THE RIGHTS OF DIPLOMATIC MISSIONS AND CONSULATES TO COMMUNICATE WITH AUTHORITIES OF THE HOST COUNTRY

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THE recent Vienna conventions on diplomatic and consular relations contain express provisions on the rights of diplomatic missions and consulates to communicate with authorities of the host country. It may be timely, therefore, to discuss this question, which in the past has attracted but little attention from writers.

Looking at the matter in perspective, it is easy to see that it is only part of the more general problem which is posed by the need of states to speak with one voice in international relations, on the one hand, and on the other the necessity under modern conditions to allow many specialized governmental authorities direct and speedy contact with their counterparts in foreign states and with international specialized agencies. Health departments, authorities for civil aviation, postal and telegraph services, customs bureaus, indeed, practically the whole range of administrative authorities and government departments nowadays are found to communicate, in varying degrees in different countries, with foreign authorities and international organizations.

The decentralization of the foreign relations of states and the breaking of the monopoly of the ministries for foreign affairs have not failed to create problems in most countries. One major problem lies in the selection of matters which are to be allowed to be handled direct between specialized authorities and, on the other hand, the identification of matters which will continue to be channelled through the ministries for foreign affairs. Another key problem concerns the administrative mechanism employed to ensure that positions taken by specialized authorities vis-à-vis foreign authorities are co-ordinated and conform with the policy of the ministry for foreign affairs.

The problems referred to above are often the subject of administrative laws and regulations, which are different in different countries. Contacts between specialized authorities and departments are also often authorized and regulated in treaties and agreements on various matters between states. The constitutions of some international organizations, likewise, stipulate that liaison

between the organization and certain specialized national authorities of the member states shall be direct. With the exception of rules regarding the competence of agents of specialized national authorities to bind their states by treaty, it does not appear, on the other hand, that there exist any rules of customary international law forbidding or regulating international contacts between specialized authorities. In contrast to this, such rules have long existed with respect to contacts between diplomatic missions and consulates and the authorities of host countries. The reason for this difference may perhaps lie in the circumstance that contacts on a large scale between specialized authorities in different countries are a comparatively modern phenomenon, whereas the channels of communication of consulates and diplomatic missions have long been a subject of some interest to governments.

The present article, which forms a part of an inquiry into the broader problems pointed to above, especially as they arise in Swedish constitutional and administrative law,[1] is confined to an examination of the rules of international law regarding the rights of diplomatic missions and of consulates to communicate with authorities of a host country. These rules will be examined as they are reflected in the practice of the Swedish government and of other governments, in doctrine and, finally and most recently, in the Vienna conventions and the discussions which preceded the conventions. The study is divided into two parts, the first part dealing with diplomatic missions, the second with consulates.

I. DIPLOMATIC MISSIONS

Swedish practice[1a]

Swedish constitutional law limits the right of governmental authorities other than the Ministry for Foreign Affairs to communicate with official authorities of foreign states. These foreign

[1] Blix, H., *Statsmyndigheternas internationella förbindelser* (Stockholm 1964).

[1a] Most of the documents bearing on Swedish practice and presented below are to be found in file P 4 S in the archives of the Ministry for Foreign Affairs, Stockholm. This file will hereinafter be referred to only as file P 4 S.

The writer wishes to express his gratitude for permission to publish the relevant material. The translations into English have been done by the writer.

authorities include diplomatic missions. There exists a rich body of practice in conformity with this basic rule. To some extent, however, exceptions from the rule are permitted, e.g. for routine replies to inquiries from diplomatic missions and for contacts with military or technical attachés. Such exceptions may be made *ad hoc,* as when in 1952, upon the request of the Finnish Minister to Stockholm, the Ministry for Foreign Affairs granted permission for a member of the Minister's staff to communicate direct with the Swedish governmental authority for hydroelectric power on a certain matter.[2]

Exceptions to the fundamental rule may also be established for a general category of matters. Of this kind is an arrangement whereby the Ministry for Foreign Affairs has authorized the Customs Administration to reply direct to inquiries by foreign diplomatic missions in matters of routine. Under the same arrangement, replies on questions of greater importance or questions of principle are to be channelled through the Ministry.[3]

The basic Swedish attitude on this question is reflected, on the other hand, in an exchange of views which took place in 1923 between the Ministry for Foreign Affairs and the French Minister to Stockholm.[4] The latter had complained that a bureau within the Swedish State Railway Administration did not reply to inquiries addressed to it and requested the Ministry to authorize "les services publics suédois" to reply direct to inquiries which might be made by the French Legation. The request was rejected, and in its oral reply the Ministry appears to have stated that there could be no question of directing Swedish authorities to communicate direct with the French Legation. However, if in a case of this kind the commercial attaché or some other member of the mission wanted informally to contact a particular specialized authority, he could approach the Ministry for Foreign Affairs, which might intervene to facilitate such contact.

Another exchange of views might also be cited:[5] an attaché of the Czechoslovak diplomatic mission to Stockholm inquired of the Ministry for Foreign Affairs whether the mission was permitted to negotiate matters with specialized Swedish authorities direct or was obliged to go through the Ministry. An officer of the Ministry

[2] Memorandum of 28 February 1952, file P 4 S.
[3] Memorandum of 11 March 1954, file P 4 S.
[4] Memorandum of 27 February 1925, file P 4 S.
[5] Memorandum of 25 August 1959, file P 4 S.

replied that the general rule in Sweden—as presumably in the attaché's own country—was that the mission should communicate with the Ministry for Foreign Affairs. It was another matter if, at a late stage, some details were left for settlement direct with a specialized authority. An approach should always, however, be initiated through the Ministry for Foreign Affairs.

American practice

Several cases may be reported from American practice indicating that the Government of the United States has consistently maintained that as a rule diplomatic missions are not entitled to communicate with any internal authority other than the State Department, and that the internal authorities, when they wish to communicate with foreign states and their diplomatic missions, must channel their correspondence through the State Department. Two cases in the latter group will first be mentioned.

In a letter of 1874 the Secretary of State declared:

> It is not regular for any other authority than that of the department of foreign affairs in the country where diplomatists are accredited to address letters upon public business directly to them. When such other authority has occasion to communicate with them, this is invariably done through the department intrusted with the foreign relations of the country.[6]

Forty-four years later Secretary of State Lansing informed a number of Federal authorities that certain difficulties which arose when foreign diplomats communicated direct with internal authorities could be avoided by a centralization of the communications in the State Department, where they belonged by law and custom. There was no intention, however, to

> restrict intercourse between members of non-diplomatic technical, scientific or other similar special missions in this country, or of joint commissions of the United States and other countries, and other departments or officials of the Government upon matters having no bearing upon political or politico-commercial relations of the United States with foreign countries.

[6] Moore, J. B., *A Digest of International Law*, vol. IV (Washington 1906), pp. 781–782.

On the other hand, it was demanded that

> where it is necessary for members of foreign missions to confer informally with your Department on matters involving the political or politico-commercial relations of the United States you will be good enough to inform me thereof, and to have the formal communications between your Department and foreign diplomatic officers on such subjects pass through the Department of State.[7]

A number of other documents from American practice are evidence of the position taken by the Government of the United States that foreign governments and diplomats are not, as a rule, entitled to communicate direct with internal American authorities, but must address themselves to the State Department. The earliest case published appears to be that reflected in a letter of 1862 from Secretary of State Dayton. He declared *inter alia:*

> This Department is the legal organ of communication between the President of the United States and foreign countries. All foreign Powers recognize it and transmit their communications to it, through the dispatches of our ministers abroad, or their own diplomatic representatives residing near this Government.... This is, I believe, the same system which prevails in the governments of civilized states everywhere.[8]

A more detailed position was taken in a letter of 1908 from Acting Secretary of State Bacon to the Norwegian Minister to Washington:

> It may be stated generally ... that it is expected that all correspondence and inquiries in respect to matters of business between the foreign governments and the Government of the United States, where such correspondence or inquiries involve comment or discussion of the subject matter, shall be conducted through the diplomatic channel, which in the United States is the Department of State. Exceptions to this are found in the cases of inquiries by military and naval attachés who are privileged to communicate directly with the War and Navy Departments, respectively, and in the case of postal conventions which the Postmaster General is empowered by law to negotiate directly.

[7] Hackworth, G. H., *Digest of International Law,* vol. IV (Washington 1942), p. 605.
[8] Moore, J. B., *op. cit.,* p. 781.

This rule was not, however, applied rigidly:

> This practice does not, however, apply to merely oral inquiries not affecting matter receiving or requiring treatment through the diplomatic channel. It is quite appropriate for instance, to send directly to another Department for copies of printed circulars or other publications which are accessible to all applicants. But even in matters of this sort it is preferred that the Department of State should be the medium through which the requests are communicated to other Departments of this Government.[9]

It is of interest to note that similar letters were sent by Secretary of State Lansing in 1915 to all heads of diplomatic missions and government departments in Washington.[1]

Practice in other countries

Practices similar to those recorded above are followed in other countries as well. Thus, in March 1934, the Ministry for Foreign Affairs of Persia appears to have sent a circular note to the diplomatic missions in that state, requesting them to channel their communications to various internal Persian authorities through the Ministry. Other Persian authorities were said to be forbidden to maintain direct liaison with the missions.[2]

The Ministry for Foreign Affairs of the Netherlands has taken the same position as that of Persia and has, moreover, offered reasons for doing so. On one occasion, when the Swedish Ministry for Foreign Affairs had contemplated instructing the Swedish Legation in the Netherlands to make an oral communication to a specialized Dutch internal authority, the Legation replied to the Ministry:

> ... according to the practice followed here, as probably in most other countries, regarding the activities of foreign missions, these are entitled to communicate neither in written form nor orally with any other authority in the country than the ministry for foreign affairs. As regards the Netherlands, this has been stressed, furthermore, in a circular which the Ministry for Foreign Affairs addressed a few months ago to all the chefs de mission here.

[9] Hackworth, G. H., *op. cit.*, p. 604.

[1] *Ibid.* See also the award in *The "Kronprins Gustav Adolf", United Nations. Report of International Arbitral Awards,* vol. II at p. 1283.

[2] Swedish Legation at Teheran to the Ministry for Foreign Affairs at Stockholm, 22 March 1934, file P 4 S.

The circular referred to—dated 20 May 1939—read:

> Le Ministère des Affaires Etrangères a l'honneur d'attirer la bienveillante attention des Missions Etrangères accréditées à la Haye sur une pratique qui semble se développer dans le contact de certaines Missions avec les autorités néerlandaises, et qui consiste en un contact de plus en plus fréquent, non pas entre les Missions et le Ministère des Affaires Etrangères, mais entre les Missions et des services faisant partie d'autres Départements ministériels ou en relevant.
>
> Soucieux de sauvegarder l'unité nécessaire dans la direction des relations étrangères des Pays-Bas et d'empêcher que des malentendus puissent naître à la suite des procédés qui ne sont pas à considérer, aux yeux du Gouvernement néerlandais comme normaux ou réguliers, le Ministère des Affaires Etrangères prie les Missions Etrangères accréditées à la Haye de vouloir bien, sauf exception à convenir avec lui dans des cas particuliers, s'adresser uniquement audit Ministère, que ce soit oralement ou par écrit, pour ce qui concerne les affaires que ces Missions aimeraient à traiter.[3]

During the Second World War the Swedish Minister to Berlin reported that the German Ministry for Foreign Affairs similarly —in a *note verbale* of 23 September 1942—repeated earlier requests to all foreign missions to channel their communications with internal German authorities and party organizations through the Ministry. The note read:

> Das Auswärtige Amt beehrt sich, den hiesigen diplomatischen Missionen folgendes zur Kenntnis zu bringen:
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> Mit Zirkularnote vom 6.1.1939 — Prot. 17983 VI 6 — hatte das Auswärtige Amt die diplomatischen Missionen gebeten, von einem unmittelbaren Verkehr mit innerdeutschen Stellen abzusehen, es sei denn, dass zwischen dem Auswärtigen Amt und einzelnen Missionen für bestimmte Fragen ausdrückliche Vereinbarungen getroffen sind, denen zufolge solche Fragen unmittelbar mit den sachlich zuständigen Reichsministerien oder anderen Dienststellen erörtert werden können.
>
> Mit einer weiteren Zirkularnote vom 2.7.1940 — Prot. A 10271 VI 6 — hatte das Auswärtige Amt darum gebeten, das gleiche Verfahren in Angelegenheiten, die die NSDAP und ihre Gliederungen betreffen, zu beachten und alle an die NSDAP und ihre Gliederungen gerichteten Anfragen und Anregungen über das Auswärtige Amt zu leiten. Gleichzeitig war darum gebeten worden, die den einzelnen Missionen unterstellten konsularischen Vertretungen an-

[3] Swedish Legation at The Hague to the Ministry for Foreign Affairs at Stockholm, 20 November 1939, file P 4 S.

zuweisen, alle die NSDAP und ihre Gliederungen betreffenden Anfragen nur auf dem diplomatischen Wege vorzubringen.

Durch verschiedene Vorkommnisse in der letzten Zeit sieht sich das Auswärtige Amt genötigt, den Inhalt dieser Zirkularnoten den diplomatischen Missionen erneut in Erinnerung zu bringen. Hierbei darf besonders darauf aufmerksam gemacht werden, dass durch die Nichtinnehaltung des diplomatischen Weges sich regelmässig Verzögerungen oder Unzuträglichkeiten ergeben, da ein unmittelbarer Verkehr der sachlich zuständigen Reichsministerien, anderer Dienststellen und der NSDAP und ihrer Gliederungen mit den diplomatischen Vertretungen nicht vorgesehen ist.[4]

Finally, a very recent case may be reported. When, at the end of 1961, the Swedish Embassy at Lagos informed the Nigerian Ministry for Foreign Affairs as well as certain other governmental organs—which were enumerated in the letter to the Ministry—of a course to be given in Sweden on methods of drying and impregnating wood, the Nigerian Ministry voiced objection to the direct communication with the internal authorities. It seems that this reaction should be viewed against the background of a circular note addressed in May 1961 by the Ministry to the missions in Lagos:

The Ministry of Foreign Affairs and Commonwealth Relations presents its compliments to all Foreign and Commonwealth Diplomatic Missions in Nigeria and has the honour to inform them that there have recently been several instances of Foreign Missions, accredited to the Federation, entering into direct correspondence with Nigerian "Home" Ministries, Government Agents, or private individuals, on matters of interest and concern to the Government of the Federation.

Such practices, it will be agreed, violate the accepted principles of diplomatic intercourse: that the Foreign Office of a receiving State should be the sole channel of communication between Foreign Missions accredited to the said State and its Home Ministries, Agents and even private individuals, if the subject of communication should in any way concern Government projects and policies or affect its external relations.

Violations of these principles are viewed with disfavour by the Ministry as they are bound to lead to confusion and to unfortunate situations to which the Ministry might be unjustly called upon to provide solutions.

[4] Swedish Legation at Berlin to the Ministry for Foreign Affairs at Stockholm, 1 October 1942, file P 4 S.

> The Ministry wishes therefore to implore, respectfully, all diplomatic Missions accredited to the Federation to refrain from channels of intercourse other than those based on diplomatic principles.
>
> — — —

The circular quoted caused the diplomatic corps in November of the same year to declare, through its doyen, in a note to the Ministry for Foreign Affairs of Nigeria that with regard to

> contacts between Heads of Mission and Ministers other than the Minister of Foreign Affairs and Commonwealth Relations, the members of the Corps feel that the common practice should be followed whereby Heads of Mission may, if they wish, get into direct touch with such Ministers without using the channel of the Ministry.[5]

Possibly the attitude of the diplomatic corps may be explained in this case by the need, which may be felt especially in new states where the administrative machinery is not yet functioning with maximum efficiency, to take short cuts in order to secure results. Nevertheless, the statement of the corps is in contradiction to all the other state practice described above.

The doctrine

In the doctrine the question of the permissibility of direct contacts between diplomatic missions and internal authorities has received but little attention. Oppenheim states briefly:

> It is he, [the foreign secretary] who, either in person or through the envoys of his State, approaches foreign States for the purpose of negotiating international matters. And, again, it is he whom foreign States, through their Foreign Secretaries or their envoys, approach for the like purpose.[6]

Satow is a little more enlightening:

> In all communications with the government of the state to which they are accredited, diplomatic agents should address themselves to the minister for foreign affairs, whether in seeking information as to the views or practice of that government in regard to various

[5] File HP 111 Bni, Ministry for Foreign Affairs, Stockholm.
[6] *International Law*, vol. I (8th ed. by Lauterpacht, London 1955), p. 764.

matters that may arise, or in furnishing information as to the views or practice of their own government.[7]

Conventions

The problem has been covered in two international conventions, namely, the Havana Convention of 20 February 1928 and the Vienna convention of 18 April 1961 on diplomatic relations. In the Havana Convention—which will only be noted here—Article 13 stipulates:

> Diplomatic officers shall, in their official communications, address themselves to the Minister of Foreign Relations or Secretary of State of the country to which they are accredited. Communications to other authorities shall also be made through the said Minister or Secretary.[8]

In the Vienna Convention Article 41: 2 prescribes:

> All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other Ministry as may be agreed.[9]

The International Law Commission

As the Vienna convention is of recent date, as it was adopted by a highly representative international conference, and as it was preceded by *travaux préparatoires* which throw light upon the rule studied here, it may be useful to examine the discussion held on this matter in the International Law Commission as well as those held at the Vienna conference.

In the first draft text, which was submitted to the Commission by Judge Sandström as rapporteur, there was no provision on the matter at all.[1] It was only during the ninth session of the Commission (in 1957) that the matter was taken up. Different views

[7] Satow, Sir E., *A Guide to Diplomatic Practice* (4th ed. by Bland, London 1957), p. 19.

[8] See *American Journal of International Law*, vol. 26 (1932), Suppl., p. 176.

[9] *Ibid.*, vol. 55 (1961), p. 1075.

[1] *Yearbook of the International Law Commission* (cited below as *Y.B.I.L.C.*) 1955: II, pp. 12 and 17.

were then expressed.[2] Judge Sandström declared that he had not included any provision on the matter "because he did not consider that international law was infringed when a diplomatic agent approached authorities without passing through the minister of foreign affairs". Mr. Spiropoulos expressed the view that this was not an important juridical problem, but rather a matter of protocol. Sir Gerald Fitzmaurice conceded that communication through the channel of the foreign office was still the rule for strictly diplomatic members of a mission. He thought it was a fairly settled practice, however, that various specialists who were attached to missions were allowed to have direct contacts. In most countries this was, indeed, preferred, and but for such contacts the tasks of the experts would be made more difficult. Like Sir Gerald, Mr. El Erian felt that no provision was required and declared that not only technical members of missions but also heads of missions "might find it more conducive to an improvement in relations to contact other departments than the ministry of foreign affairs, or even to contact prominent members of the cabinet".

Mr. Khoman also thought it was a practice that subordinate members of missions, like commercial or military attachés, were referred to specialized authorities. In his opinion, it was nevertheless a sound general principle that the ministries for foreign affairs remained the official channel for diplomatic intercourse. Mr. Garcia Amador, finally, stated that he would submit a draft proposal in line with Article 13 of the Havana Convention. This proposal was later introduced by Mr. Padilla Nervo. It read:

> 1. . . .
> 2. All official business entrusted to a diplomatic mission by its Government shall be conducted with or through the ministry of foreign affairs.[3]

Although the proposed formulation seemed neither to be dispositive nor to admit of exceptions, Mr. Nervo said a receiving state would be entitled to designate the internal authorities with which diplomatic missions were to have relations and admitted that in practice several exceptions from the main rule were found. Judge Sandström said he presumed that the exceptions were intended to be covered by the vague limitation to "official business".

[2] *Ibid.*, 1957: I, pp. 50–51 and 143 ff.
[3] *Ibid.*, p. 143.

In his view, however, all matters handled by a mission might be regarded as official. He continued: "It was really on eminently political questions that the diplomatic agent should deal solely with the ministry of foreign affairs."[4] Other members of the commission pointed to the dispositive nature of the rule and suggested that it should be more clearly expressed. Thus Mr. Bartos declared:

> ... the principle was that official business should not be conducted with other departments than the ministry of foreign affairs, except with the consent of the receiving State.

Mr. Nervo, himself, did not object to a new formulation. He had, he said, felt that where exceptions from the rule occurred with the knowledge and consent of the ministry of foreign affairs, these exceptions would be covered by the expression "with or *through* the ministry of foreign affairs". Mr. Ago held that a special provision would be redundant, since the matter was covered by the principle that the diplomats were obliged to comply with the law of the receiving state. It was inappropriate to give the impression that the Commission wished to discourage states from the exceptions which were made from the main rule, the more so as intercourse between states was steadily broadening in scope. Mr. Tunkin, Mr. Verdross and others agreed with Mr. Ago on the existence and permissibility of exceptions. They did not, however, object to the inclusion of the main rule.[5] The same view was taken by Mr. Matine-Daftary:

> Contacts with departments other than the ministry of foreign affairs were quite admissible when the nature of the question required it, the essential condition was that they must be made with the foreknowledge of the ministry. As things were, the ministry was too often by-passed and had no knowledge of what was happening.[6]

In the continued discussion Mr. Nervo declared that all he wished to state was that a diplomatic agent should not seek to influence the domestic or external policy of the receiving state through improper channels on matters outside his legitimate official interests, or in a manner incompatible with the purpose of the diplomatic function. If a mission established a direct contact

[4] *Ibid.*, p. 146.
[5] *Ibid.*, pp. 146–147.
[6] *Ibid.*, p. 148.

with a specialized authority, there would be a risk that contradictory positions would be taken by the government and the authority of the receiving state.[7] Finally, Mr. Nervo declared that by "official business" he had only meant "negotiations with government departments designed to lead up to an agreement or arrangement between the two States concerned".[8]

The proposal, having been submitted to a drafting committee, came back—as Article 32—somewhat modified:

> 2. Unless otherwise provided for by the receiving State, all official business with that State, entrusted to a diplomatic mission by its Government, shall be conducted with or through the Ministry of Foreign Affairs of the receiving State.[9]

To this provision the following commentary was added:

> 3. Paragraph 2 lays down that the Ministry of Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission shall conduct all official business entrusted to it by its Government; if, however, in a special case or in accordance with its regulations, the Foreign Ministry refers the mission to another authority, there is no reason why the mission should not deal directly with this other authority.

The formulation quoted above was subjected to some criticism in the Commission.[1] Thus, Mr. Scelle objected that the initial phrase seemed to leave the decision exclusively to the receiving state. He proposed to substitute for that phrase the expression "sauf accord contraire". Mr. Amador, who declared himself willing to accept that proposal, declared that all it was necessary to convey was that, if the receiving state did not permit direct contacts with other authorities than the ministry for foreign affairs, missions were obliged to refrain from such contacts. Mr. Bartos stated that he was prepared to accept Mr. Scelle's proposal "since it implied that the sending State had a right to ask the receiving State to permit such direct contacts". Mr. Spiropoulos was prepared to accept the amendment on the understanding that "the agreement could be tacit as well as formal". The Chairman having concluded that informal agreements would be adequate, Mr. Scelle's amend-

[7] *Ibid.*, p. 149.
[8] *Ibid.*, p. 150.
[9] Draft Report of the International Law Commission covering the work of its 9th session (1957), UN *Doc.* A/CN.4/L.70, Add. 1.
[1] *Y.B.I.L.C.* 1957: I, p. 219.

ment was accepted, and the draft article of the Commission—Article 33—came to read:

> 2. Unless otherwise agreed, all official business with the receiving State, entrusted to a diplomatic mission by its government, shall be conducted with or through the Ministry for Foreign Affairs of the receiving State.

The Commission added the following commentary:

> 3. Paragraph 2 lays down that the Ministry for Foreign Affairs of the receiving State is the normal channel through which the diplomatic mission shall conduct all official business entrusted to it by its Government; in the event, however, of agreement (whether express or tacit) between the two States, the mission may deal with other authorities of the receiving State.[2]

The draft finally adopted does not adequately reflect the consensus that appeared to exist in the Commission to the effect that the receiving State is free to indicate the authorities with which contact is to be maintained. The provision was modified from being clearly dispositive for the individual State to being dispositive for the sending and the receiving State together. As a sending State may be expected only exceptionally to object to direct contacts offered by a receiving State with specialized authorities this modification may not, however, be practically important.

The Vienna Conference

When the draft of the International Law Commission came before the Committee of the Whole of the Vienna Conference, two amendments were proposed. A Japanese amendment[3] sought to eliminate the initial phrase "Unless otherwise agreed" and to insert the words "as a matter of principle" between "shall" and "be conducted". While under this amendment the ministry for foreign affairs channel would have been emphasized, departures from the main rule would not necessarily have required agreements. The second amendment, which was proposed by Czechoslovakia and Albania,[4] likewise sought to eliminate the initial

[2] *Ibid.*, 1957: II, pp. 142–143.
[3] UN *Doc.* A/Conf.20/C.1/L.306.
[4] UN *Doc.* A/Conf.20/C.1/L.303.

phrase "Unless otherwise agreed", and to give the receiving State the possibility of unilaterally prescribing or admitting direct contacts bypassing the ministry for foreign affairs. Under that amendment the phrase "or with other departments and institutions to the extent compatible with existing rules or established practice in the receiving State" would be added at the end of the draft provision.

In the debate the Czechoslovak delegate stressed that the procedure varied from state to state and that the convention should be phrased accordingly. The amendment would, he said, enable states whose procedure was less rigid than that of other states to maintain their liberal practice.[5] This amendment was adopted by 37 votes to 12 and 20 abstentions. The article—no. 40—was thereafter adopted as a whole by 61 votes to nil and 6 abstentions. It read:

> All official business with the receiving State entrusted to a diplomatic mission by its Government shall be conducted with or through the Ministry for Foreign Affairs of the receiving State, or with other departments and institutions to the extent compatible with existing rules or established practice in the receiving State.

The Yugoslav delegate thereafter explained that he had abstained from voting, as he had felt that the communications of a mission with a host state would become complicated if several ministries could deal with it officially. This was the reason, he said, why the International Law Commission had wisely mentioned only the ministry for foreign affairs. The delegates of Mexico, Guatemala, Spain and Portugal explained that that they had abstained from voting as in their countries the ministry for foreign affairs was the only official agency competent to deal with diplomatic missions of foreign States.[6]

After having been sent to the Drafting Committee from the Committee of the Whole, the text emerged somewhat modified:

> 2. All official business with the receiving State entrusted to the mission by the sending State shall be conducted with or through the Ministry for Foreign Affairs of the receiving State or such other ministry as may be agreed and also with other departments and

[5] UN Conference on Diplomatic Intercourse and Immunities, Vienna 2 March–14 April 1961. *Official Records,* vol. I, p. 210 (Geneva 1962).
[6] *Ibid.,* p. 211.

agencies to the extent compatible with existing rules or established practice in the receiving State.[7]

With this formulation there remained a possibility of deviations from the main rule by agreement as well as by unilateral acts of the receiving State. When this draft came before the plenary session, it was, however, subjected to further revision.[8] The Mexican delegate declared that under Article 3 of the current Mexican decree concerning protocol the Ministry for Foreign Affairs was the only official channel between diplomatic missions and national agencies. The Indian delegate requested a separate vote upon the final phrase "and also with..." which, as he pointed out, had not been contained in the draft presented by the International Law Commission. The Conference decided by 33 votes to 31 and 9 abstentions to eliminate the final phrase. The clause, thus abbreviated, was thereafter adopted as a whole by 64 votes to nil, with 9 abstentions. It thereby acquired its final, current formulation, the substance of which is in line with the provision proposed by the International Law Commission. It requires that as a rule the communications of a mission shall be addressed to the ministry for foreign affairs, but opens the possibility of deviations on the basis of agreements between the sending and the receiving state.

Conclusions

Evidently several members of the International Law Commission were originally not receptive to the idea that the official channel diplomatic mission—ministry for foreign affairs be proclaimed in a formal rule, conscious as they were of the many exceptions that existed to such a rule in practice. Other members, who admitted the existence of these exceptions, were nevertheless anxious that the main rule should find expression. They pointed *inter alia* to the desirability that diplomats be prevented from using inappropriate channels to influence the domestic and foreign policy of the host countries, and to the fact that decentralized communications might lead to contradictory positions being taken by the authorities of a host country.

The difference of opinion which thus existed in the Interna-

[7] UN *Doc.* A/Conf.20/L.2/Add. 1.
[8] *Official Records,* cited above, p. 38.

tional Law Commission was not serious. The problem was largely how the exceptions from the main rule were to be formulated: were they to flow from an agreement between the parties or could the host country, unilaterally, prescribe deviations from the rule? In the Commission as well as in Vienna the former solution prevailed. As was made clear in the Commission, however, agreements on exceptions would not necessarily have to be express, but could be implied and tacit. In view of the fact that a diplomatic mission can only exceptionally be expected to have any objection to direct communications with specialized authorities, the practical effect of the rule is—as pointed out above—about the same as if the right to determine to what extent exceptions from the main rule are to be admitted or required had been conferred upon the host country alone. In any case it is an important fact that under the convention a host country is never obliged to tolerate direct communication between missions and specialized authorities.

The rule which was incorporated in Article 41: 2 of the Vienna convention and the discussions which preceded its formulation reflects rather well the attitudes which have been taken in state practice, as that practice was described in the first part of this paper. The main rule that the ministries for foreign affairs shall be the channel of communication for the diplomatic missions has often been maintained in the intercourse between states. As was shown by the Dutch and Nigerian circulars[9] the risk which otherwise arises of inconsistencies in external affairs has been advanced as a rationale of the rule. The discussion above further demonstrates that in practice exceptions from the main rule occur, particularly regarding contacts of expert members of diplomatic missions—for example, military attachés—and regarding simple inquiries, e.g. about matters which are public. The discussion further demonstrates that host countries often emphasize that even such exceptions require their consent in the form of an agreement.

II. CONSULATES

Swedish practice

The Swedish view of the right of consulates to communicate with authorities in the host country is reflected in §§ 20–21 of

[9] See above, pp. 17 f.

the general instruction—of 3 February 1928—for Swedish diplomatic missions and consulates:

> A head of mission and a consul shall, each in his area of work, protect Swedish interests, promote the Swedish economy and assist Swedish citizens.
>
> The political interests of Sweden abroad are in the care of the head of mission concerned, who is to maintain the contacts with the government of the host country. Authority to contact the government cannot, however, under current international custom be attributed to a consul. In cases requiring such contacts, a consul must request a head of a diplomatic mission to take steps for this purpose ...

The view thus reflected has found further expression in positions taken in concrete cases involving contacts with authorities in Sweden. One of these cases occurred in January 1938. In a *note verbal*[1] the German diplomatic mission to Stockholm informed the Minister for Foreign Affairs that by a letter signed "for the German Minister and Consul General" and sent to a local Swedish ecclesiastical registry—the State Church in Sweden being responsible for the registration of all births, marriages, deaths, etc.—a request had been made for register extracts regarding a certain person. The registry had replied, however, that it was not authorized to send the documents directly and had advised the mission to apply to the Ministry for Foreign Affairs. For that reason the mission requested the Ministry to inform the registry that its letter to the registry had been sent from the consular department of the mission, as was stated in the final sentence of the letter.

The German note caused the Ministry to request the registry to send the documents to the Ministry, through which they were later transmitted to the German mission. On the Ministry's copy of its own letter to the registry there is an interesting annotation, by the acting head of the legal department, to the effect that the head of the German mission also had an exequatur as a Consul General of Germany. The annotation continues:

> ... He is thus undoubtedly entitled to communicate directly or through subordinates with ecclesiastical registries in Sweden. The correct form of such correspondence would seem to require the use

[1] German Legation at Stockholm to the Swedish Ministry for Foreign Affairs, note verbal of 7 January 1938, file P 4 S.

> of paper stamped "Deutsche Gesandtschaft, Konsulatsabteilung" and signed not "For the German Minister and Consul General" but "For the Consul General". If a vicar receives a letter stamped "Deutsche Gesandtschaft" and signed "For the German Minister and Consul General" he would seem to be justified in concluding that it emanates from the German mission in its diplomatic capacity.

The annotation further reveals that its author had explained the foregoing to an officer of the German mission and that the latter had no objection or comment to make except that the mission had never previously encountered such a conscientious vicar and that therefore no difficulties had arisen. It may be concluded that the position actually taken by the local authority in this case might not have been typical. Nevertheless, the note by the acting head of the legal department seems significant as evidence of the attitude of the Ministry for Foreign Affairs.

A memorandum drawn up in the Swedish Ministry for Foreign Affairs in 1956 also illustrates the difference between the rights of diplomatic missions and that of consulates to contact local authorities.[2] The German Ministry of Justice appears to have found it peculiar that the German consulates in Sweden were entitled to communicate direct with the county administrations in matters regarding the international convention on civil procedure, while the Embassy, albeit the consulates' superior authority, had a more limited right. The memorandum indicated that although the German Embassy had a consular department, no one in that department possessed an exequatur. "The Germans cannot, therefore, claim the right to communicate with internal authorities", the memorandum went on. That permission could be granted from case to case was another matter. Having regard to Swedish internal law on the relevant kind of judicial assistance to foreign authorities[3]—which law expressly allows requests from certain foreign countries to be made by consuls of such states—permission ought not to be granted in the present case. The memorandum finally recorded that the German mission had been told that "if a consular organization had been duly presented and approved there would be no obstacle to direct correspondence".

[2] Memorandum of 2 June 1956, file P 4 S.
[3] Royal decree of 30 April 1909.

Practice in other countries

From the practice in other countries than Sweden some cases may be reported which are relevant to the rule regarding communications between consulates and authorities of host countries.

In 1934 the American Consul General in Shanghai was asked by the Chinese Minister of Finance to communicate to the President of the United States a question regarding the future policy of the United States as to the purchase of silver. The State Department declared that the message ought to have been sent through the Ministry for Foreign Affairs and the Consul General was instructed to inform his counterpart in similar cases—unless there were special reasons for not doing so—that the customary diplomatic channel should be used.[4]

In the same year, 1934, the Swedish Minister to Teheran reported that by a circular note the Persian authorities had requested that consulates should address their communications to central authorities through the provincial governor. No obstacle was raised, however, against communications between consulates and local authorities.[5]

A third case, also emanating from American practice, was reported by the Swedish Consul to Manila on 31 May 1937:[6] In a letter addressed by the American High Commissioner to all consulates at Manila reference was made to a law adopted by Congress and prescribing that the foreign affairs of the Philippines should be under American control. The letter further requested that "all official communications addressed to the Commonwealth Government or any of its agencies be forwarded to this office for transmittal to the Commonwealth Government". The Swedish Consulate in Manila later (4 August 1937) reported that the State Department of the United States had prescribed that with respect to the protection of citizens or their interests foreign consulates could address themselves directly to local authorities with the possibility of appealing to American authorities. However, it was further stipulated:

> II. Subjects of a political character and questions relating to exequaturs, visits of foreign war vessels and airplanes, and other formal

[4] Hackworth, G. H., *op. cit.*, vol. IV, p. 612.

[5] Swedish Legation at Teheran to the Swedish Ministry for Foreign Affairs, 22 March 1934, file P 4 S.

[6] Swedish Consulate at Manila to the Swedish Ministry for Foreign Affairs, 31 May and 4 August 1937, file P 4 S.

> matters should be dealt with as usual through diplomatic channels, i.e., through the Embassy or Legation in Washington of the country concerned.[7]

The doctrine

In the doctrine a fairly wide measure of agreement exists attributing to consulates the right to communicate with the authorities of the host countries. Fauchille states in this regard:

> ... Dans les pays de chrétienté, n'étant pas agents diplomatiques, les consuls ne peuvent conférer qu'avec les autorités du lieu de leur résidence. S'ils croient utile ou nécessaire de faire parvenir une protestation ou une réclamation au gouvernement central de l'Etat, ils doivent s'adresser au représentant diplomatique de leur pays.[8]

The Harvard draft convention on the rights and functions of consuls contains in Article 11 a provision regarding the rights of consuls to communicate with the authorities of the host country. It reads:

> A receiving state shall permit a consul to address the appropriate authorities within the consular district concerning matters within the scope of his consular functions. If the sending state has no diplomatic representative accredited to the receiving state, the receiving state shall permit a principal consul to address directly the government of the receiving state.[9]

In the comments on the article quoted it is reported that local authorities sometimes refuse to respond to communications from consulates for the reason that they consider the particular matter submitted to them as not falling within the consular function. It is further said that although the difference between these functions and diplomatic functions lies in part in the different channels of communication which they normally use to the receiving state, and in the more restricted area of matters that are made the subject of consular intervention, it lies also in part in the more limited aim of such communications: "While the consul may request information, initiate proceedings, make representations, or even sug-

[7] Quoted also in Hackworth, *op. cit.*, vol. IV, p. 823.
[8] Fauchille, P., *Traité de droit international public*, Tome I: 3 (Paris 1926), p. 131.
[9] *American Journal of International Law*, vol. 26 (1932), Suppl. p. 302.

gest courses of action, he cannot present formal demands, enter into formal negotiations or agree to settlements."[1] The comment thereafter points to features which may be discerned in provisions of bilateral consular conventions. Some of these features are said to have been used as a model for the article proposed.

Oppenheim pronounces in the same sense as the Harvard draft:

> The official position of consuls, however, does not involve direct intercourse with the Government of the admitting State. Consuls are appointed for *local* purposes only, and they have, therefore, direct intercourse with the local authorities only. If they desire to approach the Government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.[2]

The German *Wörterbuch des Völkerrechts* is somewhat more detailed:

> Die Konsuln haben keine unmittelbar politischen Aufgaben; sie dienen nicht dem Verkehr ihrer Regierung mit der des Empfangsstaates. Dazu sind vielmehr die diplomatischen Vertreter berufen. Im allgemeinen ist es diesen auch vorbehalten, an die Regierung des Empfangsstaates heranzutreten, während die Konsuln sich nur an die mittleren und unteren Behörden wenden können. Ist es erforderlich, eine Angelegenheit aus dem Aufgabenbereich eines Konsuls an die Regierung heranzutragen, so muss die diplomatische Vertretung damit befasst werden. Allerdings ist es den Staaten unbenommen, die Konsuln in beiderseitigem Einverständnis in den Verkehr zwischen den Regierungen einzuschalten, ohne dass ihnen dadurch eine diplomatische Stellung eingeräumt würde. Dies geschieht häufig dann, wenn keine diplomatischen Beziehungen bestehen. Eine solche Tätigkeit beruht jedoch immer auf besonderen Aufträgen und gehört nicht zu den typischen Obliegenheiten der Konsuln.[3]

The same position is taken in the latest monograph on the subject:

> The right of consuls to communicate with officials of the receiving state is, however, a qualified one. While they may address themselves to the appropriate authorities in their districts, they may not, as a general rule, correspond direct with the central government except in the absence of a diplomatic representative. Where they must deal with the central Government, they may be required

[1] *Ibid.*, p. 303.
[2] *International Law*, vol. I (8th ed. by Lauterpacht, London 1955), p. 840.
[3] Vol. 2 (2nd ed. by Schlochauer, Berlin 1961), p. 282.

> to channel their communications to officials of certain designated ranks . . .[4]

The International Law Commission

The question which authorities of a host country a consulate is entitled to approach has been made the subject of an article in the convention on consular relations, signed at Vienna in 1963. Since the *travaux préparatoires* behind the article in the International Law Commission serve to illuminate the problem and the meaning of the article, they will be discussed below.[5]

In his first report on consular relations submitted by Mr. Zourek, the Rapporteur of the Commission on this question, in 1957, a provision was found—Article 24—reading as follows:

> Communications with authorities of the state of residence.
>
> The procedure for communication between the consular representative and the authorities of the State of residence shall be determined by local custom or by the laws of that State.[6]

The comment on this provision emphasized that the host country was competent to regulate the question of the channel of communication of consular organs and that practice varied on the point. In some countries the consulates were said to be entitled to communicate with local authorities. The right of consulates to communicate with central authorities was also said to vary from country to country. In certain states they were allowed to have contacts with the ministries for foreign affairs, whereas in others—and under some consular conventions—their communications with the ministry for foreign affairs had to be channelled through a diplomatic mission. In yet other countries contacts with central

[4] Lee, L. T., *Consular law and practice* (London 1961), p. 274.

[5] It may here also be noted that a precursor to the article of the Vienna convention is to be found in the Havana convention of 1928, to which, however, only a few states have adhered. Article 11 of the Havana convention stipulates:

"In the exercise of their functions, consuls shall deal directly with the authorities of their district. Should their representations not be heeded, they may then pursue them before the government of the state through the intermediary of their diplomatic representative, but should not communicate directly with the government except in the absence or non-existence of a diplomatic representative." Cited from *American Journal of International Law,* vol. 26 (1932), Suppl., p. 379.

[6] *Y.B.I.L.C.* 1957: II, p. 98.

authorities or authorities outside the consular districts were permitted only through the diplomatic channel. Under some provisions, like the one included in the Havana convention—quoted above—consulates are permitted to communicate with central authorities if contacts with local authorities do not lead to any result or if their state has no diplomatic representation in the country.

In the second report of Mr. Zourek the exclusive competence of the host country to regulate the channels of contact was less clearly enunciated:

> The procedure for communication between consuls and the authorities of the receiving State shall be determined by usage or by the laws of that State.[7]

The Commission's most penetrating discussion of the matter took place during its 12th session in 1960.[8] There then proved to be almost general agreement that the proposed text attributed too wide a competence to the host country. One member of the Commission maintained that the law of the host country could regulate the matter only in so far as its provisions complemented and did not deviate from applicable rules of international law. Most of the members of the Commission held that under international law consulates had at least a minimum right of communication with the authorities of the host country and this right comprised contacts with local authorities. It was further noted that, beyond that right, practice varied and that the article to be drafted must not, at any rate, exclude the possibility of contacts with the ministry for foreign affairs and other central authorities.

Different opinions were voiced as to whether contacts of the latter kind ought to be permitted and, if so, to be expressly provided for as a right. According to the opinion advocated by Mr. Ago, among others, such a right was needed: one function of consulates was to protect their own citizens. This involved not only action vis-à-vis local authorities but also appeals to central authorities. In many countries, moreover, some of the interests with which consulates concerned themselves, e.g. questions of patents, were handled by central, not local, authorities. In matters touching such interests the consulates should have the opportunity to communicate with these central authorities. On the other hand,

[7] *Y.B.I.L.C.* 1960: II, p. 36.
[8] *Y.B.I.L.C.* 1960: I, pp. 35–41.

it was maintained, especially by the Rapporteur, Mr. Zourek, that such rights would go beyond current general practice and amount to an innovation.

One member maintained that if—contrary to what he considered to be existing law—consulates were expressly accorded the right to communicate with ministries for foreign affairs, the distinction between consulates and diplomatic missions might as well be abolished. The Rapporteur held that a right on the part of the consulates to communicate with the central authorities would make the consulates more privileged than the diplomatic missions. Against that argument it was objected, however, that the essential difference between the two services lay in their functions, not in the authorities with which they were allowed to communicate. The diplomatic missions had political tasks and usually handled them with the ministry for foreign affairs and were not allowed to communicate directly with other authorities.[9] The consulates concerned themselves with administrative and judicial questions. When they devoted themselves to these consular matters, they ought to be able to communicate with central as well as local authorities. Only exceptionally would they need to communicate with the ministry for foreign affairs and they should not, like diplomatic missions, be entitled as a matter of course to address that ministry.

As against these arguments, the Rapporteur expressed the view, first, that consular matters were not free from political elements, secondly, that it would be anomalous if consulates were to be entitled to communicate with central authorities generally, but not with the ministry for foreign affairs.

On no occasion during the discussions was any reference made to one possible justification for a distinction in the right to communications. This is the circumstance that the need for national coordination of the position of administrative authorities may be felt more strongly in matters—of a political kind—which are generally handled by diplomatic missions, and lead to demands that the ministry for foreign affairs shall be the sole channel of contact, than it is in matters—of an administrative and judicial character—which are usually handled by consulates and in which decentralized communications with authorities—central or local—may be permitted.

[9] *Ibid.*, p. 39 (Ago).

After its discussion of the proposal of the Rapporteur the Commission referred the matter to the drafting committee, which later presented a new draft provision:

> Communications with the authorities of the receiving State.
>
> 1. In the exercise of the functions specified in article 4, consuls may address the authorities which are competent under the law of the receiving State.
>
> 2. Nevertheless, consuls may not address the Ministry of Foreign Affairs of the receiving State unless the sending State has no diplomatic mission to that State.
>
> 3. The procedure to be observed by consuls in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the laws and usages of the receiving State.[1]

The comment on this draft provision explained—somewhat surprisingly in view of the preceding discussion—that "it is a well-established principle of international law that consuls ... may address only the local authorities. The commission was divided on the question of what these authorities are." Thereafter a brief account was given of the various opinions which had been voiced in the Commission and the text proposed was said to be a compromise. Each state would itself designate the competent authorities which the consuls could address, central authorities not excluded.[2] The Commission briefly discussed the new draft. Sir Gerald Fitzmaurice declared that the aim was to cover the many cases in which matters were handled by central authorities and no competent local authority existed in the district of the consulate. The new draft was adopted unanimously as Article 33.[3]

The proposals of the Commission were considered in the sixth committee of the General Assembly during its 15th session (1960),[4] but no comments were made of interest to the present discussion. The draft was also submitted to the member states of the United Nations and some of the replies submitted to the Secretary General had reference to Article 37. The Belgian comment urged that the article should reflect the "well-established principle of international law ... that consuls, in the exercise of their functions,

[1] *Y.B.I.L.C.* 1960: II, p. 166.
[2] *Ibid.*
[3] *Y.B.I.L.C.* 1960: I, p. 304.
[4] *Official Records of the General Assembly,* 6th Committee, Fifteenth Session (1960), pp. 5–115.

may apply only to the local authorities, i.e. to the authorities of their consular district . . .". Belgian consuls were said never to be entitled to approach central authorities or local authorities outside their districts, except in cases where there was no Belgian diplomatic mission in the country.[5] The comment submitted by the United States urged that consuls should have access to public records and be entitled to communicate with local authorities.[6]

The Rapporteur did not propose any modifications in the article in his third report, but emphasized that the law of each state will determine which authorities consulates may address and that central authorities are not thereby excluded.[7]

Little new was said in the discussion on this matter in the International Law Commission during its 13th session (1961). The Rapporteur noted that the provisions of the draft would constitute *jus dispositivum,* and that states could thus make reciprocal arrangements permitting consulates to communicate with ministries for foreign affairs.[8] Mr. Ago declared that in Article 37: 1 the Commission "had sought to indicate that the authorities which might be addressed by consuls were determined *ratione materiae* by the general legal system of the receiving State, for some matters were within the competence of central and others within that of local authorities". This idea had not found clear expression in the comment that had been adopted.[9] The Rapporteur declared, however, that the intention had undoubtedly been to say in the comment that each state determined which authorities were competent *ratione materiae*.[1] The article was again referred to the drafting committee, and came back—as no. 35—reading as follows:

> 1. In the exercise of the functions specified in article 4, consular officials may address the authorities which are competent under the law of the receiving State.
>
> 2. The procedure to be observed by consular officials in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the municipal law and usage of the receiving State.[2]

[5] *Y.B.I.L.C.* 1961: II, p. 134.
[6] *Ibid.,* p. 167.
[7] *Ibid.,* p. 68.
[8] *Y.B.I.L.C.* 1961: I, p. 100.
[9] *Ibid.,* p. 101.
[1] *Ibid.*
[2] *Ibid.,* p. 245.

This text was adopted unanimously and was included—as Article 38 with a reference in paragraph 1 to Article 5 instead of Article 4—in the final draft presented by the Commission.[3] Added to the article was a comment which more clearly than the previous one, but still not without ambiguity, indicated that under the convention consulates were entitled to "apply to the authority which, in accordance with the law of the receiving State, is competent in a specific case", i.e. competent *ratione materiae*. As in the earlier version of the comment it was provided that the *procedure* for communicating was subject—under paragraph 2—to the law of the host country. By way of example, attention was drawn to the fact that the law of certain countries requires consular officers wishing to communicate with the government of the host country to do so through their diplomatic mission.

With the interpretation thus given the value of the right stipulated in paragraph 1 would seem, however, to have become limited. Under that paragraph consulates ought to be entitled to communicate even with a government if that body was the authority competent *ratione materiae*. Under paragraph 2 consulates would not be entitled to communicate with the government of the country, if an internal provision existed to the effect that communications with the government must be channelled through the diplomatic mission. The same argument could obviously exclude direct communication with *any* central authority which might be competent *ratione materiae*.

The text finally adopted was considered by the sixth committee of the General Assembly at its 16th session (1961).[4] The provision discussed here was not, however, touched upon by any speaker in the sixth committee at that or the subsequent session.[5]

The Vienna Conference 1963

At the conference in Vienna in 1963 a number of amendments were tabled regarding Article 38. Only one of these was maintained, however. This amendment,[6] which with minor modifica-

[3] *Y.B.I.L.C.* 1961: II, p. 113.

[4] *Official Records of the General Assembly*, 6th Committee, Sixteenth Session (1961), pp. 65–119.

[5] *Official Records of the General Assembly*, 6th Committee, Seventeenth Session (1962).

[6] UN *Doc.* A/Conf.25/L.145, 18 March 1963.

tions was adopted by the second committee of the conference by 50 votes to nil with 13 abstentions, reads—as finally adopted:

> In the exercise of their functions, consular officials may address
> (a) the local competent authorities of their district;
> (b) the central authorities of the receiving state if this is allowed by the laws, regulations and usages of the receiving State or by the relevant international agreements.

As was stressed by the Belgian delegate[7] in the course of the committee's debate, the amended text—in contradistinction to the text submitted by the International Law Commission—was explicit on the right of the consuls to communicate with the authorities of the host country. The amended article distinguished between the right of consuls to communicate with the local authorities of their district, which was recognized in international law, and their right to communicate with the central authorities, which existed only in so far as it was permitted by the law and usage of the host country and by international agreements. The text adopted by the committee was later unanimously approved by the plenary session of the conference[8] and was thus incorporated in the final text of the convention. In this way the question of the rights of consulates to communicate with the authorities of the host countries came happily to be solved with greater clarity than had been the case in the proposal of the International Law Commission and in the discussion of the Commission.

It should further be noted here that the 1963 Vienna Convention on consular relations also contains a provision which regulates communications between the consular department of a diplomatic mission and the authorities of a host country. The International Law Commission's final proposal on this point—Article 68: 3—reads:

> In the exercise of consular functions a diplomatic mission may address authorities in the receiving State other than the ministry for foreign affairs only if the local law and usages so permit.[9]

As the Commission stressed in its own comment on the draft article, this provision tied in with Article 41: 2 of the 1961 Vienna Convention on diplomatic relations, which states that the official

[7] UN *Doc.* A/Conf.25/C.2/SR.20, 19 March 1963, p. 9.
[8] UN *Doc.* A/Conf.25/SR.13, 19 April 1963, p. 9.
[9] *Y.B.I.L.C.* 1961: II, p. 127.

contacts of a diplomatic mission with a host country shall be maintained with or through the ministry for foreign affairs or—after special agreement—with another department in the host country. The Commission's proposal further left open the possibility of communications between the consular department of a diplomatic mission and other authorities of the host country, in accordance with the law and usage of that country.

The Commission thus in principle referred consular departments of diplomatic missions to diplomatic channels, because these relations were maintained by diplomatic officers. At the 1963 Vienna conference, however, the United Kingdom submitted a draft amendment, which instead, in principle, referred the relations to the channels customary for consulates, namely, local authorities. The reason advanced was that the consular character of the matters handled required that the same channel be used as for other consular matters.[1] In spite of considerable opposition, especially from the Communist states,[2] the proposal of the United Kingdom was later incorporated in the convention. It read:

> In the exercise of consular functions a diplomatic mission may address
> (a) the local authorities of their district;
> (b) the central authorities of the receiving State if this is allowed by the laws, regulations and usages of the receiving State or by the relative international agreements.

Conclusions

In the International Law Commission as well as at the Vienna Conference it was agreed that, under existing international law, consulates may claim the right to communicate with local authorities. That position is also clearly supported by practice. The first proposal for a formulation of what later became Article 38 of the Vienna convention of 1963, and which only referred the matter to be settled by the local law and usage, was held to give excessively wide powers to the host country.

The only limitation thought to exist in the right of consulates

[1] UN *Doc.* A/Conf.25/C.1/L.153, 21 March 1963.

[2] See the record of the 26th meeting of the first committee in UN *Doc.* A/Conf.25/C.1/SR.26, 26 March 1963, pp. 5 ff. and the record of the 19th plenary meeting in UN *Doc.* A/Conf.25/SR.19, 22 April 1963, pp. 3 ff.

to communicate with local authorities in the host country resulted from limitations in the functions of consulates. In the Vienna convention these were defined in a special article. From the doctrine and from the discussion in the International Law Commission it may be deduced that it is not considered to be a consular function to handle political matters. The comment on the Harvard Draft Convention states that consuls cannot "present formal demands, enter into formal negotiations or agree to settlements".[3] The limitations upon their functions would thus lie not only in the area of their activity, but also in the character of that activity. There would, in particular, be excluded contacts reflecting or aiming at positions binding under international law. Such contacts would be reserved for the diplomatic missions.

The discussion in the International Law Commission as well as doctrine and practice demonstrates that a right for consulates to communicate with local authorities is no longer enough. Adequately to fulfil their functions consulates in many cases need to communicate with central authorities, in order to appeal in matters which have arisen and have been handled locally, or they may need to do so because the interest they wish to protect is administered by a central authority of the host country. The attitudes of states to these new needs of consulates vary considerably. In the International Law Commission it was urged—without any objections being raised—that no right to such contacts could be claimed on the basis of existing international law; on the other hand, there seemed to be a consensus that such a right might be needed. The result was a compromise which attributed to the consulates a right in principle, when exercising their functions—with the limitations inherent in that formula—to communicate with any authority which the law of the host country indicated as competent *ratione materiae*. That right was, however, at the same time undermined by the attributing to the host country of a right unilaterally to regulate the procedure for the contacts, and thereby even to prescribe that communication with certain authorities must not be direct.

No express rule prohibiting consulates from communicating with the ministries for foreign affairs was included in the text finally adopted by the Commission. However, on account of the limitations in the functions of consulates it may be assumed

[3] See above, p. 32; see also the quotation from Fauchille, above, p. 31.

that such communications would take place only in exceptional cases.

The text finally adopted at the Vienna conference expresses more clearly the unconditional right of the consulates, in exercising their functions, to communicate with the local authorities which the law of the host country indicates as being competent *ratione materiae*. It also spells out in unequivocal language that the right of consulates to contacts beyond this point—i.e. contacts with central authorities—depends upon the law or usage of the host country or upon existing agreements.

The provision which the International Law Commission proposed, as well the provision which was eventually adopted by the Vienna Conference, implies that in practice consulates will, on the whole, be allowed to communicate with all authorities competent *ratione materiae,* central as well as local, with the exception of the ministry for foreign affairs. Under the 1961 Vienna convention, on the other hand, the diplomatic missions will be allowed largely to communicate with the ministry for foreign affairs, but not with the specialized authorities. This result may seem somewhat paradoxical, especially where the consular and the diplomatic service of a state are integrated. As was emphasized in the Commission, however, the result is only a consequence of the distribution of functions between the consular and the diplomatic service.

The consular service fulfils functions which require communication with different specialized authorities—courts, shipping authorities, patent authorities, etc. Many of the matters concerned are of such a kind that the host country does not need to control and to coordinate the positions taken by its specialized authorities vis-à-vis the consulates. Moreover, the risk is slight that internationally legal binding obligations will arise from these contacts. On the other hand, while fulfilment by diplomatic missions of their duties might often be easier if direct contacts with specialized authorities were established, the matters handled by these missions are not infrequently of such a kind that the host country has a need both for control and coordination and a check against unintentional legal obligations. For that reason diplomatic missions are required in principle to negotiate their matters with the ministries for foreign affairs.

Against this background it seems only logical that under the new Vienna convention consular departments of diplomatic missions are required to process their matters through the same chan-

nels as consulates and are, thereby in practice, largely excluded from contacts with the ministries for foreign affairs. The functions of these departments are, indeed, the same as those of consulates. It is then only natural that they should be accorded rights to the same contacts. The fact that the consular function is exercised by employees who have formal diplomatic status seems irrelevant.