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Third Report on Consular Intercourse and Immunities by Mr. Jaroslav Žourek, Special Rapporteur

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CONSULAR INTERCOURSE AND IMMUNITIES

[Agenda item 2]

DOCUMENT A/CN.4/137

Third report by J. Žourek, Special Rapporteur

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

[Original: French]

[13 April 1961]

CONTENTS

	<i>Page</i>		<i>Page</i>
INTRODUCTION	56	Article 32	66
SECTION I: Proposals for the deletion of certain articles		Article 33	67
Article 2	56	Article 35	67
Article 6	56	Article 36	67
Article 18	56	Article 37	68
Article 19	57	Article 38	68
Article 57	57	Article 40	68
Article 64	57	Article 41	69
SECTION II: Comments suggesting amendments to the draft articles on consular intercourse and immunities		Article 42	69
The expression "consular relations"	57	Article 43	70
Article 1	57	Article 45	70
Article 2	58	Article 46	70
Article 3	60	Article 50	71
Article 4	60	Article 52	71
Article 5	62	Article 53	72
Article 6	62	Honorary consuls: General comments	72
Article 8	62	Applicability of article 31 to honorary consuls	72
Article 10	63	Article 54	72
Article 13	63	Article 59	73
Article 15	63	Article 60	73
Article 16	63	Article 64	73
Article 20	64	Article 65	73
Article 22	64	SECTION III: Additional articles proposed	
Article 23	64	Article 4 a: Power to represent nationals of the sending State	74
Article 25	64	Article 52 a: Members of diplomatic missions responsible for the exercise of consular functions	74
Article 26	65	Article 50 a: Waiver of immunity from jurisdiction ..	74
Article 27	65	Article 1 a: Right to maintain consular relations with other States	75
Consular privileges and immunities: General remarks ..	65	SECTION IV: Information provided by governments	75
Article 29	66	SECTION V: Miscellaneous questions	75
Article 30	66		
Article 31	66		

INTRODUCTION

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

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

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

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

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

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

² *Ibid.*, para 24.

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

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

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

Section I

PROPOSALS FOR THE DELETION OF CERTAIN ARTICLES

Article 2. — Establishment of consular relations

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

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

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

Article 18. — Occasional performance of diplomatic acts

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

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

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

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

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

Article 19. — Grant of diplomatic status to consuls

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

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

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

Article 64. — Non-discrimination

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

Section II

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

The expression "consular relations"

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

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

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

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

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

Article 1. — Definitions

Sub-paragraph (e)

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

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

Sub-paragraph (f)

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

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

Sub-paragraph (i)

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

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

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

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

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

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

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

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

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

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

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

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

- (b) The expression "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of the form of ownership, used for the purposes of the consulate;
- (e) The expression "consular papers" means the official correspondence and all the documents of the consulate, and the consular archives and library, as well as any article of furniture intended for their protection or safe-keeping;
- (f) The term "consul", except in article 8, means any person duly appointed by the sending State to exercise consular functions in the receiving State as consul-general, consul, vice-consul or consular agent, and authorized to exercise the said functions.

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

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

Article 2. — Establishment of consular relations

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

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

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

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

PROPOSAL BY THE SPECIAL RAPPORTEUR

Article 2. — *Establishment of consular relations*

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 3. — Establishment of a consulate

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

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

PROPOSAL BY THE SPECIAL RAPPORTEUR

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

Article 4. — Consular functions

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

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

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

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

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

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

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

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

(d) A sub-paragraph drafted along the lines of paragraph II, 7, of the Special Rapporteur's alternative text should be added;

(e) A sub-paragraph drafted along the lines of paragraph III, 10, of the Special Rapporteur's alternative text should be added;

(f) A sub-paragraph modelled upon paragraph V, 17, of the more detailed text prepared by the Special Rapporteur should be added at the end of paragraph 1 of the article.

5. *Czechoslovakia*: The Czechoslovak Government is of the opinion that in drawing up the final text of article 4 the International Law Commission should include, in addition to a general definition, a list of examples of consular functions.

6. *Philippines*: The interpretation placed on paragraph 1 of this article in the comments presented on behalf of the Government of the Philippines is that the paragraph does not actually confer any rights, since the only sources of consular powers which it mentions are bilateral agreements and domestic law. Accordingly, the Government proposes that the paragraph be amended so as to make it a direct source of consular rights.

7. *Yugoslavia*: The Yugoslav Government prefers the first version of this article, which comprises a general definition of consular functions. Pointing out that, as a result of the internal distribution of powers in the receiving State, the consul is often unable to deal with the local authorities in the exercise of many of his functions, it expresses the view that the words "or with the central authorities in connexion with consular matters which in the first instance normally fall within their competence" should be added at the end of article 4, paragraph 2, after the expression "with the local authorities".

8. *Sweden*: The Swedish Government considers it improbable that an international community of more than ninety States can reach agreement on an enumerative definition of any practical value, and considers that the only realistic approach is to be contented with a quite general definition, like that contained in paragraph 1 of the variant proposed by the Special Rapporteur.

9. The comments of the *Governments of Yugoslavia and Denmark* also contain remarks concerning the variant of article 4, which is reproduced in the commentary on this article.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The protection of nationals has always been understood as applying both to individuals and to bodies corporate. This view is confirmed by numerous consular conventions, including the following: Great Britain-Greece, of 17 April 1953 (article 2, paragraph 4); USSR-Romania, of 4 September 1957 (article 14, paragraph 1); USSR-Austria, of 28 February 1959 (article 15, paragraph 1); Czechoslovakia-People's Republic of China, of 7 May 1960 (article 11, paragraph 1). Admittedly, the provisions of municipal law concerning the mode of determining the nationality of companies and associations are not uniform, nor are the learned authorities agreed on the mode of determining the nationality of bodies corporate. Under the law of some countries, the nationality is determined by the head office of the body corporate, while under the law of others the place of incorporation is decisive, the company being deemed to have the nationality of the State in which it was formally constituted. Under the law of yet others the idea of an ostensible nationality is ruled out and the decisive test is who effectively controls the company, with the consequence that the company's nationality coincides in effect with that of its members or directors. But the existence of these differences is not a sufficient reason for saying that the consular functions may be exercised only in respect of individuals, as was suggested by the Indonesian delegation in the Sixth Committee of the General Assembly. Neither article 4 of the draft nor the commentary on this article gives a ruling on this controversial question, nor for that matter do they settle the question of the conflict of nationalities. If these questions should form the subject of a dispute, it ought to be settled by one of the pacific means for the settlement of international disputes. Accordingly, article 4 in no way prejudices the manner in which States regulate the question of the nationality either of individuals or of bodies corporate, and hence the scope of the article cannot be restricted.

2. Nor, on the other hand, can the scope of the consular functions be so broadened that stateless persons domiciled in the sending State are included among the persons to whom the consular protection may be extended as of right. There is no support for such a broadening of their scope in general international law. Consular protection (like diplomatic protection, for that matter) is always concerned with the nationals of the sending State. Possession of that State's nationality is an essential condition which must be fulfilled in order that the State can provide diplomatic and consular protection. The correctness of this view is confirmed, incidentally, by the fact that the legal status of stateless persons had to be settled by a special convention, that of September 1954. But that convention is operative as between the contracting parties only.

3. It should be emphasized that the purpose of article 4 is to codify customary international law. Once

their wording has been accepted, the rules laid down in the article will undoubtedly constitute a direct source of the rights and duties of States and not merely an indirect source referring to existing agreements and to the municipal law of the sending State. Moreover, paragraph 1 of this article mentions not only the functions mentioned in the relevant agreements in force and those vested in consuls by the sending State, but also *the functions provided for in the present articles*. Hence, it is quite unnecessary to amend the present wording of the article for this purpose.

4. As regards the type of definition to be used in this article, most of the comments received so far express a preference for a general definition, but they contain clear evidence that governments would like this general definition to be supplemented by an illustrative enumeration of the most important functions exercised by consuls. Having regard to this, the Special Rapporteur proposes that the final text of article 4 be worded as follows:

Article 4. — Consular functions

1. A consul exercises within his district the functions provided for by the present articles and by any relevant agreement in force. The principal functions ordinarily exercised by a consul are:

(a) *To protect the interests of the nationals of the sending State, and the interests of the sending State itself, and in particular,*

(aa) *To see that the sending State and its nationals enjoy all the rights accorded to them under the laws of the receiving State and under the international customs and conventions in force;*

(bb) *To safeguard, in case of need, the rights and interests of the nationals of the sending State (article 4(a));*

(cc) *To propose, where necessary, the appointment of guardians or trustees for nationals of the sending State, to submit nominations to the local authorities for the office of guardian or trustee, and to supervise the guardianship of minors and the trusteeship for persons lacking full capacity who are nationals of the sending State;*

(b) *To help and assist nationals of the sending State and, in particular,*

(aa) *To communicate with the nationals of the sending State who are in the territory of the receiving State and to give them such advice as they may require;*

(bb) *To act as their interpreter in their dealings with the authorities or to appoint and interpreter for this purpose;*

(cc) *To put nationals who arrive from the sending State into touch with commercial, cultural and other circles, according to their wishes;*

(dd) *To provide financial assistance to nationals in need and, where appropriate, to arrange for their repatriation;*

(c) *To act as notary and as registrar of births, marriages and deaths and to exercise other functions of an administrative nature and, in particular,*

(aa) *To receive and certify any declarations which nationals of the sending State may have to make;*

(bb) *To draw up, attest and receive for safe custody wills and deeds-poll executed by nationals of the sending State and indentures to which nationals of the sending State are parties, provided that they do not relate to immovable property situated in the receiving State or to rights in rem attaching to such property;*

(cc) *To legalize, authenticate or certify signatures and documents, and to certify or translate documents;*

(*dd*) To record and transcribe documents relating to births, marriages and deaths, without prejudice to the obligation of the declarants to make whatever declarations are necessary in pursuance of the laws of the receiving State;

(*ee*) To receive for safe custody money and securities belonging to nationals of the sending State;

(*ff*) To issue passports and travel documents to nationals of the sending State, and to issue visas or other appropriate documents to persons wishing to travel to the sending State;

(*gg*) To certify documents indicating the origin or source of goods, commercial invoices and like documents;

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

(*d*) To extend necessary assistance to vessels and boats flying the flag of the sending State and to aircraft registered in that State, and to their crews, and in particular,

(*aa*) To examine and stamp ships' papers;

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

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

(*dd*) To settle, in so far as authorized to do so by the laws of the sending State, disputes of any kind between masters, officers and seamen;

(*ee*) To assist members of the crews of ships, boats and aircraft in any business they may have to transact with the local authorities;

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

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

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

3. Subject to the exceptions specially provided for in the present articles or in the relevant agreements in force, a consul in the exercise of his functions may deal with the authorities which are competent under the legislation of the receiving State.

Article 5. — Obligations of the receiving State in certain special cases

1. *Yugoslavia*: The scope of sub-paragraph (*c*) should be extended to include aircraft of the sending State.

2. *Soviet Union*: Comment to the same effect.

3. *Philippines*: In its comments the Philippine Government raises the question whether the provision of sub-paragraph (*b*) is permissive or mandatory. Specifically, it asks whether proceedings in such cases, without the consul's being notified, are valid, voidable or impugnable in the absence of such notice.

* Passage based partly on a Netherlands Government's proposal (see annex I to the Commission's report on its 13th session, *infra*). However, whereas the Netherlands text [original: English] speaks of "taking of evidence" the Special Rapporteur's clause [original: French] speaks of *commissions rogatoires*. A better English rendering of the Special Rapporteur's text would be: "(*hh*) to serve judicial documents or execute letters rogatory on behalf of..." [Editor's note.]

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. What is the legal effect of the failure to give the notice stipulated in sub-paragraph (*b*) on proceedings instituted in a court or before some other authority of the receiving State for the appointment of a guardian or trustee for a national of the sending State? To answer this question correctly one must remember that, if the draft articles are accepted by States in the form of a multilateral convention, the failure to give this notice would constitute a non-observance of an international obligation on the part of the State whose organ was responsible for such failure. In the event of its rights being prejudiced in this way, the sending State would no doubt have a good case for applying for the voidance of the proceedings instituted without its being notified, for the failure to give the notice had the effect of depriving that State of the opportunity of asserting its rights during the proceedings and of taking steps on behalf of its national. For the purpose of the voidance of the order or decision in question, the procedure laid down by the law of the receiving State would, of course, have to be followed.

2. Sub-paragraph (*c*) should be drafted to read:

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

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

1. *Norway*: Principal objections to the text raised by the Government of Norway:

(*a*) The freedoms provided for in paragraph 1 are too extensive;

(*b*) These freedoms are made illusory by the important and ill-defined reservations in paragraph 2;

(*c*) It might be advisable to extend the application of the rule in order to make it applicable in all cases of forced detention (quarantine, mental institutions, etc.); this would seem particularly appropriate in regard to the members of the crews of vessels flying the flag of the sending State, whatever their nationality.

The Norwegian Government proposes that the article be re-drafted with a view to establishing clear and binding norms.

2. *Denmark*: The Danish Government interprets paragraph 2 as authorizing the receiving State to restrict the consul's freedom to converse with the prisoner, if considerations of national security or relations with foreign Powers or special considerations render this necessary.

Article 8. — Classes of heads of consular posts

1. *Norway*: Norwegian law does not differentiate between "consular agents" and other groups of consular

officials. Norway does not employ consular agents and there are no special rules governing the method of their appointment.

2. *Yugoslavia* observes that a point to be clarified is whether consular agents belong to the same class as consuls or constitute a special category of consular officials.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. Under the present terms of article 8, consular agents form one of the classes of heads of consular posts. They may, however, like consuls and vice-consuls, be assigned to other posts in a consulate-general, consulate or vice-consulate, in which they would then work under the direction and responsibility of a consul-general, consul or vice-consul, as the case may be. Perhaps an explanatory remark on this point might be included in the commentary on the article.

2. The Special Rapporteur proposes no change in the text of this article.

Article 10. — Competence to appoint and recognize consuls

1. *Norway*: Terminological consistency would seem to require that the word "consul" be replaced by the expression "heads of consular post".

The Norwegian Government sees no compelling reason for including these provisions in the draft. In its opinion, it would seem unwise to create any mutual "droit de regard" in this respect.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The word "consuls" was chosen purposely so as to cover also cases in which the sending State issues a consular commission to, and requests the *exequatur* for, a consul who is not appointed head of post.

2. This article merely says that it is the internal law of the sending State which governs the competence to appoint consuls and the manner of exercising this right; similarly, it provides that it is the internal law (of the receiving State) which determines the competence to grant recognition to consuls and the form of such recognition. It could hardly be otherwise. The article does not create a mutual "droit de regard". The rules laid down in this article are of considerable importance, for mistaken opinions have been expressed on the point in the past. These rules, which introduce a desirable clarification, will make it possible in future to avoid unjustified claims that might cause friction between States.

3. The Special Rapporteur proposes no change in this article.

Article 13. — The exequatur

1. *Czechoslovakia*: The Czechoslovak Government proposes that the first sentence of paragraph 7 of the commentary on this article be inserted in the body of the article.

2. *Finland*: Referring to paragraph 7 of the commentary, the Finnish Government asks whether, in cases where the sending State requests the *exequatur* for consular officials other than the head of post, the officials in question may enter upon their duties before obtaining the *exequatur*.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. If the sending State requests the *exequatur* for consular officials other than the head of post, these officials may enter upon their duties before obtaining the *exequatur*, provided that the head of post has already obtained the *exequatur*. The explanation is that, from the point of view of international law, the request for an *exequatur* for a consular official working under the direction of a head of post who had already obtained the *exequatur* is an optional and supplementary measure which should not affect the legal status of such an official. It should be noted that the present article speaks only of heads of consular post.

2. The Special Rapporteur proposes that article 13 should be drafted to read:

Article 13. — The exequatur

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

2. The grant of the *exequatur* to the head of consular post covers *ipso jure* the members of the consular staff working under his orders and responsibility.

Article 15. — Obligation to notify the authorities of the consular district

Yugoslavia: The Yugoslav Government suggests that paragraph 2 of the commentary on this article be inserted in the body of the article itself.

PROPOSAL BY THE SPECIAL RAPPORTEUR

Add to the present article a second paragraph worded as follows:

2. Should the government of the receiving State omit to fulfil the obligations provided for in paragraph 1 of this article, the consul may himself present his consular commission and his *exequatur* to the higher authorities of his district.

The text of the present article will then become paragraph 1.

Article 16. — Acting head of post

1. *Indonesia*: During the discussion of the Commission's report in the Sixth Committee of the General Assembly, the delegation of Indonesia expressed the opinion that only consular officials, and not all members of the consular staff, should be eligible for appointment as acting head of post (summary record of the 660th meeting, paragraph 24).

2. *Finland*: If article 13 is adopted, it would seem desirable to give the receiving State the right to refuse

to accept a person considered unacceptable as acting head of post.

3. *Yugoslavia*: The Yugoslav Government proposes that the Commission should consider whether, and in what cases, provisional recognition would be required even for the acting head of post, especially in cases where the acting head of a consular post is to serve in that capacity for a long period.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. It does not seem to be in the interests of the efficient operation of consulates to lay down the rule that the sending State must invariably choose the acting head of post from among the consular officials. It will no doubt do so whenever there is a consular official available locally. That may not be the case, however, especially if the consulate is a very small one. In such cases, and particularly if the consulate is to be under an acting head for a short time only, the possibility of selecting the acting head from among the consulate employees may provide a very practical solution. It may be observed that this solution is provided for in the Havana Convention of 1928 regarding consular agents (article 9). Lastly, the acting head of post may, as pointed out in paragraph 3 of the commentary on this article, be selected even from among the officials of a diplomatic mission. For all these reasons, it would not be advisable to alter paragraph 1 of the article.

2. Since the acting head of post holds office on a temporary basis, there is no need to make his entry on duty conditional on recognition by the receiving State. To apply the recognition procedure in such cases would mean in effect that the "acting head of post" would be prevented from "acting". Very often the acting head of post has to be appointed very quickly, as for example in case of the departure of the head of post. For this reason, the consular conventions refrain from stipulating recognition for acting heads of post. Furthermore, the interests of the receiving State are fully protected by the provisions of article 23, which gives that State the right at any time to declare a member of the consular staff unacceptable.

3. The Special Rapporteur does not propose any change in the present article.

Article 20. — Withdrawal of exequatur

Finland: As regards the circumstances in which the receiving State may request the consul's recall (paragraph 1), the Government of Finland submits for consideration the question whether this provision should be broadened so as to give wider discretion to the receiving State.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur refers to the explanations he gave during the discussion of this article.⁷ For

⁷ *Yearbook of the International Law Commission, 1959*, vol. I, pp. 166 *et seq.*; and 1960, vol. I, pp. 10 *et seq.* and 291 concerning the present article; see also the commentary.

reasons given during the discussion, no change in the article is proposed.

Article 22. — Size of the staff

Yugoslavia: According to the Yugoslav Government, the receiving State should decide on the number of consular staff it is willing to receive in its territory. In case of dispute, the matter should be referred to arbitration.

OBSERVATION BY THE SPECIAL RAPPORTEUR

1. Under the text of the article as it stands, the receiving State should first, if it considers the consulate's staff too large, try to reach an agreement with the sending State. If it does not succeed, it is entitled to restrict the size of the staff assigned to the consulate of the sending State, but at the same time it is obliged to take into account not only the conditions in the consular district, but the needs of the particular consulate. In other words, it must apply objective criteria, and any restriction must be within the bounds of what is reasonable and normal.

2. The suggestion that the system described in this article be replaced by a system which would give the receiving State an absolute right to restrict the size of the consular staff is incompatible with the requirement that the interests of both States concerned should be taken into account. The absence of any objective criterion would make negotiations between the two States concerned extremely difficult, and if, in case of a dispute between them, they agreed to submit the dispute to an international body, that body would have no objective criteria on which to base its decision. For these reasons, the Special Rapporteur proposes no change in the article.

Article 23. — Persons deemed unacceptable

1. *Greece*: The Greek delegation to the fifteenth session of the General Assembly stated in the Sixth Committee that this article gives it particular satisfaction (662nd meeting, paragraph 17).

2. *Yugoslavia*: The Yugoslav Government considers that it would not be desirable to stipulate that the sending State must be informed whenever a member of the consulate is deemed unacceptable. In the opinion of that government, information of this kind could be more detrimental to good relations between the States than the absence of such information.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes no change in this article.

Article 25. — Modes of termination

Norway: The Norwegian Government is of the opinion that this article is inadequately drafted, and it does not see the use of the article. It criticizes the article on the grounds that the present formulation leaves out of account the fact that one or more consulates are often abolished while others are maintained.

PROPOSALS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes the following wording:

Article 25. — Modes of terminating the functions of members of the consulate

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

- (a) His recall or discharge by the sending State;
- (b) The withdrawal of his *exequatur*;
- (c) The closure of its consulate by the sending State;
- (d) The severance of consular relations.

2. Except in the case referred to in sub-paragraph (b) of the preceding paragraph, the functions of the members of the consular staff shall be terminated on the same grounds. In addition, their functions shall cease if the receiving State gives notice under article 23, paragraph 2, of these articles, that it considers them to be terminated.

Article 26. — Maintenance of consular relations in the event of the severance of diplomatic relations

1. *Yugoslavia*: The Yugoslav Government considers it desirable to stress that in the event of the severance of diplomatic relations there is no interruption of consular relations, and that the consular sections of diplomatic missions then continue to function as consulates. It adds that in such cases it is necessary to make contact possible between consulates and the representatives of the protecting Power.

2. *Norway*: The Norwegian Government sees no reason for including a provision to this effect in the draft.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that the rule laid down in article 26 should be stated in more explicit language. He therefore proposes that the article should be drafted to read:

Maintenance of consular relations in the event of the severance of diplomatic relations

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

2. In the event of the severance of diplomatic relations, the consulates, and the consular sections of the diplomatic missions, of the two States concerned shall continue to exercise their functions. In such cases, the consular sections shall act as consulates.

3. In the case provided for in the preceding paragraph, the receiving State shall permit and protect communications between the consular offices referred to in the said paragraph and the diplomatic mission of the protecting Power.

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

Norway: The Norwegian Government's comments state that paragraph 3 is not clear. This government considers that the expression "discharged locally" will have to be clarified in order to make it possible to comment upon the substance of the paragraph.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The expression "discharged locally by the sending State" is a technical term which means "dismissed on the spot by the sending State". It refers, firstly, to the cases in which the sending State dismisses on the spot members of the consulate whom it recruited locally and who often, but not invariably, have the nationality of the receiving State. Secondly, it refers to cases in which the sending State discharges locally, even though he has its nationality, a member of the consulate who has committed an offence under the ordinary law which the sending State regards as incompatible with the status of member of a consulate.

2. The meaning of the expression "discharged locally" will be explained in the commentary. There is no need to change the text of the article.

CONSULAR PRIVILEGES AND IMMUNITIES

GENERAL REMARKS

1. At the time when the report of the International Law Commission on the work of its twelfth session was being discussed in the Sixth Committee of the General Assembly, the Greek delegation expressed the opinion that any privileges and immunities to be granted to consuls and honorary consuls should be based on the principle of reciprocity (662nd meeting, paragraph 17).

2. It should be pointed out in the first place that many consular privileges and immunities are based on customary international law. Examples of these are the use of the national flag and of the State coat-of-arms, the inviolability of the consular premises and archives, and of the documents and official correspondence of the consulate, the freedom of communication of the consulate, the levying of consular fees and charges and the exemption from taxes and dues. Every State has a duty to respect the provisions in question, and the idea of reciprocity is irrelevant.

3. Even in the case of provisions constituting wholly or partly a progressive development of international law—the draft does not distinguish the provisions which do from those which do not—the Commission, after due consideration, dropped the idea of a reciprocity clause. It took the view that all the provisions would be equally binding on all the contracting parties with the consequence that the parties would all be on a footing of equality, which would make a reciprocity clause unnecessary.

4. The Commission applied the reciprocity concept to those consular privileges and immunities only *which are granted in addition* to those provided for in the present articles (article 64, paragraph 2, of the present draft).

5. For the reasons stated above, the Special Rapporteur considers that the Commission is unable to base the chapter relating to consular privileges and immunities on the principle of reciprocity.

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

1. *Norway*: If it is the intention to provide for a right to use a consular flag besides, or instead of, the national flag, it ought to be made clear in the text of the article and not only in the commentary.

2. *Yugoslavia*: It would be desirable to specify whether the acting head of post has the right to fly the national flag on his personal means of transport.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

1. Under article 16, paragraph 2, of the draft, the competent authorities are to admit the acting head of post, while he is in charge of the consular post, to the benefit of the present articles and of the relevant agreements in force *on the same basis as the head of the consular post concerned*. It follows that the acting head of post also has the right to fly the national flag on his personal means of transport. The Special Rapporteur thinks that the reference to the acting head of post in paragraph 4 of the commentary on this article might be expanded by the addition of the explanation just given.

2. If the Commission should agree that a reference to the consular flag should be introduced into the body of the article, the text should be amended to read:

*Article 29. — Use of the national flag, the consular flag
and the State coat-of-arms*

1. The consulate shall have the right to fly the national flag and the consular flag on the building occupied by the consulate and within its precincts.

2. The consulate shall in addition have the right to display the State coat-of-arms, with an inscription identifying the consulate, on the building occupied by the consulate and at or near the entrance door.

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

Article 30. — Accommodation

Norway: The Norwegian Government considers that the legal import of the expression "has the right to procure" is difficult to understand; and that the second sentence should be made applicable also to the head of the consular post and to the employees of the consulate.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The expression "has the right to procure" was selected so as to cover all the forms of tenure possible under the law of the receiving State: ownership, lease, precarious tenancy, etc.

2. The Commission was unwilling to extend the obligation provided for in this article to the residence of members of the consular staff, for it considered that such a duty would be too onerous for the receiving State (see paragraph 1 of the commentary on this article). It should be recalled that the draft articles

on diplomatic intercourse and immunities (A/3859, chapter III) contain no such obligation in respect of the heads and members of diplomatic missions. If, however, the Commission should wish to extend the scope of the article so as to include the head of consular post and the members of the consular staff within its terms, a second paragraph worded as follows might be added:

It shall also assist the consulates of the sending State, if necessary, in finding adequate accommodation for the members of the consulate.

Article 31. — Inviolability of the consular premises

1. *Norway*: The Norwegian Government considers that the second sentence of paragraph 1 is far too categorical, for it would preclude even a courtesy call. Secondly, the Government considers that appropriate exceptions should be included to provide for the case of fire or other disaster and for cases where the local authorities have reasonable cause to believe that a crime of violence has been, or is about to be, committed in the consular premises. Lastly, it thinks that, in cases where the consent of the head of the consular post is refused, the agents of the receiving State should nevertheless be entitled to enter the premises, provided that they have secured prior authorization from the Ministry for Foreign Affairs.

2. *Yugoslavia*: It would be useful to make provision for authorization to be granted, either by the head of the consular post or by some other duly authorized person, to representatives of the authorities of the receiving State to enter the consular premises in case of fire or similar emergency.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

During the discussion of this article, the Commission carefully examined proposals for exceptions to the rule in the cases mentioned in the above comments. After thorough discussion, it decline to allow exceptions, a majority of its members being of the opinion that any exception might lead to abuses and would substantially weaken the rule. The Commission was of the opinion that in any cases where the head of consular post thought it necessary for the agents of the receiving State to enter the consular premises, he would not fail to give the consent provided for in this article. For these reasons, the Special Rapporteur does not consider it desirable to change the text of the present article, and he proposes no amendment.

*Article 32. — Exemption from taxation in respect
of the consular premises*

1. *Ghana*: During the debate on the Commission's report at the fifteenth session of the General Assembly, the delegation of Ghana in the Sixth Committee expressed the view that it should be specified whether the exceptions were to be regarded as rights or as privileges (659th meeting, paragraph 23).

2. *Norway*: The Norwegian Government draws attention to the difference between the commentary on

this article and the commentary on the corresponding article of the draft on diplomatic intercourse (article 21). It is opposed to giving the exemption provided for in article 32 the effect *in rem* which is suggested in the Commission's commentary.

3. *Denmark*: In its comments, the Danish Government makes a reservation regarding exemption from taxation in cases where the consular premises are only leased. As regards exemption from dues, it considers that the sending State should be exempted only from dues chargeable on the purchase of real property, and not when it is merely a question of a lease.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. This article repeats *mutatis mutandis* the text of article 21 of the draft articles on diplomatic intercourse and immunities. As regards the scope of the text, the Commission wished to make it clear that the exemption contemplated in this article is an exemption *in rem*, for otherwise the exemption would be nugatory where there is a contract of sale or lease, because, as explained in paragraph 2 of the commentary, the owner would then, by means of the contract, debit the sending State with the taxes and dues payable on the consular premises and the intended purpose of the exemption would in practice be defeated.

2. If it should prove that most governments are not prepared to grant the exemption provided for in this article, then the Commission would have to consider the possibility of restricting the article to premises owned by the sending State or by the head of post.

3. The decision of the United Nations Conference on Diplomatic Intercourse and Immunities regarding article 21 of the diplomatic draft will give the Commission some guidance. The Special Rapporteur proposes no change, reserving the right to submit a re-draft of this article at the Commission's forthcoming session.

Article 33. — Inviolability of the consular archives, and documents and official correspondence of the consulate

Yugoslavia: In its comments, the Yugoslav Government suggests that this article would be more complete if the definitions of inviolable articles were incorporated separately in the body of the provision.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

If the Commission accepts the definition of "consular papers" proposed by the Special Rapporteur in article 1, then the present article should read:

Inviolability of the consular papers

The consular papers shall be inviolable, wherever they are.

Definitions of official correspondence, consular archives and documents of the consulate would then have to be added to the definitions in article 1.

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

The expression "consular archives" means all the chancery papers, the consulate library and any article of furniture intended for their protection or safe keeping.

The term "documents" means any handwritten or printed paper used by the consulate, other than the official correspondence.

Article 35. — Freedom of movement

Yugoslavia: The Yugoslav Government considers that the draft should state clearly that the consul may be denied admission to prohibited zones even if they are situated within his consular district and his intention to enter them is based on the need to exercise his consular functions.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that the present text of the article should be interpreted in the sense indicated by the Yugoslav comments and that there is no need to add anything.

Article 36. — Freedom of communication

1. *Ghana*: The delegation of Ghana in the Sixth Committee of the General Assembly observed that it should be specified whether this article is to be regarded as conferring rights or privileges (659th meeting, paragraph 23).

2. *Denmark*: The Danish Government would prefer that the freedom of communication for consulates provided for in paragraph 1 of the present article should be restricted, so that, apart from maintaining contact with the government of the sending State and that State's diplomatic missions accredited to the receiving State, a consulate would be free to communicate only with consulates of the sending State situated in the same receiving State.

The Danish Government would consider it desirable if a rule could be added to paragraph 3 along the following lines:

In special cases, however, the authorities of the receiving State may request that a sealed courier bag should be opened by a consular official in their presence so as to ensure that it contains nothing but official correspondence or articles intended for official use.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The Special Rapporteur would point out that what the present article defines are rights belonging to the sending State. Since freedom of communication is a fundamental rule of consular law, it would be most undesirable to weaken the rule by exceptions which might lead to annoyance. For this reason it is better to keep the present text of the article.

Article 37. — Communication with the authorities of the receiving State

Yugoslavia: The Yugoslav Government considers that a passage on the following lines might be added to paragraph 2:

... or such communication is indispensable in connexion with consular functions and relates to the competence of the central authorities to rule in first instance on the scope of the consular activity.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

The article as it stands represents a compromise between two different points of view disclosed by discussion in the Commission. Under the article the question which authorities the consuls may apply to is determined by the legislation of each State. Hence, it does not rule out an approach to the central authorities, *even in cases in which those authorities decide not in first instance* but in an appellate or reviewing capacity. Though he agrees in principle with the substance of the proposed addition, the Special Rapporteur prefers, because the provision is a compromise, that for the time being at least the wording adopted by the Commission should stand.

Article 38. — Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

This article leaves aside for the time being the question to what extent documents executed at a consulate between private persons are exempt from the taxes and dues levied by the law of the receiving State. The commentary on this article (paragraph 4) cites the opinion that the said taxes or dues should be charged on such acts in those cases only where the acts are intended to produce legal effects in the receiving State. Not only has this opinion not met with any objections, but the Finnish and Danish Governments, in their comments, express agreement with it. Accordingly, the Special Rapporteur proposes that a third paragraph in the following terms should be added to the present text of the article:

3. Documents executed at the consulate between private persons shall be exempt from the taxes and dues chargeable under the law of the receiving State, unless the documents are to produce direct legal effects in that State.

Article 40. — Personal inviolability

1. *Indonesia:* The delegation of Indonesia, speaking in the Sixth Committee of the General Assembly, suggested that the second sentence of paragraph 4 should be re-drafted to read:

Should the latter be himself the object of the said measures, the receiving State shall notify the sending State through the usual diplomatic channels.

[Summary record of the 660th meeting, paragraph 26.]

2. *Finland:* The Finnish Government expresses its preference for the alternative wording given in paragraph 1

and considers that the inviolability granted by paragraph 2 is too wide and should be narrowed down substantially.

3. *Norway:* The Norwegian Government proposes that paragraph 2 be deleted, criticizes the drafting of paragraph 3 and expresses the view that the text of the paragraph does not support the interpretation placed upon it in paragraph 17 of the commentary. It sees no reason why the consul should have the choice of being represented by his attorney. The granting of such a privilege in connexion with criminal proceedings would hardly accord with the corresponding rule in article 42, paragraph 2, of the draft.

4. *Czechoslovakia:* The Czechoslovak Government considers the criterion based on the length of the sentence unsuitable; it expresses a preference for the alternative wording given in paragraph 1 and proposes that paragraph 2 be amended accordingly.

5. *Yugoslavia:* In its comments, the Yugoslav Government suggests that the article should provide that the consul may not be imprisoned except in a case where he has committed an offence punishable by a minimum sentence of five years' imprisonment. In addition, it considers that the article ought to stipulate that the sending State has the duty to place on trial an official to whom the penalty could not be applied in the receiving State because of his immunity.

6. *Denmark:* The Danish Government does not consider that there are sufficient grounds for the inclusion of paragraph 2 of this article in the convention.

7. *Sweden:* Though it expresses no objection to the article itself, the Swedish Government considers that the reasons given in the commentary for maintaining paragraph 2 are open to question.

OBSERVATIONS AND PROPOSALS BY THE SPECIAL RAPPORTEUR

In the light of the comments of governments, the Special Rapporteur proposes that the final text of this article should read:

Article 40. — Personal inviolability

1. Consular officials who are not nationals of the receiving State and do not carry on any gainful private activity shall not be liable to arrest or detention pending trial, unless they commit a serious offence.

2. Except in the case specified in paragraph 1 above, the officials referred to in that paragraph shall not be committed to prison or subjected to any other restriction upon their personal freedom save in execution of a final sentence of imprisonment for a serious offence.

3. [This paragraph remains unchanged.]

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

Article 41. — Immunity from jurisdiction

1. *Indonesia*: During the debate on the Commission's report on its twelfth session at the last session of the General Assembly, the Indonesian delegation speaking in the Sixth Committee observed that it would be most desirable if the Commission, in preparing its final draft, gave special attention to the question how the line is to be drawn between the official acts and the private acts of the consular official (660th meeting, paragraph 27).

2. *Finland*: The Finnish Government supports the article unreservedly.

3. *Norway*: The Norwegian Government is of the opinion that the expression "in respect of acts performed in the exercise of their functions" is not sufficiently clear. It points out that article 50 uses the expression "official acts" and, relying on paragraph 2 of the commentary on the present article, holds that the expression used in this article is synonymous with "official acts". It considers that the text of the article should be revised.

4. *Philippines*: The comments of the Philippine Government draw attention to the question who is to determine whether an act has been performed in the exercise of the consular functions and what criteria are to be applied for this purpose.

5. *Yugoslavia*: The Yugoslav Government suggests that the word "consular" be inserted before the word "functions".

6. *Denmark*: The Danish Government considers that it would be desirable to insert in the draft, in connexion with the rule on immunity from jurisdiction, a provision concerning liability to pay compensation for damage caused by motor vehicles. It suggests the following text:

All motor vehicles, vessels and aircraft owned by members of the consulate shall be insured by policies against third-party risks. Such insurance shall be made in conformity with any requirements that may be imposed by the law of the receiving State.

The preceding provisions shall not be deemed to preclude a member of the consulate from being held liable in a civil action by a third party claiming damage in respect of injuries sustained as a result of an accident involving a motor vehicle, vessel or aircraft under his control. In connexion with such an action, members of the consulate shall not be entitled to refuse to produce any document or to give evidence.

7. *Sweden*: The Swedish Government considers that there is no real reason for establishing any discrimination between official acts performed by consuls who are nationals of the receiving State and those performed by consuls who are not nationals of that State.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The general criterion for deciding whether an act was performed in the exercise of the consular functions is the delimitation of those functions (article 4). It is not possible, however, to give precise criteria for application to borderline cases. The decision will depend on the circumstances, and each case will therefore have to be judged on its merits.

2. Both the sending State and the receiving State are competent to interpret the terms in question. Any difference of opinion will have to be resolved by one of the peaceful means for the settlement of international disputes (Charter of the United Nations, Article 33).

3. As regards the compulsory insurance of a member of the consulate for liability vis-à-vis third parties for damage caused by motor vehicles, the Special Rapporteur is of the opinion that this question, which is dealt with in some of the consular conventions, could more easily be settled by bilateral conventions.

4. In the light of the above comments, the Special Rapporteur proposes that the article should be re-drafted to read:

Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State so far as acts coming within their consular functions are concerned.

Article 42. — Liability to give evidence

1. The delegation of *Ghana*, speaking in the Sixth Committee, proposed that the word "liable" should be replaced by the word "competent" (659th meeting, paragraph 23).

2. *Norway*: The Norwegian Government considers paragraph 1 unnecessary.

3. *Philippines*: The word "liable" in the first sentence of paragraph 1 is negated by the passage "no coercive measure may be applied" in the second sentence.

4. *Yugoslavia*: The Yugoslav Government considers:

(a) That a provision should be included to the effect that the consul may, instead of giving evidence at his office or residence, submit a written declaration;

(b) That it would be desirable to insert in this article a rule stipulating that, in a case where a consul refuses to give evidence on the grounds that the evidence is connected with the exercise of his functions, the receiving State may request the sending State to authorize the consul to give evidence and to release him from official secrecy if the sending State does not consider this secrecy to be of essential importance to its interests;

(c) That it would be desirable to provide that the consul is not obliged to testify under oath.

5. *Denmark*: The Danish Government does not consider that there are sufficient grounds for the inclusion in the convention of the rule formulated in the second sentence of paragraph 1.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The waiver of immunity will be dealt with in a separate article (see section III).

2. Paragraphs 1 and 2 of this article should be worded as follows:

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

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

Article 43. — Exemptions from obligations in the matter of registration of aliens and residence and work permits

1. *Finland*: In the opinion of the Finnish Government, the provision of article 43 should be limited to work performed in the consulate instead of being extended to every type of work.

2. *Norway*: The proposed exemptions should be granted only to members of the consulate and their families. The Norwegian Government does not see any sufficient reason for extending them to the private staff. This government further considers that the exemption in regard to work permits should not apply to members of the consulate and their families who carry on a gainful private activity outside the consulate.

PROPOSAL BY THE SPECIAL RAPPORTEUR

Members of the consulate, members of their families, and their private staff, other than those who carry on a gainful private activity outside the consulate, shall be exempt from all obligations under the legislation of the receiving State in the matter of the registration of aliens, residence permits and work permits.

Article 45. — Exemption from taxation

1. *Ghana*: The delegation of Ghana at the fifteenth session of the General Assembly stated that it should be specified whether the exceptions provided for in this article are to be regarded as rights or as privileges (659th meeting, paragraph 23).

2. *Indonesia*: The Indonesian delegation to the General Assembly proposed that these exemptions should be granted only to consular officials (660th meeting, paragraph 25).

3. *Norway*: The Norwegian Government thinks that the tax exemptions provided for in this article go too far. It considers that members of the consulate other than consular officials should be accorded exemption only from dues and taxes on the wages they receive for their services. It further considers that paragraph 1 (b) should be so drafted as to cover all kinds of property, and not only immovable property.

4. *Yugoslavia*: In the opinion of the Yugoslav Government, it should be stated that the consul is liable to taxation on capital invested for gainful purposes or deposited in commercial banks.

5. *Denmark*: In the case of persons who are not nationals of the receiving State, but who, at the time of their engagement on the consular staff, were fully taxable in that State, exemption from taxation should, in the opinion of the Danish Government, cover only the salary receivable from the consulate.

6. *Sweden*: The Swedish Government would like the article to define the expression "members of their families".

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. Taking into account the comments of governments and the discussions at the Vienna Conference on a similar article in the draft on diplomatic intercourse and immunities, the Special Rapporteur proposes that subparagraphs (a) and (d) of the article should be re-drafted to read:

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

(d) Taxes and dues on income having its source in the receiving State, and taxes on capital invested in commercial or financial undertakings in the receiving State.

2. Since the expression "members of their families" or an equivalent expression is used in many articles (e.g., articles 24, 27, 43, 44, 45, 48, 49, 50, 51, 52, 57, 59), it would be more appropriate, should the Commission consider a definition desirable, to define this expression in article 1. The definition might be worded as follows:

The expression "member of the family" of a consular official or of an employee of the consulate means the spouse, children and other dependent relatives.

Article 46. — Exemption from customs duties

1. *Ghana*: On this article, the delegation of Ghana at the fifteenth session of the General Assembly made the same observation in the Sixth Committee as on article 45 (659th meeting, paragraph 23).

2. *Indonesia*: The Indonesian delegation at the fifteenth session of the General Assembly recommended that the article should apply only to consular officials (660th meeting, paragraph 25).

3. *Norway*: The Norwegian Government is of the opinion that the exemption provided for in subparagraph (b) should be granted to consular officials only. As it stands, the exemption is more generous than the exemption suggested for diplomats, since it includes also the service staff.

4. *Yugoslavia*: The Yugoslav Government proposes that the words "and [foreign] motor vehicles" should be added in subparagraph (b) of this article.

It should be specified that, if objects imported duty-free are sold, customs duty must be paid or that the sale of such goods may only take place in conformity with the customs regulations of the receiving State.

5. *Denmark*: According to the Danish Government, the exemption should be enjoyed only by career consuls who are not nationals of the receiving State and who are not carrying on a gainful occupation in that State.

6. *Sweden*: The proposed text accords exemption also to employees of the consulate, whereas the corresponding category is excluded from this privilege in the draft articles on diplomatic intercourse and immunities. In the opinion of the Swedish Government, members of a consulate should never enjoy more extensive privileges than members of a diplomatic mission.

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. The Commission included the phrase "in accordance with the provisions of its legislation" in order to allow for the practice of States which specify by domestic regulations how and on what conditions exemption from custom duties is granted (see paragraph 3 of the commentary on this article). This clause also gives the States the power to specify the conditions on which articles imported duty-free may be sold.

2. Taking into account the comments of governments and the decisions of the Vienna Conference on article 34 of the draft on diplomatic intercourse, the Special Rapporteur proposes that the present article should be re-drafted to read:

The receiving State shall, in accordance with the laws and regulations which it may have adopted, permit entry of and grant exemption from the customs duties, taxes and charges which might be payable at the time of customs clearance (other than charges for storage and cartage or similar charges) on articles intended:

- (a) For the official use of a consulate of the sending State;
- (b) For the personal use of consular officials, including articles intended for their installation, and motor vehicles.

Article 50. — Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State

1. *Norway*: The Norwegian Government makes several comments on this article.

(a) The wording is too abstruse for immediate and easy interpretation. It should be revised.

(b) The document would be easier to read and apply if references to article 50 were inserted in all the causes affected by the exemptions for which that article provides.

(c) The privileges and immunities provided for in this article are too restricted. Members of the consulate who are nationals of the receiving State should at least be excused from producing official correspondence and documents relating to the exercise of their functions (see article 42, paragraph 3).

(d) A provision similar to that of article 37 of the draft on diplomatic intercourse should be added:

However, the receiving State must exercise its jurisdiction over such persons in such a manner as not to interfere unduly with the conduct of the business of the consulate.

2. *Philippines*: The Government of the Philippines, transmitting the comments of the Committee set up to study the Commission's draft articles, observes:

(a) That paragraph 1 of this article seems to imply that only consular officials may perform consular functions; and that members of the consulate, under paragraph 2, perform non-consular functions;

(b) That the immunity from jurisdiction under article 50 seems to depend on the performance of consular functions, irrespective of the nationality of the consular official performing those functions;

(c) That this article seems untenable when viewed in the light of article 1, which gives a definition of consular officials that includes even members of the consulate; here also, as in the case of article 41, the problem arises which persons or organizations may determine whether an act is a consular function and what criteria should be applied for this purpose.

3. *Yugoslavia*: It should be specified which persons are to be considered members of the consul's family.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

1. The draft articles would certainly be much easier to interpret and apply if cross-references to the present article could be added in every article affected. But, apart from the fact that it is quite unusual in the technique of treaty-drafting, such a system of cross-references would make the text very clumsy. The Special Rapporteur could, of course, include in the final commentary on each of the articles to which the exemption provided for in article 50 applies a statement to the effect that the article does not apply to nationals of the receiving State. Perhaps the best solution would be to include in article 1, which has to be consulted for the purpose of interpreting each of the articles, a suitable statement to the effect that consular officials who are nationals of the receiving State enjoy immunity from jurisdiction only in respect of acts coming within their duties. In this way, any person asked to interpret any of the provisions of the convention would realize that, so far as consular privileges and immunities are concerned, nationals of the receiving State have a different status.

2. Governments would hardly be likely to accept the suggestion that the personal immunities referred to in this article should be extended. In so far as the object of the suggestion is to secure the inviolability of the official correspondence and official documents, it should be noted that this inviolability is fully safeguarded in all cases by article 33 of the present draft.

3. For the definition of "members of their families", see the observations on article 45, above.

4. The Special Rapporteur proposes that the first sentence of article 50 should be re-drafted to read:

Consular officials who are nationals of the receiving state shall enjoy immunity from jurisdiction only in respect of acts coming within their consular functions.

Article 52. — Obligations of third States

1. *Finland*: The scope of paragraph 1 should be narrowed down substantially.

2. *Norway*: The draft ought to settle in an affirmative sense the question whether or not a third State is under a duty to grant consular officials free passage through its territory. Paragraph 3 seems to have settled this question so far as other members of the consulate and members of their families are concerned.

3. *Philippines*: The comment made on articles 41 and 50 would seem to apply with as much weight to paragraphs 1 and 3 of article 52.

4. *Yugoslavia*: This article does not apply to a consul's private visits to third States.

PROPOSALS BY THE SPECIAL RAPporteur

It is proposed that paragraphs 1 and 3 should be re-drafted to read:

Paragraph 1

If a consular official passes through or is in the territory of a third State while proceeding to take up or return to his post, or when returning to his own country, the third State shall accord to him the personal inviolability provided for by article 40 above, and all other immunities which are provided for by the present articles and which are required to ensure his transit or return."

Paragraph 3

In circumstances similar to those specified in paragraph 1 above, third States shall not hinder the transit through their territories of other members of the consulate and their families.

Article 53. — Respect of the laws and regulations of the receiving State

Yugoslavia: It is indispensable to insert in this article a provision to the effect that consuls have no right to provide asylum.

OBSERVATION BY THE SPECIAL RAPporteur

Paragraph 3 of the commentary on this article explains that consular premises may not be used as an asylum for persons prosecuted or convicted by the local authorities. If the Commission should decide on an additional clause, perhaps a second sentence in these terms might be added in paragraph 2:

In particular, they may not be used as an asylum for persons prosecuted or convicted by the authorities of the receiving State.

It should be noted, however, that the corresponding article (article 39) of the Vienna Convention on Diplomatic Relations does not contain a specific provision to this effect.

HONORARY CONSULS

GENERAL COMMENTS

1. *The delegation of Greece* at the fifteenth session of the United Nations General Assembly fully approved of the decision to omit any definition of honorary consuls from chapter III, being of the opinion that the matter was sufficiently covered by article 1(f) (662nd meeting, paragraph 17).

2. *The Norwegian Government*, on the other hand, suggests that a definition of honorary consuls should be adopted.

3. As regards the privileges and immunities of honorary consuls, the *Norwegian Government* thinks there is no reason to discriminate between honorary consuls who are, and those who are not, nationals of the receiving State.

4. *The delegation of the Ukrainian Soviet Socialist Republic* at the fifteenth session of the General Assembly said that the privileges and immunities of honorary consuls under chapter III were much greater than those which they actually enjoyed in practice (657th meeting, paragraph 19).

5. *The delegation of Indonesia* at the fifteenth session of the General Assembly said it fully shared the Special Rapporteur's opinion that the privileges and immunities granted to honorary consuls in chapter III far exceeded those granted to them in the practice of many States (660th meeting, paragraph 28).

6. *The Czechoslovak Government* does not wish to comment on chapter III of the draft as it considers the institution of honorary consuls unsatisfactory from the point of view of the present level of contacts between States.

Applicability of article 31 to honorary consuls

The Commission decided to defer its decision as to whether article 31 concerning the inviolability of consular premises was applicable to honorary consuls until governments had commented on the matter (*cf.* paragraph 5 of the commentary on article 54 of the draft). *The Governments of Finland, Norway and Denmark* are of the opinion that article 31 should not apply to honorary consuls. The *Yugoslav Government* considers that, in the case of honorary consuls, article 31 can only apply to premises intended solely for the exercise of consular functions.

Article 54. — Legal status of honorary consuls

1. *Finland*: Proposes that the reference to article 42, paragraph 2, be deleted.

2. *Norway*: The Norwegian Government says that the system of references and cross-references will inevitably lead to difficulties of interpretation, particularly in the case of article 54, paragraph 3. It considers that it would be better to spell out in chapter III all the provisions which apply to honorary consuls, even at the risk of repetition. Lastly, it considers that article 32 should not be made applicable to the premises of honorary consulates.

PROPOSALS BY THE SPECIAL RAPporteur

The Special Rapporteur proposes:

(a) That the reference to article 42, paragraph 2, be replaced by a reference to paragraph 3 of the same article;

(b) That the references to articles 32 and 50 in paragraph 2 of the present article be deleted;

(c) That paragraph 3 of the present article be deleted;

(d) That the substance of the rule laid down in article 50 should be reproduced in article 54.

Article 54 would then read as follows:

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

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

3. Honorary consuls who are nationals of the receiving State shall enjoy immunity from jurisdiction only in respect of acts coming within their consular functions.

Article 59. — Exemption from personal services and contributions

In the comments of the *Yugoslav Government*, it is suggested that paragraph 2 of the commentary, which explains that this article does not apply to nationals of the receiving State, should be inserted in the body of the article as sub-paragraph (c).

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

While recognizing that an express provision excluding nationals of the receiving State from the benefit of this article might be thought particularly necessary, the Special Rapporteur considers that it would be impossible to include a clause to that effect in this article alone, inasmuch as nationals of the receiving State are debarred from the benefit of all the articles of chapter III. Furthermore, the revised text proposed by the Special Rapporteur for article 54 makes such an express stipulation less necessary.

Article 60. — Liability to give evidence

Philippines: The members of the committee which prepared the comments make the same reservations regarding this article as in the case of articles 41, 50 and 52.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur proposes no change in this article.

Article 64. — Non-discrimination

The Norwegian Government regards this article as superfluous and open to misconstruction.

OBSERVATION BY THE SPECIAL RAPPORTEUR

The Special Rapporteur considers that it is desirable though not indispensable, to express the principle of non-discrimination in the form proposed.

Article 65. — Relationship between the present articles and bilateral conventions

1. During the Sixth Committee's discussion of the Commission's report at the fifteenth session of the General Assembly, the delegations of the United Kingdom (652nd meeting, paragraph 5), Austria (658th meeting, paragraph 3) and France (658th meeting, paragraph 23) expressed a preference for the second version of this article, whereas those of Italy (656th meeting,

paragraph 16), Argentina (657th meeting, paragraph 11) and Portugal (659th meeting, paragraph 9) preferred the first. The delegations of Japan (655th meeting, paragraph 15) and Iraq (661st meeting, paragraph 12) were in favour of a different formulation, on the lines of that given in paragraph 2 of the commentary. The delegation of Ghana (659th meeting, paragraph 23) took up a position which seems very close to that of the two delegations last mentioned.

2. Of the governments which have commented on the draft articles on consular intercourse and immunities, those of *Norway*, the *Soviet Union* and *Czechoslovakia* express a preference for the second version.

3. In its comments, the Government of the *Philippines* states that its attitude towards this article will depend on the extent to which its comments meet with acceptance.

4. The Yugoslav Government considers the first text as the more acceptable, but suggests that the following clause should be added: "provided that they do not affect the minimum guarantees offered by this convention." Alternatively, it could be stressed that future conventions may be concluded provided that they are not, at least, in conflict with the basic principles of this convention.

5. The Netherlands delegation to the fifteenth session of the General Assembly expressed regret that by presenting alternative texts on a point which ought to be settled by the Commission, the Commission had shown signs of indecision (659th meeting, paragraph 16).

OBSERVATIONS AND PROPOSALS
BY THE SPECIAL RAPPORTEUR

1. Up to the present, the second text has been more favourably received than the first. The Special Rapporteur therefore proposes that it be adopted. This choice is supported by practical considerations, for the first text would encounter considerable difficulties. In the first place, it would mean that any State wishing to ratify or accede to the convention would have to review all its bilateral consular conventions and to ascertain whether the States with which it was bound by those conventions wish to become parties to the multilateral convention. Then, it would have to enter into negotiations with those of the States in question which wish to maintain the existing bilateral conventions in force. For States which in the past have concluded a number of conventions on the subject of consular intercourse and immunities, this obligation would involve a considerable amount of work. Apart from this, there is a risk attached to such negotiations, for any State may later change its mind and decide that it no longer wishes to maintain in force a convention concerning which it had previously taken a contrary view. Moreover, provisions relating to consular intercourse and immunities are very often incorporated in conventions dealing with other subjects: establishment conventions, treaties of friendship, commercial treaties, treaties concerning juridical relations in civil and penal matters, etc. If the clause in question was interpreted as covering these cases also, States would be obliged

to review their whole system of international agreements in order to find out whether the international treaties to which they are parties contain provisions dealing with consular intercourse and immunities. This would involve even more preliminary research, would delay the ratification of the convention and would entail the danger that a provision might be overlooked and consequently abrogated without any real intention on the part of the contracting States to abrogate it.

2. It has been asked whether not only bilateral, but also multilateral conventions should be kept in force. The Special Rapporteur does not think so. The multilateral convention being drafted by the Commission is a codification of the essential rules of consular law, and its principal object is the progressive unification of consular law. This object would be unattainable if other multilateral conventions were to be kept in force, for either those other multilateral conventions contain provisions similar to those in the general convention, in which case they are unnecessary, or else they contain provisions which differ from those of the general convention, and in that case they would seriously hamper the unification of the rules concerning consular intercourse and immunities.

Section III

ADDITIONAL ARTICLES PROPOSED

Article 4 a. — Power to represent nationals of the sending State

1. At the twelfth session of the Commission, the Special Rapporteur proposed an additional article concerning the power of consuls to represent the nationals of the sending State (text in paragraph 12 of the commentary on article 4 of the present draft).⁸ After an exchange of views on this question, the Commission decided to await the comments of governments, without taking any decision for the time being.

2. In their comments, several governments have expressed their views on this proposal. The Danish Government adopts a negative attitude. The Governments of Norway and Yugoslavia agree that the consul should be entitled to represent nationals of the sending State in matters connected with the settlement of estates. The Government of Finland proposes that the powers of the consul should be restricted to safeguarding the rights and interests of nationals of the sending State. The Government of the Soviet Union is in favour of the provision proposed by the Special Rapporteur.

3. The Special Rapporteur proposes the following text for the article in question, which might be inserted immediately after article 4 of the draft:

With the object of safeguarding the rights and interests of nationals of the sending State, the consul shall have the right to appear, without producing a power of attorney, before the courts and other authorities of the receiving State for the purpose

⁸ *Official Records of the General Assembly, Fifteenth Session, Supplement No. 9 (A/4425), chapter II.*

of representing such nationals in cases in which, owing to their absence or for any other reason, they are unable to defend their rights and interests in due time. This right shall continue to be exercisable by the consul until the nationals in question have appointed an attorney or have themselves assumed the defence of their rights and interests.

Article 52 a. — Members of diplomatic missions responsible for the exercise of consular functions

4. In its comments, the Soviet Union proposes that an article in the following terms should be included in the present draft:

1. The provisions of these articles regarding the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions and of whose appointment the Ministry of Foreign Affairs of the receiving State has been notified by the diplomatic mission concerned.

2. The diplomatic privileges and immunities to which any such persons may be entitled shall not be affected by their carrying out consular functions.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

5. Analogous provisions occur in many consular conventions, among which the following at least may be mentioned by way of example: Soviet Union - Albania, of 18 September 1957 (article 26); Soviet Union - Federal Republic of Germany, of 25 April 1958 (article 35); Soviet Union - Austria, of 28 February 1959 (article 32); Bulgaria - Romania, of 23 April 1959 (article 21); and Czechoslovakia - People's Republic of China, of 7 May 1960 (article 20).

The inclusion of the new article proposed by the Soviet Union would have the great advantage of unifying the practice of States in a matter in which such unification seems particularly desirable.

The Special Rapporteur proposes that the new article should be inserted after article 52 of the present draft.

Members of diplomatic missions assigned to a consulate

6. The Czechoslovak Government proposes that a provision should be included in the draft to the effect that a member of the diplomatic mission who is assigned to a consulate of the sending State retains his diplomatic privileges and immunities.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

7. The case mentioned in the comments of the Czechoslovak Government is covered by the new article proposed in paragraph 4 above. An express clause might be added either in the commentary or in the body of the article.

Article 50 a. — Waiver of immunity from jurisdiction

8. In the opinion of the Governments of Norway and Yugoslavia, the draft should contain a provision enabling the authorities of the sending State to waive

the immunities provided for in article 40 (Norway and Yugoslavia) and in articles 41 and 42 (Norway).

PROPOSAL BY THE SPECIAL RAPPORTEUR

9. The Special Rapporteur proposes that a new article in the following terms should be inserted after article 50:

Article 50 a. — Waiver of immunity from jurisdiction

1. The sending State may waive the immunity from jurisdiction of consuls and of members of the consular staff.

2. The waiver shall in all cases be express. It shall be communicated through the appropriate diplomatic channel.

3. The waiver of immunity for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

Article 1 a. — Right to maintain consular relations with other States

10. The Czechoslovak Government considers that a provision to the effect that every State has the right to maintain consular relations with other States should be included in the draft.

OBSERVATIONS BY THE SPECIAL RAPPORTEUR

11. In his first report (A/CN.4/108), the Special Rapporteur included a provision to the effect that every State has the right to establish consular relations with foreign States.⁹ In deference to the objections of some members of the Commission to the term "right", the initial text was re-drafted as follows: "Every sovereign State is free to establish consular relations with foreign States."¹⁰ The late Professor Scelle then proposed another wording: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected."¹¹ Since several members of the Commission were opposed to the inclusion of such a provision, mainly on the grounds that no corresponding provision occurred in the draft articles on diplomatic intercourse and immunities, the Special Rapporteur withdrew his proposal, expressing regret that the draft would as a consequence be incomplete. Being of the opinion that, if interpreted in the context of the other articles of the draft and particularly articles 2 and 3, the above-mentioned article on the right to maintain consular relations expresses a commonly accepted customary rule, the Special Rapporteur is prepared to include this article in the present draft.

⁹ *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), p. 83.

¹⁰ *Yearbook of the International Law Commission, 1959*, vol. I (United Nations publication, Sales No. 59.V.1, vol. I), 496th meeting, paragraph 17.

¹¹ *Ibid.*, paragraph 26.

Section IV

INFORMATION PROVIDED BY GOVERNMENTS

In response to the Commission's request for certain information (see report on the twelfth session), some of the government comments received contain information on the practice of States. For example, as regards the class of consular agents, the Governments of Norway and Sweden have given particulars which are discussed above in connexion with article 8. The same governments, commenting on article 12, state that a fresh consular commission is necessary for every appointment, even if the consul is assigned to another post in the territory of the receiving State. The Finnish Government confirms that the rule laid down in article 62 regarding precedence is observed in Finland.

Section V

MISCELLANEOUS QUESTIONS

1. During the debate on the Commission's report at the fifteenth session of the General Assembly, some delegations thought that the draft articles on consular intercourse and immunities should be preceded by a historical introduction. If the Commission agrees that the final report should be supplemented in this way, the Special Rapporteur would be prepared to submit a draft introduction following broadly the lines of chapter I of his first report.¹²

2. At the same session of the General Assembly the Indonesian delegation expressed full agreement with the Special Rapporteur's suggestion for a special chapter establishing the optional character of the institution of honorary consuls (660th meeting, paragraph 28).

3. The Israel delegation to the same session of the General Assembly expressed the opinion that the International Law Commission should include in the draft its suggestions regarding the final clauses, including a reservations clause, in keeping with its own recommendation of 1951 (A/1858, paragraph 33)¹³ and General Assembly resolutions 598 (VI) and 1452 (XIV) (663rd meeting, paragraph 9).

4. Lastly, the Canadian delegation to the same session of the General Assembly, while finding the Commission's report very satisfactory, said that the Canadian Government would hardly be able to accept the draft articles on consular intercourse and immunities, as they contained no federal clause or reservations clause, such as occurs in several international conventions (656th meeting, paragraph 11).

¹² *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 57.V.5, vol. II), pp. 72 *et seq.*

¹³ *Ibid.*, 1951, vol. II (United Nations publication, Sales No. 51.V.6, vol. II), p. 130.