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Report on Consular intercourse and immunities by Mr. J. Zourek, Special Rapporteur

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CONSULAR INTERCOURSE AND IMMUNITIES

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Report by Jaroslav Zourek, Special Rapporteur

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PART I

CHAPTER I

Historical development¹

I. INTRODUCTION

1. Consulates are a much more ancient institution than permanent diplomatic missions, and one born of international trade requirements and having its economic basis in trade relations.

Henry Bonfils, *Manuel de droit international public (Droit des gens)*, 3rd ed., rev. P. Fauchille (Paris, Arthur Rousseau, 1901), pp. 410-439.

Alberto M. Candiotti, *Historia de la institución consular en la antigüedad y en la Edad Media* (Buenos Aires, Editora Internacional, 1925).

C. Cardahi, "La conception et la pratique du droit international privé dans l'Islam", in *Académie de droit international, Recueil des cours, 1937, II* (Paris, Librairie du Recueil Sirey), pp. 537 ff.

Francesco P. Contuzzi, *La istituzione dei consolati ed il diritto internazionale europeo nella sua applicabilità in Oriente* (Naples, 1885).

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H. Déherain, "Les premiers consuls de France sur la côte septentrionale de l'Anatolie", *Revue de l'histoire des colonies françaises, 12th year* (1924) 3rd quarter (Paris, Société de l'histoire des colonies françaises).

¹ Main works consulted or to consult, on the historical development of consulates.

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Ernest Genevois, *Histoire critique de la juridiction consulaire* (Paris, A. Durand et Pedone Lauriel, 1866).

Frank E. Hinckley, *American Consular Jurisdiction in the Orient* (Washington, D.C., W. H. Lowdermilk and Co., 1906).

F. I. Kozhevnikov, *Uchebnoe posobie po mezhdunarodonomu publichnomu pravu*, vol. III *Organi vneshnikh znachenii* (Moscow, 1945), pp. 37-39.

Karl Lippmann, *Die Konsularjurisdiktion im Orient* (Leipzig, Verlag von Veit and Comp., 1898).

F. Martens, *Das Consularwesen und die Consularjurisdiction im Orient*, trans. from Russian by H. Skerst (Berlin, Weidmannsche Buchhandlung, 1874).

M. L. de Mas-Latrie, *Traité de paix et de commerce et documents divers concernant les relations des Chrétiens avec les Arabes de l'Afrique septentrionale au Moyen Age* (Paris, Henri Plon, 1866 and 1872), 2 vols.

Alex. de Miltitz, *Manuel des consuls* (London-Berlin, A. Asher, 1837-1842), 5 vols.

J. M. Pardessus, *Collection de lois maritimes antérieures au XVIIIème siècle* (Paris, Imprimerie royale, 1828-1845), 6 vols.

G. Pelissé du Rausas, *Le régime des capitulations dans l'Empire ottoman*, 2nd ed., (Paris, Arthur Rousseau, 1910-1911), 2 vols.

V. P. Potemkin, ed., *Istoria diplomatii* (Moscow and Leningrad, OGIZ, 1941-1945), 3 vols.

H. G. Rawlinson, *Intercourse between India and the Western World—from the earliest times to the fall of Rome*, 2nd ed. (London, Cambridge University Press, 1926).

G. Salles, "L'institution des consulats - son origine, son développement au Moyen Age chez les différents peuples", *Revue d'histoire diplomatique*, 11th year, No. 2 (Paris, Ernest Leroux, 1897).

L. Strisower, "Konsulargerichtsbarkeit", in E. Mischler and J. Ulbrich (ed.) *Österreichisches Staatswörterbuch*, 2nd ed. (Vienna, Alfred Hölder, 1907), vol. III, pp. 170-200.

Graham Stuart, "Le droit et la pratique diplomatiques et consulaires", in *Académie de droit international, Recueil des cours, 1934, II*, (Paris, Librairie du Recueil Sirey), pp. 463-570.

Charles James Tarring, *British Consular Jurisdiction in the East* (London, Stevens and Haynes, 1887).

Marcel Sibert, *Traité de droit international public* (Paris, Librairie Dalloz, 1951), vol. II, pp. 64-95.

2. Even in the ancient days of slavery, trade relations between different peoples gave rise to institutions which may be considered as the forerunners of modern consulates. The merchants of those days went after trade in foreign countries which often were very far away and had very different laws and customs; hence their desire to have their disputes settled by judges of their own choice administering their own national laws. Foreigners living in ancient Greece chose protectors known as *prostates*, who acted as their intermediaries in legal and political relations with their State of residence. Six centuries before our era, according to Herodotus, the Egyptians allowed Greek settlers at Naucratis to select a magistrate, also called a *prostates*, who administered Greek law to them. During the same period, there were special judges for foreigners among some of the peoples of India.

3. The need of the Greek city states to protect their trade and their citizens in other cities gave rise to *proxeny*, which is very similar to the modern system of honorary consuls. *Proxeni* were chosen from citizens of the city whose protection was sought, their main duty being to protect citizens of the city they represented, act for them in assemblies, witness their wills, arrange the succession of foreigners who died without heirs, and see to the sale of cargoes. They introduced foreign ambassadors to assemblies and temples and prepared treaties between their own country and the city they represented.² Some of them are known to have been sent later by their country as ambassadors to the country they had represented (Callias, *proxenos* of Sparta at Athens) was sent by Athens to Sparta as an ambassador).

4. The Roman institution of the patronate bears some resemblance to the Greek system of *proxeny*. But the main measure to meet the need to administer justice to foreign merchants in accordance with legal principles less formalistic than those of Roman civil law, hence better suited than the ancient Roman law to trade requirements, was the creation in 242 B. C. of the office of the *praetor peregrinus*, a magistrate who judged disputes between foreigners (*peregrini*) or between foreigners and Roman citizens. That is to say, foreigners' cases were tried under the rules of *jus gentium*, including both those arising out of international trade relations and those borrowed from laws of foreign countries.

2. ORIGIN OF CONSULATES

5. After the fall of the Western Roman Empire in

A.D. 476, the economy of western Europe was agricultural for several centuries, whereas Byzantium, backed by Asia Minor, remained the centre of a vast international trading system. It traded intensively with the East, Italy and the Frankish Kingdoms, and also with the Slav world; for the Kingdom of Great Moravia and Bulgaria (ninth century), and the Kiev State of the Ruriks (ninth and tenth centuries), maintained very close economic and political relations with Byzantium.

6. Many foreigners, attracted by the international trade, took up residence in Constantinople and other towns of the Byzantine Empire. Merchants from the same town or the same country would live in the same district, setting up independent communities (brotherhoods, colonies), and building their warehouses, administrative offices and churches, while remaining subject to their own national laws. Flourishing colonies were established at Constantinople by several Italian towns, Venice and Amalfi to begin with, and later Genoa and Pisa. The Bulgarians also kept warehouses there from the ninth century on, and Russian merchants took over a special district there in the tenth century. On the basis of the principle of the personality of laws, which was widely recognized in the feudal times, these communities soon acquired a degree of autonomy, and in particular the right to have special magistrates, who began to be called "consuls" in the twelfth century.

7. For instance, in 1060 Venice acquired the right to send magistrates to Constantinople to try their compatriots in civil and criminal cases, while in the following century the Emperor Alexius III's Golden Bull of 1199 granted the Venetians the privilege of having even disputes between them and citizens of the Byzantine Empire judged by their own magistrates. In 1204, the Republic of Genoa obtained permission to occupy, and appoint Genoese magistrates to administer, a district in Constantinople, from which its merchants were to trade as far afield as the south shores of the Black Sea. In 1243, the merchants of the town of Montpellier had a consul and their own street in Constantinople, and in 1340 the town of Narbonne obtained permission for its merchants to settle there also.

8. After the Arab conquest of much of the Roman Empire in the seventh century, the Moslem States granted merchants from cities of western Europe a system of protection, on which the capitulations were later based. Pisa appears to have been the first town to enjoy this privilege in Morocco in 1133; Montpellier and Narbonne achieved it at Alexandria, in 1267 and 1377, respectively.

9. The same kind of international trading requirements as had given rise to the institution of independent communities with their own magistrates in the Byzantine Empire and the Muslim States led to the establishment of warehouses or trading posts in the various Christian principalities during the Crusades. The town of Amalfi set up trading posts at Acre (1110) and Tyre (1123), in the Kingdom of Jerusalem (1157), at Antioch and Tripoli (1170), and Pisa at Tyre (1187). These independent trading posts greatly increased in number as a result of the Crusades. Marseilles obtained permission to have consuls at Tyre and Beirut (1223), Montpellier at Antioch and Tripoli

² Stuart, *loc. cit.*, p. 484.

(1243), in Cyprus (1254) and Rhodes (1356), and the town of Narbonne in Rhodes (1351).

10. The institution of special judges survived after the fall of the Western Roman Empire even in western Europe, where the militarily organized tribes of barbarian invaders founded, on the ruins of the Roman Empire, feudal States characterized by the sovereignty of the feudal domains, the decay of the towns and a return to an agricultural economy, economic and administrative particularism, and the personality of laws. Where trade managed to survive, the institution of special judges survived likewise. For instance, in the fifth and sixth centuries the Visigoths had special magistrates called *telonarii* for settling disputes between foreign merchants in accordance with their own laws. But the great invasions of the Huns (fifth century), the Avars (sixth century) and the Lombards (sixth century) almost completely destroyed foreign trade in western and southern Europe.

11. Trade in that part of Europe was not revived until much later, as a result of the division between crafts and agriculture, the manufacture of products for sale, the resurgence of the old Roman towns which had been depopulated during the invasions, and the foundation of new towns in the feudal societies of central and eastern Europe. International trade grew up, at first with the Italian, Slav and Frankish cities, then with the Moslem States, and, later, with the Atlantic, North Sea and Baltic ports.

12. A similar process went on in the western part of the Mediterranean basin. In most of the trading and industrial towns, special magistrates called "consul judges" or "merchant consuls" were appointed to settle disputes between foreigners and local merchants.

13. Soon, the need to protect their interests abroad induced the mercantile towns to send similar magistrates, known as "overseas consuls" or "foreign consuls" to foreign towns and ports, for the main purpose—in the generally unsettled conditions of the period—of providing their own traders with *security* and a *judicature* for the protection of the interests of merchants and ships' masters and the settlement of their disputes in accordance with their own laws.

14. Consulates therefore had their origin in the institution of the special magistrates whose function it was to settle disputes between merchants. The history of the very earliest centuries of our era shows that these judges appeared wherever international trade arose. They apparently existed in China (eighth century), India and the Arab countries (ninth century); but consulates first appeared in Europe to deal with relations between Europe and Byzantium. As early as 945, under a treaty concluded between the Russian principality of Kiev and the Byzantine Empire, Russian merchants were protected by a Russian official whose task it was to settle disputes between them. The part played at that time by the Byzantine Empire in international trade explains the great expansion in the system of consulates.

3. DEVELOPMENT OF CONSULATES

1st period: The consul mainly as judge

15. Spurred on by international trade, the consular in-

stitution developed rapidly in the thirteenth and fourteenth centuries, not only in the Mediterranean basin but also on the Atlantic, North Sea and Baltic coasts. The Italian republics, for example, exchanged consuls with one another and set up consulates in Spain. In 1251, the city of Genoa obtained permission from King Ferdinand III of Castille to have consuls at Seville empowered to settle disputes, not only between Genoese, but between Genoese and local citizens. In the thirteenth century, Venice had consuls in more than thirty cities. In 1347, King Peter IV of Aragon granted the city of Barcelona the right to set up a consular court.

16. By the thirteenth and fourteenth centuries, the important part played by the Italian republics and the cities of Marseilles, Valencia and Barcelona in international trade obliged them to send consuls to cities and ports on the Atlantic, North Sea and Baltic coasts. In 1402, consuls of the Italian republics were sent to London and the Netherlands. In 1485, the England of Richard III sent its first consul to Italy and, before the end of the fifteenth century, there were English consuls in the Netherlands, Sweden, Norway and Denmark.

17. During the same period, the Hanseatic and Flemish towns set up trading posts, under officials called aldermen, conservators, praetors or consuls, on the Atlantic and Mediterranean coasts.

18. The laws, customs and usages administered by the consuls of the time have been handed down to us in the form of collections or compilations of maritime law. The first of the codes on the duties of consuls, known as the *Amalfi Tables* (*Tabula Amalfitana*), probably dates from the eleventh century. Its main object was to protect the interests of the shipowners of the time. Another collection of texts, of French origin and dating from the feudal era, is the document entitled *Jugemens d'Oléron*, also known as the *Rôles* (or *Charte*) *d'Oléron*. This is a private collection of judgements rendered by the Court of Justice on the Ile d'Oléron, also dealing with relations between ships' masters and crews. These judgements probably date from the end of the eleventh and beginning of the twelfth century. They were in force over a long period in the countries of western Europe.

19. The best-known compilation of maritime customs is unquestionably the *Consolato del Mare* (Consulate of the Sea), which, it is generally agreed, was drawn up at Barcelona in the fourteenth century. It is a complete codification of the contemporary maritime law under which disputes between sailors and merchants were settled by two magistrates called consuls.

20. The Consulate of the Sea appears to have been accepted in nearly all Mediterranean seaports and enjoyed considerable authority. In the towns of the Hanseatic League it was the *Codes of Lübeck* and the *Maritime Law of Visby*, a town on the island of Gotland, which became the basis of international practice at almost the same time.

21. The existence of merchant colonies in the Levant was unaffected by the disappearance of the Christian Kingdoms there or the Turkish capture of Constantinople in 1453. To enable them to trade and to have their disputes settled by their own consuls in accordance with their

own national laws, the Italian cities and the kings of France obtained special concessions called *capitulations* from the Turkish Porte and the chiefs of the Moslem States. The powers of consuls in countries governed by the capitulations were subsequently extended to cover penal and administrative (police) matters, foreigners being completely exempt from the jurisdiction of the territorial State and having ex-territorial rights.

22. Among the Italian cities, Genoa concluded capitulations with the Turkish Empire in 1453 and Venice in 1454. France was the first great power to obtain the same privilege in 1535.

2nd period: The consul as State representative

23. In the sixteenth century, the consolidation of the power of the monarchy in the feudal States, the expansion of productivity within the feudal system, the growth of towns and the new stimulus given to international trade by the great geographical discoveries fostered the development of the consular institution.

24. The great importance of this institution at the time can only be understood in the light of the difficulties under which international trade then laboured. In the first place, every nation was hostile to every other nation's trade as detrimental to its citizens. Again, trade was greatly hampered by the dangers of sea and land communications, and by the very frequent wars of the feudal age. International treaties were a dubious safeguard, as diplomatic missions were rather infrequent and, as a rule, of short duration. Therefore, only consuls could give any sort of effective protection to international trade; but, to do so, they had to be vested with sufficient authority, hence the need for the consul judge to become a real public minister. So the State took over the right to send consuls, who ceased to represent the traders and became official State representatives performing certain diplomatic functions and enjoying the corresponding privileges and immunities.

25. This situation is at the bottom of the arguments, so common in the 17th century, as to whether or not consuls are public ministers. These arguments were still going on in the nineteenth century, as witness the view upheld by Mr. Ed. Engelhardt in his report of 1894 to the Institute of International Law that the consul represents "within the varying limits of his competence, the interests both of the sending State and of its subjects, and thus in some degree partakes of the main attribute of the diplomatic function".³

26. The last traces of this old dispute are to be found in those provisions of some of the older conventions where the contracting parties deemed it necessary to eliminate any doubt by answering the above question in the negative. (See, for example, the Convention between Cuba and the Netherlands of 31 December 1913, article 6, para. 1).

3rd period: Safeguarding trading and shipping interests

27. The vast increase in productivity in the countries of western Europe brought about immense changes in the

domestic circumstances and the foreign relations of States in the first half of the seventeenth century. The pressing need for large domestic markets resulted in the unification of States. Those which had overcome their feudal particularism began to affirm their national sovereignty and independence. The exercise of civil and penal jurisdiction by consuls became incompatible with the sovereignty of the territorial State. Everywhere in Europe this consular right was transferred to the State.

28. The first of the consuls' traditional powers to be lost were those affecting citizens of the State of residence. It was not until much later that the State began to exert its legal authority over foreigners also. For instance, the Convention of Pardo, concluded between France and Spain in 1769 ("Convention between the Courts of Spain and France for the better regulation of the functions of the Consuls and Vice-Consuls of the Spanish and French Crowns in their respective ports and territories"), still prescribed that "disputes between subjects of either contracting party in the territory of the other, including all matters concerning seafarers, shall be settled by the respective consuls without the intervention of any local official". Under this Convention appeals from these decisions could only be lodged with the courts of the country of origin of the consuls.

29. Consular powers were further reduced in another direction. The appearance and spread of permanent diplomatic missions in Europe during the sixteenth and seventeenth centuries resulted in consuls losing their diplomatic powers.

30. Owing to this development, the consul's functions underwent a radical change. His diplomatic and judicial duties, on which most of his powers had previously been based, were replaced by the task of looking after the interests of the State and its citizens, *particularly in trade, industry and shipping*.

31. As this change took place only in European countries, it did not affect the status of consuls in countries where the capitulations obtained. There consular representatives still enjoyed diplomatic privileges and immunities. This exceptional system was subsequently imposed on other countries: in Asia, Africa and Europe.

32. The interest of States in the consular service is borne out by the regulations governing it. The first set of consular regulations was published in France by Colbert in his *Ordonnance de la marine* (1681), which several other States took as a model in organizing their consular services. At the same time, the ramification of economic relations between States helped to generalize the institution.

33. In the seventeenth century, British, Swedish and Danish consuls went to Russia; but Russian consuls were not sent abroad until the beginning of the eighteenth century, when they went to Amsterdam (1707), Venice (1711), Hamburg (1715), Paris (1715), Wroclav (Breslau) (1717), Antwerp (1717), Vienna and Liège (1718), Nuremberg (1722), and Bordeaux and Cadiz (1723). Austria, which already had consulates in the countries of the Levant, set up others in Europe in 1752. The United States of America set up its first consulate in France in 1780.

34. The abolition of the feudal system and the in-

³ *Annuaire de l'Institut de droit international, Edition nouvelle abrégée* (1928) (Paris, A. Pedone, 1928) vol. III, p. 415.

dustrial revolution at the beginning of the nineteenth century brought about an unprecedented expansion of communications, international trade and foreign travel, which led to an extraordinary increase in the number of consulates and to the adoption by States of regulations for the consular service. In France, the edict of 1778 and the ordinances of 1781 made substantial changes in the *Ordonnance de la marine*, the new regulations being amplified by a series of ordinances in 1833. The first United States laws concerning consuls were drafted in 1792. Prussia published its first consular regulations in 1796, Sardinia in 1815, Russia in 1820 (amended in 1858), Great Britain in 1825 and the Netherlands in 1838. The German Confederation promulgated a law on the organization of consulates in 1867, and this was supplemented by instructions in 1871 and 1873. Other States also issued regulations for their consular services during the nineteenth century, for example, Colombia (Organic Law of 1866), Paraguay (Regulations of 1871), the Principality of Monaco (Ordinance of 1878), Romania (Consular Regulations of 1880), Bolivia (Consular Regulations of 1887), the Dominican Republic (Organic Law of 1887), Guatemala (Regulations of 1892), the Republic of San Marino (Law of 1892), Peru (Consular Regulations of 1898) and Japan (Regulations of 1899).

35. In the twentieth century, almost every State took steps to regulate its consular service, and many formulated rules defining the legal status of foreign consuls in their territory.

36. The development of consular relations was also reflected in the ever-increasing number of bilateral treaties with provisions concerning consuls. Phillimore gives a list of 140 treaties concluded before 1876 on the duties, powers and privileges of consuls, 10 of which were concluded in the seventeenth century, 33 in the eighteenth century and 94 in the nineteenth century.⁴

37. The importance of the consular institution for economic relations between States and the need to define the legal status of consuls were the reasons for the conclusion on 13 March 1769 of the Convention of Pardo between France and Spain. This Convention, which prescribed detailed rules governing the status of the consuls of the two States concerned, was the first of the consular conventions.⁵

Abolition of the capitulatory system

38. After the emergence of independent national States, the maintenance of consular jurisdiction in countries where the capitulatory system obtained, was, as Professor Fauchille has said, diametrically opposed "to national unity and homogeneity and to the sovereignty of States".⁶ The abolition of consuls' civil and penal jurisdiction in Europe made its survival in non-European countries look like a form of discrimination incompatible with the principles of national sovereignty and equality between States. Hence

it was naturally not very long before steps were taken to remove the anomaly.

39. Some States got rid of the capitulatory system on attaining their national independence, for example, Serbia, Bulgaria, Romania and, later, Syria and Lebanon. Others saw it wane after coming under the colonial domination of foreign Powers. Among the remainder, only Japan succeeded—under the Anglo-Japanese Treaty of 16 July 1894—in getting rid of the capitulatory system, before the end of the First World War, by means of a series of treaties concluded with the States enjoying capitulatory rights.

40. Turkey's repeated efforts before the First World War to achieve the same result were fruitless, and its repudiation of the capitulatory system in its note of 9 September 1914 met with the unanimous opposition of all the States enjoying capitulatory rights. The Treaty concerning the Protection of Minorities in Greece, signed at Sèvres on 10 August 1920 but not ratified, prescribed, in article 261, the restoration of the capitulations. When, after the October Revolution, the Soviet Union abrogated all the unequal treaties concluded by the former Czarist Government in a declaration dated 7 December 1917, Turkey was one of the first countries to benefit. The Soviet Union later confirmed its abandonment of capitulatory privileges in its treaty with Turkey of 16 March 1921 (article VII). It was not until after that date that Turkey managed to achieve the complete abolition of the capitulations, under the Treaty of Peace signed at Lausanne on 24 July 1923 (article 28).

41. Having, like Turkey, benefited from the Soviet Government's abrogation of unequal treaties, Iran won confirmation of the abandonment of the capitulations in the Russo-Iranian Treaty of 26 January 1921 (article XVI). Other European powers did not give up their capitulatory privileges in Iran until 1928.

42. The capitulatory system ended for Egypt with the Convention regarding the Abolition of the Capitulations in Egypt, signed at Montreux on 8 May 1937.

43. In the case of China, the Soviet Union was for a long time the only State to have abolished its consuls' jurisdiction and extraterritorial rights, which were privileges based on the earlier capitulations, the abolition being confirmed by the Treaty of 31 May 1924 (article 12). Despite repeated efforts, China only achieved the abrogation of extraterritorial rights during the Second World War, under its treaties of 11 January 1943 with the United States and the United Kingdom, and its Agreement of 28 February 1946 with the French Government.

44. The abolition of consular jurisdiction in Thailand was achieved, subject to certain conditions, under a series of agreements concluded from 1925 on with the States enjoying capitulatory rights.

45. A glance at the measures taken to abolish the capitulatory system is enough to show that the privileges enjoyed under it by the consuls of some European countries, and in particular their judicial powers in civil, commercial and penal matters, belong to the past, and, conflicting as they do with the fundamental principle of the sovereign equality of States, have no place in current international law.

⁴ Robert Phillimore, *Commentaries upon International Law*, 3rd ed. (London, Butterworths, 1882), vol. II, pp. 280 ff.

⁵ Fauchille, *op. cit.*, p. 115.

⁶ *Ibid.*, p. 144.

4th period: Recent developments in the consular institution

46. The economic interests of States and the importance foreign trade has acquired for most of them have compelled Governments to entrust the protection of their citizens' trade and the safeguarding of their economic interests to their diplomatic representatives, assisted by officials specially versed in trade matters, known as *commercial attachés*. Whereas in earlier times the consul's main function was the protection of trade and shipping, nowadays he is more concerned with administrative matters.

47. This trend in the development of the consular institution has been hastened by economic factors in both the capitalist and the socialist worlds. The concentration of industry in the capitalist countries has enabled large firms and trusts to send abroad more and more frequently representatives with technical knowledge not readily available to a consul,⁷ while the introduction in some socialist countries, and above all in the Soviet Union, of a foreign trade monopoly has led to the creation of a special organ to deal with trade matters, namely, the *trade mission*, which forms part of the diplomatic mission.

48. The consul's powers in economic matters, as recognized in customary international law, remain unchanged; but he is, in fact, no longer the main representative of his country's commercial interests, his more limited task being to act as intermediary between the diplomatic mission or the trade mission and the authorities or traders of his consular district.

49. In this connexion, however, two points are to be noted: first, that in countries where the State of origin has no diplomatic mission the consular representatives' commercial activities normally retain their former scope, and, secondly, that consular functions have been widened in modern times by technical improvements in international air communications and the development of cultural relations between countries.

50. Some consular conventions, for example, that between Czechoslovakia and the Soviet Union of 16 November 1935 (article 18), define consular duties as regards assistance to aircraft. The consular regulations of some countries likewise specify consular powers regarding air traffic and prescribe, *inter alia*, that they must help aircrews, lend assistance where aircraft are damaged, supervise the observance of international conventions on aviation, and check log-books. Recent consular conventions recognize the right of consular representatives (which was already theirs by custom) to foster scientific, artistic, professional and educational relations, or cultural relations in general (article 20 of the Consular Convention of 14 March 1952 between the United Kingdom and Sweden; article 20 of the Consular Convention of 22 February 1951 between the United Kingdom and Norway; article 28 of the Consular Convention of 31 December 1951 between the United Kingdom and France; article 20 of the Consular Convention of 17 April 1953 between the United Kingdom and Greece; article 21 of the Consular Conven-

tion of 20 March 1954 between the United Kingdom and Mexico).

51. A brief analysis of the historical development of the consular function shows it to reflect the main features of international economic relations at each stage, the nature, scope and content of consular duties being mainly determined by international trade requirements in the widest sense. What also emerges from such an analysis is that, despite the changes it has undergone during its history, the institution of consular missions is still fully adapted to the real requirements of international life.

CHAPTER II

Codification of consular law

52. The first attempts to codify the rules of international law on consuls were the result of the growth of consular relations and the extraordinary increase in the number of consulates during the nineteenth century. They were all due to private effort.

53. The first draft codification was the work of the Swiss Johann Gaspart Bluntschli: "*Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*" which appeared in 1868.⁸ This was followed in 1872 by the draft of the American jurist David Dudley Field, published in his work entitled *Draft Outlines of an International Code*. Chapter XIII of the second edition of this work, which appeared in 1876, deals with consuls (articles 159-185).⁹ The Italian Pasquale Fiore dealt with consuls in his work entitled "*Il Diritto internazionale codificato e la sua sanzione giuridica*".¹⁰ The 5th edition, which appeared in 1915,¹¹ deals with this subject in title XV of book I.

54. The main feature common to these three codifications is that they contain an indiscriminate mixture of rules of international law and personal suggestions by the authors which should, in their opinion, be accepted as rules of international law.

55. The Institute of International Law first looked into the legal status of consuls during its sessions held at Lausanne (1888), Hamburg (1891), Geneva (1892) and Venice (1896). Draft regulations containing twenty-one articles on the immunities of consuls were adopted at the Venice session.¹²

⁸ Translated into French by M. C. Lardy: *Le droit international codifié*, 5th ed. (Paris, Guillaumin et Cie., 1895). In this edition articles 244-275 of the "*Code de droit international*" deal with consuls.

⁹ *Draft Outlines of an International Code*, 2nd ed. (New York, Baker, Voorhis and Company, 1876), pp. 58 ff.

¹⁰ 1st edition, 1889-1890; 2nd edition, 1898; 3rd edition, 1900; 4th edition, 1909. French translation of the 4th edition by Ch. Antoine: *Le droit international codifié et sa sanction juridique* (Paris, A. Pedone, 1911).

¹¹ English translation by Edwin M. Borchard, *International Law Codified and its Legal Sanction* (New York, Baker, Voorhis and Company, 1918).

¹² *Annuaire de l'Institut de droit international*, Edition nouvelle abrégée (1928), (Paris, A. Pedone, 1928), vol. III, pp. 1075-1081.

⁷ See Luke T. Lee, "Some New Features in the Consular Institution", *The Georgetown Law Journal*, vol. 44, No. 3, March 1956, pp. 406-424.

56. In 1925, the American Institute of International Law adopted a draft convention containing eleven articles on consuls.¹³ This draft was sent to the Governments of the American Republics through the Pan-American Union.

57. A draft convention on immunity in international law, submitted by Dr. Karl Strupp to the thirty-fourth conference of the International Law Association, held at Vienna in 1926, contained only two articles on consuls. Article XXVIII provided that consuls should enjoy only such immunities as were granted to them under special agreements, and article XXIX that, in the absence of special provisions, consuls in capitulatory countries should enjoy the same immunity as the heads of diplomatic missions.¹⁴

58. In 1927, Mr. David Jayne Hill presented to the Institute of International Law a report on "Diplomatic and consular immunities and immunities to be granted persons vested with international functions", the second part of which deals with consular immunities, the author's conclusion being that there is no need for a radical revision of the regulations drafted at Venice (1896), that the principles governing consular immunities are sound and generally accepted, and that he has no proposals to make on the subject.¹⁵

59. A draft multilateral consular convention containing twenty-four articles¹⁶ is included in Mr. Witold Wehr's report on the codification of consular law to the thirty-fifth conference of the International Law Association, held at Warsaw in 1928.

60. Lastly, the detailed draft codification (in thirty-four articles) concerning the legal position and functions of consuls, prepared by the Harvard Law School on Professor Quincy Wright's report, has the merit of containing abundantly documented commentaries on the articles.¹⁷

61. On the other hand, there were no signs of any official efforts to codify the rules of international law on consuls in the form of multilateral conventions until the beginning of the twentieth century. The first such conventions were of a regional nature, the earliest being that signed at Caracas on 18 July 1911 by Bolivia, Colombia, Ecuador, Peru and Venezuela, concerning consular functions in each of the signatory Republics.¹⁸

62. In 1927, the Inter-American Commission of Jurists prepared a draft set of twenty-six articles on consuls.¹⁹ On the basis of this draft, the Sixth International Conference

of American States drew up the Convention regarding Consular Agents, signed at Havana on 20 February 1928,²⁰ which contained twenty-five articles regulating the appointment and functions of consuls, their rights, and the suspension and termination of consular functions.

63. The question of the legal status and functions of consuls was taken up again as part of the activities of the League of Nations. In 1926, the Committee of Experts for the Progressive Codification of International Law, established pursuant to the Assembly resolution of 22 September 1924, compiled a list of seven subjects, the regulation of which seemed to be most desirable and realizable.²¹ The Committee of Experts subsequently studied other subjects that might be added to its list, among them the question of the legal status of consuls. A Sub-Committee, with Mr. Guerrero as Rapporteur, was set up to prepare a report on whether it was possible to establish by way of a general convention provisions as to the legal status and functions of consuls, and, if so, to what extent. In the words of the conclusions to that Sub-Committee's report,²² amended as a result of discussion in the Committee, the latter found that "the regulation of the legal status of consuls by international agreement is desirable from every point of view, and is even indispensable in order to avoid disputes which the absence of definite rules on the matter must certainly cause". The question of consular functions was reserved for later examination.²³

64. A questionnaire (questionnaire No. 9), dated 2 April 1927, was sent out to Governments to ascertain whether they considered that the questions referred to in the aforementioned report of the Sub-Committee, or some of them, could advantageously be examined with a view to the conclusion of a general convention which, if necessary, could be completed by particular agreements between groups or pairs of States.²⁴ Of the twenty-six Governments which replied to the questionnaire, sixteen favoured regulation by multilateral agreement, and, since one Government did not indicate its official view but sent personal comments from a professor of international law supporting codification, it may be taken that there were seventeen replies in favour. Two Governments, while not opposed to codification, more or less adopted a waiting attitude, while seven Governments were against.²⁵

65. Following this consultation, the Committee of Experts added two new questions, including one entitled "Legal position and functions of consuls", to the original list of seven subjects. The League of Nations Assembly took note of this decision in 1928 and reserved the two additional questions with a view to subsequent conferences.²⁶ And that was as far as the question got.

¹³ Harvard Law School, *Research in International Law, II. The Legal Position and Functions of Consuls* (Cambridge, Mass., 1932), pp. 392 and 393.

¹⁴ The International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, Ltd., 1927), p. 433.

¹⁵ *Annuaire de l'Institut de droit international, 1927* (Paris, A. Pedone), vol. I, p. 420.

¹⁶ The International Law Association, *Report of the Thirty-Fifth Conference* (London, Sweet and Maxwell, Ltd., 1929), pp. 356-375.

¹⁷ Harvard Law School, *op. cit.*, pp. 217-375.

¹⁸ *British and Foreign State Papers, 1914 (Part 1)* (London, H.M. Stationery Office, 1917), vol. CVII, pp. 601-603.

¹⁹ Harvard Law School, *op. cit.*, pp. 389-392.

²⁰ League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

²¹ League of Nations publication, *V. Legal, 1926. V.11* (document C.96.M.47.1926.V).

²² *Idem, V. Legal, 1928.V.4* (document A.15.1928.V), pp. 41-44.

²³ *Ibid.*, p. 44.

²⁴ *Ibid.*, p. 41.

²⁵ *Ibid.*, pp. 57 ff.

²⁶ League of Nations, *Official Journal, Special Supplement No. 63* (October 1928), p. 10.

CHAPTER III

General nature of the consular mission

66. Before approaching the subject of the codification of consular intercourse and immunities, it is necessary to consider the general nature of the consular mission and to devote a few words to the, in the past much-debated, question whether or not the consul is a "public minister", since on the answer to that question largely depends the definition of his rights and prerogatives. From an analysis of the international treaties, and of the national laws and jurisprudence concerning consuls, the answer is distinctly in the negative, and most authorities confirm this view. The opinions of some nineteenth century authors who defended the opposite thesis are doubtless explained by the fact that they were misled by the status of the consul in a country where the sending State has no diplomatic mission and by that of the consul-general—*chargé d'affaires*, i.e. by two exceptional cases. Consular representatives, though official representatives of the State appointing them, are not at the present time public ministers—in other words, are not diplomatic agents. And though, as a glance at the historical background of the consular mission shows, consuls at one point in their history did fill that role, they have since lost it (see chapter I above).

67. Diplomatic agents, within the limits fixed by international law, represent the State whose credentials they bear in all aspects of its international intercourse. They are representatives of the Head of State and of the Government which appointed them. It is the State itself that speaks through them. That is their essential attribute. Their main role is to act as a liaison organ and agent in all their Government's transactions, in the negotiations it conducts, and in all intercourse between the Head and the Government of the sending State and the Head and the Government of the State to which they (the agents) are accredited—unless, of course, the sending State prefers to send a special mission for the purpose. Consuls, on the other hand, while State representatives, are appointed for limited purposes to a specific district outside which they can engage in no official activity without the permission of the Government of the State of residence. They are State agents whose competence is limited *ratione materiae*, and very often *ratione loci* as well.

68. The difference between these two categories of State representative comes out in the manner of their appointment, the form of their credentials, their assumption of office and their attributes.

69. Diplomatic representatives, with the exception of *chargé d'affaires* accredited by the minister of foreign affairs of one State to the minister of foreign affairs of another, are appointed by a Head of State and accredited to another Head of State. The appointment of consuls is governed not by international but by municipal law. Although in many countries consuls-general and consuls are appointed by the Head of State, in others the power of appointment is vested in the minister of foreign affairs. As to vice-consuls and consular agents, there are several States whose laws accord even consuls-general or consuls the right to appoint them, subject in some cases to confirmation by the ministry of foreign affairs.

70. Diplomatic representatives are provided with credentials addressed by the Head of the accrediting State to the Head of the receiving State, whereas consuls carry commissions, which are often signed by the Head of State but are mostly drafted in the form of a power of attorney addressed to the civil authorities.

71. Diplomatic representatives are entitled to the immunities recognized under international law from the moment they arrive in the State of residence, provided they produce reliable documentary proof of their status,²⁷ and enjoy in full all the prerogatives deriving from their function as soon as they have presented their credentials. Consuls are recognized in their official capacity, not from the time they present their commission, but only from the time they are granted the *exequatur*, or at least provisional recognition.

72. In the absence of international treaties, the attributes of diplomatic representatives are regulated by customary international law, whereas the scope of a consul's functions is, in such case, determined only in part by customary international law, being mainly defined by municipal law, in conformity, of course, with the fundamental principles of international law. Furthermore, the attributes of diplomatic representatives are much wider than those of consuls and include consular functions.

73. Lastly, there is also a difference as regards their right to communicate with the authorities of the State of residence. A diplomatic representative may approach the minister of foreign affairs and, through him, even the Head of State. As a general rule, a consular representative can approach only the local authorities of his consular district, direct access to the central authorities of the State of residence being allowed him only in exceptional circumstances, (for example, in the absence of a diplomatic mission from his country).

CHAPTER IV

Honorary consuls and consuls otherwise gainfully employed

74. Apart from career consuls (*consuls d'Etat, consules missi*), who are officials of the State, paid by it and fully occupied in the performance of their official duties, hence engaged in no other lucrative occupation on their own account, consular intercourse is maintained in some countries by honorary consuls (*consules electi*), mostly chosen from among merchants or businessmen of the State in whose territory they are to exercise their functions. In most cases they do not have the nationality of the State appointing them. Honorary consuls enjoy much less favourable treatment than career consular representatives. Consular conventions and national regulations do not grant the same privileges and immunities to consular representatives who, though officials of the State they represent, are authorized by their national laws to engage in some gainful activity

²⁷ P. Pradier-Fodéré, *Cours de droit diplomatique à l'usage des agents politiques du ministère des affaires étrangères des États européens et américains*, 2nd. ed. (Paris, A. Pedone, 1899), vol. I, p. 446.

or occupation outside their consular functions in their country of residence.

75. The existence of these two categories of consular representative complicates the work of codifying consular law. One question which arises is whether the draft convention on consular intercourse and immunities should include provisions concerning honorary consuls. The above-mentioned report of the sub-committee appointed by the Committee of Experts for the Progressive Codification of International Law expresses the following view on the subject:

"In the present stage of development of the institution of consuls and in the interest of the prestige of the career, the latter class of consuls should no longer exist. In point of fact, most honorary consuls of foreign nationality are far busier with their personal affairs than with those of the country which has conferred the title upon them, and as they generally engage in commerce in their consular area they occasion appreciable loss to other merchants. The commercial invoices submitted to them enable them to obtain valuable information which is of great use to them in their private affairs. They are thus able to compete on an unfair basis with the traders in their area. Moreover, nationals of the country which appoints these foreign consuls do not obtain from them the protection to which they are entitled and which they would always obtain from a consul of their own nationality."²⁸

76. To the arguments put forward in the report of the Sub-committee should be added the point that the State which has appointed an honorary consul of foreign nationality can exercise no effective control over his activities. Should he perform his duties badly, the only practical remedy is to dismiss him.

77. It must be added that the authorities on the subject are far from unanimous on the need to retain this type of consul. For a very long time there have been writers advocating the abolition of *consules electi* who are citizens of the State of residence. For instance, as early as the eighteenth century, Vattel very firmly maintained that a consul's functions demanded that he should not be a subject of the State in which he resided, as otherwise he would be obliged to take orders from that State on all matters, and would not be free to perform his duties.²⁹ Phillimore is also opposed to them.³⁰

78. Despite the above-mentioned objections, a fair number of Governments still employ this type of consul nowadays. Some of them, in their replies to the 1927 questionnaire of the Committee of Experts (see above, para. 64), opposed the abolition of honorary consuls. Among these were Finland, the Netherlands and Switzerland, the opposition of at least Finland and Switzerland

being based on practical and financial considerations. On the other hand, due account must be taken of the already quite large number of States which refuse to accept honorary consuls, and of the even larger number which do not appoint them. A convention containing provisions relating to honorary consuls would certainly not be acceptable to such States.

79. In these circumstances, the only means of reaching international agreement would be to devote a special chapter to honorary consuls in a draft set of articles on consular intercourse and immunities, and to stipulate in the final clauses that the chapter need not apply to States which do not appoint or accept honorary consuls.

CHAPTER V

Questions of method

80. In framing draft articles on consular intercourse and immunities, a careful distinction must be drawn between those aspects of the status of consular representatives which are regulated by municipal law and those which are, or could be, regulated by international law. In the latter case, the regulations must be divided into two categories: (a) *customary* international law provisions, and (b) *international conventions*, or more specifically consular conventions. The former establish the general system applicable to all consular representatives, whereas the latter define the system applicable, on a strictly reciprocal basis, to consuls appointed by the contracting parties. Such particular provisions can of course be given general application under the most-favoured-nation clause.

81. Going through the international treaties, it is possible to pick out rules that might be acceptable, on a reciprocal basis, to at least the vast majority of, if not all, States.

82. Wherever the need arises to fill in gaps left by this process or to clarify certain disputed or obscure points, account will have to be taken of the practice of States, and of the regulations enacted under the world's main legal systems, in so far as the national laws concerned are consistent with the fundamental principles of international law.

83. That is the only method of successfully preparing a draft that will have any chance of being accepted by Governments, and of becoming an effective instrument for furthering co-operation in that aspect of international relations which involves daily contact between States with different political and economic systems.

84. A draft set of articles prepared by that method will therefore entail the 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.

85. The question arises what the relationship will be between the draft articles to be prepared by the International Law Commission and the many agreements to which States are parties. It would seem reasonable to specify that the projected draft should not affect existing bilateral

²⁸ League of Nations publication, *V.Legal*, 1928.V.4 (document A.15.1928.V), p. 43.

²⁹ E. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, vol. I, reproduction of books I and II of 1758 edition (Washington, D.C., Carnegie Institution of Washington, 1916), book II, chap. II, sect. 34, p. 282.

³⁰ Phillimore, *op. cit.*, p. 279.

agreements, assuming it is finally accepted by States in the form of a multilateral convention. An explicit provision to that effect should be included in the draft. For obvious practical reasons, there would be every advantage in leaving such arrangements intact, the new convention applying only to questions not regulated by *ad hoc* agreements. States acceding to the new multilateral convention would be entirely free thereafter to depart from the *ad hoc* system whenever it was different from, or less favourable than, that introduced by the multilateral convention.

86. Discussion and codification of this question would be greatly facilitated if the collection of legislative texts concerning diplomatic and consular representatives now being prepared for publication by the Secretariat of the United Nations could be published as soon as possible, since the comprehensive collection of such texts, edited in two volumes by A. H. Feller and Manley O. Hudson (*A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries*), was published in 1933.

87. Through the good offices of the Secretariat of the United Nations (Codification Division of the Office of Legal Affairs), the Special Rapporteur has had an opportunity of studying the available material on the laws of thirty-seven States concerning the legal status of consular representatives; having succeeded in obtaining privately similar information in eight other States, he has been able to take account in his report of the national regulations of forty-five States in all.

CHAPTER VI

Questions of terminology

88. Complete lack of uniformity is to be noted in the generic appellations of consular representatives abroad.

89. The term most frequently used is "consul". It is to be found, for instance, in the report on the legal position and functions of consuls by the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law,³¹ in the draft prepared by the Inter-American Commission of Jurists in 1927,³² in the Caracas Convention of 18 July 1911,³³ and in many national regulations (for example, Argentina, Regulations of 1926, article 2; Bolivia, Regulations of 1886, article 1; Colombia, Act of 1905, article 1; Chile, Act of 1930; Switzerland, Consular Regulations of 1924, article 1; and the Democratic Republic of Viet-Nam, Provisional Regulations governing Relations with Foreign Consuls). The term is used in the same sense in the draft codifications of Bluntschli,³⁴ Field³⁵ and Fiore,³⁶ in the draft convention on immunity in international law, submitted by

Karl Strupp in 1926 to the thirty-fourth conference of the International Law Association, held at Vienna (article XXVIII and XXIX),³⁷ and in the Harvard draft published in 1932.³⁸ It is also used in the same sense in quite a considerable number of bilateral treaties.

90. In some conventions care is taken to specify that the term "consul" covers consuls-general, consuls, vice-consuls and consular agents (for example, the Consular Convention between Bulgaria and Poland of 22 December 1934, article 1, para. 3; the Consular Convention between the Soviet Union and Czechoslovakia of 16 November 1935, article 1, para. 3; and the Consular Convention between Poland and Romania of 17 December 1929, article 1, para 3).

91. Other terms than the word "consul" are used in official texts to designate all categories of consular representative.

92. In some conventions the term used is "*consular official*". In others, this term covers not only consular representatives who are heads of consular offices, but also all official staff employed in the consul's office.

93. In other texts the expression "*consular agents*" is used to describe all classes of consular representative, (for example, the Belgian Regulations of 1920, article 53, and the Convention regarding Consular Agents signed at Havana on 20 February 1928). In the draft of the American Institute of International Law the terms "consular officer" (article 1) and "consular agent" (article 2, *et seq.*) are used alternatively.

94. The term "consular officer" is to be found in the regulations and conventions of the United Kingdom and of the Netherlands; it is also sanctioned by the municipal law of the United States of America (Regulations of 1931, sections 11 and 19, and Consular Regulations of 1932, section 19—although the latter regulations explicitly permit the use of the term "consul" (section 20)). The same term (or its French equivalent, "*fonctionnaire consulaire*") is also to be found in conventions concluded by other States: for example, in the French text of the 1923 Treaty between the United Kingdom and Finland, article 1, and in the French text of the Consular Convention of 22 April 1926 between Cuba and the United States of America. It is also used in the treaties between the United Kingdom and Thailand, of 23 November 1927 (articles 17 and 18), between Chile and Sweden, of 30 October 1936 (article 6, used alternatively with the terms "consular agents" and "consular representatives"), between Denmark and Thailand, of 5 November 1937 (article 17 to 21, used alternatively with the expression "consular agents"), between Germany and Thailand, of 30 December 1937 (article 16 to 18), in the conventions between the Netherlands and Cuba, of 31 December 1913, and between the Netherlands and Austria, of 6 November 1922, and in the Consular Convention between Mexico and Panama, of 9 June 1928 (articles I to VII).

³¹ League of Nations publication, *V. Legal, 1928.V.4* (document A.15.1928.V), pp. 41-44.

³² Harvard Law School, *op. cit.*, pp. 389-392.

³³ *British and Foreign State Papers, 1914 (Part I)* (London, His Majesty's Stationery Office, 1917), vol. CVII, pp. 601-603.

³⁴ Harvard Law School, *op. cit.*, pp. 403-406.

³⁵ *Ibid.*, pp. 399-403.

³⁶ *Ibid.*, pp. 396-399.

³⁷ The International Law Association, *Report of the Thirty-Fourth Conference* (London, Sweet and Maxwell, Ltd., 1927), p. 433.

³⁸ Harvard Law School, *op. cit.*, pp. 193-200.

95. Less common is the term "consular authority", which occurs in the Franco-British Treaty of 1922 (article 4), and in the Hispano-Greek Treaty of 1919 (article 1).

96. Lastly, the term "consular representative" is to be found in certain national regulations (Soviet Union, Norway, Honduras, Luxembourg, People's Democratic Republic of Korea, Federal Republic of Germany) and in some international conventions: Germany-Austria of 1920 (article 14); Denmark-Finland of 1920 (article 21); Germany-Finland of 1922 (article 16); Provisional Agreement between Afghanistan and the United States of America, of 26 March 1936 (article II); Treaty between Japan and Thailand, of 8 December 1937 (articles 25 and 26); Treaty between Chile and Sweden, of 30 October 1936 (article 6); and the Provisional Agreement between Saudi Arabia and the United States of America, of 7 November 1933 (article 1).

97. There can be no doubt that standardization of the above-mentioned terminology is highly desirable.

98. The term "consul", being used to designate a particular class of consular representative, is accordingly ambiguous and not to be recommended where a general term is required to cover all categories of consular representative.

99. The same remark applies to the term "consular agent". Since, however, the term "consular" in the broad sense is sanctioned by long usage, it may be accepted in all cases where its use can lead to no misunderstanding, and particularly in all cases where its meaning is defined in the legal text itself. The same cannot be said of the term "consular agent", since it is reserved in certain laws and regulations (for example, those of France) for non-official staff. According to the regulations on consular immunities adopted by the Institute of International Law at its session held at Venice, in 1896, "consular agents" are: (a) national consuls who exercise some other function or profession; and (b) consuls who by their nationality are subject to the jurisdiction of a State which is not the appointing State, whether or no they exercise other functions or professions.³⁹

100. Furthermore, this expression is apt to be confused with the term "agents of the consular service", which is used in some conventions to designate all staff of consular offices other than heads of offices (acting and assistant consuls, vice-consuls, chancellery attachés and secretaries, chief clerks, chancellery assistants, consular attachés and secretaries, interpreters, and chancellery clerks (cf. article 4 of the Consular Convention of 3 June 1927 between France and Czechoslovakia).

101. For the reasons given, the term "consular representatives", which is also sanctioned by international practice, appears to be the most suitable in the circumstances, having the advantages of clarity and precision and being easy to translate into all languages.

PART II

INTRODUCTION

1. After making a general review of international law at its first session in 1949 on the basis of a survey prepared by the United Nations Secretariat (A/CN.4/Rev.1), the International Law Commission added the following question to the list of topics selected for codification: "Consular intercourse and immunities".⁴⁰

2. The General Assembly of the United Nations, by approving at its fourth session [resolution 373 (iv)] part I of the report of the Commission, signified its acceptance of the list of topics selected.

3. At its seventh session, the Commission decided to begin the study of "Consular intercourse and immunities" and appointed Mr. Jaroslav Zourek Special Rapporteur on the question.⁴¹

4. As the rules of international law concerning consular intercourse and immunities can only be codified by the conclusion of a multilateral convention, the Special Rapporteur, following a well-established practice of the Commission, has prepared a series of draft provisional articles on the subject. As was explained in part I, chapter V, of this report, some of the texts proposed represent an attempt to formulate rules based on common practice as evidence of international custom, while others reproduce provisions which have been selected from international conventions and national laws and on which agreement is sufficiently wide to justify the hope of their acceptance by governments. It will be indicated in the comments on the various articles whether the text suggested merely codifies existing practice or is, from the point of view of general international law, a proposal *de lege ferenda* more fitly coming under the progressive development of international law.

5. In accordance with the Commission's well-established practice, the Special Rapporteur has added comments to the provisional articles, drawing attention to the relevant provisions of international conventions and national laws, and, where it appeared expedient, to the views of the authorities on the subject.

6. The Special Rapporteur would like to point out that, in view of the vast range of material available, he was not always able to check whether a particular convention or a particular set of regulations published in the standard collections of treaties or legal texts was still in force or not. Any attempt to do so would have entailed extensive research, which would have delayed completion of this report. He took the view that such necessarily laborious research was not absolutely essential at the present stage of the work, as such a check will be made more or less automatically when the draft provisional articles formulated by the Commission are communicated to Governments for their observations.

7. Chapter I of the draft contains the articles relating to consular intercourse, chapter II those relating to the

³⁹ *Annuaire de l'Institut de droit international. Edition nouvelle abrégée* (1928) (Paris, A. Pedone, 1928), vol. III, p. 1076.

⁴⁰ *Official Records of the General Assembly, Fourth Session, Supplement No. 10*, para. 16.

⁴¹ *Ibid.*, Tenth Session, Supplement No. 9, paras 31 and 34.

privileges and immunities of career consular representatives, chapter III is designed to regulate the legal status of honorary consuls, and chapter IV contains general provisions.

DRAFT PROVISIONAL ARTICLES ON CONSULAR INTERCOURSE AND IMMUNITIES

CHAPTER I

Consular intercourse

Article 1

Establishment of consular relations

1. Every State has the right to establish consular relations with foreign States.
2. The establishment of diplomatic relations includes the establishment of consular relations.
3. In cases other than those covered by the preceding paragraph, the establishment of consular relations shall be effected by an agreement between the States concerned regarding the exchange or admission of consular representatives.

Comment

1. The right to establish consular relations — like the right of legation, whether active or passive — derives from the sovereignty of States. For a fairly long period the two rights were exercised separately, with the result that in most States the diplomatic and consular services were kept separate. This attitude was still in evidence in the Caracas Convention of 1911, article III of which prohibits the joint exercise of consular and diplomatic functions.

2. With the extension of diplomatic duties (see part I, chapter I, section 3, above), consular functions came to be, in principle, incorporated in diplomatic functions in the broad sense of the term. A logical consequence of this development is that the establishment of diplomatic relations is assumed to include the establishment of consular relations. Another is the abolition of the strict separation between the diplomatic service and the consular service in many States. Since the end of the First World War, most States have merged their diplomatic and consular services, and are in the habit of assigning to their officials diplomatic functions *stricto sensu* or consular functions.

3. The tendency to merge the two services (diplomatic and consular) is of long standing, having been in evidence as early as the eighteenth century. Some States, while preserving the distinction between the two services, were content to ensure their interconnexion by a kind of personal union, appointing their diplomatic officers simultaneously as consular representatives. For instance, Mr. Gérard, the first minister plenipotentiary sent by France to the United States in 1778, was the bearer of a commission appointing him consul-general "at Boston and other ports belonging to the United States of America".⁴²

4. This practice was still current after the First World War. Under the Norwegian law of 7 July 1922, ministers and *chargés d'affaires* were also to be appointed as consuls-general, and counsellors of legation and secretaries of legation as consuls, unless otherwise decided by the King (section 2, para. 4). The same idea would appear to have inspired article 13 of the Havana Convention of 1928,⁴³ under which one and the same person duly accredited for the purpose may combine diplomatic representation and the consular function provided the State to which he is accredited consents to it. The Venezuelan delegation entered a reservation concerning this provision, which it regarded as opposed to its national tradition.

5. But legislation in other States has followed the above-mentioned trend in confirming the competence of diplomatic agents to perform both diplomatic and consular functions. An example is the Swedish Law of 1 April 1927, which stipulates that every official act or other measure which is within the competence of consular agents, according to the provisions in laws or regulations, may also be validly undertaken by a diplomatic agent. Under the Ordinance of 3 February 1928, when there is no consul at the seat of a legation, the chief of legation must undertake the official acts and take all the other measures whose execution devolves upon consuls (article 22).

6. At the present time, the vast majority of diplomatic missions also performs consular duties. As a general rule, they set up a consular department for the purpose in which consular activities are centralized, on account of their special nature. Recent trends may therefore be said to have resulted, not so much in a merging of the diplomatic and consular services as in a novel kind of symbiosis. Analysis of national laws shows that States still regard consular departments as organs of the consular service (see the 1932 Consular Law of the Mongolian People's Republic, article 3, and the Ecuadorian Presidential Decree No. 820 of 16 May 1953, article 1).

7. This new mode of exercising consular functions is furthermore confirmed by several conventions. For example, the Consular Convention of 18 July 1924 between Poland and the Soviet Union stipulates that its provisions relating to consular officials shall also apply to officials belonging to diplomatic missions insofar as they perform consular functions in their country of residence (article 25). A similar provision is to be found in the Consular Convention of 16 November 1935 between the Soviet Union and Czechoslovakia (article 19). Article 31 of the Treaty concluded between Greece and Lebanon on 6 October 1948 also contains a clause to the effect that the provisions of the treaty concerning the duties and prerogatives of consuls shall also apply to diplomatic agents of either party invested with consular functions whose appointment has been notified to the other party through the diplomatic channel.

8. Furthermore, almost all States entrust their diplomatic representatives with the general supervision of their consular missions' activities in the countries to which they

⁴² A. H. Feller and Manley O. Hudson (ed.), *A Collection of the Diplomatic and Consular Laws and Regulations of Various Countries* (Washington, D. C., Carnegie Endowment for International Peace, 1933), vol. II, p. 1222.

⁴³ Convention regarding Consular Agents, signed at Havana on 20 February 1928. See League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

are accredited, and there are many countries under whose laws diplomatic representatives are authorized to issue instructions to their consular representatives in their countries of residence.

9. While, as has been stated, consular relations are in most cases established concurrently with diplomatic relations, this is not always so. Consular relations may sometimes be established separately, often as a kind of prelude to diplomatic relations.

10. No State is bound to establish consular relations, unless it has covenanted to do so under an earlier international agreement. Subject to the same reservation, no State is obliged under international law to admit foreign consuls into its territory. This has always been the accepted view of the authorities,⁴⁴ and it is confirmed by the international treaties on the subject. Under the Havana Convention of 1928, for instance, the consent (express or tacit) of States is required for the appointment of foreign consuls (article 1).

11. A State may refuse to receive consuls and give preference to the immediate establishment of diplomatic relations. It may also require consular relations to be arranged in accordance with certain rules governing, for example, the number of consulates and the area of the districts they serve.

12. However, systematic refusal by a State to accept the establishment of consular relations with one or more other States at peace with it is to be considered as contrary to the fundamental principles of international law, and, in particular, when Members of the United Nations are concerned, to Article 1, paragraph 3 of the Charter of the United Nations, which lays on such States the duty of achieving international co-operation in solving international problems of an economic, social, cultural or humanitarian character. The establishment of diplomatic and consular relations is undoubtedly the first condition to be

fulfilled, and diplomatic and consular missions are the main means to that end.

13. The problem of what the connexion between consular and diplomatic services should be is a matter solely for the State concerned, all States being at liberty to safeguard their interests in consular affairs through their diplomatic missions, or, with the consent of the State of residence, through consular missions. Where consular duties are performed by a diplomatic mission, there can be no objection to the joint discharge of diplomatic and consular functions by the officers of that mission, or to such officers enjoying all the privileges and immunities accorded to diplomatic agents under international law. For, in that case, who shall discharge the consular functions is the particular diplomatic mission's own domestic concern, the diplomatic representative being alone responsible for the conduct of consular affairs.

14. The term "sending State" denotes the State which appointed the consular representative; the term "State of residence", the State in whose territory the representative is to perform his functions.

Article 2

Agreement concerning the consular district

1. The agreement concerning the exchange and admission of consular representatives shall specify, inter alia, the seat and the district of the consular mission.

2. Subsequent changes in the consular district may be made only by agreement between the sending State and the State of residence.

3. No consulate may be established on the territory of the State of residence without that State's permission.

4. Save as otherwise expressly provided in these articles, consular representatives may exercise their functions outside their district only with the express permission of the State of residence.

Comment

1. The permission of the State of residence, whether at the time of establishing consular relations or subsequently, is essential for the creation of a consulate. This principle, which derives from the sovereign authority exercised by the State over its own territory, also applies when a State maintaining consular relations with another State through its diplomatic mission decides to create an independent consular office having as its district either the whole or part of the territory of the State of residence.

2. The consent of the State of residence is also required if the sending State, or its consular representative, wishes to create a consular office within the existing consular district, as often happens in the case of consular agencies.

3. The State of residence may object to the opening of a consular office in a particular town. It may also exclude a particular town or zone from the consular district of a foreign consul. This principle has been sanctioned by practice and stated in many international treaties: the Agreement of 25 April 1947 between the United States

⁴⁴ See, for example:

Vattel, *op. cit.*, book II, chap. II, sect. 34;

P. Fiore, *Il Diritto internazionale codificato e la sua sanzione giuridica*, 5th ed. trans. by Edwin M. Borchard: *International Law Codified and its Legal Sanction* (New York, Baker, Voorhis and Company, 1918), p. 250;

J. G. Bluntschli, *Das moderne Völkerrecht der zivilisierten Staaten als Rechtsbuch dargestellt*, trans. by M. C. Lardy: *Le droit international codifié*, 5th ed. (Paris, Guillaumin et Cie., 1895), "Code de droit international", art. 247;

Ph. Zorn, *Deutsches Gesandtschafts- und Konsularrecht auf der Grundlage des Allgemeinen Völkerrechts*, in Fritz Stier-Somlo (ed.), *Handbuch des Völkerrechts*, vol. II, 3rd part, (Berlin-Stuttgart-Leipzig. Verlag von W. Kohlhammer, 1920), pp. 64 ff.

F. P. Contuzzi, *Trattato teorico-pratico di diritto consolare e diplomatico* (Turin, Unione tipografico-editrice torinese, 1910), vol. I, pp. 178 ff.;

L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), vol. I, p. 834;

A. S. Hershey, *The Essentials of International Public Law and Organization* (New York, The Macmillan Company, 1927), p. 418;

Kozhevnikov, *op. cit.*, p. 42;

Harvard Law School, *op. cit.*, pp. 505-507.

and Nepal (para. 2); the Agreement of 4 May 1946 between the United States and Yemen (article II); the Consular Convention between France and Czechoslovakia of 3 June 1927 (article 1); the Consular Convention between the United States and Costa Rica of 12 January 1948 (article I, para. 1); the Treaty between Greece and Lebanon of 6 October 1948 (article 14, para. 2); the Provisional Agreement between the United States and Saudi Arabia of 7 November 1933 (article 1); the Caracas Convention of 18 July 1911 (article I). Certain national regulations sanction the same principle: Honduras, Law No. 109 of 14 March 1906 (article 7).

4. The consent of the State of residence is also required when it is wished to include the territory of a third State in a consular district.

5. Lastly, the permission of the State of residence is necessary for subsequent changes in the consular district.

6. Some conventions contain provisions granting the sending State the right to own or lease buildings for the use of its consular missions (the Treaty between the United States and Finland of 13 February 1934, article XXI; the Consular Convention between the Philippines and the United States of 14 March 1947, article III; the Consular Convention between the United States and Costa Rica of 12 January 1948, article V; Consular Convention between the United States and France of 31 December 1951, article 9). The right to lease premises needed for the exercise of consular functions derives *ipso jure* from the establishment or the existence of consular relations, while the right to own the necessary buildings depends on the domestic legislation of the State of residence. In view of these facts, there seemed to be no need to include a provision on this point in the articles.

Article 3

Classes of consular representatives

1. Consular representatives shall be divided into four classes:

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

2. Consular representatives shall rank in these four classes according to the date of the granting of the *exequatur*. Where the *exequatur* was granted simultaneously to two or more representatives, rank shall be determined according to the dates on which their commissions were presented. Heads of consular offices shall take precedence of consular officials not holding such rank.

Comment

1. The classes of consul, unlike the classes of diplomatic agent, which were laid down in the Regulations adopted at the Congresses of Vienna (1815) and Aix-la-Chapelle (1818), have not yet been codified. In the past, the most varied titles were used. Even today the law differs from country to country on this point. For instance, in

several countries the consular corps comprises only consuls-general, consuls and vice-consuls (Bolivia, Consular Regulations of 4 July 1887, article 2; Norway, Law of 7 July 1922, section 2; Sweden, Ordinance of 3 February 1928; article 3; People's Democratic Republic of Korea, Decree of 29 June 1951, article 2). In Switzerland, the consular hierarchy comprises: (a) consuls-general, (b) consuls, (c) vice-consuls of the first class, and (d) vice-consuls of the second class, (Consular Regulations of 1923, as amended in 1937, article 10). The consular missions of Ecuador are divided into the following categories: (a) consulates-general of the first class, (b) consulates-general, (c) consulates of the first class, (d) consulates, (e) vice-consulates, and (f) consular departments of diplomatic missions (Presidential Decree No. 820 of 16 May 1953, article 1).

2. Nevertheless, the present practice of States, as it emerges from national laws and international conventions, reveals sufficiently wide agreement to warrant the classification proposed in article 3.

3. The four classes of consular representatives listed in the article are to be found in the legislation of many countries: Colombia, Law of 1866 (article 26); Nicaragua, Consular Regulations of 16 October 1880 (article 4); Peru, Consular Regulations of 1 January 1898 (article 3); Honduras, Law No. 109 of 14 March 1906 (article 5); Liberia, Regulations of 1908 (article 1); Haiti, Law of 27 April 1912 (article 1); Costa Rica, Organic Law of the Consular Service of 1 July 1925 (article 1); Panama, Law No. 41 of 1925 (article 51); Venezuela, Organic Law of the Consular Service of 30 July 1925 (article 3); Soviet Union, Consular Law of 8 January 1926 (article 5); Netherlands, Rules and Regulations of 1926 (article 1); Guatemala, Decree No. 1780 of 1939 (article 111, 112, 114); Mongolian People's Republic, Consular Law of 1932 (article 3); Yugoslavia, Law of 25 March 1930 (section 37); United States, Consular Regulations of 1932 (section 20); Luxembourg, Statutory Order of 5 July 1935 (section 47, para. 1, point 4).

4. The fact that heads of consular departments in diplomatic missions are listed among consular representatives in the laws of certain States (Soviet Union, Mongolian People's Republic, People's Democratic Republic of Korea, Ecuador, etc.) does not affect the proposed classification, since in this case a function rather than a new consular class is involved.

5. The above-mentioned four classes also figure in the peace treaties concluded after the First World War (Versailles, article 279; Saint-Germain-en-Laye, article 231; Trianon, article 214; Neuilly, article 159).

6. Lastly — and this is a decisive point in favour of codification — these four classes of consular representatives are to be found in many international agreements: the Caracas Convention of 1911 (article I); the Consular Convention between the United States and Romania, of 17 June 1881 (article I, II, IX); the Convention between the Netherlands and Cuba, of 31 December 1913 (articles 1 to 4, and 6 to 13); the Convention between Spain and Greece, of 6 March 1919 (article I); the Convention

between the Netherlands and Austria, of 6 November 1922 (article 1 to 4, 6 and 8 to 13); the Treaty between the United Kingdom and Finland, of 14 December 1923 (article 18); the Consular Convention between Italy and Czechoslovakia, of 1 March 1924 (article I); the Consular Convention between France and Poland, of 30 December 1925 (article 1, 3, 5, 8, 9 and 11); the Convention between Albania and Yugoslavia, of 22 June 1926 (article 5); the Consular Convention between France and Czechoslovakia, of 3 June 1927 (articles 1, 2 to 4, 17, 18 and 20); the Consular Convention between Yugoslavia and Czechoslovakia, of 7 November 1928 (article I); the Consular Convention between Spain and Greece, of 23 September 1926 (article 8); the Consular Convention between the Soviet Union and Czechoslovakia, of 16 November 1935 (article I); the Protocol to the Treaty between the United States and Finland, of 13 February 1934; the Treaty between Germany and Siam, of 30 December 1937 (article 17); the Treaty between the Philippines and Spain, of 27 September 1947 (article V); the Treaty between Greece and Lebanon, of 6 October 1948 (article 14); the Consular Convention between the United Kingdom and France, of 31 December 1951 (article 3); the Consular Convention between the United Kingdom and Norway, of 22 February 1951 (article 3); the Consular Convention between the United States and the United Kingdom, of 6 June 1951 (article 3); the Consular Convention between the United Kingdom and Sweden, of 21 August 1952 (article 3).

7. It should be pointed out that the term "consular agent" is used in article 3 in its technical sense, which differs radically from the general meaning attached to it in some international instruments. (See part I, chapter V, of this report). To avoid confusion on the subject, the use of this term in its broad sense, i.e. to mean a consular representative of any of the above-mentioned four classes, should be abandoned. In the laws of certain States, vice-consuls and consular agents may be gainfully employed in the State of residence — a practice which is sanctioned by international conventions, (for example, the Consular Convention between the United Kingdom and France, of 31 December 1951, article 2, para. 7, in the case of consular agents). Some States reserve the title of vice-consul or consular agent solely for *honorary* i.e. non-salaried officials (Peru, Consular Regulations of 1 January 1898, article 5).

8. The term "commercial agent" is still used sometimes to designate a consular agent (see, for example, article 4 of the Havana Convention of 1928).

9. Article 3 refers solely to (titular) heads of offices, and in no way affects the right of States to determine the titles of officials and clerks on the staff of the head of a consular office. Usage varies greatly in this respect.

Article 4

Acquisition of consular status

A "consular representative" within the meaning of these articles is an official appointed by a State to a post in one of the four classes listed in article 3, and recognized in that capa-

city by the State on whose territory he is to discharge his functions.

Comment

1. Two conditions must be fulfilled for a person to acquire the legal status of consular representative:

(a) He must be appointed consul-general, vice-consul or consular agent by the authority designated in the Constitution or laws of the State; and

(b) He must be recognized in that capacity by the Government of the State on whose territory he is to exercise his functions.

2. It is a universally accepted principle that a consular representative cannot be recognized as a consul without the consent of the State in which he exercises his functions. This principle is laid down in almost all consular regulations as well as international conventions, for example: the Consular Convention between the Soviet Union and Poland, of 18 July 1924 (article 2); the Consular Convention between Yugoslavia and Czechoslovakia, of 7 November 1928 (article I); the Consular Convention between the United States and Costa Rica, of 12 January 1948 (article I, para 3); the Consular Treaty between Greece and Lebanon, of 6 October 1948 (article 14).

3. A consular representative completely loses his official status and becomes a mere private individual if his consular district is incorporated in a new State. The same applies if the Government controlling the territory on which he exercises his functions withdraws its recognition from him.

4. The article enunciates a fundamental principle, which is elaborated in articles 6 to 9 below.

Article 5

Powers of the State relating to the appointment of consular representatives

The power to appoint consular representatives, the manner of their appointment, and their allocation to a particular class and category are governed by the domestic legislation of the sending State.

Comment

1. Since there are no rules of international law specifying which State organ is empowered to appoint consular representatives, the competent organ is that indicated in the legislation of the State concerned. Each State is also at liberty to decide the manner and qualifications for appointment of consular representatives, and their category (career or honorary) and class. There is no ground for the view expressed by some authorities that the right to appoint consular representatives is the sole prerogative of the head of State. This view is confirmed neither by the practice of States nor by national laws. For instance, in Soviet Union law, consular representatives are appointed by the minister of foreign affairs. In the United States, consular representatives other than vice-consuls and consular agents are appointed by the President on the advice and with the consent of the Senate, while vice-consuls and

consular agents are appointed by the Secretary of State, the latter after being nominated by the consular representative for the district in which they are to exercise their functions (Foreign Service Regulations of January 1941, I-3 (b), (c), (d)).⁴⁵ In Poland, consular representatives are appointed by the minister of foreign affairs. In Bulgaria, consuls-general and consuls are appointed by the President of the National Assembly, vice-consuls and consular agents by the minister of foreign affairs. In Switzerland, consuls are appointed by the Federal Council on the proposal of the Political Department, vice-consuls of the second class by the Political Department (Consular Regulations of 1923, article 11). In Sweden, the Royal Ordinance of 3 February 1928 reserved to the Head of State the right to appoint consuls-general and non-salaried consuls, and empowered the minister of foreign affairs to appoint vice-consuls and non-salaried chancellors (article 10). Even in States where the appointment of consular representatives lies with the Head of State, an exception is sometimes made with regard to honorary consuls (Norwegian Law of 7 July 1922, section 3).

2. The sending State is at liberty to choose whatever class of consular representative it deems appropriate. Domestic regulations sometimes stipulate that a consular representative whose district embraces the whole territory of the State of residence must have the rank of consul-general, but these are exceptional (see, for example, article 66 of the Law of 14 March 1906, Honduras).

3. The principle on which article 5 is based is codified in article 2 of the Havana Convention of 1928, which runs as follows: "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."⁴⁶

Article 6

The consular commission

1. Consular representatives who are heads of consular offices shall be furnished by the State appointing them with full powers in the form of a commission made out for each appointment and showing the surname and first name of the consular representative, the consular category and class, the consular district and the representative's future place of residence.

2. The State appointing a consular representative shall communicate the commission through diplomatic channels to the Government of the State on whose territory the consular representative is to exercise his functions, with a view to obtaining the necessary consent for the exercise of the said functions.

3. When the two States concerned have no diplomatic relations with each other, the commission shall be transmitted through the consular mission or, where none exists, through a diplomatic mission accredited to a third State.

Comment

1. The form of the special letters patent issued to a

⁴⁵ Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Company, 1947), vol. II, p. 1314.

⁴⁶ League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582, p. 306.

consular representative is governed entirely by the domestic legislation of the State sending the officer concerned. The letters patent have the same importance for the latter as his letters of credence for a diplomatic agent. But from the point of view of form there is a fundamental difference between the diplomat's credentials and the consular commission: namely, that the latter is not addressed to the Head of the State in which the consular representative is to exercise his functions, but either bears no address at all (this appears to be the practice in Austria, Bolivia, Brazil, the Chinese People's Republic, Costa Rica, Czechoslovakia, Denmark, Finland, Greece, Guatemala, Iran, the Mongolian People's Republic, the Netherlands, Paraguay, Poland, Portugal, Sweden, Switzerland, Turkey) or is addressed "to all who shall see these presents" (Belgium, Colombia, France, Nicaragua, Panama, United States of America) or "to all whom it may concern" (Iraq) or "to those to whom these presents shall come" (Japan, Thailand, Venezuela), or "to all and singular to whom these presents shall come" (United Kingdom). But even if it bears no address, the consular commission often contains a general request to the Government of the State of residence — or, much more commonly, to the authorities of the State of residence in general — that the consular representative be recognized in that capacity, that the free discharge of his functions and enjoyment of all privileges appertaining thereto be ensured, and, lastly, that he be afforded all aid, assistance and protection of which he may anywhere or in any circumstances stand in need.

2. In the practice of some States, the consular commission contains a provision authorizing the consular representative to appoint vice-consuls at ports and localities in his district (United Kingdom) or to appoint vice-consuls and consular agents (France). This power can of course only be exercised with the consent of the State of residence.

3. What is normally called the "consular commission" in English-speaking countries is variously termed in French: *lettre patente* or *lettre de provision*, or *commission consulaire*, depending on the legislation concerned.

4. The instrument handed to vice-consuls and consular agents when they are appointed by consuls and consuls-general is often called a *brevet*. Article 6 is designed to unify practice on this point in all cases where the consular representative is appointed head of an office, since it is undesirable for consular representatives in the same town with the same title and equivalent functions to be furnished with full powers of different types according to whether they are appointed by a central authority of the sending State or by a consular representative of the latter.

5. The consular commission and the *brevet* are regular letters of appointment. However, it is the practice among States to accept, and some recent conventions allow — in addition to these regular documents — irregular documents, such as a notification concerning the consular representative's posting (cf. article 4 of the Consular Convention between the United Kingdom and France, of 31 December 1951; article 4 of the Consular Convention between the United States and the United Kingdom, of 6 June 1951; article 4 of the Consular Convention between the United Kingdom and Norway, of 22 February 1951;

article 4 of the Consular Convention between the United Kingdom and Sweden, of 14 March 1952). It would nevertheless not be in the interest of relations between States to encourage the tendency to replace regular by irregular letters of appointment, which should continue to be reserved for exceptional cases only.

6. In some cases, the form of the consular commission has been the subject of regulation between States (see, in particular, the following conventions: Philippines—United States, of 14 March 1947, article I; United States—Finland, of 13 February 1934, article XIX, para. 3; Spain—Philippines, of 20 May 1948, article IV, para. I, stipulating that regular letters of appointment shall be duly signed and sealed by the Chief of State).

7. Certain conventions even contain provisions concerning the terms of the consular commission (cf. the Convention between Cuba and the Netherlands, of 31 December 1913, article 3).

8. It was on the terms of the commission that Lord Chancellor Talbot based his judgement in the *Barbuit* case (1735) that Mr. Barbuit, who was designated in the commission as commercial agent of the King of Persia, was a consul but was not, as he claimed, a public minister.⁴⁷

9. Procedure for the presentation of the consular commission is quite often regulated by national laws: Argentina, Regulation No. 4712 of 31 March 1926 (article 18); Belgium, Decree of 15 July 1920 (article 53); Brazil, Decree No. 14058 of 11 February 1920 (article 13); Costa Rica, Decree No. 46 of 7 July 1925 (article 7); Ecuador, Presidential Decree of 27 October 1916 (article 4); Luxembourg, Grand-Ducal Decree, of 29 June 1923 (article 8); Switzerland, Consular Regulations of 1923 (article 13).

10. It is also stipulated in certain international conventions that the consular commission shall be communicated through the diplomatic channel (see, for example, article 4 of the Convention regarding Consular Agents (Havana, 1928).

Article 7

The exequatur

Without prejudice to the provisions of articles 9 and 11, consular representatives appointed heads of consular offices may not take up their duties until they have obtained the assent of the Government of the State in which they are to exercise them. Such assent is given in the form of an exequatur.

Comment

1. The granting of an exequatur is the act whereby the State of residence confers on a representative of a foreign State admitted into its territory the right to exercise his consular functions in that territory. This act, added to the appointment of the consular representative by the sending State, vests the representative with the authority he must enjoy in dealings with the officials of the State of residence.

⁴⁷ Charles Calvo, *Le droit international théorique et pratique*, 5th ed. (Paris, Arthur Rousseau, 1896), vol. III, pp. 245-247.

The exequatur is therefore a formal recognition of a person as a consular representative. It is the usual mode of conveying such recognition.

2. In most States the exequatur is granted by the Head of the State, if the commission is signed by the Head of the sending State, and by the minister of foreign affairs in other cases. The power to grant the exequatur may be reserved to the Government (cf. Honduras: Law No. 109 of 14 March 1906, article 13). In a number of countries the exequatur is granted by the minister of foreign affairs (Soviet Union, Chinese People's Republic, Poland, etc.).

3. The form of the exequatur is governed by the domestic law of the State in which the consular representative is to exercise his functions. But certain forms most commonly used in practice are to be noted. The exequatur may be granted by decree of the Head of the State, signed by him and countersigned by the minister of foreign affairs, the original being handed to the representative concerned, or by decree of the Head of the State, a copy of which, certified by the minister of foreign affairs, is handed to the consular representative. In other countries, again, the exequatur is granted in the form of a special instrument signed by the minister of foreign affairs.

4. Another mode of granting the exequatur is to copy the text by which it is conveyed onto the document bearing the commission. This method had several variants, for example, an entry on the commission certifying that the exequatur is granted by the Head of the State and signed by the minister of foreign affairs (Czechoslovakia).

5. The simplest form consists of notifying the sending State through the diplomatic channel that the exequatur has been granted.

6. The United Kingdom practice distinguishes between the exequatur granted by the Head of State on presentation of the commission, signed by the supreme sovereign authority of the appointing State, and the formal recognition granted in other cases.⁴⁸

7. The issue of the exequatur is in some cases covered by agreements, which usually specify that it shall be granted without delay and free of charge.

8. The granting of the exequatur is not the only means whereby a foreign consul may be recognized. He may, as prescribed in article 9, be accorded provisional recognition before receiving his exequatur. Under article 11, a substitute may *temporarily* assume consular functions in the case of disability, death, or absence of the head of a consular office. That is why article 7 had to be qualified by an explicit reference to the two articles aforementioned.

9. Certain international conventions provide for other modes of authorizing the consular representative to discharge his functions than the granting of the exequatur (Consular Convention between the United States and Costa Rica, of 12 January 1948, article I, para. 3), or do not use the term "exequatur" (Treaty between Germany and Siam, of 30 December 1937, article 17, para. 2). But if the term "exequatur" is taken in the technical

⁴⁸ Oppenheim, *op. cit.* p. 835.

sense in which it is defined above, it must cover such other forms of authorization (for example, notification of admission) as well. The Special Rapporteur accordingly saw no point in mentioning them in the text of article 7.

10. The authorization conferred by an exequatur granted to a consular representative appointed head of a consular office covers *ipso jure* the consular activities of his assistants and of all consular staff working under his orders and on his responsibility. Accordingly, it is unnecessary for consular representatives who are deputies of the head of office or members of the consular staff to present their own commissions for the purpose of obtaining an exequatur. Notification by the head of the consular office to the competent authorities of the State of residence should suffice to ensure their enjoyment of the rights and privileges recognized under international law or conferred by these articles.

Article 8

Refusal of the exequatur

Unless it has given its *agrément* in advance, any State shall be entitled to refuse to admit a person to the exercise of consular functions on its territory, without giving reasons for its refusal.

Comment

1. The right to refuse a foreign consul the exequatur is implicit in the sovereignty of a State. There are various examples of the exercise of this right in international practice. For instance, in 1720 Denmark refused to accept Mr. Niel Sandersse Wienwich, a Danish citizen, as consul of the United Provinces at Bergen, Norway. In 1830, Austria refused to grant the exequatur to Stendhal, who had been appointed consul at Trieste by the French Government, giving as its ground that he had been in trouble with the Austrian police. In 1855 Mr. Priest, who had been appointed United States consul at San Juan del Sur, was refused an exequatur by the Nicaraguan Government on the ground that he had written a private letter which it regarded as reprehensible.⁴⁹ The United Kingdom Government refused the exequatur to Major Haggerty, a naturalized Irishman whom General Grant had appointed United States consul at Glasgow in 1869, giving as its reason that Major Haggerty had taken part in the Fenian revolutionary movement.⁵⁰

2. The principle that a State may refuse to admit a foreign consul into its territory seems to be universally accepted. It is all the more justified by the fact than an *agrément* procedure for consular representatives, though much to be desired, does not generally exist. The giving of *agrément* in advance by a State, whether under convention or otherwise, is an exception to the rule contained in this article. The fact that the peace treaties concluded after

the First World War imposed on the defeated States a one-sided obligation to receive the consuls of the allied and associated Powers merely confirms the rightness of this point of view.

3. The only doctrinal point of controversy has been whether the government concerned must be told the reasons for the refusal of an exequatur. Some of the older authorities thought that it must.⁵¹ This view is incorrect. In order to take that attitude, one would have to be able to point to a general practice requiring the communication of the grounds for such a refusal. But we are bound to note that conventions specifying that reasons must be communicated are the exception; examples are the Convention between Guatemala and Honduras of 10 March 1895 (article 21), the 1894 Convention between Honduras and Nicaragua (article 20) and the Convention between Honduras and El Salvador of 19 January 1895 (article 21). There are also very few States whose domestic legislation requires communication of reasons (see, for example, the Bolivian Consular Regulations of 4 July 1887, article 93). There are, on the other hand, many national laws and international conventions which establish the right to refuse the exequatur, but make no mention whatsoever of the need to give reasons for such refusal, for example: Costa Rica, Organic Law of the Consular Service of 7 July 1925 (article 8); Honduras, Law No. 109 of 14 March 1906 (article 54); Treaty of 23 September 1926 between Spain and Greece (article 8, para. 2); Treaty of 1903 between Denmark and Paraguay (article 8); the Havana Convention of 1928 (article 5). It is even explicitly acknowledged in some conventions that there is no need to communicate the reasons for refusal to the other party (see the Consular Convention between the Soviet Union and Poland of 18 July 1924, article 2, para. 3). This was also the view expressed in 1927 by the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law in the conclusions of its report.⁵² That being so, the rule stated in this article may be regarded as reflecting the existing state of law.

Article 9

Provisional recognition

Pending the delivery in due form of his exequatur, a consular representative may be granted provisional recognition by the State of residence at the request of the State which appointed him.

Comment

1. While it is true that a consular representative cannot take up his official duties until he has received his exequatur, there may be cases in which it is desirable to allow a consular representative to exercise his functions before the exequatur is granted, for example, where a

⁴⁹ John Bassett Moore, *A Digest of International Law* (Washington, D.C., Government Printing Office, 1906), vol. V, p. 28.

⁵⁰ William Edward Hall, *A Treatise on International Law*, 8th ed., A. Pearce Higgins (ed.) (Oxford, The Clarendon Press, 1924), p. 373.

⁵¹ See, for example, A. von Bulmerincq, *Consularrecht* (Hamburg, Verlag von J. F. Richter, 1887), p. 20; and E. von Ullmann, *Völkerrecht* (Tübingen, Verlag von J. C. B. Mohr (Paul Siebeck), 1908), p. 215.

⁵² League of Nations publication, *V. Legal*, 1928.V.4 (document A.15.1928.V), p. 43.

consular office already exists and its new head is awaiting the exequatur. Provisional recognition meets this need, and is an expedient often resorted to in practice. Such provisional authorization is, moreover, provided for in various international treaties, for example, the Consular Convention between Mexico and Panama of 9 June 1928 (articles II and III), the Consular Convention between Bulgaria and Poland of 22 December 1934 (article 2, para. 4), the Consular Convention between the United States and Costa Rica of 12 January 1948 (article 1, para. 3, last sentence) and, in particular, the Havana Convention regarding Consular Agents of 1928 (article 6, para. 2). The laws and regulations of certain States also make the same provision (Cuba, Regulations for Consular Offices of 30 October 1925, article 2; and the United States Regulations of 1932, section 49). All things considered, it appeared advisable to include a provision such as article 9 in the draft, although it was impossible to ascertain whether this practice was quite general.

2. It should be noted that the right to grant or refuse provisional recognition is within the discretionary power of the State of residence.

Article 10

Obligation to notify the authorities of the consular district

The Government of the State of residence shall immediately notify the competent authorities of the consular district that the consular representative has taken office, and the said authorities, on receipt of such notification, shall without delay take all the necessary steps to enable the consular representative to carry out the duties appertaining to his office and to enjoy the privileges and immunities recognized by existing conventions and by these articles.

Comment

1. This article lays down two obligations:

(a) The Government of the State of residence must notify the competent authorities of the consular district that the exequatur or provisional recognition has been granted;

(b) The said authorities must ensure that the consular representative is able to perform his duties and to enjoy the privileges and immunities recognized by existing conventions and by these articles.

2. The custom in many States is to publish the granting of the exequatur in an official gazette.

3. The obligations laid down in article 10 are a corollary to recognition of the consular representative. They are stipulated in some consular conventions (see, for example, that between Yugoslavia and Czechoslovakia of 7 November 1928, article I, para. 3).

Article 11

Ad interim functions

1. In case of death or absence of the head of a consular office (consulate-general, consulate, vice-consulate or consular

agency) or other impediment to the performance of his duties, a substitute, whose name must be communicated in good time to the competent service of the State of residence, shall be permitted *ipso jure* to perform the duties of the head of the office *ad interim*, pending the latter's return to duty or the appointment of a new head.

2. The competent authorities shall afford assistance and protection to such substitutes, and accord them, while in charge of the consular office, such privileges and immunities as are conferred on the head of the consular office concerned by existing conventions and by these articles.

Comment

1. This article regulates the function of acting head of a consular office, which corresponds to that of *chargé d'affaires ad interim* in diplomatic law. The acting head may be designated beforehand under the national regulations of the State that established the consular office, or may be appointed by the competent authority of that State when the vacancy occurs. This function of acting head of a consular office has been common practice for a long time, as witness many national regulations: Bolivia, Regulations of 4 July 1887 (articles 16 and 17); Cuba, Regulations of 30 October 1925 (article 47, para. 26, and article 48, para. 13); Egypt, Legislative Decree of 5 August 1925 (article 6); United States, Regulations of 1932 (section 20, para. 5 and section 29); France, order of 20 August 1833 (article 8); United Kingdom, General Instructions of 1922 (chapter XIII, article 11); Luxembourg, Order of 29 June 1923 (articles 2 and 3); Soviet Union, Consular Law of 8 January 1958 (articles 13 to 15).

2. International conventions often contain provisions concerning acting headships of consular offices. Take only the following consular conventions: United States - Romania, of 5 to 17 June 1881 (article VII); Italy - Czechoslovakia, of 1 March 1924 (article 3); Soviet Union - Poland, of 18 July 1924 (article 8); Albania - Yugoslavia, of 22 June 1926 (article 6); Poland - Yugoslavia, of 6 March 1927 (article IV), France - Czechoslovakia, of 3 June 1927 (article 3); Albania - France, of 5 February 1928 (article 7); Belgium - Poland of 12 June 1928 (article 4); Poland - Romania, of 17 December 1929 (article 4); Bulgaria - Poland, of 22 December 1934 (article 4); United States - Finland (treaty), of 13 February 1934 (article XXII, para. 3); United States - Liberia of 7 October 1938 (article IV, para. 3); United States - Costa Rica, of 12 January 1948 (article I, para. 6); Philippines - Spain (treaty), of 20 May 1948 (article IV, paras. 3 and 6); Greece - Lebanon (treaty), of 5 October 1948 (article 14, last paragraph); United Kingdom - France, of 31 December 1951 (article 7); United States - United Kingdom, of 6 June 1951 (article 6); United Kingdom - Norway, of 22 February 1951 (article 7); United Kingdom - Sweden, of 14 March 1952 (article 7).

3. The Convention regarding Consular Agents (Havana, 1928) also contains a provision concerning temporary assumption of consular functions (article 9).

4. The text proposed therefore merely codified existing practice, leaving States quite free to decide the method of appointing the acting head.

5. For such an acting head to enjoy the prerogatives attaching to his office under this article, notice of his appointment must be given to the competent authority of the State of residence, usually the ministry of foreign affairs.

Article 12

Consular relations with unrecognized States and Governments

The granting of an exequatur to a consular representative of an unrecognized State or Government, or a request for the issue of an exequatur to a Government or State not recognized by the State which appointed the consular representative, shall imply recognition of the State or Government concerned.

Comment

1. The view that the granting of an exequatur implies recognition seems to be generally accepted. It is confirmed by authorities like Hall,⁵³ and Oppenheim,⁵⁴ and by the practice of States.⁵⁵

2. As to the request for the issue of an exequatur made to the Government of a State which is not recognized by the State that appointed the consul, or to the unrecognized Government of a State which is itself recognized, practice does not seem to be uniform.⁵⁶ If it is borne in mind that the exequatur is, in fact, the means by which a Power exercising sovereignty over a certain territory conveys its permission to the representative of a foreign State to exercise consular functions in that territory or a part of it, it is hard to see how one can request the issue of an exequatur without recognizing the sovereignty of the Government so requested over the territory in question, unless the special circumstances of the case or an explicit declaration by the sending State make it clear that there is no intention of according such recognition.

3. When a new government is formed in the State of residence as a result of a revolution or of a change in the social and economic system of the State, and the Government of the sending State refuses to recognize that Government, the State of residence is not bound to recognize the consular status of the representatives accepted by the previous Government. Where recognition is withheld, such persons cease to enjoy consular privileges and immunities.

4. Questions relating to the juridical status of neutral consular representatives in occupied territory during an armed conflict are reserved for later study.

Article 13

Consular functions

FIRST VARIANT

The functions and powers of consular representatives shall

be determined, in accordance with international law, by the States which appoint them.

SECOND VARIANT

The task of consular representatives is to defend and further the economic and legal interests of their countries, to safeguard cultural relations between the sending State and the State of residence, and to protect the nationals of the State which appointed them.

For the above purposes they shall be entitled, *inter alia*:

1. To see that the treaties between the sending State and the State of residence are properly observed, and to make representations concerning any breach of such treaties of which their State or its nationals may have to complain;

2. To protect and promote trade between the respective countries, and to foster the development of economic relations between the two States;

3. To ensure the general protection of shipping, and to render assistance of every kind to merchant vessels flying the flag of the sending State when in any port within their consular district, and in particular:

- (a) To examine and stamp ships' papers;
- (b) To take statements with regard to a ship's voyage and destination, and to incidents during the voyage (master's reports);
- (c) To draw up manifests;
- (d) To question masters, crews and nationals on board;
- (e) To settle, in so far as authorized to do so by the laws of the sending State, disputes of any kind between masters, officers and seamen, especially those relating to pay and the execution of contracts between them;
- (f) To facilitate the departure of vessels;
- (g) To assist members of the ship's company by acting as interpreters and agents in any business they may have to transact, or any applications they may have to make, for example, to local courts and authorities;
- (h) To be present at all searches (other than those for customs, passport and aliens control purposes and for the purpose of admission to *pratique*) conducted on board merchant vessels and pleasure craft;
- (i) To be given notice of any action by the courts or the administrative authorities on board merchant vessels and pleasure craft flying the flag of the sending State, and to be present when such action is taken;

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

(k) To settle, in accordance with the laws of the sending State, disputes concerning general average between nationals of a State of residence;

4. To render assistance to vessels owned by the sending State, and particularly to its warships;

5. To render, in so far as authorized to do so by the laws of their country of residence, all necessary assistance to aircraft registered in the sending State, including:

- (a) Checking log-books;
- (b) Rendering assistance to air crews;
- (c) Giving help in the event of accident or damage to aircraft;
- (d) Supervising compliance with international conventions on air transport to which the sending State is a party.

⁵³ Hall, *op. cit.*, p. 109.

⁵⁴ Oppenheim, *op. cit.*, p. 148.

⁵⁵ See the letter, dated 28 January 1819, addressed to the President of the United States of America by Mr. Adams, Secretary of State, in J. B. Moore, *op. cit.*, vol. V, p. 13.

⁵⁶ See H. Lauterpacht, *Recognition in International Law* (Cambridge, The University Press, 1947), pp. 384-387.

6. To further cultural relations, particularly in the realms of science, the arts and professions, education and sport;

7. To protect juridical entities and persons of the nationality of the sending State and, to that end:

(a) To see that nationals of the sending State enjoy all the rights accorded them under the laws of the country of residence, in accordance with existing treaties and conventions between the two States concerned and with international custom;

(b) To take all the necessary steps to obtain redress when the rights of juridical entities or persons of the nationality of the sending State are infringed;

(c) To defend the labour rights of employed persons who are nationals of the sending State, in accordance with the international conventions on the subject;

(d) To make welfare payments to nationals of the sending State who are in difficulties through illness, accident or other similar cause;

8. To perform certain administrative functions, and in particular to:

(a) Keep a register of nationals of the sending State residing in their consular district;

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

(c) Visa passports and other documents of persons travelling to the sending State;

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

(e) Supply to interested persons in the country of residence information on trade and industry, and on all aspects of national life in the sending State;

(f) Stamp certificates indicating the origin or source of goods, invoices and the like;

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

(h) To receive payment of pensions or allowances due to nationals of the sending State absent from the State of residence;

(i) To perform all duties relating to service in the armed forces of the sending State, the keeping of muster-rolls for those services and the medical inspection of conscripts who are nationals of the sending State;

9. To perform acts of civil registration or record those acts, in so far as they are authorized to do so under the laws of the sending State, and in particular:

(a) To receive declarations concerning births and deaths of nationals of the sending State, without prejudice to the obligation on the declarant to make such declarations in accordance with the laws of the State of residence;

(b) To record marriages celebrated under the laws of the territory, provided that at least one of the parties is a national of the sending State;

10. To perform certain notarial functions, and in particular:

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

(b) To draw up, attest and receive for safe custody, wills and all deedspoll executed by nationals of the sending State;

(c) To draw up, attest and receive for safe custody indentures to which the parties are nationals of the sending State or nationals of the sending State and nationals of the State of residence, provided that they do not relate to immovable property situated in the country of residence or to rights *in rem* in connexion with such property;

(d) To attest signatures of nationals of the State of residence, acts and documents emanating from the authorities or officials of the sending State or of the State of residence, and copies of such acts and documents;

(e) To translate acts and documents of any kind emanating from officials of their own country or of their country of residence;

(f) To receive for safe custody such sums of money, documents and articles of any kind as may be entrusted to them by nationals of the sending State;

11. To serve judicial documents or take evidence on behalf of courts of the sending State, in the manner specified by existing conventions or otherwise not inconsistent with the laws of the State of residence;

12. To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to courts for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for insane and other incapable persons who are nationals of the sending State and who are in the consular district;

13. To represent in all cases connected with succession, without producing power of attorney, the interests of absent heirs-at-law who have not appointed special agents for the purpose, to approach the competent authorities of the State of residence in order to arrange for the compilation of an inventory of assets and for the winding up of estates, and to settle disputes and claims concerning the estates of deceased nationals of the sending State;

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

15. To celebrate marriages between nationals of the sending State in accordance with the laws of that State, if this is permitted by the laws of the country of residence.

Comment

1. The functions of consular representatives are determined by international custom and usage, international treaties and national laws and regulations—which explains why they differ so much in particular cases. Whereas, for example, consular activities in protecting and promoting trade, supervising shipping, assisting warships and protecting nationals of the sending State have always been recognized in international law, other activities are based on individual conventions, the scope of which has in many cases been widened by application of the most-favoured-nation clause. This is especially true of civil registration, notarial functions, the serving of judicial documents and the taking of evidence on behalf of courts, the supervision of guardianship and trusteeship over nationals of the sending State, the development of cultural relations, and assistance to aircraft, etc.

2. Moreover, conventions differ quite considerably in their provisions on the same subject, a typical example being those defining the powers of consuls in regard to successions.

3. The question arises whether draft provisional articles on consular intercourse and immunities should also comprise a definition of consular functions.

4. Earlier codifications or attempts at codification of this subject reveal two trends, based on different approaches.

5. The first is to leave the definition of consular functions generally speaking to municipal law. This is the approach adopted, for instance, in the Havana Convention of 1928, article 10 of which provides that: "Consuls shall exercise the functions that the law of their State confers upon them, without prejudice to the legislation of the country where they are serving."⁵⁷

The League of Nations Committee of Experts for the Progressive Codification of International Law adopted the same approach in reserving the question of consular functions for later examination.⁵⁸ Reference may also be made, in this connexion, to the resolution adopted in 1896 by the Institute of International Law, which deals solely with the regulation of consular immunities, making no attempt to define consular functions.

6. The second trend is towards the more or less exhaustive definition of consular functions in conventions and draft codifications. This is the approach that prevailed in, for example, the Caracas Convention of 1911 previously referred to, and in the Harvard draft (article 11).⁵⁹ This trend is apparent in almost all consular conventions, though no exhaustive definition of consular functions has so far been produced.

7. The Special Rapporteur thinks that the International Law Commission should adopt the first of these two approaches, at any rate for the time being, since consular functions necessarily reflect, on certain points, the differences in the social structure of States and the economic life of nations, which also come out in municipal law and international treaties. Moreover, certain functions are conferred on consular representatives under some collective agreements, for example, the Sanitary Conventions of 1903 and 1905, the International Convention relating to the Simplification of Customs Formalities of 3 November 1923, and the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications of 12 September 1923 — which are binding on by no means all States. It should be added that a general definition of consular functions covering only typical activities of consular representatives could not take into account those special circumstances which sometimes enable States to give consuls wider powers in their mutual relations. Again, a general definition of consular functions could have an adverse effect in cases where local laws and custom allow the performance of consular functions not covered by the definition.

8. In view of all this, it was felt inopportune to propose unification of consular functions.

9. Nevertheless, as some members of the Commission held at the eighth session that it would be preferable to include a definition of consular functions in the projected draft, the Special Rapporteur has prepared, purely for guidance and as a second choice, the rough draft of an article setting out the functions of consular representatives, to enable the Commission to make its choice between the two approaches mentioned above in full knowledge of the facts.

Article 14

Extension of consular functions in the absence of a diplomatic mission of the sending State

The consular representative in a State where there is no diplomatic mission of the sending State may undertake such diplomatic actions as the Government of the State of residence may permit in such cases.

Comment

1. A consular representative in a country in which the sending State has no diplomatic mission, and in which he is therefore the sole representative of his State, is in a very special position, being compelled by the force of circumstances to act as spokesman for the sending State, even in questions outside his consular functions proper, and possibly even to undertake diplomatic action. Such an extension of consular functions — which may be purely temporary pending the establishment of a diplomatic mission in the country — can, of course, be made only with the (express or tacit) consent of the State in which the consular representative is serving. The taking of diplomatic action naturally does not confer diplomatic character on the consular representative or affect his legal status.⁶⁰

2. In its reply of 11 January 1928 to the questionnaire of the Committee of Experts for the Progressive Codification of International Law, the Government of the Commonwealth of Australia pointed out that, there being no diplomatic missions in Australia at the time, consuls-general and consuls often transacted business with the Government which in countries where diplomatic missions exist is normally dealt with by the latter. This was the reason which that Government then gave for its negative view on the possibility of regulating the legal position of consuls by way of a general convention.⁶¹

3. The merging of the diplomatic and consular services into a single foreign service in a goodly number of States has resulted in diplomatic functions being conferred on consular representatives (see comment on article 1). The laws of certain States provide for such duality of functions in the case referred to in article 14. (Cf. Haiti, Decree of 7 August 1917, article 6; Monaco, Ordinance of 7 March 1878, article 2; Republic of San Marino, Law

⁵⁷ League of Nations, *Treaty Series*, vol. CLV, 1934-1935, No. 3582.

⁵⁸ League of Nations publication, *V.Legal*, 1928.V.4 (document A.15.1928.V), p. 44.

⁵⁹ Harvard Law School, *op. cit.*, pp. 251 ff.

⁶⁰ Paul Heilborn, *Das System des Völkerrechts entwickelt aus den völkerrechtlichen Begriffen* (Berlin, Verlag von Julius Springer, 1896), pp. 176 ff.

⁶¹ League of Nations publication, *V.Legal*, 1928.V.4 (document A.15.1928.V), p. 59.

of 12 January 1892, article 9). In other countries, the consular representative must have special authorization before accepting a diplomatic or political function. (Cf. Switzerland, Consular Regulations of 1923, article 32; Italy, Decree of 28 January 1866, (article 20). A provision similar to article 14 also appears in the Havana Convention of 1928 (article 12).

4. Article 14 may be taken to reflect the existing state of law. It caters for a need that arises in real life.

Article 15

Consuls-general - chargés d'affaires

A consular representative serving in a country where the sending State has no diplomatic mission may, with the consent of the State of residence, 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.

Comment

1. Consuls-general - *chargés d'affaires* used to form an intermediate category of State representatives between diplomatic agents and consular representatives, and bore a variety of titles: consul-general - *chargé d'affaires*, *chargé d'affaires* - consul-general, diplomatic agent and consul-general, commissioner and consul-general. Consuls-general - *chargés d'affaires* had a diplomatic character, signed international conventions, and corresponded on political questions with the ministry of foreign affairs. A consul-general - *chargé d'affaires* must be provided with both a consular commission and a letter of credence. It is acknowledged that he should enjoy diplomatic privileges and immunities.⁶²

2. It is essential to distinguish between consular representatives of this type and those referred to in article 14, who, though not formally vested with diplomatic functions, are allowed by the State of residence, in the absence of a diplomatic mission from the sending State, to undertake certain diplomatic action or discharge certain similar functions. Consuls-general - *chargés d'affaires* must be specifically entrusted with diplomatic functions and provided with a letter of credence; they enjoy diplomatic privileges and immunities and discharge diplomatic functions in the widest sense, and not only within the limits agreed by the State of residence.

3. The Special Rapporteur has not been able so far to check whether, and if so to what extent, such representatives are still used; but they appear to be few in number nowadays. The laws of several countries, however, contain provisions which would have no point unless such representatives existed. (Cf. Argentina, Law No. 4712 of 25 September 1905, article 11; Cuba, Organic Law of 14 February 1903, Transitory Provisions; Soviet Union, Consular Law of 8 January 1925, article 18).

⁶² See Hall, *op. cit.*, p. 378; L. van Praag, *Jurisdiction et droit international public* (The Hague, Librairie Belinfante Frères, 1915), p. 245, note 647, and the literature quoted, including the decisions of the Paris Court dated 1 December 1840 and La Goulette Court dated 27 June 1889.

This being so, the Special Rapporteur thought it better to include in his draft a special article on consuls-general - *chargés d'affaires*.

Article 16

Discharge of consular functions on behalf of a third State

No consular representative may discharge consular functions on behalf of a third State without the express permission of the State of residence.

Comment

1. Consular intercourse between two States may, in exceptional cases, be effected through a consular representative of a third State. This situation chiefly arises when consular relations are broken off, or when a State not maintaining a consular mission in the country concerned wishes to arrange consular protection for its nationals.⁶³

2. Under the Caracas Convention of 1911, the consuls of each contracting Republic, residing in one of the others, could make use of their powers in favour of individuals of the other contracting Republics which did not have a consul on the spot (article VI). The laws of many countries used to provide, or now provide, for such plurality of functions — subject, however, to the authorization of the Head of State, or of the Government, or of the minister of foreign affairs. (Cf. Argentina, Regulation No. 4712, of 31 March 1926, article 7; Belgium, Law of 1 January 1856, article 59; Ecuador, Law of 28 July 1870, article 19; France, Ordinance of 20 August 1933, article 45; United Kingdom, Act of 27 August 1917, article 16; Luxembourg, Decree of 29 June 1923, article 7; Netherlands, Regulations of 1926 on the consular service, chap. 1, article 12; Norway, Law of 7 July 1922, article 10; San Marino, Law of 12 January 1892, article 58; Siam, Consular Regulations of 12 January 1929, article 6; Sweden, Ordinance of 3 February 1928, article 18; Switzerland, Consular Regulations of 1923, article 33; Soviet Union, Consular Law of 6 January 1926, article 19).

3. In some States such plurality of functions is prohibited or permitted only as a temporary expedient. (Cf. Chile, Law of 31 January 1930, article 21; Venezuela, Law of 30 July 1925, article 10; United States of America, Regulations of 1931, sections 174 and 453).

4. It is self-evident that neither the performance of isolated acts of consular protection nor the discharge of consular functions on behalf of a third State is permitted without the express consent of the State of residence.

Article 17

Withdrawal of the exequatur

1. A consular representative's exequatur may be withdrawn

⁶³ The practice prior to 1931 is outlined in the Harvard draft (Harvard Law School, *op. cit.*, p. 204) according to information given in the *Annuaire du corps diplomatique et consulaire* (Geneva, 1931). The Special Rapporteur had no information on current practice at his disposal.

by the Government of the State of residence in the event of his being guilty of an infringement of that State's laws; but, except in urgent cases, the State of residence shall not resort to this measure without previously attempting to obtain the consular representative's recall by his sending State.

2. The reasons for withdrawal of the exequatur or for a request for recall shall be communicated to the sending State through the diplomatic channel.

Comment

1. The revoking of the consent given by the State of residence to the exercise of consular functions in its territory is usually called "withdrawal of the exequatur", although the destruction of the document recording the granting of the exequatur is not required. The withdrawal, like the granting, of the exequatur is a sovereign right of the State.

2. There have been various cases of withdrawal of the exequatur in the history of consular intercourse. For instance, the French vice-consul at Boston, Mr. Duplaine, had his exequatur withdrawn in 1793 for using force in resisting the enforcement of local laws.⁶⁴ In 1856, the United States Government withdrew its exequatur from three British consuls (at New York, Philadelphia and Cincinnati), alleging that they had tried to recruit men to serve in the British army during the Crimean War.⁶⁵ In 1861, the United States withdrew its exequatur from the British consul, Mr. Bunch, on the ground that he had infringed the Logan Act forbidding unauthorized persons to correspond with foreign Powers. Although it disputed the charge levied against its consul, the British Government did not question the right to withdraw the exequatur. In 1897, the President of the Republic of Guatemala withdrew the exequatur from Mr. Florentin Souza, United States consular representative at Champerico.⁶⁶ There have been several cases of withdrawal of the exequatur since the Second World War.

3. The right to withdraw the exequatur is sanctioned in many international treaties, for example, the Consular Convention of 14 March 1947 between the Philippines and the United States (article XV); the Treaty of 20 May 1948 between the Philippines and Spain (article XXI); Consular Convention of 4 November 1913 between Chile and the Netherlands (article 3); the Treaty of Peace and Friendship of 31 July 1950 between India and Nepal (article 4); the Consular Convention of 1 March 1924 between Italy and Czechoslovakia (article 1, para. 7); the Convention of 1913 between Cuba and the Netherlands (article 3); and the Havana Convention of 1928 (article 8).

4. There has been no consistent regulation in international instruments of the question whether a State resorting to the measure in question is obliged to communicate its reasons to the Government of the sending State; the provisions of a convention on the point run counter to

those of the text.⁶⁷ Some conventions stipulate that the reasons for the measure must be communicated to the sending State, for example, the Consular Convention of 1924 between Italy and Czechoslovakia (article 1, para. 7); the Treaty of 22 June 1926 between Albania and Yugoslavia (article 5, para. 7); the Consular Convention of 28 May 1929 between Germany and Turkey (article 3, para. 6); the above-mentioned conventions between the Netherlands and Cuba, and Chile, in 1913 (article 3, para. 3). But others either state the opposite or make no mention of the obligation to give reasons.

5. In view of the seriousness of the measure, the State taking it should in this case — as distinct from cases where it merely refuses the exequatur (article 8) — be bound to give its reasons. As, however, there is no rule on the subject in existing international law, this is no more than a proposal *de lege ferenda*. The remainder of the article is to be regarded as reflecting the existing state of law.

Article 18

Termination of consular functions

A consular representative's functions are terminated by, *inter alia*:

1. His recall by the Government of the sending State;
2. His resignation;
3. His death;
4. Withdrawal of his exequatur;
5. Breaking-off of consular relations.*

* See Article 19.

Comment

1. Termination of consular functions is to be distinguished from the breaking-off of consular relations referred to in article 19. While the breaking-off of consular relations always entails the cessation of the consular functions between the States concerned, the opposite is not the case.

2. The termination of consular functions is due either to a decision taken by the State which appointed the consul or to steps taken by the State of residence; it may also arise out of some personal activity of the consular representative.

3. The list contained in article 18 is not restrictive; it covers only the commonest causes of the cessation of consular functions. There may be others — for instance, the extinction of the sending State or the incorporation of the consular district in another State.

4. The situations resulting in the termination of consular functions are sometimes listed in international conventions (cf. the Consular Conventions between Mexico and Panama, of 9 June 1928 (article XVII), between the Philippines and Spain, of 20 May 1948 (article XXI),

⁶⁴ Moore, *op. cit.*, vol. V, p. 19.

⁶⁵ Stuart, *American Diplomatic and Consular Practice*, 2nd ed. (New York, Appleton-Century Crofts Inc., 1952), pp. 299-301.

⁶⁶ *Ibid.*

⁶⁷ A. V. Sabanin, *Posolskoe i konsulskoe pravo* (Diplomatic and Consular Law), (Moscow, G9Z, 1930), p. 65.

between the Philippines and the United States, of 14 March 1947 (article XV), and the Havana Convention of 1928 (article XXIII).

5. This article is to be regarded as reflecting the existing state of law.

Article 19

Breaking-off of consular relations

1. Consular relations may be broken off by an official declaration to that effect by the Government of one of the States concerned.

2. Proclamation of a state of war between the sending State and the State of residence entails *ipso facto* the breaking off of consular relations between them.

3. Except in the case referred to in paragraph 2 of this article, the breaking off of diplomatic relations shall not automatically entail the breaking off of consular relations.

Comment

1. This article, which complements article 1, gives two causes for breaking off consular relations, leaving aside those causes, such as the extinction of the sending State or of the State of residence, which put a complete end to consular relations.

2. Armed conflict between the sending State and the State of residence does not necessarily lead to the cessation of consular relations. That situation would only arise where a state of war has been declared by at least one of the parties.

3. Existing as they do for particular purposes and being specific in nature and self-contained, consular relations need not be broken off because diplomatic relations are broken off. This principle has practical implications, particularly where consular intercourse is through the medium of consular offices distinct from diplomatic missions.

CHAPTER II

Privileges and immunities of career consular representatives

Article 20

The protection and immunities of consular representatives and their staff

1. The State of residence is bound:

(a) In accordance with the conditions set forth in this chapter and subject to reciprocity, to grant consular representatives and consular staff the privileges and immunities conferred by existing conventions and by these articles;

(b) Ensure protection of consular representatives and consular staff, and safeguard consular offices from attack.

2. For the purposes of these articles, "consular staff" includes any person who, although not belonging to one of the classes of consular representatives referred to in article 3, performs consular duties under the orders of the head of a consular office, provided that the person is not a national of the State

of residence and that he engages in no professional or gainful activity other than his consular functions in that State.

Comment

1. It is generally acknowledged in international law that the State of residence is obliged to grant consular representatives such privileges and immunities as are essential to the discharge of their functions; for, were it otherwise, the admission of these representatives would serve no practical purpose. Article 10 of this draft provides one possible means of ensuring the conditions required for the exercise of consular functions.

2. Provisions stressing the respect and consideration due to consuls are to be found in certain national laws, for example, Argentina, Regulation of Law No. 4712 of 1926 (article 63); Honduras, Law No. 109 of 14 March 1906 (article 40); and Venezuela, Decree of 25 January 1883 (article 5).

3. So far as could be ascertained, the laws of all countries make immunity from jurisdiction, exemption from taxation and from customs duties, and other material or honorific privileges accorded to consular representatives conditional on reciprocity. This stipulation is designed to guarantee consular representatives of the same category (status) and of the same class (rank) equality of treatment in the State of residence with that accorded the latter's consular representatives in the sending State, and vice versa.

4. Under certain national regulations, the condition of reciprocity applies to all privileges and immunities; but under others it applies only to some of them. Depending on circumstances, its effect may be positive (where it serves as a basis for claiming certain privileges and immunities) or negative (where it constitutes the juridical basis for a State's refusal to grant a particular prerogative to the consuls of another State because it is not granted to its own consuls in the latter State). Reciprocity is also stipulated in international agreements, for example, in the following: the Exchange of Notes between Finland and Norway of 23 August and 30 September 1927, the Exchange of Notes between the Iranian and Swedish Governments of 30 July and 9 August 1928, the Treaty between Japan and Siam of 8 December 1937 (article 25, para. 3), the Treaty between Great Britain and Siam of 23 November 1937 (article 18, para. 2).

5. The principle of reciprocity can be said to be inherent in consular relations and to constitute one of the elements in customary international law relating to consular privileges and immunities.

6. The admission of consular representatives involves the obligation on the State of residence to protect them and their consular staff in the discharge of their official functions. That obligation includes the duty to ensure their personal safety and to protect consular offices from attack. In some countries, consular officials, as representatives of foreign States, are protected by special provisions in criminal law (Cf. article 95 of the Norwegian Penal Code of 1902). The obligation to protect or support is often covered by international treaties: the Consular Con-

vention of 1925 between Italy and Czechoslovakia (article 1, para. 9); the Treaty of 20 May 1948 between the Philippines and Spain (article 4, para. 5); the Consular Conventions of 1951 between the United States and the United Kingdom (article 5, para. 2) and of 1952 between the United Kingdom and Norway (article 5, para. 2). The obligation to protect the consul in the discharge of his functions is also prescribed in article 7 of the Havana Convention of 1928.

7. Failure to protect has often given rise to diplomatic representations by States whose consulates have been attacked, or whose representatives have been maltreated.⁶⁸

8. Article 20 is partly based on article 15 of the Harvard draft.

Article 21

The coat-of-arms of the sending State

1. The coat-of-arms of the sending State, with an appropriate inscription, may be displayed on the building occupied by the consular offices or by the entrance door thereto.

2. These external signs, which mainly serve to indicate the consular office to interested parties, may not be interpreted as conveying the right of asylum.

Comment

1. The right to place the coat-of-arms of the sending State on, or at the entrance to, the building occupied by consular offices serves an eminently practical purpose, namely, to identify the offices for anyone needing their services. This right is sanctioned under many international consular conventions of which the following at least should be mentioned: United States-Romania, 1881 (article 5); Cuba-Netherlands, 31 December 1913 (article 4); United States-Germany, 1923 (article 20); Italy-Czechoslovakia, 1924 (article 2); Soviet Union-Poland, 1924 (article 9); France-Poland, 1925 (article 5); United States-Cuba, 1926 (article 7); United States-El Salvador, 1926 (article 18); United States-Honduras, 1927 (article 19); Albania-France, 1928 (article 5); Poland-Yugoslavia, 1927 (article 5); Albania-Yugoslavia, 1926 (article 7); Germany-Turkey, 1929 (article 5); Poland-Romania, 1929 (article 5); Bulgaria-Poland, 1934 (article 5); United States-Finland, 13 February 1934 (article XXII, para. 1); Soviet Union-Czechoslovakia, 1935 (article 8); Philippines-United States, 14 March 1947 (article VI); Philippines-Spain, 1948 (article IX); Greece-Lebanon, 1948.

The Havana Convention contains no provision on the subject.

2. Some consular conventions specify that the appropriate inscription must be in the national language of the sending State, and that the coat-of-arms and inscription may also be placed on or by the entrance door to the consulate (France-United Kingdom, 1951, (article 10); United States-United Kingdom, 1951, (article 8, para. 1); United Kingdom-Norway, 1951, (article 10, para. 1); United

Kingdom-Sweden, 1952, (article 10, para. 1)). The right to place the coat-of-arms of the State on the consulate building or its entrance is generally acknowledged in modern times, and may certainly be considered as accepted in international law.⁶⁹

3. The provisions of consular conventions regarding the right to display the coat-of-arms of the State are often qualified by a clause designed to prevent misinterpretation of the privilege. While this is doubtless a provision framed *ex abundanti cautela*, the Special Rapporteur retained it in paragraph 2 of the article because it appears in many consular conventions.

Article 22

The national flag

The State of residence is bound to permit:

(a) The national flag of the sending State to be flown by the consular office on solemn public occasions and on other customary occasions;

(b) Consular representatives who are heads of consular offices to fly the national flag of the sending State on all means of transport used by them in the discharge of their functions.

Comment

1. While the right to fly the national flag on the building occupied by the consular office has not gained as wide acceptance as the right to put up the coat-of-arms of the State, since it frequently depends on local usage and custom, recent conventions regularly confer this privilege along with that concerning the coat-of-arms of the State.

2. As this right is extended to vessels, motor vehicles, aircraft and other means of transport in a fairly large number of international conventions, it seems wisest to take account of this trend in article 22 and prescribe the right to fly the national flag also on means of transport used in the discharge of official functions. The sending State is granted this privilege, however, only in respect of the heads of consular offices (i.e. the titular consul).

3. When States use a special consular flag, the above provisions refer to that flag.

4. It should be noted that the obligation on the State of residence to permit the flying of the national flag implies the obligation to ensure its protection.

Article 23

Communication with the authorities of the sending State

The sending State has the right that its consular representatives established in the State of residence should be at liberty to correspond freely, in time of peace, with its governmental authorities, including its diplomatic and consular missions established on the territory of the State of residence. Consular re-

⁶⁸ See Moore, *op. cit.*, vol. V, pp. 42-44; and Fauchille, *op. cit.*, p. 127.

⁶⁹ In support of this assertion, see Hall, *op. cit.*, p. 375; Hershey, *op. cit.*, p. 422; Sabanin, *op. cit.*, p. 84; Institute of Law of the Academy of Sciences of the USSR, *Mezhdunarodnoe pravo* (International Law) (Moscow, 1947) p. 328.

representatives have, in particular, the right to communicate with the said authorities by messages in cipher.

Comment

1. The right to communicate freely with the authorities of the State which appointed the consul is an essential condition for the discharge of consular functions, and may be regarded as part of customary international law; it is frequently enunciated in national regulations (Argentina, Organic Regulation of Law No. 4712 of 1926, article 355; United States, Regulations of 1932, sections 94, 97, 101, 114, 115, 117, 118; Soviet Union, Consular Law of 1926, article 21; Bolivia, Consular Regulations of 1887, article 14; Belgium, Decree of 1920, article 69; Luxembourg, Grand-Ducal Order of 1923, article 17; Haiti, Law of 1912, article 14; Netherlands, Regulations of 1926, articles 4 and 5; Sweden, Ordinance of 1928, article 64; General Instructions of 1928, article 64).

2. It should be pointed out that the regulation of such communication is within the sole competence of the State which appointed the consul; it mainly depends on the rules governing relations between consular representatives of the various grades and their home authorities. The laws of most countries authorize consular representatives abroad to communicate with their Government only through the ministry of foreign affairs, and sometimes carefully stipulate that correspondence shall be conducted through the official senior in consular rank.

3. The use of cipher or code is provided for in the regulations of certain countries and is authorized in some consular conventions: Italy-Czechoslovakia, 1924 (article 9, para. 5); Treaty between Afghanistan and Great Britain, 1921, (schedule II, para. *f*), etc.

4. Freedom of communication may be restricted in case of armed conflict.

Article 24

Communication with authorities of the State of residence

The procedure for communication between the consular representative and the authorities of the State of residence shall be determined by local custom or by the laws of that State.

Comment

1. It lies with the State of residence to regulate the manner in which consular representatives may communicate with the local authorities, and in particular those of their consular districts. National regulations vary widely on this point. Under some regulations consuls may address the "local authorities" direct. (See, for example, Bolivia, Regulations of 1887 (article 31); Brazil, Regulations of 1928 on formalities for the admission of foreign consuls (article 24); United States of America, Regulations of 1932 (sections 149 and 437); Soviet Union, Consular Law of 1926 (article 23); Sweden, Ordinance of 1923 (articles 20 to 22)). Under some of the last-named regulations, consuls, though they may address the local authorities, must conform to international usage and to local custom (Sweden, Instructions of 1928, article 64, para. 5).

2. The question whether consular representatives may approach the Government and the central authorities of the State of residence is settled in a variety of ways by national laws. In some States consular representatives are authorized to communicate with the ministry of foreign affairs. Consuls of States which do not authorize direct correspondence have to resort to the good offices of a friendly legation (Haiti, Order of 1925 on foreign consuls, article 17). Other States permit communication with the central authorities, or the authorities outside the consular district, only through the diplomatic channel (Honduras, Law of 1906 on foreign consular missions, article 16). Under the laws of various countries, consuls may communicate with the central authorities if the local authorities do not act in response to their representations, or if there is no diplomatic representative of their sending State in the country (Bolivia, Regulations of 1887, articles 22 and 23; United States of America, Regulations of 1932, section 437; Denmark, Instructions of 1932, article 35; Ecuador, Law of 1870 on the consular service, article 28, and Decree of 27 October 1916, article 7; United Kingdom, Instructions of 1923, chapter 5, article 13; Honduras, Decree of 1906, article 31; Sweden, Instructions of 1928, article 24, para. 2, article 35 and article 64, para. 5). The same right is recognized under the Havana Convention of 1928 (article 11). The Brazilian Regulations of 1928 authorize consuls of countries having no diplomatic mission in Brazil to address only certain officials of the ministry of foreign affairs itself (article 31). The Consular Regulations of Switzerland (1923) authorize Swiss consuls to have recourse to diplomatic representatives of other States (article 28).

3. Under some international conventions the right in question can only be exercised through the diplomatic channels: Cuba-Netherlands, 1913 (article 6); Soviet Union-Poland, 1924 (article 11); Italy-Czechoslovakia, 1924 (article 11, para. 4). The Consular Convention of 1923 between the United States and Germany (article 21) grants this right only to a consul-general or consular official established in the capital.

Article 25

The inviolability of consular correspondence, archives and premises

1. The correspondence and archives of consular offices and the premises used as consular offices shall be inviolable.

2. The State of residence must ensure that the privilege of inviolability referred to in paragraph 1 above is respected. If the authorities of that State wish to inspect the consular premises, they must first obtain the permission of the head of the office. However, on no pretext whatever, may the said authorities examine, seize or place under seal the files, papers or other articles which are in the consular offices.

Comment

1. The inviolability of consular correspondence and archives is universally recognized in international law. It is also absolutely essential to the discharge of consular functions. Its logical corollary is the inviolability of the premises where such correspondence and archives are found.

2. The principle stated in this article is to be regarded as reflecting the existing state of law. It is confirmed by many conventions: Greece-Lebanon, 5 October 1948, (article 16, para. 1); Cuba-Netherlands, 31 December 1913 (article 5); Philippines-United States, 14 March 1947 (article VI, para. 2); United States-Romania, 5-17 June 1881 (article VI); United States-Costa Rica, 12 January 1948 (article VI); Spain-Philippines, 20 May 1948 (article IX, para. 2); United States-Finland, 13 February 1934 (article XXII, para. 2); Greece-Spain, 23 September 1926 (article 9, para. 1); Soviet Union-Czechoslovakia, 16 November 1935 (article 7); France-Czechoslovakia, 3 June 1927 (article 7); Italy-Czechoslovakia, 1 March 1924 (article 9); Yugoslavia-Czechoslovakia, 7 November 1928 (article 10); Poland-Romania, 17 December 1929 (article 8); Soviet Union-Poland, 18 July 1924 (article 10); Belgium-Poland, 12 June 1928 (article 8); Albania-Yugoslavia, 22 June 1926 (article 12); Poland-Yugoslavia, 6 March 1927 (article VIII); Albania-France, 5 February 1928 (article 6); Soviet Union-Germany, 12 October 1925 (article 5); Germany-Turkey, 28 May 1929 (article 6); Havana Convention of 1928 (article 18).

3. Doctrine is unanimous in recognizing the inviolability of consular archives.⁷⁰ In article 9 of its Regulations on Consular Immunities, adopted in 1896, the Institute of International Law recognized the inviolability of consular archives and premises in the following terms:

"The official residence of consuls and the premises occupied by their office and its archives are inviolable.

"No administrative or judicial officer may invade them under any pretext whatsoever."⁷¹

4. Some countries grant consuls even inviolability of their residence: Honduras, Law No. 109 of 1906, article 36.

5. It has been accepted in practice that the consular representative is entitled to enjoy inviolability of his correspondence, archives and offices — as a mark of the respect due the State which appointed him — even before he obtains the *exequatur*.⁷²

6. This immunity persists even after the breaking-off of consular relations.

⁷⁰ See Kozhevnikov, *op. cit.*, p. 43; Sabanin, *op. cit.*, pp. 79-80; Institute of Law of the Academy of Sciences of the USSR, *Mezhdunarodnoe pravo* (International Law); W. E. Beckett, "Consular Immunities", *British Year Book of International Law*, 1944, pp. 37-38 (Mr. Beckett quotes the following authorities as affirming the inviolability of consular archives: Bluntschli, Fiore, Martens, Phillimore, Fauchille, Hall, Pradier-Fodéré, Anson, Strupp, Bustamante, Guerrero, Stewart, Hyde, Verdross); Hershey, *op. cit.*, pp. 421 and 422; Oppenheim, *op. cit.*, p. 842.

⁷¹ Albéric Rolin, *Tableau général de l'organisation des travaux et du personnel de l'Institut de droit international pendant la période décennale 1904 à 1914* (Paris, A. Pedone, 1919), p. 87; *Annuaire de l'Institut de droit international*, édition nouvelle abrégée (1928), vol. III, p. 1078.

⁷² See Green Haywood Hackworth, *Digest of International Law* (Washington, D.C., Government Printing Office, 1942), vol. IV, p. 694.

Article 26

Consular fees

For official acts performed by its consular representatives, the sending State is entitled to charge on the territory of the State of residence the fees payable under its national laws.

Comment

This article states a rule of customary international law. It has always been accepted in practice that the State to which the consular representative is responsible has the right to charge the fees laid down in its legislation for official acts performed by its consular representative in the performance of his duties.

Article 27

Immunity from jurisdiction

Consular representatives and members of consular staff shall not be amenable to the jurisdiction of the judicial or administrative authorities of their State of residence in respect of acts performed in the discharge of their functions.

Comment

1. The immunity from jurisdiction enjoyed by consular officers (consular representatives and members of their staff) with regard to acts performed by them in the discharge of their functions is based on the respect due the sovereignty of the foreign State whose organs they are. It is therefore not a personal immunity but an immunity attaching to every act of a sovereign State.

2. This immunity from jurisdiction is confirmed by many consular conventions, of which only the following need be mentioned: Belgium-Poland, 12 June 1928, article 6, last paragraph; Albania-France, 5 February 1928, article 4, para. 1; Albania-Yugoslavia, 22 June 1926, article 9; Poland-Yugoslavia, 6 March 1927, article 6, last paragraph; Bulgaria-Poland, 22 December 1934, article 11; Italy-Czechoslovakia, 1 March 1924, article 4; Soviet Union-Poland, 18 July 1924, article 5; Soviet Union-Czechoslovakia, 16 November 1935, article 4; Germany-Turkey, 28 May 1929, article 10; France-Poland, 30 December 1925, article 4, para. 1; Yugoslavia-Czechoslovakia, 7 November 1928, article 4; Mexico-Panama, 29 February 1924, article IV; Italy-Turkey, 9 September 1929, article 11; Havana Convention of 1928, article 16.

3. The relevant laws of several countries are based on the same principle (cf. Ecuador, Law of 1870, article 17; Dominican Republic, Law of 1887, article 18; Uruguay, Regulations of 1917, article 57; Soviet Union, Law of 14 January 1927, article 11 (c)).

4. The rule stated in article 27 is to be regarded as part of existing international law.⁷³

⁷³ W. E. Beckett gives copious references to immunity from jurisdiction in respect of acts done in the performance of consular duties, and quotes the following writers in support of the opinion expressed above: C. de Martens, Fiore, Pradier-Fodéré, Halleck, Rivier (only in penal proceedings), Calvo, von Ullmann, Stowell, de Louter, Hall, Fenwick, Fauchille, Stewart, Lapradelle and Niboyet, Hezking, Puente, de Paeppe, François, Fedozzi, Verdross (only in penal proceedings) (*loc. cit.*, p. 47).

5. As regards their private activities, consular officers are subject to the jurisdiction of the State of residence, unless otherwise provided in international conventions.

Article 28

Exemption from taxation

1. The State of residence is bound to exempt consular representatives and members of consular staff from payment of all direct taxes and dues levied by the competent authorities, including those of territorial subdivisions (cantons, provinces, departments, districts, communes) but not from dues representing payment for services actually rendered.

2. The exemptions provided for in the preceding paragraph shall not, however, apply to taxes and dues on any immovable property which the officers referred to in that paragraph may possess or farm in the State of residence, or to any capital or income from investments they may have there.

Comment

1. As there are considerable differences in taxation systems, the exemptions from taxation which States grant consular officials vary widely in scope.

2. Subject to reciprocity, States generally grant consular representatives and members of their official staff exemption from direct taxes and charges of a personal nature. Such exemption primarily concerns salaries and other emoluments received by consular officers in respect of their official functions.

3. Exemption is not, however, usually granted to:

(a) Consular officers who are nationals of the State of residence; or

(b) Consular officers engaging in any professional business occupation or in any occupation for gain, apart from their consular functions, in the State of residence.

4. Many national regulations confer exemption from taxation on a strictly reciprocal basis. (Cf. Argentina, Law No. 13,238 of 10 September 1948, article 1; Brazil, Decree No. 18,956 of 22 October 1929; Honduras, Law of 14 March 1906, article 41; Greece, Income Tax Code of 1929, article 25; Cuba, Decree No. 347 of 17 July 1934, articles 40 to 44; Decree No. 2677 of 13 September 1939, articles 8 to 11; Ecuador, Income Tax Law, article 8; Finland, Law of 12 July 1940, No. 378, articles 4 and 18; and Law No. 886 of 19 November 1943, article 9; Norway, Law of 18 August 1911, article 7 (f) and Decree of 7 December 1939; Peru, Decree No. 69, of 18 February 1954, articles 60 to 62; Soviet Union, Law of 14 January 1927, article 11 (a); Poland, Decree of 26 October 1950, article 2.)

5. Exemption from taxation is also granted under many conventions, which are alike in recognizing the exemption prescribed in paragraph 1 of this article, though in a fair number of cases they exclude the two categories of officer mentioned in paragraph 3 above. Many of the texts carefully state that exemption from taxation does not apply to charges that are in the nature of payment for a service actually rendered.

6. Under certain conventions, income derived from the possession or ownership of real estate in the State of residence is not eligible for exemption from taxation (cf. Havana Convention of 1928, article 20). Under others, all income from sources situated on the territory of the State of residence is excluded.

7. On all the foregoing grounds, it seemed essential to restrict exemption from taxation, in accordance with the principles on which consular conventions are based, to income from sources outside the State of residence.

Article 29

Exemption from customs duties

1. The following items shall be admitted free of all customs duty and other taxes:

(a) Coats-of-arms, flags, signs, seals and stamps, books and all official printed matter for the current use of the consulate;

(b) Furniture, office equipment and other articles required to fit out the consular offices;

(c) Personal possessions and effects which consular representatives, members of the consular staff, and members of their families proceeding to the State of residence bring with them or have brought in from the sending State within six months of their arrival in the State of residence.

2. For the purposes of these articles the term "members of his family" shall mean the wife, children under age, and parents of any of the persons referred to in paragraph 1 (c) above, when they are economically dependent on that person and live with him under the same roof.

Comment

1. National laws and consular conventions usually prescribe duty-free admission for the three categories of items listed in this article, but with certain differences of detail. For example, under certain regulations and some of the conventions the items referred to in paragraph 1 (b) are admitted free of customs duty only on first installation of the office. In regard to the personal possessions and effects of persons referred to in paragraph 1 (c), the period of time from the consular officer's arrival in the State of residence within which they are admitted free of duty varies. Lastly, there are differences in the definition of the expression "members of his family".

2. The term "office equipment" should be taken to cover all articles required to fit out offices (filing cabinets, calculating machines, typewriters, writing materials, etc.).

3. Although, as regards general international law, this article constitutes a proposal *de lege ferenda*, it contains elements from enough different national laws and international conventions to warrant the hope that it will be found acceptable.

Article 30

Exemption from military and personal services

1. The State of residence shall:

(a) Not subject the buildings and premises used by a consul-

ate, or the equipment, means of transport and furniture pertaining thereto, to military requisitions or billeting;

(b) Exempt consular representatives, members of consular staff, or such other staff as are in the sole employ of the consulate or of the families of consular officers and are not nationals of the State of residence, from material military obligations (requisitions, taxation or billeting);

(c) Exempt the persons referred to in sub-paragraph (b) above from all personal services, and in particular personal military obligations, and from all public service of whatever kind.

2. The premises used by consulates or by the persons referred to in paragraph 1 (b) above shall not, however, be exempt from temporary occupation, expropriation and like measures for purposes of national defence or public utility in accordance with the laws of the State of residence. In such cases, every consideration shall be shown to avoid interference with the performance of consular functions.

Comment

1. The exemption of consular representatives from military service and all personal military obligations is to be regarded as part of customary international law. Many conventions prescribe such exemption, often including exemption from material military obligations, i.e. taxation, billeting and the requisitioning of premises used by consular offices or officials, of vehicles, furniture and other household goods.

2. Under some conventions and some national laws, consuls are granted exemption from all personal services and any service of a public nature, which may be taken to cover such things as service in the territorial army, conscription by communes for work on the roads or in connexion with a public disaster, and service as a jurymen, or as a lay magistrate.

3. All the exemptions prescribed by this article are essential to the discharge of consular functions. Being granted only to career consular officers, they do not apply to the officers referred to in article 35, or to staff in the sole employ of the consular office, or of consular officers, where such staff have the nationality of the State of residence.

4. The provision contained in paragraph 2 of this article is designed to reconcile the sending State's interest in the free exercise of consular functions with the sovereign rights of the State of residence.

Article 31

Social security legislation

The State of residence shall grant exemption from all obligations under its social security legislation to consular representatives of the sending State, to members of consular staff and to other persons in the sole employ of a consular office or of consular officers, if they are nationals of the sending State and are not permanently established in the State of residence.

Comment

This article is based on practical considerations. In

view of their frequent postings to different foreign countries, it would create serious difficulties for them, if consular representatives, or other members of the consular staff or persons in the sole employ of a consular office or of consular officers were to cease to be subject to their country's social security laws (insurance against sickness, old age, disability, etc.) and come under different legislation every time they were moved. It is therefore in the interest of all States to grant the exemption prescribed in this article, so that consular officers and other persons in the sole employ of consular offices or of consular officers may remain subject to the social security legislation of their own country throughout. The only exception to this rule is in the case of persons who, though nationals of the sending State, are permanently established in the State of residence.

Article 32

Attendance as witnesses in courts of law and before the administrative authorities

1. Consular representatives are liable to attend as witnesses in the courts of their country of residence if the local judicial authorities deem it necessary. In such cases, the judicial authorities must request them to attend by an official letter addressed to the consular mission, without any threat of penalties in case of non-appearance.

2. Should the consular representative be prevented from appearing before the judicial authorities for reasons connected with his duties or with his health, he must send them a written deposition bearing his signature, and, where appropriate, his official seal, when such a method of giving evidence is sanctioned by the laws of the country. Otherwise, the judicial authorities shall be entitled to take his oral evidence at his office or residence in the form prescribed by the laws of the country of residence.

3. Consular representatives may decline to give evidence on circumstances connected with the performance of their official duties and to produce official correspondence and documents relating thereto.

4. Any case of non-appearance in court or of refusal to give evidence or to produce a document shall be settled solely through the diplomatic channel. No coercive measures may be taken by the court.

5. The provisions contained in the preceding paragraphs shall apply *mutatis mutandis* to members of the consular staff.

6. The provisions of this article shall also apply to proceedings before the administrative authorities.

Comment

The wording of this article is based on the provisions to be met with in many consular conventions, for example, Poland-Romania, 17 December 1929 (article 7); France-Czechoslovakia, 3 June 1927 (article 4, paras. 2 and 3); Soviet Union-Czechoslovakia, 16 November 1935 (article 6); France-Albania, 5 February 1928 (article 4, paras. 5 and 6); United States-Costa Rica, 12 January 1948 (article 2, para. 3); Havana Convention of 1928 (article 15).

*Article 33**Jurisdiction of the State of residence*

Subject to the privileges and immunities recognized by existing conventions or conferred by these articles, consular representatives and all members of consular staff shall be amenable to the jurisdiction of the State in which they discharge their functions.

Comment

1. The principle stated in this articles is part of customary international law. It is in many cases confirmed by international conventions. (Cf. Consular Convention between France and Albania, of 5 February 1928, article 4, last paragraph; Havana Convention of 1928, article 17; Convention between Italy and Turkey, of 9 September 1929, article 11, etc.).

2. Except in cases where they enjoy exemption under international law or existing conventions, consular representatives are subject to the jurisdiction of the courts of their country of residence in both civil and criminal proceedings.

*Article 34**Obligations of the State of residence in certain special cases*

To facilitate the work of consular representatives, the State of residence shall:

(a) In the case of the death on its territory of a national of the sending State, see that a copy of the death certificate is sent to the consular representative in whose district the death occurred;

(b) Have the nearest consular office immediately notified of any cases where the appointment of a guardian or trustee appears to be in the interests of a minor or otherwise incapable person who is a national of the consular representative's sending State;

(c) Have the competent consular representative, or, failing him, the representative nearest to the scene of the accident, immediately informed when a vessel flying the flag of the sending State is wrecked or runs aground on the coast or in the territorial waters of the State of residence.

Comment

This article is designed to ensure co-operation between the authorities of the State of residence and consular representatives in three types of cases affecting the work of consular offices. The obligation to bring the facts referred to in this article to the notice of consular representatives in three types of cases affecting the work of consular offices. It would greatly facilitate the task of consular representatives if this obligation were made more general by means of a multilateral convention.

CHAPTER III

Privileges and immunities of honorary consuls and similar officers*Article 35**Honorary consuls*

1. For the purpose of these articles the term "honorary

consuls" shall mean consular representatives*, whether nationals of the sending State or not, who are not officers appointed or paid by the State.

2. Consular representatives who, although officers of the sending State, are authorized by the national laws to be in business, or engage in some other occupation for gain, in the State of residence shall be on the same footing as honorary consuls.

* See article 3, page 85.

Comment

1. The term "honorary consul" is not used in the same sense in the laws of all countries. The decisive criterion in some is the fact that the official concerned is not paid for his consular work (Switzerland, Consular Regulations of 1923, article 10, para. 1). In others, while it is expressly acknowledged that career consuls may be either paid or unpaid, the essential difference between the two types of agents is that the career consul is sent out while the honorary consul is selected on the spot (cf. Finland, Law of 6 July 1925, para. 4). In still other national regulations the term "honorary consul" means an agent who is not a national of the sending State, and who is entitled to engage in a gainful occupation apart from his official functions in the State of residence, whether he does in fact do so or not (cf. Peru, Decree No. 69 of 18 February 1954, article 62). For the purpose of granting consular immunities, other States again regard as honorary consuls any representatives, of whatever nationality, who engage in a gainful occupation or profession apart from their official functions in the country of residence (cf. Cuba, Decree of 17 July 1934, article 29).

2. In the face of such divergent views, it would seem essential to find a uniform criterion. The consul's position with regard to the administrative machinery of the State may afford a satisfactory solution. If the consul is a civil servant, paid by the State and subject to its disciplinary powers, he should be regarded as a career consul, and in other cases as an honorary consul.

3. As to consular representatives who, although civil servants, are entitled under the laws of their country to engage in business or some other gainful occupation in the State of residence, they should be put on the same footing as honorary consuls, because States treat them in the same way as honorary consuls, even though, as has just been shown, they do not directly regard them as such.

*Article 36**Powers of honorary consuls and similar officers*

1. The powers of the consular representatives referred to in article 35 shall be determined by the sending State in accordance with international law.

2. The sending State shall inform the Government of the State of residence through the diplomatic channel of the extent of the powers of its honorary consuls.

Comment

The powers of honorary consuls are often much narrower than those of career consular representatives. In some countries honorary consuls are not authorized to perform notarial acts or to exercise jurisdictional powers (cf. Peru, Presidential Decree No. 820 of 16 May 1953, articles 50 to 52). It would therefore seem advisable to follow the regular practice of leaving it to the sending State to determine the powers of its honorary consuls. But, as the State of residence is entitled to know the extent of these powers, an obligation is placed on the sending State, under paragraph 2 of the article, to inform the State of residence on that point.

*Article 37**Legal status of honorary consuls and similar officers*

1. The provisions of articles 21, 22 (a), 24, 26, 29 (para. 1 (a)) and 32 shall apply to the consular representatives referred to in article 35.

2. The official correspondence, official documents and papers, and consular archives of the consular representatives referred to in article 35 shall be inviolable and may not be the subject of search or seizure, provided that they are kept separate from private correspondence and from books and documents relating to any business, industry or profession in which such representatives may be engaged.

3. The consular representatives referred to in article 35 may decline to give evidence before a judicial or administrative authority, or to produce documents in their possession, should their evidence or the production of documents relate to their consular functions. No coercive measures may be taken in such cases.

Comment

It emerges clearly from a study of national laws and international conventions that States are not prepared to accord honorary consuls and officers authorized to engage in a gainful occupation or profession in the country of residence the same treatment as career consular representatives in the matter of consular privileges and immunities. This differentiation is quite understandable, in view of the fact that the honorary consuls and officers in question are engaged in another gainful occupation or profession apart from their consular functions in the country of residence, that they are not civil servants of the sending State, and, as often as not, are not even nationals of that State. An attempt is made in this article to define the legal position by referring to some of the articles concerning career consular representatives, and by specifying, in its paragraphs 2 and 3, the exemptions to be granted in respect of official acts of the foreign State.

CHAPTER IV

General provisions

*Article 38**The relationship between these articles and previous conventions*

1. The provisions contained in these articles shall in no way affect conventions previously concluded between the Contracting States, these articles shall apply solely to questions not covered by previous conventions.

2. Acceptance of these articles shall be no impediment to the conclusion in the future of individual conventions concerning consular intercourse and immunities.

Comment

The reasons for including this article in the draft were explained in chapter V of part I of this report. It should be pointed out that the same procedure was adopted in the Havana Convention of 1928 (article 24).

*Article 39**Complete or partial acceptance*

1. Ratifications of and accessions to these articles may refer:

(a) Either to all the articles (chapter I, II, III, IV and V),

(b) Or to those provisions only which relate to career consular representatives (chapters I, II, IV and V).

2. The Contracting Parties may benefit by the ratifications or accessions by other Parties only in so far as they have themselves assumed the same obligations.

Comment

The reasons why provision had to be made for complete or partial acceptance of the articles on consular intercourse and immunities were adequately explained in chapter IV of part I of this report. This article merely adopts the procedure provided in, and follows the wording of, article 38 of the General Act for the Pacific Settlement of International Disputes, adopted in 1928 and revised in 1949⁷⁴.

CHAPTER V

Final Clauses

[The final clauses will be formulated at a later stage of the work.]

⁷⁴ Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949. See United Nations, *Treaty Series*, vol. 71, 1950, No. 912.