



Explanatory Report to the European Convention on Consular Functions

Paris, 11.XII.1967

I. The European Convention on consular functions and its Protocols (ETS Nos. [061A](#) and [061B](#)) were prepared, within the framework of the Council of Europe, by a committee of governmental experts which carried out its duties under the supervision of the European Committee on Legal Co-operation (CCJ). The Convention and its Protocols were opened for signature by member States of the Council of Europe on 11th December 1967.

II. The text of the explanatory report of the Committee of Experts is presented here as amended and completed by the Committee on Legal Co-operation.

General Considerations

1. The European Convention on Consular Functions will consist of six chapters :

- Chapter I : Definitions
- Chapter II : Consular Functions in General
- Chapter III: Estates
- Chapter IV: Shipping
- Chapter V : General Provisions
- Chapter VI : Final Provisions

2. On several occasions the Committee had occasion to consider the scope of the Convention it was entrusted to draw up. It was at first decided that all aspects of consular law should be regulated. However, the Committee later decided that the Treaty would deal only with consular functions, since the subject of "consular privileges, immunities, and relations" was already covered in the Vienna Convention on Consular Relations signed on 24th April 1963.

3. The Committee also considered it unnecessary to have a special article dealing with the manner in which consular relations, privileges and immunities were to be considered as being governed. Such an article could only have a declaratory effect in any event. Accordingly it was decided to include a reference to the Vienna Convention, as the major Treaty governing these matters, in the Preamble., it was also decided to insert in the Preamble a provision to the effect that the rules of customary international law continue to govern matters not regulated by the present Convention. The Committee felt that these provisions sufficiently covered the ground.

4. The Committee also discussed on several occasions the purposes of a European Consular Convention. The debate was principally concerned with the directives, that should be regarded as representing the European spirit which ought to inspire the work of the Committee. On this point, two tendencies were discernible within the Committee:

(a) According to the first point of view, one should draw a distinction between certain traditional functions which were now largely without object, and those consular activities that must be strengthened and extended in view of their growing importance. It would therefore, be a matter of entrusting, in a spirit of confidence, the authorities, of the receiving State with those functions which they were able to perform and allowing the consular authorities to retain, where necessary in a strengthened form, those functions which they were by nature best fitted to carry out.

(b) Some delegations upheld a second point of view, maintaining on the contrary that it was, appropriate to give the same confidence to the authorities of the sending State. and not to limit the traditional functions of consular officers in favour of the authorities of the receiving State, a view which is strengthened by the fact that the Vienna Convention lays down the general principle of the development of consular relations.

5. In drawing up the draft of this Convention, the Committee had constantly to keep in mind that the two tendencies described above can only be reconciled by each side making concessions to the other. In the same context, the Committee was convinced that on the European level, the regulation of consular matters ought to be based essentially upon a ready co-operation between the local authorities and the representatives of the sending State.

6. On the other hand, the Committee affirmed the principle of an extension of consular functions or grant of new functions to consular officers in those fields where their role was at present most useful. With this, in view, and so as better to appreciate contemporary requirements, the Committee took as a basis for its work the latest bilateral and multilateral consular conventions.

7. In adopting the present Report, the Committee considered it necessary to draw attention to the fact that numerous articles in the draft Convention contain clauses safeguarding the law of the receiving State. The effect of such a clause is that in a case of conflict, certain provisions of the Convention give way to the provisions of the internal law of the said State. The Committee was of the view that this state of affairs should be considered merely provisional, and expressed the wish that, as far as possible, the Contracting Parties should progressively adapt their internal law to the rules laid down in the Convention.

Commentary

Preamble

8. The text of the Preamble corresponds in general to that usually adopted in conventions drawn up within the Council of Europe.

9. The recital in the *first paragraph*, beginning with the words "considering that..." impliedly refers to Article 1 of the Statute of the Council of Europe dealing with the aim of the Council.

10. As to the *second recital* it was proposed that there should be a separate declaratory article on relations, privileges and immunities ; but this was later felt to be unnecessary. The decision of principle (cf. paragraphs 8 and 9 above), that the Strasbourg Convention should deal only with consular functions made it to some extent inevitable that an express reference should be made to the Vienna Convention.

11. According to the intention of the Committee the *final recital* was designed to give the Convention a "closed" character. Furthermore it will be noticed that by the terms of Article 5 1 only "European" States, unanimously invited by the Committee of Ministers, can become parties to, the Convention. The phrase "close co-operation" therefore has a geographical as well as a political connotation.

Chapter I – Definitions

Article 1

12. In drafting this article, the Committee took care to reproduce as far as possible, and where necessary, the definitions in Article 1 of the Vienna Convention on Consular Relations. The Committee thought that to proceed in this way would not only avoid certain possible conflicts between the Strasbourg and the Vienna Conventions but would also take into account, as far as possible, the character of the Vienna Convention as a work of codification in the field of public international law. Moreover, it would permit European States which do not become parties to the latter Convention to accept the Strasbourg Convention without, in so doing, being bound by an article which contained an express reference to the United Nations Convention.

The Committee could only apply this method to two definitions in Article 1 ; those in sub-paragraphs (e) and (f) of this article.

By contrast the definitions employed by sub-paragraphs (a), (b), (c), (d) and (g) are peculiar to the European Convention.

13. With regard to the definition of "consular officer" in *sub-paragraph (a)*, the Committee decided to diverge from the definition contained in Article 1 (d) of the Vienna Convention on Consular Relations, for the following reasons:

Since the Strasbourg Convention does not contain rules as to the procedure to be followed by virtue of which a consular officer can be admitted to exercise consular functions in the receiving State, it was thought preferable to fill up this lacuna by introducing into the definition of consular officer an express reference to this State.

Moreover, in adopting this definition of consular officer, the Committee took into account the fact that the Strasbourg Convention does not contain any provision similar to that in Article 70 of the Vienna Convention, governing the exercise of consular functions by the members of a diplomatic mission. The Committee's intention, therefore, was to regulate, by a definition which refers both to the sending State and to the receiving State, the position of these diplomatic agents, particularly with respect to Article 25 of the Strasbourg Convention.

Nonetheless, it was admitted that Article 1, sub-paragraph (a) must not be interpreted as meaning that for such diplomatic agents a procedure requiring an *exequatur* would be necessary, the question of the admission of diplomatic agents to the exercise of consular functions being governed by already existing principles of State practice or in conformity with international instruments in force.

Moreover, the Committee recognised unanimously that the definition contained in sub-paragraph (a) was to be interpreted as including "heads of consular posts", "consuls-general", "consuls", "vice-consuls" and "consular agents", as well as "diplomatic agents admitted to exercise consular functions" as mentioned above.

The Committee recognised that the Convention will not be applicable to officials who although they exercise consular functions have not the status of consular officers. It was further admitted that the Convention would not be applied between countries of the Commonwealth in the absence of consular relations between these countries.

14. The definitions of " sending State " and of " receiving State" in sub-paragraphs (b) and (c) were based on those in the Franco-Swedish Consular Convention of 5th March 1955. It was noticed that similar provisions were to be found in most modern consular conventions. The Committee considered that the words *Etat accréditant* and *Etat accréditaire* in the French text of the Vienna Convention on Diplomatic Relations (1961) could not be used as regards consular relations. It was agreed that the expression "Contracting Party " referred to all States with regard to which the Convention had entered into force.

So far as concerns the phrase "Contracting Party by whom a consular officer is appointed", which appears in the definition of "sending State", a special question arose concerning the nomination of consular agents, who, according to the regulations in force in certain countries, are not nominated by the central authorities but by consular officers of a higher rank. The Committee thought that the term "sending State" ought to be understood as comprehending all authorities of the State, whether central or local. It is understood that the definition given in paragraph (c) does not permit the consular officer to exercise his functions in the receiving State without having complied with the admission procedure recognised in international consular law.

15. *Sub-paragraph (d)* (completed by the contingency foreseen in Article 2 (3)) by defining the word "national", specifies the extent of application of the Convention *ratione personae*. It indicates, in fact, those categories of subjects (natural and legal persons) whose interests may be protected by consular officers in the relations between Contracting Parties. In adopting this somewhat general text, the Committee wishes to take into account the special position of the United Kingdom in matters of nationality. It nevertheless thought it necessary to point out that the text ought not to be considered as a precedent in other than a European context.

16. The Committee was unanimously of the opinion that in the existing state of international law, any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State. On this question the Committee was nonetheless aware that the problem of double nationality could arise, and recognised that in such a case, that is to say where the individual also has the nationality of the receiving State, the latter can oppose the intervention of the consular officer of the sending State.

On the other hand the Committee recognised that the words "in relation to the sending State" provide for a special case, concerning particularly legal persons; the Committee were aware that the receiving State is not compelled to recognise the status of a "national" accorded under the law of the sending State with a view to providing consular protection.

More specifically with reference to the meaning of the term "legal persons", the Committee was of the opinion that it ought to be interpreted in the light of other Council of Europe conventions (principally of the Convention on the Establishment of Legal Persons) and that in any case it comprises equally both commercial corporations (*sociétés commerciales*) and corporations with no profit motive (*associations sans but lucratif*).

With respect to both natural and legal persons, the Committee considered it useless to refer in paragraph (d) expressly to international law, since at least in most member States of the Council of Europe, rules of public international law in matters of nationality are considered as part of national law.

17. The British and German delegations declared that their Governments reserved the right to make a declaration on the subject of the interpretation that they will give to the term "national" so far as concerns, their respective nationals. Such a declaration may be made and modified at any time.

18. With reference to *sub-paragraph 5* of Article 1, the Austrian and Swiss delegations declared that their countries did not admit that consular agencies were independent consular posts. They could not therefore recognise such a consular agency as having a consular district properly speaking under the terms, of Article 1 (*f*).

19. Sub-paragraph (*g*) defines the word "vessel" and the nationality of the vessel by a *renvoi* to the law of the sending State. The Belgian delegation declared that it would interpret the phrase "which possesses the nationality of the sending State" as if it read "which is registered in the sending State". One delegation recalled, on the subject of vessels,, the statement appearing in the first sub-paragraph of paragraph 16 above.

In defining the term "vessel", the Committee also omitted any reference to international law for the same reasons as those given in the last sub-paragraph of paragraph 16 above.

20. Some delegations pointed out that their Governments interpreted the word "vessel" as excluding any craft which, according to their municipal law, did not require to be registered.

Chapter II – Consular Functions in General

Article 2

21. This article, which is of a general nature, governs all the operative provisions of the Convention. It gives a comprehensive definition of consular functions. It should not be interpreted restrictively but in the light of paragraph 1 of Article 44 according to which the provisions relating to consular functions are not exhaustive.

22. The words "shall be entitled", do not constitute an obligation on consular officers to exercise their protective function in each particular case ; it merely gives them the power to do so.

23. It was agreed that the functions referred to in *paragraph 2* of this article can be exercised by consular officers only in a strictly consular context and within the territorial limits of their district. The word "including" confirms the interpretation given in paragraph 27 above.

24. With regard to the word "co-operation" mentioned in paragraph 2, the Committee decided to employ this term in preference to the word "relations " used in a previous version of this text. The Committee considered that the word co-operation would be better suited to a European context, more particularly as the corresponding provision of the Vienna Convention (Article 5 (*b*)) refers to friendly relations ".

25. In the Committee's opinion, the expression social referred in particular to the interests of the sending State in questions of emigration and immigration.

Article 3

26. This article concerns the right of consular officers to apply to the authorities of the receiving State.

27. As to paragraph 1 (*a*), the Committee was of the opinion that this provision ought not to be interpreted as permitting a consular officer to have a right of audience before a court of the receiving State if this faculty is reserved to persons having specific qualifications.

28. In *paragraph 1 (b)* the Committee adopted the principle that consular officers were entitled to apply directly to the central authorities of the receiving State. However, this right applies only to the exercise of consular functions, and only to those matters falling within the district of the consular officer concerned. Furthermore, the authority must be a competent one as in the case of *paragraph 1 (a)*. This right must also be exercised "having regard to the practice of the receiving State". The Committee felt, however, that the word "practice" should be interpreted as covering both the laws and the usages of the receiving State.

29. The question arose whether the expression "central authorities" also covered Ministries of Foreign Affairs, particularly in cases where the sending State did not have any diplomatic representative in the receiving State, so that if consular officers were given the right to apply to the Ministry of Foreign Affairs this would imply an occasional exercise of diplomatic functions. The Committee unanimously agreed that, according to the meaning of *sub-paragraph (b)*, such applications must conform to the "practice" of the receiving State. In any event, they should be considered quite exceptional.

30. It was further agreed that the expression "administrative authorities" must be understood in its broadest sense as also including "para-administrative" authorities such as the social security authorities.

31. As regards *paragraph 2*, the Committee was of the opinion that it would be for the authorities of the receiving State to choose the official language into which the translation mentioned in that paragraph should be made.

Article 4

32. Article 4 defines certain rights enjoyed by a consular officer with a view to the protection of the nationals of the sending State.

33. According to the Committee's interpretation, the word "communicate" in *sub-paragraph (a)* covers any oral or written communication between the consular officer and a national.

34. It is understood that the consular officer's right to seek information on any incident affecting the interests of the sending State, provided for in *sub-paragraph (b)*, does not imply that the local authorities are in all circumstances obliged to supply all the information in their possession.

35. One delegation did not share this view. It considered that all such information as was necessary to enable him to carry out his task ought to be communicated to the consular officer.

36. In the opinion of the Committee, *sub-paragraphs (c) and (d)* permit a consular officer – under certain reservations – to take upon himself personally the protection of the interests of his nationals.

37. The word "proceedings" used in *sub-paragraph (d)* also covers voluntary jurisdiction and other non-litigious procedures. This *sub-paragraph* applies likewise to proceedings before administrative and labour tribunals.

38. The word "arrange" in *sub-paragraph (c)* means that the consular officer is entitled to propose a legal representative to assist his nationals. The Committee considered that this right must in no sense be understood as implying that the consular officer was legally empowered to appoint such a representative. In no circumstances must the consular officer exercise the function referred to in *sub-paragraph (c)* against the wishes of the national concerned. The Committee agreed, however, that the said function could be exercised both before administrative authorities and in judicial proceedings.

39. *Sub-paragraph* (f) empowers the consular officer to suggest an interpreter to the authorities in question so as to assist his nationals; the authorities would consequently be entitled to refuse the proposed interpreter. The consular officer may himself act as interpreter only with the consent of the authorities of the receiving State. If in the opinion of the consular officer, a translation given by an interpreter is faulty, the consular officer may challenge it through his national's legal representative.

Article 5

40. This article is a corollary to Article 4 (a).

Article 6

41. Article 6 is concerned with consular functions in a case where a national of the sending State is deprived of his liberty. The first paragraph has a general effect ; paragraph 2 is concerned with provisional deprivation of a person's liberty and paragraph 3 with imprisonment or detention in pursuance of a sentence or other decision.

42. The words "measure depriving him of his liberty" in the first paragraph have a general sense and thus refer to custody pending trial as well as to a term of imprisonment proper.

43. Paragraph 2 applies to arrest or to detention pending trial, i.e. any form of provisional detention, whether or not it is followed by a detention or imprisonment in pursuance of a final decision.

44. The "communications" referred to in the first sentence of paragraph 2 mean any kind of contact except, of course, personal visits, which are dealt with in the second sentence of this paragraph.

45. The words "all communications between a consular officer and a national of the sending State" mean communications from the consular officer to his national and vice versa.

46. Paragraph 3 of Article 6 concerns detention in pursuance of a judgment or other decision. The Committee did not consider it necessary, therefore, to add to this provision a restrictive clause similar to that embodied in the third sentence of paragraph 2, since the question of secrecy does not arise in the situations covered by paragraph 3.

47. The words " subject to that limitation " at the beginning of the second sentence of paragraph 3, refer to the words " having regard to the regulations of that institution " at the end of the preceding sentence.

48. In the Committee's opinion, paragraph 3 is concerned not only with penal detention but also, for example, detention for reasons of mental disorder. As in paragraph 2 the words "between a consular officer and a national of the sending State" imply reciprocal communication.

49. As to the second sentence of paragraph 3, it should be pointed out that the Committee adopted the principle that the consular officer should first inform the authorities of his intention to visit a national in detention ; such notification, which may be given at any time and through any channel, ensures a courteous reception and appropriate conditions for the interview.

50. After the words "consular officer" in the same sentence, one delegation would have liked to see inserted the words: "or social assistants acting on his behalf". This suggestion did not, however, receive the approval of the majority of the Committee.

Article 7

51. The words "any other persons entitled to receive them" in sub-paragraph (b) refer to any category of persons other than nationals of the sending State which are entitled under the legislation of that State to obtain the documents mentioned in this paragraph (e.g., protected persons, political refugees or stateless persons).

52. By virtue of agreements concluded within the Council of Europe, "identity documents" may within certain limits be used as "other travel documents". It was agreed that the latter expression would denote safe-conducts and warrants for compulsory repatriation.

53. The Committee was of the opinion that it belongs to each State to define, in the context of its own law, the identity cards mentioned in sub-paragraph (b) (i).

Article 8

54. The expression "compulsory national service including military obligations" in paragraph (a) ought to be interpreted in a wide sense: it might, thus, include also the duty of "civil service" in war-time.

55. In adopting the text of this paragraph, the Committee unanimously recognised that the information consular officers might publish for the benefit of their nationals could only be displayed within the interior of consular buildings.

56. Paragraph (b) is an innovation and must be considered as a "European provision" *par excellence*; the text was favourably received by most delegations. Some delegations would have preferred that this paragraph contain a clause indicating that its provisions could only apply "where there was nothing contrary thereto in the law of the receiving State". This suggestion did not, however, meet with the agreement of the majority of the Committee.

57. On the other hand, the Committee was unanimously of the opinion that this paragraph (b) could not in any way authorise the conduct of an electoral campaign within the receiving State; such an activity being considered contrary to the *ordre public* of the State. For this reason, it was decided not to introduce into this paragraph a phrase according to the terms of which the consular officer would have the right to "publish information" concerning the electoral activities of the sending State.

Article 9

58. The area covered by Article 9 is limited to civil and commercial matters. The Committee did not think it appropriate to include in Article 9 a reference to penal questions, since these are already dealt with in the "[European Convention on Mutual Assistance in Criminal Matters](#)" concluded within the Council of Europe.

Article 10

59. The Committee pointed out that "certificates of origin" concerned the country of origin proper, and that certificates "of immediate source of goods" indicated the country from which the merchandise had last come.

60. On this subject the Committee was of the opinion that the right of consular officers to issue the said certificates did not imply that the receiving State recognised their effect on its territory.

Article 11

61. The Committee agreed that private deposits of sums of money did not constitute part of the "consular archives".

62. It was understood that the power to receive for safe custody did not imply a power to transfer. On this matter, the Committee thought that transfers of sums of money or other objects, in particular *objets d'art*, should continue to be regulated, in the absence of international agreement, by the law of the receiving State.

Article 12

63. This article concerns certain administrative acts and formalities carried out by a consular officer by virtue of laws of the sending State or instructions from his Government.

64. In this case, the Committee stated that in most of the recent bilateral conventions, the functions set out in Article 12 are combined with the "notarial" activities of the consular officer; it preferred, however, to devote a special provision to them, on the model of certain other conventions. It was pointed out that there was a rather wide difference in kind between the nature of the functions referred to in Article 12 – which are of an administrative character and, as it were "unilateral" – and that of the functions referred to in Article 15, which are for the most part similar to those habitually performed by a "notary" in countries where such officers exist, and which generally concern (apart from wills) bilateral acts and contracts dealing in most cases with property situated in the sending or the receiving State.

65. The *paragraph 1* of Article 12 does not call for any special comment.

66. As to the *paragraph 2*, the Committee considered that the signatures and documents referred to in this paragraph included both those issued by the authorities of the sending and of the receiving State, and those emanating from nationals of either State. It was agreed that the clause "to the extent that there is nothing contrary thereto in the law of the receiving State" applied only with respect to documents which have to be produced in the receiving State.

The Committee was of the opinion that paragraph 2 should not be interpreted to mean that acts performed by a consular officer in accordance with this paragraph shall, in the receiving State, have legal effects more extensive than the same acts when performed by competent authorities of that State.

67. The Committee also examined, during the drafting of the text of paragraph 2, the relationship of this text with the "Convention abolishing the requirement of legalisation for foreign public documents" adopted at The Hague on 5th October, 1961; it stated that this relationship should be considered as being governed by Article 43 of the draft Convention.

68. The Committee decided that there was no need to mention among the various documents and formalities mentioned in Article 12, the "issuing of notices"; the possibility of issuing such notices fell within the provisions of Article 44, paragraph 1.

Article 13

69. Article 13 is concerned with the functions of a consular officer acting in the capacity of registrar.

70. In *paragraph 1 (a)* the word "record" refers to the transcription of a certificate drawn up by the authorities of the receiving State.

71. The words "any other documents" in sub-paragraph (a) would include both a certificate of recognition of a child and a marriage certificate. This latter case would for example occur when the marriage has been solemnised in accordance with the law of a country under which marriage takes place only by religious ceremony.

72. In *paragraph 1 (b)*, the words "and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer" refer either to a municipal law which does not recognise any marriage before a consular officer, or to a municipal law which prohibits mixed marriages before a consular officer between nationals of the sending State.

73. The Belgian delegation declared that the general reservation appearing *in fine* in sub-paragraph (b) to some extent embarrassed the Belgian Government. States which are opposed to the celebration of consular marriages were, in this delegation's view, extremely rare and only one European country could be cited in this respect. In principle, countries which are unfavourable to such marriages confine themselves to not recognising them. This delegation pointed out furthermore that the above-mentioned general reservation might serve as an example for certain non-European countries whose registration system is defective but which, for reasons of sovereignty and prestige, desire to limit consular functions in this field, in particular to the detriment of nationals of European States. Hence the Belgian delegation would have preferred, instead of embodying this provision in the Convention itself, to leave it to the discretion of such countries as deem it necessary, to formulate a special reservation at the time of signature or ratification of the Convention, unless, of course, sub-paragraph (b) could have been drafted on the lines of Article 15 (2), which provides that certain acts shall have judicial effect in the territory of the receiving State only to the extent that there is nothing contrary thereto under the law of that State.

74. The Danish delegation declared, on the question of marriages celebrated in accordance with paragraph 1 (b), that Danish law did not recognise consular marriages as having any effect unless expressly provided for in bilateral agreements.

75. The British delegation, for its part, pointed out that consular marriages are illegal under English law.

76. *Paragraph 2* specifies that the exercise of the consular functions referred to in Article 13 (a) does not as such limit in scope the application of the law or administrative practice of the receiving State. The Committee considered that drawing up a birth or death certificate, for example, did not exempt the consular officer – or the persons concerned – from any obligation laid down by municipal law regarding notification of births or deaths to the authorities of the receiving State. The Committee also envisaged the case where the power to draw up a birth certificate can be exercised both by the local authorities and by the consular officer; on this subject it was however observed that the relationship between the latter and the local authorities ought to be complementary ; the certificate drawn up by the consular officer ought to be notified to the local authorities, and vice versa.

77. The word "issue" in paragraph 2 refers to the words "draw up" in paragraph 1 (a). It was pointed out that recording by a consular officer always presupposed a certificate drawn up locally, and thus raised no problem of complying with requirements laid down by the law or practice of the receiving State. Hence such recording need not be notified to the local authority, as the certificate is drawn up locally and is therefore known to those authorities.

Article 14

This article is concerned with the powers of the consular officer in matters of guardianship and trusteeship.

It reflects an attempt at compromise between the principle of territoriality – which gives the receiving State the right of guardianship or trusteeship – and the principle of nationality, which confers this right upon the authorities, and in particular the consular officer, of the State whose nationality the person concerned possesses. The solution arrived at by the Committee gives, as it were, precedence to the territorial principle, as is shown by the first clause of paragraph 1 ; however, as stipulated in paragraph 2, the consular officer retains certain rights in cases where guardianship or trusteeship is in the hands of the authorities of the receiving State.

79. The words in *paragraph 1* "without prejudice to any action which the competent authorities of that State may take..." are intended to leave open the possibility of subsequent intervention by the local judicial or administrative authorities. The expression "competent authorities" may also signify administrative authorities.

The expression "safeguard the interests of minors" was taken from Article 5 (*h*) of the Vienna Convention 1963. The use of this expression in the Strasbourg Convention was designed to take into account a certain evolution in regard to the law on protection of minors, which today manifests a tendency to extend beyond the traditional limits of guardianship and trusteeship.

80. The Committee agreed unanimously that *paragraph 2 (b)* merely conferred on a consular officer a right of surveillance over the administration exercised by the guardian or trustee; and that it gave him the power, if need arose, only to present observations or suggestions or to assist the minor or person incapable of looking after his own affairs, out of his good will in any case where this, was permitted by the law of the receiving State.

81. *Paragraph 3*, which lays upon the consular officer and the local authorities a duty of mutual information, is intended to ensure that guardianship or trusteeship shall be arranged at the outset by the appropriate authority and that the consular officer may exercise to the full, if this should be necessary, the powers conferred upon him by paragraph 2.

82. The problem arose of the relationship between, on the one hand, consular law (including Article 14) and on the other, the "Convention on the competence of authorities and law applicable with regard to the protection of minors", concluded at The Hague on the 5th October 1961. As with the last point, the Committee recognised that this question should be limited to the right of "arranging for" guardianship or trusteeship, as Article 14 does not prejudice the question of the law applicable in this matter.

With regard to this problem, the Committee recalled in the first place that in certain recent bilateral conventions the principle followed is that of nationality. The Committee observed, moreover, that in its broad lines, the Hague Convention gives an initial competence to the territorial authorities, but leaves the authorities of the State of whom the person concerned is a national the right to intervene if they consider that the interests of the minor so require. This latter State has, however, certain "reserved powers for taking protective measures in certain eventualities.

In these conditions the Committee considered that the relationship between Article 14 and other international agreements on these matters should be settled by the provisions of Article 43. Although Article 1.1 settled any conflict of competence in favour of the territorial authorities – (except for the powers reserved for the consular officer under paragraph 2) – it was nevertheless worded in a manner flexible enough not to exclude on the face of the text different solutions laid down by other international agreements.

Article 15

83. *Paragraphs 1 and 2* of Article 15 deal with the "notarial" functions of the consular officer. As "notaries" do not exist in all member States of the Council, *paragraph 1* contains the words "in notarial form or in such similar form as may be laid down by the law of the sending State".

84. In *paragraph 1 (a)* the words "concerning exclusively nationals of the sending State" refer to any acts or contracts concerning personal status or the property and interests of such nationals, but not contracts of marriage, which are dealt with in sub-paragraph *(b)*.

85. As to *paragraph 1 (b)*, it is necessary to distinguish between, on the one hand, the drawing up of a contract of marriage referred to in this sub-paragraph, and on the other, the drawing up of the "marriage certificate", which is a document concerning both civil status and the celebration of the marriage ; these two latter functions come under Article 13.

86. *Paragraph 2* concerns the legal effect in the receiving State of acts and contracts in the first-mentioned category.

This paragraph does not in any way prejudice the legal effect of acts and contracts in a third State. Several delegations, however, took the view that a European multilateral convention should provide explicitly for the effect of acts and contracts in a State other than the sending and receiving States. Other delegations felt that a provision on this point might cause difficulties in relations with non-signatory States.

87. As to paragraph 3, in the opinion of the Committee, only a consular officer expressly authorised for this purpose by the sending State may exercise the right of administering an oath or affirmation under the terms of the third paragraph.

88. Finally, one should point out that the Committee considered that it was superfluous to make a special provision regarding consular functions relating to wills, since wills could be considered as included in the " acts and contracts referred to in paragraph 1 (a).

Article 16

89. This article is concerned with consular functions with regard to social security and social and medical assistance.

90. *Paragraph 2* refers in particular to the possibility of a consular officer receiving pensions or allowances due to one of his nationals who is neither present nor represented in the receiving State. Two stages are envisaged. The *first part* of the paragraph deals with the first phase. It proceeds on the assumption that the consular officer may receive the said pensions and allowances under the law of the receiving State ; it follows that if the law does not recognise this right in the consular officer to receive such payments paragraph 2 can have no further application. The *second part* of the paragraph concerned with the case where the consular officer does have this right, provides that the transfer of sums of money received under the law of the receiving State will be carried out in conformity with the law of the sending State and international agreements on the matter. In this respect, the Committee recalled the arguments stated in the commentary to Article 11, in paragraph 68 of this document.

91. The Committee recognised, on the other hand, that Article 16 (2) does not exclude other methods of making payments, if these are permitted by the law or international agreements relevant to the matter: such payments might therefore, in a suitable case take place equally by "transfer from system to system" (that is to say directly from one national security system to another) or through consular officers of the State distributing the payments in questions.

Chapter III – Estates

92. Articles 17 to 27 deal with consular functions in respect of estates. Like certain bilateral conventions the provisions of the chapter on estates recognise two conditions, governing consular intervention : it may be based either on the nationality of the persons having an interest in the estate, or on the nationality of the deceased.

93. The former condition is considered in Articles 20, 21 (1) and 22 ; and the second is the basis for Articles 18, 19, 21 (2).

94. In adopting such a system the Committee was attempting to find a compromise between two different approaches which it noted would often lead to the same result in practice. On this point, certain delegations declared that although the traditional criterion of the intervention of a consular officer was the nationality of the deceased, this criterion was not in fact very far removed from that of the nationality of the interested person, for they presumed that, in the majority of cases, the beneficiaries – or some of them – would have the same nationality as the deceased.

Article 17

95. Article 17 deals with the requirement of mutual information between the consular officer and the authorities of the receiving State ; in practice the operation of the subsequent Articles is conditional upon this notification.

96. The Committee adopted in the French text the plural *les autorités compétentes* in view of the fact that the authorities concerned with sub-paragraphs (a) and (b) of paragraph 1 might not be the same. (The English text is unaffected.)

97. The Committee recognised that administrative practice in some countries might render it difficult to give information provided in paragraph 1 (a), this is so particularly when in registering a death with the competent authorities it is not obligatory to mention the nationality of the deceased. The Committee considered, however, that the words "as soon as it has, knowledge" met this difficulty, since in this way the obligation was imposed on the competent authorities only in so far as they were in a position to comply with them.

98. Certain delegations, notably the United Kingdom, proposed restricting the application of paragraph 1 (a) to deaths leaving an estate to be settled, in order to minimise the obligation of information on the part of the competent authorities and make it easier to identify those authorities in their own countries. Most of the other delegations, on the other hand, felt that the competent authorities could not be expected to make enquiries into the existence of an estate, particularly since the information referred to in sub-paragraph (a) should be given as soon as possible.

Article 18

99. Article 18 grants consular officers certain powers in respect of personal effects and sums of money left by nationals of the sending State who have died while they were in the receiving State.

100. In the Committee's opinion the term "law of the receiving State", in the second sentence of the article, refers solely to the rules establishing a procedure for preservation or disposal.

101. It is understood that Article 18 does not contain any rule of private international law on the law applicable to estates.

Article 19

102. In connection with the French translation of the expression "grant of representation" appearing in the English text, it should be pointed out that the Committee used as a model Article 32 (5) of the Anglo-Belgian Consular Convention of 8th March 1961, the English and French texts of which are equally authoritative, and which uses the expression *mandat judiciaire*.

One delegation drew attention to the fact that it would be necessary to interpret the expression "estate of small value" appearing in Article 19, according to the law of the receiving State.

Article 20

103. Article 20 deals with the consular officer's right of representation ; like a number of recent bilateral conventions, it establishes on his behalf a presumed power of attorney prior to any expression of intention by the person concerned.

The consular officer's intervention as provided for by this right of representation, protects the interests of nationals of the sending State, having an interest in the estate. It is understood that the "deceased person" in question in this provision may be of any nationality.

104. Article 20 is preliminary to Articles 21 (1), 22, 23 and 24.

105. In this connection it should be pointed out that although the right of representation provided for in Article 20 constitutes in the case of each consular officer the condition on which the above-mentioned articles regarding the preservation and administration of property are applicable as far as he is concerned, his exercise of these rights is nevertheless not guaranteed. It is possible that the deceased may have named an executor, that certain of the heirs may be present and may take the necessary action, or that other consular officers may already have intervened for the purpose of such preservation and administration. In such cases the consular officer will nevertheless represent the interests of his, national in contacts with those persons who have assumed responsibility for the estate.

One delegation proposed to replace in *paragraph 1* the words "has or may have an interest in such property" by the expression "has or may have an interest as a beneficiary under a will, or as a beneficiary in a case of intestacy, or as an executor or administrator".

However, the majority of the Committee did not accept this proposition, since in its opinion no limitation ought to be admitted to the principle laid down in Article 17 (1) (b) according to which the consular officer has a general power to intervene in favour of his nationals in matters of estates, even if their claims are found to be based on private law in general.

On the other hand the Committee was of the opinion that the interests mentioned in paragraph 1 must be defined by reference to the law of the receiving State, including rules of the conflicts of law of this State.

One delegation also proposed the insertion in paragraph 1 of a provision according to which this paragraph ought not to be applied in the case where the national in question, while having had the possibility to do so, has voluntarily refrained from appointing a representative.

106. The right of representation provided for in Article 20 is exercised on behalf of two categories of people: in the first place, nationals, of the sending State who are not resident in the receiving State and are not legally represented there (paragraph 1), and secondly, nationals of the same State, even when resident in the territory of the receiving State, who are incapable of exercising their rights (paragraph 2).

107. The word "property" used in Article 20 and other articles was chosen to underline the difference with the word "estate", since an estate might include property in another country with which the consular officer would not have to deal.

108. The "presumed power of attorney" of the national concerned should in the Committee's opinion be regarded, since it is, tacit, as a general power of attorney. A consular officer is therefore not entitled to effect acts – such as waiver of rights – which would require the existence of special power of attorney on behalf on the representative.

The Committee also agreed that in the exercise of his right of representation the consular officer may nominate a lawyer - for example, a member of the Bar.

109. Paragraph 2 provides for a consular "power of attorney" on behalf of any national of the sending State who is incapable of exercising his rights. The Committee considers that the following categories of persons especially would be in that situation :

- those who are *de jure* incapable and are in the territory of the receiving State, until such time as guardianship or trusteeship is arranged or when the guardian or trustee finds it impossible to exercise his rights ;
- persons, also in the territory of the receiving State, who are to be regarded as *de facto* incapable (seriously injured persons, mentally deranged persons who are not in an asylum etc.).
- persons resident in the receiving State but far from the place where the estate is situated.

Article 21

110. Article 21 refers to the power of a consular officer in respect of the protection and preservation of property. The first paragraph, which comes within the framework of the power of representation provided for in Article 20, is based on the criterion of the nationality of the heirs and beneficiaries ; the second paragraph, which is to be applied when Article 20 is not applicable is based on the criterion of the nationality of the deceased.

111. The words "He may, for example", at the beginning of the second sentence of *paragraph 1* were used to make allowance for the fact that some States do not recognise the practice of placing seals.

The word "request" in the same sentence, does not imply that the authorities of the receiving State have the obligation in all cases to give a positive response to the consular officer's request.

112. It was pointed out that although the application of Article 21 (1) might lead to the simultaneous intervention of several consular officers if persons of different nationalities had an interest in the estate, there was no need for anxiety about such a situation, since the protection and preservation of the property would normally be ensured by the earliest intervention and the local authorities were competent to settle any possible conflict.

113. In the Committee's opinion, the words "Where Article 20 does not apply" in *paragraph 2* provided for a case where no interested persons were known and where for other reasons no consular officer could intervene on the basis of Article 20.

In such cases the consular officer of the deceased is called upon to preserve the estate of his national for the benefit of any possible claimants.

114. According to the terms of the second paragraph, a consular officer may also intervene for the purpose of protection and preservation if the executors are not present or represented. It should be pointed out that paragraph 1 already permits the consular officer to intervene in such cases, if he can exercise the right of representation provided for in Article 20 ; the second sentence of paragraph 2 should therefore be read in context with the phrase "where Article 20 does not apply".

115. In adopting in *paragraph 2* the phrase "provided that this is consistent with the law of the receiving State" the Committee recognised that consular intervention based on the nationality of the deceased might not be permitted under the law of some Contracting Parties.

116. One delegation proposed the suppression of paragraph 2 of Article 21, since it would be capable of prejudicing the rights of the receiving State to *bona vacantia*. Nevertheless, the majority of the Committee were against this proposition. On reflection, it appeared that paragraph 2 should be retained. At first sight it seems highly doubtful whether a consular officer should be given the right to take in hand the protection and conservation of the estate of a deceased person having the nationality of the sending State, on the basis of a purely hypothetical interest. Nevertheless, this provision regulates the frequent case where a deceased leaves no beneficiaries in the receiving State or where the latter are not known within the State. Besides all that is in issue in this case is a conservation measure which can only be taken in the absence of beneficiaries; from which it follows that the rights of the State to *bona vacantia* are in fact protected.

At the request of one delegation, the Committee recognised that the expression "protection" in paragraph 2 of this article includes *inter alia* the concept of "immediate safeguard".

117. Moreover, it was agreed that if, within a certain time, nobody comes forward or is represented, the estate will be settled in conformity with the law of the receiving State applicable to the case of *bona vacantia*.

Article 22

118. Article 22 deals with action by a consular officer to take into his control and administer an estate.

119. The Committee included the phrase, "provided that this is consistent with the law of the receiving State" to, allow for the law of certain countries which do not recognise consular administration based on a presumed power of attorney.

120. The words "take into his control" were adopted so as not to prejudge the legal means of control exercised by the consular officer over the property in the estate.

121. It was noted that any conflict as to the right to take property into control and to administer it would be settled by the local courts. Some experts pointed out that in their opinion Article 22 did not exclude the possibility of joint administration of the property, by the consular officer together with some other person entitled to claim such administration, if the law of the receiving State rendered such an arrangement necessary.

122. On first reading, Article 22 included a second paragraph in the following terms:

"Where Article 20 does not apply and provided that this is consistent with the law of the receiving State, the consular officer of the State of which the deceased was a national may, to the same extent and subject to the proviso in paragraph 1, take into his control and administer the estate until such time as any person entitled to claim such control and administration shall present himself or appoint a representative for this purpose."

Nevertheless during the second reading, the Committee, after a short review of national legislations, decided to suppress the said paragraph 2, since the restrictive clause "consistent with the law of the receiving State", would mean, for the great majority of member countries of the Council of Europe, that there would be in practice a bar to the application of the whole paragraph.

Article 23

123. Article 23 is intended to ensure that a consular officer shall be given any grant of representation or order of a court required by some legislations (for example, that of the United Kingdom) in order that he may exercise the powers provided for in Articles 21 and 22.

124. The term *mandat judiciaire* used in the French text of Article 23 covers the terms "grant of representation or order of the court" of the English text. Having regard to certain translation difficulties, the Committee did not see the necessity of introducing into the French version of the text all the nuances of a legal institution which concerns common law countries alone.

125. It was suggested that Article 23 should include a provision as to how the consular officer's grant of representation should be terminated. The Committee considered, however, that there was no need for such a clause, and that on this point the relevant legislations would have to be consulted.

Article 24

126. This article deals with the transfer of the assets after control and administration by the consular officer.

Although the issue of a grant of representation under Article 23 could in any case be accompanied by any conditions deemed necessary by the court, the Committee recognised that the safeguards provided in Article 24 were nevertheless decidedly useful.

Article 25

127. This article provides for an exception to the jurisdictional immunity accorded to consular officers when they exercise their functions.

It was inserted in this Convention at the request of several delegations, including in particular those representing the common law countries for which such a provision meets a real need. Article 25 was likewise accepted by other countries for which its insertion in the Convention does not present the same importance. The exception provided in Article 25 is justified by the fact that, in the context of Chapter III of the Convention, the consular officer is vested with certain special powers by the legal system of the receiving State and that it is thus normal that to this extent the immunity from jurisdiction is limited by this same legal order.

The Committee also pointed out that Article 25 relates primarily to civil proceedings.

A substantial minority of the Committee would have liked the exception to the principle of consular immunity to be explicitly extended to Articles 26 and 27 of the Convention. A proposal in this sense was not, however, approved by the majority since these articles concern only a final stage in the liquidation of an estate and even matters which have no connection with estates at all. The minority finally expressed their readiness to approve Article 25 in this form after certain changes to Articles 26 and 27 had been accepted by the Committee.

Article 26

128. Article 26 provides for a consular officer's intervention only when he is acting as an intermediary in the transmission of money or other property to nationals of the sending State resident abroad. According to this article, the consular officer may exercise these functions when the estate is administered by some other person, as well as when he himself has assumed control and administration.

129. However, Article 26 will also be applicable in cases other than those of an "estate" properly speaking, since the money referred to in paragraph 1 may originally be destined for a national of the sending State resident abroad, but "as a consequence of the death of any person" (that is to say *mortis causa*) ; this is the case particularly with the proceeds of life assurance policies. It should be pointed out, in this connection, that as regards payments, made in virtue of social legislation, Article 26 constitutes a special case of the right granted to consular officers by Article 16.

130. It is the Committee's intention that the words "may receive" which also appear in the first sentence of Article 26, mean that on the one hand the authority or person in question is not bound to transmit the money or other property through the intermediary of the consular officer, and, on the other hand, that the latter is not bound to receive it.

Article 27

131. In adopting the text of Article 27, the Committee considered it necessary to draw attention to the fact that under Articles 24 and 26, the consular officer might be required to furnish reasonable evidence of receipt of the assets by the beneficiary, and to obtain for this purpose from the person concerned a formal discharge from his liability.

132. The Belgian delegation considered that, while the second sentence of this article was superfluous, the first on the contrary was dangerous and unacceptable in its actual and final form. Since Article 26 gave the consular officer the duty to respect the conditions laid down by the competent authority or person, the Belgian delegation was convinced that nothing remained to be added and that this article risked being interpreted in such a way that – in the absence of any explanation in the commentary – it affected not only rules of procedure, but also rules of substance, as for example rules regulating the distribution of the estate.

Chapter IV – Shipping

133. The definition of a vessel (see Article 1) as a "seagoing vessel " is meant to imply that navigation within internal waters is excluded from the field of application of the Convention. In the Committee's opinion this definition should also be taken into consideration when determining the scope of the term "maritime laws" employed in Article 31.

134. "Warships" are also excluded from the application of the Convention by virtue of Article 1. The Committee however, was of the opinion that the nature of relations between European States made the insertion in the Convention of a special provision on the powers of consular officers with regard to warships superfluous.

135. The "consular officer" referred to in the articles in this chapter is the consular officer of the State of the flag. The Committee realised, however, that certain powers of other consular officers must be recognised in regard to their nationals who were members of the crew but not nationals of the State of registration. In the Committee's opinion, any conflicts arising out of such a situation should be governed by the provisions of Article 45 of the Convention.

136. The question of the relationship between the first articles of Chapter IV of the draft Convention and the provisions of Article 19 of the Convention on the Territorial Sea and the Contiguous Zone signed at Geneva on 29th April 1958, was raised on several occasions. It was recalled in this connection that the relevant provisions of the Territorial Seas Convention dealt only with the criminal jurisdiction of coastal States in relation to vessels "passing" through the territorial sea. Whereas Article 28 (see following paragraph) appears to be applicable to such vessels, the majority of the articles adopted clearly refer to vessels calling at ports or anchorages in the receiving State. In general, then, there should be no conflict between the two instruments, which should rather be regarded as complementary.

Article 28

137. Article 28 states the general principle of a consular officer's right to afford assistance to vessels of the sending State. Such assistance may also be given to a vessel that is merely passing through the territorial waters of the receiving State; in such cases it would be chiefly concerned with relations between the master or crew of a vessel and the authorities of the receiving State (see Article 32), if the latter is exercising its criminal jurisdiction. Such consular competence is presupposed by Article 19 of the above-mentioned Convention of 29th April 1958 (cf. paragraph 136); it should be made clear, however, that it is to be exercised without right of visit, since Article 30 makes this right conditional upon receipt of pratique by the vessel.

Article 29

138. Article 29 is of a general nature, for it applies to all the provisions of Chapter IV which are capable of giving rise to requests for assistance from the consular officer to the territorial authorities. For this reason it has been placed after Article 28, at the beginning of the chapter on Shipping.

139. In the almost unanimous opinion of the Committee, the "serious reasons" that may be put forward under Article 29 by the authorities of the receiving State for refusing their assistance must be based upon *ordre public*, political reasons or imperative provisions of their national legislation.

140. The Committee chose the words "put forward" in order to make it clear that although the receiving State remained absolutely free to judge the reasons for any refusal of assistance, it should at least inform the consular officer what they are. The words "in a particular case" guarantee that precise reasons will be given for any refusal.

Article 30

141. Article 30 deals with the right of a consular officer to visit a vessel and the right of the Master and members of the crew to communicate with the consular officer.

142. As is made clear in *paragraph 1*, the consular officer's right of visit is conditional upon a ship's, stopping and receiving pratique; he therefore does not enjoy the right in respect of a vessel in transit through the waters of the receiving State.

Beyond this, however, the consular officer has a right to render assistance which is independent of the anchorage of the vessel and its admission to pratique ; that right was covered by Article 28.

143. So far as *paragraph 2* of Article 30 is concerned, it was felt that the right of "foreign" members of the crew to communicate with "their" consular officer was adequately protected by Article 5. In connection with this question, the Committee thought that the restrictive clause at the beginning of Article 5 (subject to the provisions of Article 6) ought to be considered as applying equally to Article 30 (2).

144. Moreover, the Committee was of the opinion that the right to communicate with the consular officer, declared in Article 30 (2) did not exclude the application of the law of the receiving State in question concerning immigration and police regulations governing aliens.

Article 31

145. It should be pointed out in connection with the functions listed in Article 31 that a consular officer may also be called upon to exercise in respect of the Master and members of the crew a number of the functions listed in the chapter on General Functions, particularly those dealt with in Articles 9 and 15 (3).

146. On the subject of seamen's cards, the Committee agreed that the special documents mentioned in *sub-paragraph (i)* might be either working permits properly speaking, or identity cards issued in conformity with the law of the sending State or with relevant international agreements (for example, Convention No. 108 of the ILO concerning national identity cards for seamen).

Concerning the clause "in conformity with the law of the receiving State" in *sub-paragraph (f)*, the Committee thought that this might permit a consular officer to issue a seamen's card event to a non-national of the sending State.

147. It was understood that *sub-paragraph (g)* gave a consular officer no more than purely formal powers in respect of the discharge of the Master, the decision in fact being taken by the owner.

148. *Sub-paragraph (h)* deals with those consular functions which are in some way connected with the "legal existence" of a vessel. These functions call for no special comment.

149. It was agreed that the measures provided for in *sub-paragraph (i)* might be taken on shore at the consular post or elsewhere, but that their effect would be limited to the vessel. Since such measures are only effective "on board", the Committee thought it superfluous, to require that they should be compatible with the law of the receiving State.

On the other hand, as regards any measures which would take effect on shore, the Committee felt that these were covered by paragraph 1 of Article 44 which reserves to the consular officer the right to exercise "other consular functions consistent with the law of the receiving State".

150. It was pointed out that certain other provisions of Article 31 established the applicability of the maritime laws of the sending State on board the vessel, so that from this point of view *sub-paragraph (i)* was a general clause of "safeguard" covering all other cases of such applicability.

Article 32

151. This article is a corollary to Article 4 (c) and (d).

152. The Committee retained the formula "in their dealings with the... authorities" so as not to prejudice the way in which consular assistance may be given before the judicial authorities, which must therefore be defined under the law of the receiving State.

153. The Committee felt that the powers dealt with in Article 4 (f) regarding the provision of an interpreter were adequately covered in Article 32 by the notion of "aid".

Article 33

154. This article deals with the preservation of order and the settlement of disputes on board vessels of the sending State.

155. In using the words "subject to..." Articles 35 and 36 the Committee intended to reserve the concurrent jurisdiction of the local authorities in respect of the preservation of *ordre public* and the settlement of disputes.

156. It was understood that the settlement of disputes as to "contracts of service" included the settlement of disputes regarding signing-on and discharge.

Article 34

157. The Committee considered that under the terms of paragraph 2 of Article 34, it was also the duty of the consular officer of the State of registration of a vessel to make arrangements for the repatriation of seamen of any nationality other than that of the State of registration, that is to say for the return of such seamen to their own countries.

Article 35

158. This article deals with the jurisdiction of the receiving State regarding matters internal to the vessel.

159. Article 35 complements Article 33 when it defines that State's right of intervention in regard to the detention of a seaman in custody on board or in case of dispute between the Master and members of the crew.

160. The three conditions for non-intervention listed in paragraph 2, are of an alternative nature, so that if any one of them is not complied with, the authorities of the receiving State have the right to intervene.

161. With regard to the words "provided that such detention is lawful under the law of the sending State", the Committee was of the view that the onus of proof lay with the Master or with the consular authorities of the sending State, so that if a detained seaman (or someone acting on his behalf) challenged in a court of the receiving State the legality of his detention it would be for the Master (or those representing him) to prove that the detention was lawful under the law of the sending State. Such a case would, however, in all likelihood be extremely rare. Certainly the proviso in question did not have the effect of requiring the Master affirmatively to satisfy the territorial authorities as a matter of course in each case that the detention was lawful under the law of the sending State.

It was agreed that the other two conditions laid down in paragraph 2 were to a greater extent than the first two subject to evaluation by the receiving State,

162. The words "such jurisdiction as they possess" in paragraph 3 signify that the Committee took into consideration the fact that under their own law some States had no jurisdiction with regard to disputes between the Master and members of the crew.

163. The question arose as to whether the judicial authorities of the receiving State could exercise their jurisdiction in spite of the consular officer's objection, if the member of the crew who was a party to the dispute was a national of that State. A substantial majority of the Committee agreed that in this case too, an objection by the consular officer should have the force of a veto.

Article 36

164. Article 36 lists cases in which the judicial or administrative authorities of the receiving State may on their own initiative either entertain prosecutions or intervene in respect of offences committed or matters occurring on board the vessel. It should be pointed out that the entertaining of such prosecutions or such intervention may occur either on board the vessel or on shore, according to circumstances (the same applies, moreover, to Article 35).

The solutions adopted in respect of the jurisdictional competence of the receiving State are to a great extent similar to those provided in respect of the criminal jurisdiction of the receiving State within territorial waters under Article 19 of the Convention on the Territorial Sea and Contiguous Zone.

The Committee agreed that in the application of the present Convention, the expressions "offence" and "grave offence" comprised only penal matters.

165. The Committee stressed the fact that the conditions listed in sub-paragraphs (a), (b), (c) and (d) of the *second paragraph*, are alternatives.

166. A proposal designed to add to *paragraphs 2 (b) and (c)* the following: "provided that matters relating to discipline on board are not concerned", was not accepted; the majority of the experts felt that jurisdictional action by the receiving State should not be ruled out by the mere fact that the offence concerned might give occasion for disciplinary measures on board the vessel.

167. *Paragraph 3 (c)* is intended to cover cases of detention for political reasons. The words "with the exception of a member of the crew detained for a disciplinary offence" refer to the detention provided for in Article 35 (2).

168. It should be pointed out that in *paragraph 3 (d)* the word "examination" covers routine health and customs checks etc. which do not presuppose the commission of any "offence" on board the vessel.

169. The words "other person duly authorised" may refer to the Master. On this subject, it was even maintained that the Captain alone should be entitled to make a direct request for intervention by the authorities of the receiving State, this solution being the one moreover provided for in Article 19 of the above-mentioned Convention on the Territorial Sea and Contiguous Zone. The Committee felt, however, that the interpretation of the words "other person duly authorised" should be left to the laws of the sending State.

170. *Paragraph 4* defines the term "grave offence" used in Article 36 (2) (c). The criterion adopted by the Committee was that of the duration of the sentence. The minimum adopted was a maximum penalty of five years, but the possibility was left open for this minimum to be reduced to three or four years by means of a notification to the Secretary General of the Council of Europe, who would pass on this information to the other Contracting Parties. It goes without saying that the latter case also refers to a maximum penalty of at least three or four years.

Article 37

171. Article 37 is concerned with the obligation of the territorial authorities to inform the consular officer if they exercise the power reserved to them by Article 36. The Committee stated that Article 37 was strictly limited in its application to offences committed and matters occurring on board the vessel. The Committee deliberately excluded offences committed and matters occurring on shore, from the Convention, having regard to the fact that in these matters the competence of the territorial authorities is sufficiently clearly established both by internal and international law.

The Committee nevertheless stated that in cases of detention, Article 6 of the Convention would apply.

172. Certain delegations thought that the obligation to give information laid down in Article 37 ought to apply not only in cases when the authorities of the receiving State act in pursuance of Article 36 on board a vessel but also in the event of their doing so on shore. These delegations maintained that various practical reasons (such as the risk of delaying the departure of the vessel or the need for special assistance for seamen of the sending State) made it necessary to extend to intervention by the authorities of the receiving State the provision for notification made in Article 37.

173. Other delegations felt that there was no need to make special provision for notification in such cases, since in their opinion only acts of the territorial authorities on board the vessel required the presence of the consular officer in order to guarantee respect for the particular legal status of the vessel.

174. A compromise was effected by the Committee, which is reflected in the text adopted.

Paragraph 1 of Article 37 lays down the principle of giving the consular officer information in advance in cases where the territorial authorities apply Article 36 on board a vessel of the sending State.

Paragraph 2 covers all cases where the territorial authorities proceed to apply Article 36, even on shore.

Article 38

175. This article is concerned with collaboration between the territorial authorities and consular officers in a case where a seaman who is a member of the crew of a vessel of the sending State has failed to report for duty in a port of the receiving State. It refers in particular to desertion.

176. *Paragraph 1* is general in its effect, for it merely imposes an obligation to assist in finding the missing seaman.

177. *Paragraph 2* provides for a subsequent state at which mere absence becomes "desertion" (that is to say "wilful" absence). In the Committee's view, the notion "desertion" must be construed in accordance with the law of the receiving State. The expression "such other person as may be competent", according to the Committee's interpretation, refers in particular to the owner's representative in the port where the desertion took place, the port officer etc.

The Committee unanimously agreed that the reference to Article 29 implies that the authorities concerned could refuse to hand over the deserter in some cases, for example on grounds of *ordre public*, "political reasons" or because of "imperative provisions of their national legislation". Furthermore, the Committee agreed, on the proposal of certain delegations, that the reference to Article 29 implies that the authorities of the receiving State are entitled to postpone handing over the deserter if he has committed some offence on shore. They may also do so, in the view of several delegations, if, for example, affiliation proceedings have been instituted against the deserter in the receiving State.

178. On the other hand, the Committee agreed that Article 38 should not apply if it was incompatible with an extradition treaty or the European Convention on Human Rights and additional protocols.

179. As to *paragraph 3*, the question was raised whether the authorities of the receiving State might refuse to deliver up a deserting seaman whose life and liberty are threatened not in the country of probable destination of the vessel, as foreseen in sub-paragraph (b), but on board the vessel itself. On this question, the Committee gave an affirmative reply, while recalling that Article 29, as well as the general articles, also applies in this hypothesis.

180. *Paragraph 4* completes the cases considered in the preceding paragraphs by providing for the assistance of the authorities of the receiving State in the case where a seaman unintentionally misses his vessel. According to the Committee's interpretation, the provisions of paragraph 4 could not in any circumstances be interpreted as imposing an obligation on the receiving State to pay the travel expenses of a seaman who wishes to rejoin his vessel or leave the country.

The reference to Article 29 in paragraph 4 must be interpreted *mutatis mutandis*, in the light of the comments contained in paragraph 145 of this document.

The "facilities and assistance" referred to in the second part of paragraph 4 may be accorded through the consular officer or even directly to the seaman.

The expression "where appropriate" in the second part of the same paragraph, means that the authorities of the receiving State shall offer the said facilities and assistance only when these are necessary, but they are obliged, in any event, to refrain from any action which would impede the effective application of these measures.

Article 39

181. *Paragraphs 1 and 2* of Article 39 concern collaboration between the authorities of the receiving State and consular officers of the sending State in the event of a vessel being shipwrecked or stranded or cargo being washed ashore. The provisions place the authorities of the receiving State under an obligation to:

- inform the appropriate consular officer of any shipwreck occurring in the conditions specified in paragraph 1 ;
- carry out certain measures for the protection of the wrecked vessel;
- inform the appropriate consular officer of these measures.

Under the terms of the second sentence (*in fine*) of paragraph 2, the authorities of the receiving State shall also associate the appropriate consular officer with the measures taken.

The words "or in the vicinity of those waters" at the end of paragraph 1 (*a*) envisage the case of shipwreck on high seas not necessarily followed by either goods or persons reaching the shore.

182. The Committee agreed that paragraph 2 did not imply that the consular officer was obliged to take certain safeguard measures personally.

183. The Committee agreed that Article 39 applied to persons who are shipwrecked ; and this not only when they reach shore by swimming or in a life-boat, but also if they should be carried there by another ship which has picked them up after the shipwreck.

Article 40

184. This article relates to the salvaged vessel, parts of a vessel and other goods with which the preceding article is concerned.

185. Paragraph 1 deals exclusively with the case where neither the captain nor the owner nor any other persons normally responsible are in a position to make arrangements for the custody and disposal of the goods concerned. It confers subsidiary powers on the consular officer in such circumstances. The Committee specified that the appropriate consular officer is the consular officer of the State of the flag and not, as certain delegations had initially proposed, of the State of which the owner of the goods is a national. The Committee further

agreed that in exercising these additional powers, the consular officer was bound not only to respect local legislation, but also to see that he did not exceed the limits of his own consular instructions, as generally provided for in Article 44 (2) of the Convention. Lastly, it was made clear that paragraph 1 did not imply that the consular officer was obliged to make arrangements for salvage or custody in all the cases envisaged by this provision.

Unlike the preceding article, Article 40 speaks only of shipwrecked or stranded goods, and makes no mention of the persons rescued from a shipwreck ; it is, of course, understood that the latter will apply, on their own initiative, to the consular officers of the State of which they are nationals. In any event, they are covered by Article 2 of the Convention.

186. Paragraph 2 is concerned with the fiscal aspects of a shipwreck. In the Committee's view, shipwrecked goods should not be liable to customs duties or import tax unless they are intended for consumption in the receiving State. If, however, the goods are merely based temporarily in the receiving State, pending re-exportation, the receiving State shall be entitled, in conformity with Article 40, to demand a guarantee deposit to cover the amount of any duties or taxes, the deposit being refunded following re-exportation of the goods.

It is understood that the expression "articles belonging to such a vessel or cargo" also covers both the vessel itself and the whole of her cargo.

Article 41

187. Article 41 relates to the estate of a seaman, national of a Contracting Party, who was a member of the crew, on the vessel of another Contracting Party.

188. Paragraph 1 provides for a very flexible system of information. The expression "competent authorities of the State of the flag " covers several practices ; the competent authority may be the consular officer of the first port at which the ship touches in (general French practice), the consular officer in the port of enrolment (Norwegian practice), or the central authorities of the State of the flag. Similarly the organs of the State of the deceased competent to receive the information may be the consular officer of the first port of call, the consular officer of the port of enrolment or the consular officer resident in the capital of the State of the flag, or again the central authorities of the State of the deceased.

189. Paragraph 2 determines the minimum value of a transferable estate within the meaning of this paragraph. This limit was prescribed owing to the restrictions operative in certain countries in regard to the matter. Provision was made, however, to enable each country, where necessary, to fix a higher sum by means of notification to the other States, through the Secretary General of the Council of Europe (see Article 57 (g)).

190. In the Committee's view, the "persons" referred to in paragraph 2 may also be legal persons. It goes without saying that if this is the case, the concept of "residence " ought to be understood as referring to the registered office (*siège*).

Chapter V – General Provisions

Article 42

191. This article corresponds in part to Article 39 of the Vienna Convention.

192. The question arose whether Article 42 ought not rather to be considered as a provision governing the domain of consular privileges and immunities. However, on this point the Committee agreed that it was in fact an article on functions in the proper sense of the word since the right to receive fees and charges was an inherent complement to certain consular functions.

193. In adopting the text of the second sentence of Article 42 on the possibility of such fees and charges being freely transferable, the Committee wished to fill a lacuna left open in the Vienna Convention which had been unable to deal with this problem in a world-wide context. However one delegation declared itself opposed to the insertion of this sentence, which in its opinion went beyond the context of this Convention. Moreover it only reproduced a principle already recognised in international law.

194. The Committee did not think it opportune to insert in Article 42 a provision relating to exemption from taxation on such fees and charges. It was recognised that in this case one was concerned with public funds belonging to the sending State and that it was a well-established rule in public international law that no State could submit another State to measures of fiscal taxation.

Article 43

195. This article deal's with the relations between the present Convention and other international agreements between the parties. It is in the same terms as Article 73 (1) of the Vienna Convention.

The Committee agreed that the present article would apply both to consular and non-consular treaties.

196. In the Committee's opinion, the expression "in force as between States parties to them" appearing at the end of this article should be interpreted as meaning "in force as between any two States both of whom are bound by the present Convention and by any other international agreement to which Article 43 refers".

197. A strong minority of the Committee would have preferred to see priority given to the present Convention. A proposal in this sense was however defeated. Delegations supporting the proposal pointed out that the article as adopted did not in reality solve any conflict at all. Even bilateral treaties of extreme antiquity between the parties were kept in force and given preference to the present Convention, to perfect which the Committee had worked for five years. Against this argument, however, it was pointed out that nothing prevented States from denouncing such treaties or abridging them by mutual arrangement. To give priority to the present Convention would destroy the value of modern bilateral consular treaties, which went into more detail and were generally more comprehensive than the present, or indeed any, multilateral text.

Article 44

198. This article is also of general effect, since it applies to all the first four chapters.

199. The object of the first paragraph is to serve as a "gap clause" and govern the special case of certain functions which, although they do not appear in the Convention, are compatible with the law of the receiving State or to which no objection is taken. In this respect, paragraph 1 corresponds to a certain extent to Article 5 (*m*) of the Vienna Convention on consular relations.

200. In the Committee's opinion, the use of the expression "consular functions" was designed to exclude not only diplomatic functions but also functions normally considered as being outside a consular officer's competence.

201. Paragraph 2 is a complement to the preceding paragraph. It regulates, however, the opposite case, that is to say those consular functions which, although recognised by the Convention, are not included in the internal consular regulations of the sending State. Thus, it would, for example depend on the regulations of this State whether these consular officers are authorised or not to give financial assistance to the nationals of the said State in certain cases.

209. The object of the paragraph 3 is to introduce the principle of reciprocity into the application of those articles of the Convention which make the performance of consular functions depend on various conditions of conformity with the law of the receiving State.

The Committee's opinion was that the provision of the third paragraph cannot be invoked in the case provided for in Annex II to the Convention. In fact the words "does not permit ... to exercise" cover the case in which a Contracting Party is free to apply or not to apply the provisions of the Convention to the consular officers of another Party, and do not cover the case (provided for in Annex II) in which a Party is authorised by the Convention itself not to apply certain provisions.

Article 45

203. This article is one which is particularly justified in the context of co-operation between European countries.

Article 46

204. This article is concerned with consular protection of stateless persons.

As to the problem posed by stateless persons, the Committee considered that it was not sufficient to treat this question by the same methods as those chosen to regulate the question of refugees, it was for example thought that it would not be appropriate to include in the body of the Convention only a provision governing conflicts, and to defer the question of effective consular protection to an optional Protocol (cf. below paragraphs 208 - 211). The Committee came to the conclusion that a more general protection was necessary for stateless persons since no international protection comparable to that exercised by the United Nations High Commissioner for Refugees existed with regard to such persons. In consequence, the Committee decided that Article 48 should deal with the question of effective consular protection for stateless persons.

205. Several delegations would have preferred to see the words "unless he is a former national of the receiving State" deleted from the text of Article 46, since the right of a consular officer to protect a stateless person ought not to be so limited.

206. One delegation thought that the protection assured to a stateless person by the authorities of the receiving State where the stateless person was temporarily present was sufficient and did not justify the intervention of a consular officer of the State where the stateless, person had his habitual residence. This delegation, supported on this point by several others, moreover declared that in any event a provision of this type contained in Article 46 of the Convention would be better placed in an optional Protocol.

The Committee not having accepted this argument, the said delegation declared that its Government would be led to make use of the corresponding reservation in the Annex to the Convention.

Article 47

207. The intention of this article is to exclude the competence of the consular officer of the sending State of a person who has become a political refugee for reasons of race, nationality, political opinion, or religion.

It should be pointed out that the category of refugees covered by this article is wider than that indicated in Article 48, in which the definition of the word "refugee" is given by an implicit reference to the Convention relating to the status of refugees and to the Statute of the Office of the United Nations High Commissioner for Refugees (see paragraph 210 below).

Article 48

208. The text of Article 48 was drawn up on first reading, during a discussion in which a representative from the United Nations High Commissioner for Refugees participated.

209. The formula "international instruments" covers not only international agreements properly so-called, but also texts such as that of the "Statute of the United Nations High Commissioner for Refugees" adopted by a Resolution of the General Assembly of the United Nations.

210. The word "refugee" is defined, according to this article, as an implied *renvoi* to the "Convention relating to the Status of Refugees", and the "Statute of the Office of the United Nations High Commissioner for Refugees". It covers thus, *inter alia*, not only persons who had become refugees as a result of events before 1st January 1951 (Convention) but also the refugees to whom the above-mentioned Resolution applies.

211. It was noticed in particular that so-called "national refugees" were excluded from this definition, since these persons had an "effective" nationality, that is to say a nationality which gave them the chance of effective protection by their own State. A certain number of stateless persons are however included in the definition.

Chapter VI – Final Provision

212. Articles 50 to 53, 55 and 57 follow in general, the model approved by the Ministers' Deputies.

213. As to Article 50, paragraph 2, the Committee thought it opportune to increase from three to five the number of ratifications necessary for the entry into force of the Convention. The Committee thought the particular importance of the Convention merited a substantial number of States for its operation.

214. Article 53 concerns reservations. On this subject the Committee was presented with three possibilities: the system of unlimited reservations, the system of a convention without reservations, and the system of negotiated reservations. The Committee adopted the last system, which consists in enumerating the different permitted reservations, in a list which is to be found in the Annex of the Convention. The system excludes the possibility of making use of reservations which do not appear in the said Annex.

In the Committee's opinion, the first paragraph of Article 53 is not designed to prevent a State, which at the time of signature had formulated certain reservations as provide in the Annex, to suppress these or add others which are also provided in the Annex, at the moment of ratification.

Moreover, the Committee thought it useful that at the moment of deposit of its instrument of ratification, the State concerned should confirm the reservations that it formulated at the time of signature.

215. During the adoption by the Committee of Article 53, several delegations declared their hostility to any system of reservations, such a system finding no justification in a European context.

216. Article 54 is a novelty ; it has no equivalent in other Council of Europe Conventions. It is to be considered as a complement to Article 43 and as a counterpart to Article 53.

217. Article 56 deals with the peaceful settlement of disputes.

The Committee thought it desirable to include in the text of the Convention such an article, which provides at paragraph 2 for reference to the International Court of Justice, because several member States of the Council of Europe had not accepted the mandatory competence of the International Court of Justice, either under the influence of the European Convention for the Peaceful Settlement of Disputes or by acceptance of the clause regarding the mandatory jurisdiction of that Court.

The second sentence of *paragraph 1* provides that the Committee of Ministers may establish a non-judicial European procedure which member States could use before submitting matters to the International Court of Justice.

The Committee felt that the various types of peaceful settlement mentioned in the first paragraph of this article were not cumulative, so that States were not obliged to exhaust all of these methods of settlement before submitting the case to the International Court of Justice. This interpretation is made clear by the words " by one of the methods in paragraph 2.

218. The provisions of Annex II confer on the Austrian authorities the faculty not to apply in Austria the rules of the Convention relating to shipping. The insertion of this Annex in the Convention takes into account Austria's special situation.

Commentary on the Protocol concerning the protection of refugees

219. The Protocol to the European Convention on Consular Functions, by withdrawing refugees from the consular protection of the State of their nationality while assuring them that of the State of their habitual residence, is intended to put into operation the spirit of the Geneva Convention relating to the Status of Refugees. The Protocol is optional. In form it is based on certain provisions of the "Protocol to the European Interim Agreement on Social Security other than Schemes for Old Age, Invalidity and Survivors " and the Protocol to the European Code of Social Security ".

The Protocol was drafted during a debate in which a representative of the United Nations High Commissioner for Refugees participated.

220. Article 1 of the Protocol gives a definition of the term "refugee" for the purposes of the Protocol's application; the definition includes *inter alia* all refugees to whom the Contracting Parties apply the "Convention relating to the Status of Refugees" of 1951 and the "Statute of the Office of the United Nations High Commissioner for Refugees " of 1950 (cf. also paragraphs 208 and 211 of the present report).

221. Article 2 is the operative article of the Protocol ; it realises the objective described in paragraph 225 of the present report. The first paragraph puts aside the competence of the consular officer of the State of origin of the refugee, while paragraph two assures the refugee the consular protection of the State of his, habitual residence. These two paragraphs are thus complimentary to each other, one filling a gap created by the other.

222. In drawing up the text of paragraph 1 of Article 2, the Committee preferred the criterion of "habitual residence" to either "permanent residence" or the State where the refugee has "refugee status". The term "permanent residence" was considered inappropriate because it might be taken to denote a fixed intention to remain in the country of refuge, which is not always the case. Since some States do not have legislation on the matter of according "refugee status", this latter criterion was also rejected ; on the other hand, the term "habitual residence" appears in the 1951 Convention relating to the Status of Refugees.

223. During the adoption of the text of the first paragraph, three delegations declared that they could not accept such a text : in the opinion of these delegations, there can be no doubt that the Government of each State is entirely free to refuse to permit a consular officer to protect one of his nationals if such national is a refugee ; this right is already recognised in international practice, and it is superfluous, even dangerous, to devote to it a special article in the context of an optional Protocol to the European Convention on Consular Functions.

224. The expression "whenever possible" in *paragraph 2* was preferred to "whenever necessary", as being a less subjective criterion some qualification was thought to be necessary, if only because the High Commissioner himself may not have the facilities available to act in all cases. Moreover the Committee thought that the French expression *chaque fois que c'est possible* should be interpreted in the English version as "whenever possible and appropriate".

225. Articles 3 to 8 of the Protocol correspond, in general, to the analogous provisions in the two Protocols mentioned above. One general principle which underlies the text should, however, be specially noted : that by virtue of which the Protocol cannot be signed by a State not having signed the Convention; nor can it be ratified or accepted by a State which has not already ratified or accepted the Convention. It should also be pointed out that the Committee increased to five the number of ratifications necessary to bring the Protocol into force, This number is thus the same as that required for the entry into force of the Convention.

Commentary on the Protocol in respect of civil aircraft

226. The object of this Protocol is to extend, *mutatis mutandis*, the application of Chapter IV of the Convention on Shipping to civil aircraft.

227. Several delegations would have preferred the insertion of the text of the operative article of the Protocol in the text of the Convention itself. Since, however, in such a case several Governments might have been obliged to formulate a reserve, the Committee considered it better to deal with matters concerning civil aircraft in an Optional Protocol.

228. The question arose whether certain provisions of the Convention of a general character, principally Articles, 1, 43 and 44 should be considered equally as applying to the Protocol. Several delegations suggested this problem be resolved by the insertion of an article in the Protocol dealing specifically with this question. Nevertheless, the Committee did not feel able to accept this suggestion. It considered that the reference to the Convention contained in the first recital of Preamble to the Protocol made such an insertion unnecessary.