within the district covered by his commission and *exequatur* would seem to merit further consideration. When a consular officer performs occasional diplomatic functions, he acts on an intergovernmental level. Therefore the limitations of his consular district are not pertinent.

Paragraphs 7 and 8 of the commentary are of a substantive nature, and should be a part of article 3 or of another article.

Article 4

The functions of consular officers should be limited not only to those which can be exercised without breach of the laws of the receiving State, but also to those on which the law is silent, and to which the receiving State does not object.

Add to "a" the words "and of third states of which it is agreed he may accord protection." See article 7.

The functions of a "notary" in the United States are not comparable to those of a notary in certain other countries. The words "civil register" are not easily identifiable in United States law. "Administrative" is a rather ambiguous word, not really descriptive of functions to be performed.

The text of the more detailed or enumerative definition reproduced in paragraph 11 of the commentary and the proposed additional article reproduced in paragraph 12 described various consular functions not now permissible in the United States and in some respects unacceptable. Considering the present case of communications, it seems unnecessary for the consul to undertake to represent his absent countryman in court proceedings, to direct salvage operations, or represent him in other matters without first obtaining a power of attorney and appropriate instructions. In many situations the consul need be notified only when it has not been possible to notify the parties in interest in order that he may contact them, and thereafter render such assistance as they may request.

Article 5

In the United States, vital statistics records are maintained by state and municipal authorities rather than by the Federal Government. Except in the case of travellers, the authorities often do not know that a deceased person was not a national until the fact develops in the course of administration of his estate and search for his next of kin. It is desirable, of course, when a deceased person is found to be of foreign nationality, that the consular officer of the foreign country be apprised as promptly as possible of the death and have access to public records, if necessary, to obtain the information required for the preparation of a consular report of death, and further, at the request of the next of kin or if there are no next of kin, and if permissible under local law, be permitted to arrange for the burial or shipment of the body. These are matters, however, with respect to which the drafting of provisions requires careful consideration, having in mind such factors as the federal-state system in the United States.

When minors or incompetents are in difficulties, it would seem enough for local authorities to seek out next of kin, who may, if they wish, seek the assistance of the consul concerned. The important thing is that the consul be assured access to public records.

Article 6

In some cases persons arrested and imprisoned may not wish their consul to be notified. The United States believes it is enough to assure that a person arrested or imprisoned may, upon request, communicate at once with his consular officer, and that in such case the consul be given immediate access to him, and have the opportunity to arrange for his legal representation, and to visit him if convicted and serving a term of imprisonment.

The United States would object to inclusion of a provision which appears to give validity to arrest procedures whereby a person may be held *incomunicado*. The domestic law of the United States would not support the proposition that it is necessary to hold a person *incomunicado* in order to conduct properly a criminal investigation. In certain countries, the *incomunicado* measure may be required by law. In such a case a maximum of 48 or 72 hours might be agreed upon.

Article 8

American consular agents are appointed by the Secretary of State. They are not necessarily full-time government employees, and sometimes engage in outside business activities.

The advisability of formulating a rule which would codify the titles of heads of consular posts is questioned.

Article 10

This article seems both unnecessary and redundant. It is one of a number of articles which should either be deleted or their substance incorporated in another article.

Article 12

It is the practice of the United States to require a new consular commission of appointment or assignment whenever a consular officer is transferred from one post to another in the United States. If a United States consular officer is detailed to another consular district, he is provided with an assignment commission to the post where he is to perform his functions temporarily; he nevertheless holds his commission to his regular post. Thus, when his detail terminates, he resumes his functions at his regular post without need of a new assignment commission and a new recognition.

The United States does not accept the informal method of notification of a "consul's posting" unless at the same time a written request is made for some kind of consular recognition at the new post. It should be practicable to prescribe the limitations of consular districts by simple notification to the Foreign Office, the latter's acceptance without objection, and subsequent publication.

Article 13

As previously stated in lieu of "heads of consular posts" the phrase "officers of consular posts" should be used.

Article 14

Provisional recognition granted by an exchange of diplomatic notes frequently is the "final" recognition of a consular officer, particularly when consular recognition is required for secondary consular officers who are not commissioned. In the United States, provisional recognition is never granted by oral communication only.

Article 15

The United States notifies only the authorities of those States which have requested such notifications. Any obligation with respect to notification which governments can practicably accept should be one which can be complied with by publication in an official gazette. The consul can carry a copy of such publication with him to introduce himself, and, if need be, to buttress his authority. His predecessor, his office staff, and the dean of the consular corps can smooth the way for him, until he has learned to find his way around.

Article 16

Under the present practice all consular officers at a post request and obtain recognition. When the principal officer is absent or incapacitated, another officer of his staff replaces him, and if there is no other officer at his post, his government usually will provide a replacement. The head of a consular post must be a person recognized by the receiving State in a consular capacity. Other than this, the matter seems solely one of internal administration, of principal interest to the sending State.

Article 17

The United States would be agreeable either to inclusion of an article along these lines, or to its deletion, thereby leaving the precedence of consular officers to be determined in accordance with local custom.

Article 18

This might be deleted. Its meaning is uncertain, and it appears unnecessary.

Article 19

A consular officer performing functions of a diplomatic character due to the non-existence of diplomatic relations between his government and the government of the country of his assign-

ment remains a consular officer. He is not thereby entitled to enjoy diplomatic privileges and immunities, and needs no special title.

Article 20

The receiving State's withdrawal of an *exequatur* should be effective immediately, but a request for recall need not be.

Article 21

The United States considers that consular officers are those of a consular establishment who have some form of consular recognition, and that consular employees are those members whose presence has been notified to the Department of State as members of the staff, but who have no consular recognition.

Article 22

This article should be deleted.

Article 23

Any person deemed unacceptable to the receiving State should upon its notification to the diplomatic mission of the sending State cease forthwith to be entitled to perform consular functions.

Article 24

The receiving State needs to be notified of arrivals and departures of all persons claiming privileges and immunities by virtue of their connexion with a consular post.

Article 26

It seems unnecessary to state the generally accepted proposition that the severance of diplomatic relations does not *ipso facto* terminate consular relations.

Article 28

The United States agrees that consular officers and employees and members of their families should be permitted to depart as soon as possible after their functions have been terminated, even in event of armed conflict. The details of the article should, however, be considered in the light of the practice of governments. Their immediate departure may necessarily be delayed pending negotiation of arrangements for an exchange of persons, the obtaining of safe conducts, availability of means of transport, etc., and the extent to which general regulations relating to departure of aliens may apply in particular cases. The matter is further complicated by the possible need to provide special protective facilities pending their departure, and the application of currency control regulations, restrictions on transfer of foreign assets, etc.

The receiving State should not be obligated to assume a bailee responsibility with respect to the sending State's property in case of severance of diplomatic and consular relations.

Article 30

This article might be revised to read as follows:

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

Article 31

Consular premises often consist only of space in an office building, or of a building adjoined to other buildings. Such premises should be inviolable, but with a right of entry reserved in case

of fire or other force majeure, or crime in progress. Since consular agents usually establish their office in a local business enterprise, perhaps article 31 and article 33, out of an abundance of precaution, should be so worded that the premises and archives will be held inviolable, notwithstanding the fact that the consular agency is headed by a local business man and usually located on his local business premises, both being otherwise subject to local jurisdiction.

Article 32

This article may be intended to eliminate any differentiation in treatment as between property leased by a sending State and property owned by it. While the objective is clear, this would involve establishment of a new concept in the administration of property taxes. Generally no distinction is drawn in the application of property taxes on the basis of who the lessee may be. Thus, property leased by the United States Federal Government from private owners is generally subject to property tax although property owned by it is exempt. The practice which the draft would introduce would, moreover, fail to benefit the sending State in some cases and provide a windfall to the property owner. This would be likely to occur where a long-term rental agreement is in existence which does not reflect the tax exemption status of the property, or, where a sending State leases only a small part of a property — i.e. space in an office building.

Finally, it may be noted that this article, in conjunction with the definition of consular premises, might exempt from tax property owned by a sending State even if only a small part were used for consular purposes and the balance rented out. This would be undesirable.

Article 33

In the United States domestic mail service, only first class mail is not subject to inspection. Relevant provisions of postal conventions should be considered.

Article 34

This article might well be deleted.

Article 35

The United States is opposed in principle to the imposition of travel restrictions. In any event, if the consul cannot go to his nationals in a restricted zone, his nationals should be permitted to come to him.

Article 36

This article corresponds to article 25 of the draft articles on diplomatic intercourse and immunities to be considered at the Vienna Conference. The Commission will presumably take due account of the Conference's decisions in the matter to the extent applicable. The United States believes that a diplomatic bag may be refused entry by the receiving State if it has reason to believe it contains articles other than correspondence, and the sending State is unwilling to open it for cursory inspection. The United States believes also that considerations which might warrant permitting diplomatic missions to operate their own radio transmitters do not necessarily exist with respect to consulate posts.

It is assumed that the article is not intended to exempt consular officers from payment of postage.

Article 37

Consuls should have access to public records, and should be permitted to address local authorities — the term meaning authorities of branches of government other than the central government.

Article 39

The United States Federal Government is without authority to "protect" a foreign consular officer from what he or his government may well consider a "slandrous" press campaign. Freedom of press is guaranteed by the United States Constitution.

Articles 40, 41 and 42

The basic principles of customary international law as presently understood are (1) that consuls do not enjoy a diplomatic character, and (2) that the jurisdiction of the territorial sovereign is presumed. The draft articles 40 and 41 attempt to bring about a change in this area by providing for a general inviolability of consuls and immunity from jurisdiction. The various theories which have developed on the subject are outlined in the commentary.

It is noted, however, that article 40 (1) would waive the personal inviolability of consuls in cases of offences "punishable by a maximum sentence of not less than five years' imprisonment" or, alternatively, "in the case of a grave crime". The wording seems unsatisfactory, considering the practice of certain States to impose severe criminal sanctions for so-called "political crimes". An analogy can be drawn here with extradition treaties (see, for example, the multilateral Montevideo Treaty of 1933, 49 Stat. 3111), which provides that the act for which extradition is sought must constitute "a crime and (be) punishable under the laws of the demanding and surrendering State with a minimum penalty of imprisonment for one year." Similarly, article 40 might be re-worded to provide criminal jurisdiction over consular officers in case of grave crimes *only* where such offences constitute such a crime under both the laws of the sending and the receiving State.

The test as to whether a function is official is whether the sending State assumes responsibility for it. The officer concerned is not the person to decide.

Further consideration should be given to the matter of requiring a consular officer or employee to give evidence or permitting him to decline to give evidence, and to his taking an oath with the possibility of liability for perjury or contempt of court.

Article 43

United States immigration laws impose no requirements regarding residence and work permits.

Article 45

The grant of exemption from taxation to members of a consulate and their families is conditioned on their not carrying on "any gainful private activity". It is not clear whether the quoted phrase is consistent with the intent of the article. If an individual were to make investments in the United States, it would constitute "gainful private activity". Under this circumstance, none of the exemptions accorded by article 45 would apply to such an individual. It does not seem to be the intended result.

The commentary points out that under article 50 there are excluded from the scope of the exemption members of a consulate and their families who are nationals of the receiving State. This exclusion is desirable as far as it goes, but it does not go far enough. The principle incorporated in article 44 seems highly appropriate in connexion with this article, so that not merely nationals but also persons who are permanently resident in the receiving State would fall outside the scope of the exemption. There is a large and growing body of persons in the United States, and presumably elsewhere, whose employment is largely with various foreign missions and who are permanent residents of the host country. There seems to be no sound reason why they should be tax-exempt or why their tax liability should vary from time to time depending upon whether their employment is with a foreign mission. In this connexion, it may be noted that the imposition of a tax on the

remuneration of employees is not a tax on a foreign government, and there would seem to be no legal objection to this levy. Moreover, the mechanism by which wages and salaries are commonly determined in these cases is generally such that the taxable or exempt status of the employee is an irrelevant factor. Consequently not even an indirect burden may be said to be imposed on the foreign government. In any event, these individuals are beneficiaries of the services of the receiving government and should not be absolved from sharing its costs.

The article grants to members of a consulate and their families exemption from certain taxes other than "indirect taxes incorporated in the price of goods or services". The meaning of this language is ambiguous. It is not clear whether this refers only to those taxes which normally are not stated separately, or whether it refers to taxes which cannot ordinarily be separated out of the price. The former interpretation would be more restrictive than the latter. Thus, the manufacturer's excise tax on automobiles is not usually quoted separately from the price, but it is readily ascertainable. Either interpretation would depart significantly from existing United States practices and would not be desirable. Under existing law, consular officers of foreign governments are exempt from federal excise taxes, the legal incidence of which would fall upon them in connexion with transactions arising in the performance of their official duties. The exemption thus applies to such taxes as those on transportation, admissions and dues, and communications. It does not apply to the various excise taxes imposed either at the manufacturer's or retailer's level.

Articles 46-53

These articles are among those which should be considered in the light of the results of the Vienna Conference.

Articles 54-63: Chapter III, "Honorary Consuls"

The United States suggests that this chapter may be unnecessary. While the United States does not now appoint honorary consuls, it does appoint consular agents, who are often resident in the country, and engaged in business. The United States accords consular recognition to honorary consuls in the United States appointed by other governments, but does not accord them personal privileges and immunities. The United States refuses to recognize in a consular capacity, other than "honorary", any person who is a national or permanent resident of the United States.

Consular agents and honorary consular officers, who are nationals or residents of the receiving State, should be entitled, in the performance of their official functions and the custody of the archives of the consular post, to whatever rights and privileges other consular officers of the sending State would enjoy in those respects. Except for that, their status and that of their families and households in the receiving State should be the same as any other national or permanent resident.

The United States observes also that while the provisions on nationality adopted at the Vienna Conference should be considered, the language adopted at Vienna may not be entirely suitable for incorporation in a proposed convention relating to consular personnel. The United States Constitution provides that all persons born "subject to the jurisdiction thereof" automatically acquire United States nationality at birth. Since a consular officer's child is not immune from United States jurisdiction, it automatically acquires United States citizenship if born in the United States. The child of a diplomatic officer, in contrast, is immune from jurisdiction, and therefore does not acquire United States citizenship automatically.

Article 65

The first text is not acceptable. It is considered unnecessary and undesirable to require, either explicitly or impliedly, that

the contracting parties enter into special agreements for the purpose of retaining in force bilateral conventions between them. As to a bilateral convention in force at the time of the entry into force of the multilateral convention, it is understood that the normal rule would apply that, to the extent that there is any real conflict between the provisions of the two conventions, the one later in time will prevail, and that other provisions of both will continue in effect according to their tenor. It is to be expected that, after entry into force of the multilateral convention, if two of the contracting parties negotiate a bilateral convention they will give adequate consideration to the terms of the multilateral convention and consider to what extent, if any, they wish to amplify the scope of provisions on consular intercourse and immunities or include in the bilateral convention provisions having the effect of modifying as between themselves the multilateral convention.

The second text for article 65 is closer to a statement of situation, but the question may be raised whether the expression "shall not affect" is in accordance with the actual intent. If it were intended that, even as to provisions where there is a real conflict, the multilateral convention shall not affect the prior bilateral convention, then the second text would accomplish that purpose. Ordinarily, as indicated above, it would be expected that, in any case of real conflict between the provisions, the multilateral, being later in time, would prevail. However, if it were the consensus of opinion that the prior bilateral convention should be left unaffected by anything in the multilateral convention, the United States would be prepared to acquiesce in a decision to that effect. As indicated in the commentary, the multilateral convention would then apply only to matters not covered by the bilateral convention. So far as a later bilateral convention is concerned, the second text would leave the way open for such later convention to have the effect, as between the parties thereto, of modifying or limiting the application of certain provisions of the multilateral convention. This would be the normal application of the later-in-time rule.

19. YUGOSLAVIA

Transmitted by a note verbale dated 28 February 1961 from the Permanent Representative of Yugoslavia to the United Nations

[Original: French]

The draft articles on consular intercourse and immunities adopted at the twelfth session of the International Law Commission contain the principles of contemporary international law and generally recognized practice, and are in principle acceptable to the Government of the Federal People's Republic of Yugoslavia.

With regard to certain articles of the draft, the Government of the Federal People's Republic of Yugoslavia considers it desirable to point out a few details where the text can be somewhat improved at its second reading in the International Law Commission, and requests the Secretary-General to transmit the comments made hereunder to the Commission.

Article 1. It would be desirable to state whether the consular agent referred to in section (f) of this article enjoys the same consular privileges and immunities as a consul.

A proper definition of the terms "sending State" and "receiving State" as set forth in article 3, commentary, paragraphs 7 and 8, could, for the sake of completeness, be inserted in the text of article 1.

Article 4. The Government of the Federal People's Republic of Yugoslavia prefers the first variant of this article, which comprises a general definition of consular functions, since it is in fact impossible to include all the aspects of such functions

in one definition. Any enumeration of these functions, however detailed, would be incomplete.

It should be noted that, as a result of the internal distribution of powers in the receiving State, the consul is often unable to deal with the local authorities in the exercise of many of his functions. For this reason it would be desirable to add at the end of paragraph 2 of article 4 of the first variant, after the expression "with the local authorities", the following phrase: "or with the central authorities in connexion with consular matters which in the first instance normally fall within their competence".

Should the Commission consider it more desirable to adopt the second variant, the Government of the Federal People's Republic of Yugoslavia will not oppose this—in spite of the views expressed above—but in that case the provisions proposed therein, i.e., the enumeration of consular functions, should be the subject of more detailed study. Such a review is necessary because the Commission has not discussed the text of the second variant in detail. The Government of the Federal People's Republic of Yugoslavia requests the Commission to take the following observations into consideration:

(a) First of all, it is desirable to insert a general provision stipulating that consular functions are exercised within the limits of the legislation of the receiving State. When the second variant is discussed, consideration might be given to the following:

I

Functions concerning trade and shipping

Paragraph 2 (a). It might be added that the consul is competent to deliver and renew the validity of ships' papers and renew passports of the crew.

Paragraph 2 (c). The consul does not draw up the manifests but may certify them, particularly in the case of manifests of ships of any flag carrying cargo consigned to the sending State.

Paragraph 2 (e). The authorization for the consul to settle all disputes between masters, officers and seamen, even disputes unconnected with employment, is too comprehensive.

Paragraph 2 (g). A consul cannot be permitted to act as the agent of a shipping company.

Paragraph 2 (h). It should be decided whether the consul should be informed of searches conducted on ships when his residence is not at the port and for how long he should be awaited in his absence. There is no provision for this in international law except with regard to criminal matters (article 19 of the Convention on the Territorial Sea, 1958).

Paragraph 2 (j). Salvage operations are a matter of the public policy (*ordre publique*) of each State and the consul cannot be permitted to direct such operations. It is, however, within his competence to ensure, on behalf of the party concerned, that the appropriate salvage measures be taken.

Paragraph 3 (d). It would be wrong to authorize the consul to supervise compliance with international conventions. He is not empowered to make representations with regard to violations of international agreements, since this falls within the competence of the diplomatic mission.

A distinction should be made between civil, public and military aircraft, since each has a different status and receives different treatment. Furthermore, paragraph 4 distinguishes between "vessels" and warships.

The Government of the Federal People's Republic of Yugoslavia considers that warships, since they are ex-territorial, do not come within the competence of consuls.

II

Functions concerning the protection of nationals of the sending State

Paragraph 7. The Government of the Federal People's Republic of Yugoslavia agrees that the consul may represent, without producing a power of attorney, the nationals of his country in all cases connected with succession, provided that the parties concerned are not opposed to this and do not appear themselves before the authorities in question.

III

Administrative functions

Paragraph 8. With respect to the delivery of acts of civil registration, the State of residence normally reserves the sole right to deliver death certificates (in view of the possibility of criminal proceedings) and birth certificates. Marriage certificates are governed by the procedure agreed upon by the two States concerned.

Paragraph 8 (g). The stipulation according to which the consul would transmit benefits, pensions or compensations to persons entitled to such payments in the foreign territory, in particular to the nationals of the receiving country, seems somewhat difficult to accept.

Paragraph 11. The consul may neither receive nor draw up statements in the receiving State which could violate its public policy (*ordre publique*).

Paragraph 13. The consul cannot be authorized to receive for safe custody articles which it is prohibited to export.

Paragraph 17. The Government of the Federal People's Republic of Yugoslavia agrees that, in given conditions, the consul may exercise additional functions.

Article 5. It is desirable to make provision in section (c) for the consul to be informed not only in the case of accidents involving ships, but also of those involving aircraft.

Article 8. A point to be clarified is whether agents belong to the same class as consuls or to a special category of consular officials.

Article 15. The Government of the Federal People's Republic of Yugoslavia believes that paragraph 2 of the commentary should be inserted in the text of the provisions (presentation of the consular commission and *exequatur* by the consul himself, should the government of the receiving State omit to fulfil these obligations).

Article 16. It would be desirable for the Commission to consider whether, and in what, cases provisional recognition is required for the acting head of post, even in cases where the acting head of a consular post serves in that capacity for a long period. Unless this is clarified, the institution of the delivery of the *exequatur* might be jeopardized.

Article 18. The occasional performance of diplomatic acts by the consul should, in the opinion of the Government of the Federal People's Republic of Yugoslavia, be subject to the articles on diplomatic intercourse and immunities, and not to those on consular intercourse.

The Government of the Federal People's Republic of Yugoslavia considers that this article should be omitted.

Article 22. The receiving State should decide on the number of consular staff it is willing to receive in its territory. In case of dispute, the Government of the Federal People's Republic of Yugoslavia considers that the matter should be referred to arbitration on the understanding that the decision of the receiving State shall remain in force until the award.

Article 23. The Government of the Federal People's Republic of Yugoslavia considers that it would not be desirable to stipulate that the sending State must be informed whenever a member of the consulate is deemed unacceptable.

Information of this kind could be more detrimental to good relations between the States than the absence of such information.

Article 26. It is desirable to stress that upon severance of diplomatic relations there is no interruption of consular relations and that the consular sections of diplomatic missions then continue to function as consulates.

In such cases, it is necessary to make contact possible between consulates and the representatives of the protecting Power.

Article 29. It would be desirable to decide in the Commission whether the head of the consular post has the right to fly the national flag on his personal means of transport, since this does not necessarily follow from paragraph 2 of this article.

Article 31. The Government of the Federal People's Republic of Yugoslavia considers that it would be useful to make provision for authorization to be granted, either by the head of the consular post or some other person authorized for this purpose, to representatives of the authorities of the receiving State to enter the consular premises in case of fire or similar emergency.

Article 33. This article would be more complete if the definition of inviolable articles were incorporated separately in the body of the provision.

Article 35. With regard to this article, the Government of the Federal People's Republic of Yugoslavia considers that it should be stated clearly that the consul may be prevented from entering prohibited zones even if they are situated within his consular district and his intention to enter them is based on the need to exercise his consular functions.

Article 37. Paragraph 2 of this article, which deals with the question of the consul's communication with the central authorities, could be completed as follows: "or such communication is indispensable in connexion with consular functions and relates to the competence of the central authorities to rule in the first instance on the scope of the consular activity."

Article 40. In the opinion of the Government of the Federal People's Republic of Yugoslavia, it should be explicitly stated that it is possible for the sending State to waive the immunity referred to in this article and also that it must waive the same in the case of an offence committed by a consular official whenever the sending State has no justifiable interest in preventing legal proceedings from being taken. Provision should also be made to cover the obligation of the sending State to try any official who could not be tried, or to whom the penalty could not be applied, in the receiving State because of his immunity.

With regard to the variants in paragraph 1 of article 40, the Government of the Federal People's Republic of Yugoslavia considers that it would be desirable to state that the consul may not be imprisoned except in a case where he has committed an offence punishable by a minimum sentence of five years' imprisonment.

Article 41. It would be desirable, in order to make the text clearer, to add at the end of the article, which refers to the immunity from jurisdiction of consular officials, the term "consular" before the word "functions".

Article 42. The Government of the Federal People's Republic of Yugoslavia considers it desirable to provide, in the interests of establishing the truth in a dispute at law, that the consul may, instead of giving evidence at his office or residence, submit a written declaration.

The effect of this could be that consular officials would less frequently refuse to give evidence.

Finally, in the opinion of the Government of the Federal People's Republic of Yugoslavia it would be desirable to insert in article 42 a rule stipulating that, in a case where a consular official refuses to give evidence or claims that the evidence is connected with the exercise of his functions, official correspondence or documents, the receiving State may request the sending State through the legal diplomatic channel either to instruct the consul to give evidence or to release him from official secrecy whenever the sending State does not consider this secrecy to be of essential importance to its interests. This is suggested in view of the fact that exemption from the duty to give evidence cannot be considered a personal privilege of the consul; such exemption is an immunity granted in the interests of the service, and it is for the sending State to judge whether this interest really exists.

It would also be desirable to provide that the consul has the right to demand exemption from the requirement of testifying under oath.

Article 45. In the opinion of the Government of the Federal People's Republic of Yugoslavia, it should be stated that the consul is liable to taxation on capital invested for gainful purposes or deposited in commercial banks.

Article 46. It would be desirable to add at the end of paragraph (b) of this article the words "and foreign motor vehicles". It should also be specified that the "articles intended for their establishments" must have been actually received.

If such objects, after being imported by the consul free from customs duties, are sold, it should be specified that customs duties must be paid or that the sale of such articles may only take place in conformity with the customs regulations of the receiving State.

Article 47. The exemption from succession duties on the movable property of the consul and members of his family could be restricted to property intended for direct personal use, or for the household of the person inheriting the property.

Article 50. The Government of the Federal People's Republic of Yugoslavia considers that it should be specified which persons are to be considered members of the consul's family.

Article 52. In the opinion of the Government of the Federal People's Republic of Yugoslavia, this article does not apply to a consul's private visits to third States.

Article 53. It is indispensable to insert in this article a provision to the effect that consuls have no right to provide asylum.

Article 54. In the opinion of the Government of the Federal People's Republic of Yugoslavia, the provisions of article 31 of the draft on the inviolability of consular premises can only apply in the case of honorary consuls, to premises intended solely for the exercise of consular functions.

Article 59. Paragraph 2 of the commentary, which stresses that this article does not apply to nationals of the receiving State, should be inserted in the body of this article as paragraph (c).

Article 65. With respect to the relationship between the present articles and bilateral conventions, the Government of the Federal People's Republic of Yugoslavia considers that the first text is more acceptable, and that it could terminate with the following phrase: "provided that the minimum guarantees offered by this convention are at all times extended". Alternatively, it could be stressed that future conventions may be concluded provided that they are not, at least, contrary to the basic principles of this convention.

ANNEX II

Table of references indicating the correspondence between the numbers allocated to the articles of the final draft on consular relations adopted by the International Law Commission and those allocated to the articles of the various preliminary proposals and drafts

	A	B	C	D	E	F	G
	Draft provisional articles prepared by the Special Rapporteur, 9th session of I.L.C., 1957 (A/CN.4/108)	Texts of draft articles 1-19 adopted by I.L.C., 11th session, 1959 (A/4169)	Additional articles proposed by the Special Rapporteur, 12th session of I.L.C., 1960 (A/CN.4/131)	Draft provisional articles submitted by the Special Rapporteur, 12th session of I.L.C., 1960 (A/CN.4/L.86) a	Draft articles adopted by I.L.C., 12th session, 1960 (A/4425)	New proposals submitted by the Special Rapporteur in the light of the comments of governments, 13th session, 1961 (A/CN.4/137) b	Draft final articles adopted by I.L.C., 13th session, 1961 (A/4843)
<i>Preamble</i>	—	—	—	—	—	—	8
<i>Definitions</i>	d and art. 35 (para. 1)	art. 1	—	art. 1 and 54	art. 1	art. 1 and 45	art. 1
<i>Chapter I:</i>							
Consular relations in general	—	—	—	—	—	—	—
<i>Section I:</i>							
Establishment and conduct of consular relations	art. 1 and 19	art. 2 ^e	—	art. 2 ^e and 50	art. 2 ^e and 26	art. 2 and 26	art. 2
Establishment of consular relations	art. 2	art. 3 (paras. 1-4)	—	art. 3 (paras. 1-4)	art. 3 (paras. 1-4)	—	art. 3
Establishment of a consulate	art. 13 ^f	art. 15 ^g	—	art. 4 ^g	art. 4 ^g	—	art. 4
Consular functions	—	art. 3 (para. 5)	—	art. 3 (para. 5)	art. 3 (para. 5)	art. 4 and addit. article 4a	art. 5
Exercise of consular functions in a third State	art. 16	art. 4	—	art. 5	art. 7	art. 3 (para. 3)	art. 6
Exercise of consular functions on behalf of a third State	art. 5	art. 7	—	art. 8	art. 10	—	art. 7
Appointment and admission of heads of consular posts	art. 3 (para. 1)	art. 5	—	art. 6	art. 8	—	art. 8
Classes of heads of consular posts	art. 6	art. 9	—	art. 10	art. 12	—	art. 9
The consular commission	art. 7 and 8	art. 10	—	art. 11	art. 13	art. 13	art. 10
The <i>exequatur</i>	art. 4	art. 6	—	art. 7	art. 9	—	art. 11
Formalities of appointment and admission	art. 9	art. 11	—	art. 12	art. 14	—	art. 12
Provisional admission	art. 10	art. 12	—	art. 13	art. 15	—	art. 13
Obligation to notify the authorities of the consular district	—	—	—	—	—	—	art. 14
Temporary exercise of the functions of head of a consular post	art. 11	art. 13	—	art. 14	art. 16	—	art. 15
Precedence	art. 3 (para. 2)	art. 14	—	art. 15 and 57	art. 17 and 62	—	art. 16
Performance of diplomatic acts by the head of a consular post	art. 14 and 17	art. 16 and 17	—	art. 16 and 17	art. 18 and 19	—	art. 17
Appointment of the same person by two or more States as head of a consular post	—	—	—	—	—	—	art. 18
Appointment of the consular staff	—	—	art. I	art. 19	art. 21	—	art. 19
Size of the staff	—	—	—	—	art. 22	—	art. 20
Order of precedence as between the officials of a consulate	—	—	—	—	—	—	art. 21
Appointment of nationals of the receiving State	—	art. 8	—	art. 9	art. 11	—	art. 22
Withdrawal of <i>exequatur</i>	—	—	—	—	—	—	—
Persons deemed unacceptable	art. 17	art. 18	art. II	art. 18 and 20	art. 20 and 23	—	art. 23
Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff	—	—	art. IV	art. 21	art. 24	—	art. 24

ANNEX II (continued)

	A	B	C	D	E	F	G
	Draft provisional articles prepared by the Special Rapporteur, 9th session of ILC, 1957 (A/CN.4/108)	Texts of draft articles 1-19 adopted by ILC, 11th session, 1959 (A/4169)	Additional articles proposed by the Special Rapporteur, 12th session of ILC, 1960 (A/CN.4/131)	Draft provisional articles submitted by the Special Rapporteur, 12th session of ILC, 1960 (A/CN.4/L.86) a	Draft articles adopted by ILC, 12th session, 1960 (A/4425)	New proposals submitted by the Special Rapporteur in the light of the comments of the governments, 13th session, 1961 (A/CN.4/137) b	Draft final articles adopted by ILC, 13th session, 1961 (A/4843)
Section II:							
End of consular functions	—	—	—	—	—	—	—
Modes of termination of the functions of a member of the consulate	art. 18	—	—	art. 49	art. 25	art. 25	art. 25
Right to leave the territory of the receiving State and facilitation of departure	—	—	art. XI	art. 51	art. 27	—	art. 26
Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances	—	—	art. XII	art. 52	art. 28	—	art. 27
Chapter II:							
Facilities, privileges and immunities of career consular officials and consular employees	—	—	—	—	—	—	—
Section I:							
Facilities, privileges and immunities relating to a consulate							
Use of the national flag and of the State coat-of-arms	art. 21 and 22	—	—	art. 22 and 23	art. 29	art. 29	art. 28
Accommodation	—	art. 19	—	art. 24	art. 30	art. 30	art. 29
Inviolability of the consular premises	art. 25	—	—	art. 25	art. 31	—	art. 30
Exemption from taxation of consular premises	—	—	—	art. 26	art. 32	—	art. 31
Inviolability of the consular archives and documents	art. 25	—	—	art. 27	art. 33	art. 33	art. 32
Facilities for the work of the consulate	—	—	—	art. 28	art. 34	—	art. 33
Freedom of movement	—	—	—	—	art. 35	—	art. 34
Freedom of communication	art. 23 and 25	—	—	art. 29	art. 33 and 36	—	art. 35
Communication and contact with nationals of the sending State	—	—	—	—	art. 6	—	art. 36
Obligations of the receiving State	art. 34	—	—	art. 48	art. 5	art. 5	art. 37
Communication with the authorities of the receiving State	art. 24	—	—	art. 30	art. 37	—	art. 38
Levying of fees and charges and exemption of such fees and charges from dues and taxes	art. 26	—	—	art. 31	art. 38	art. 38	art. 39
Section II:							
Facilities, privileges and immunities regarding consular officials and employees	—	—	—	—	—	—	—
Special protection and respect due to consular officials ...	art. 20	—	special article (paras. 1-3)	art. 32 art. 33 (paras. 1-3)	art. 39 art. 40 (paras. 1-3)	art. 40 (paras. 1-3)	art. 40 art. 41
Personal inviolability of consular officials	—	—	special article (para. 4)	art. 33 (para. 4)	art. 33 (para. 4)	art. 40 (para. 4)	art. 42
Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings	—	—	—	art. 34 and 47 art. 40	art. 41 art. 42	art. 41 art. 42	art. 43 art. 44
Immunity from jurisdiction	art. 27 and 33	—	—	—	—	—	art. 45
Liability to give evidence	art. 32	—	—	—	—	—	art. 44
Waiver of immunities	—	—	—	—	—	additional article 50a	art. 45

Exemption from obligations in the matter of registration of aliens and residence and work permits	art. 31	—	—	art. III	art. 35	art. 43	art. 46
Social security exemption	art. 28	—	—	—	art. 36	art. 44	art. 47
Exemption from taxation	art. 29	—	—	—	art. 37	art. 45	art. 48
Exemption from customs duties	—	—	—	—	art. 38	art. 46	art. 49
Estate of a member of the consulate or of a member of his family	—	—	—	—	—	—	—
Exemption from personal services and contributions	art. 30	—	—	art. VIII	art. 44	art. 47	art. 50
Question of the acquisition of the nationality of the receiving State	—	—	—	—	art. 39	art. 48	art. 51
Beginning and end of consular privileges and immunities ..	—	—	—	art. V	art. 41	art. 49	art. 52
Obligations of third States	—	—	—	art. VII	art. 43	art. 51	art. 53
Respect for the laws and regulations of the receiving State ..	—	—	—	art. IX	art. 45	art. 52	art. 54
Special provisions applicable to career consular officials who carry on a private gainful occupation	art. 35 (para. 2)	—	—	art. X	art. 46	art. 53	art. 55
—	—	—	—	—	art. 58	—	art. 56
<i>Chapter III:</i>							
Facilities, privileges and immunities of honorary consular officials	—	—	—	—	—	—	—
Regime applicable to honorary consular officials	art. 36 and 37 (paras. 1 and 3)	—	—	—	art. 55 and 56 (paras. 1 and 3)	art. 54 and 60	art. 57
—	—	—	—	—	—	—	—
Inviolability of the consular premises	—	—	—	—	—	—	art. 58
Exemption from taxation of consular premises	—	—	—	—	—	—	art. 59
Inviolability of consular archives and documents	art. 37 (para. 2)	—	—	—	art. 56 (para. 2)	art. 55	art. 60
—	—	—	—	—	—	—	—
Special protection	—	—	—	—	—	art. 56	art. 61
Exemption from obligations in the matter of registration of aliens and residence permits	—	—	—	—	—	art. 57	art. 62
Exemption from taxation	—	—	—	—	—	art. 58	art. 63
Exemption from personal services and contributions	—	—	—	—	—	art. 59	art. 64
Obligations of third States	—	—	—	—	—	—	art. 65
Respect for the laws and regulations of the receiving State ..	—	—	—	—	—	art. 61	art. 66
Optional character of the institution of honorary consular officials	—	—	—	—	—	art. 63	art. 67
<i>Chapter IV:</i>							
General provisions							
Exercise of consular functions by diplomatic missions	—	—	—	—	—	—	art. 68
—	—	—	—	—	—	additional article 52a	—
Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State	—	—	—	art. VI	art. 42	art. 50	art. 69
Non-discrimination	—	—	—	art. XIII	art. 53	art. 64	art. 70
Relationship between the present articles and conventions or other international agreements	art. 38	—	—	—	art. 59	art. 65	art. 71

^a Prepared by the Special Rapporteur for the convenience of the members of ILC, this text comprised the articles already adopted at the eleventh session of ILC (A/41/69), the texts contained in the first report of the Special Rapporteur to the ninth session (A/CN.4/108) and the additional articles contained in the second report of the Special Rapporteur to the twelfth session of ILC (A/CN.4/131), and was amended and supplemented to bring it into line with the draft articles on diplomatic intercourse and immunities.

^b The articles listed comprise only those for which the Special Rapporteur had proposed an amended text.

^c The Commission decided that the text proposed for the preamble would be inserted in the commentary introducing the draft convention (A/CN.4/141, para. 36).

^d "Questions of terminology", part one, chapter VI of the report.

^e The Commission reserved its decision on the second paragraph proposed by the Special Rapporteur.

^f The Special Rapporteur presented two variants.

^g The Commission adopted two types of definition — one general and the other detailed and enumerative. It also submitted the two types of definition to governments for their comments. The general definition was included in the draft, whereas the detailed definition was reproduced in the commentary.

CHECK LIST OF COMMISSION DOCUMENTS REFERRED TO IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/925	Report of the International Law Commission covering its first session (12 April - 9 June 1949)	<i>Official Records of the General Assembly, Fourth Session, Supplement No. 10</i> ; also published in the <i>Yearbook of the International Law Commission, 1949</i>
1/1858	Report of the International Law Commission covering the work of its third session (16 May - 27 July 1951)	<i>Ibid.</i> , <i>Sixth Session, Supplement No. 9</i> ; also published in vol. II of the <i>Yearbook of the International Law Commission, 1951</i>
A/2934	Report of the International Law Commission covering the work of its seventh session (2 May - 8 July 1955)	<i>Ibid.</i> , <i>Tenth Session, Supplement No. 9</i> ; also published in vol. II of the <i>Yearbook of the International Law Commission, 1955</i>
A/3159	Report of the International Law Commission covering the work of its eighth session (23 April - 4 July 1956)	<i>Ibid.</i> , <i>Eleventh Session, Supplement No. 9</i> ; also published in the <i>Yearbook of the International Law Commission 1956</i> , vol. II
A/3859	Report of the International Law Commission covering the work of its tenth session (28 April - 4 July 1958)	<i>Ibid.</i> , <i>Thirteenth Session, Supplement No. 9</i> ; also published in the <i>Yearbook of the International Law Commission, 1958</i> , vol. II
A/4425	Report of the International Law Commission covering the work of its twelfth session (25 April - 1 July 1960)	<i>Ibid.</i> , <i>Fifteenth Session, Supplement No. 9</i> ; also to be published in the <i>Yearbook of the International Law Commission, 1960</i> , vol. II
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	See <i>Yearbook of the International Law Commission, 1956</i> , vol. II
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1957, vol. II
A/CN.4/108	Consular intercourse and immunities: report by Jaroslav Zourek, Special Rapporteur	<i>Ibid.</i>
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1958, vol. II
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1959, vol. II
A/CN.4/125	State responsibility: International responsibility: fifth report by F. V. García Amador, Special Rapporteur	<i>Ibid.</i> , 1960, vol. II
A/CN.4/131	Consular intercourse and immunities: second report by Jaroslav Zourek, Special Rapporteur	<i>Ibid.</i>
A/CN.4/L.86	Consular intercourse and immunities: provisional draft articles submitted by Jaroslav Zourek, Special Rapporteur	<i>Ibid.</i> , 1960, vol. II

NOTE: For the summary records of the Commission meetings referred to in this volume, see:

Yearbook of the International Law Commission, 1959, vol. I, 479th to 525th meetings

Yearbook of the International Law Commission, 1960, vol. I, 526th to 579th meetings

Yearbook of the International Law Commission, 1961, vol. I, 580th to 627th meetings

For the summary records of the Sixth (Legal) Committee of the General Assembly referred to in this volume, see: *Official Records of the General Assembly, Fifteenth Session (part I), Sixth Committee*

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