
Rapport de la Commission spéciale établi par M. Ph. W. Amram

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Report of the Special Commission

I Introduction

As the result of a resolution adopted at the 1960 Session of the Conference¹, the Conference took the first step in a comprehensive study of the broad field of international litigation, i.e. the study of the service abroad of judicial and extrajudicial documents. Three fundamental areas are involved within the broad field: the international aspects of the commencement of litigation; the international aspects of the adjudicative process; and the international aspects of the enforcement of a final judgment. The first and second of these areas had been considered by the Conference as early as 1904 leading to a Convention on Civil Procedure of 17 July, 1905, which dealt with service of documents abroad and the securing of evidence abroad. These two areas were again reviewed in 1954 leading to a revised Convention on Civil Procedure of 1 March, 1954.

The resolution of the Ninth Session required, in effect, the re-study of that part of the 1954 Convention (Chapter I) which dealt with service of documents. At the Tenth Session in 1964, Chapter I of the 1954 Convention was revised. Also, the third of these areas, the recognition and enforcement of foreign judgments was explored by the Conference. This had not been included in either the 1905 or the 1954 Conventions.

A Convention on the Service of Documents was completed. This has been ratified by the United Kingdom and by the United States; ratification is under way in several other Member States and it is anticipated that the Convention will be in force early in 1969.

In addition, considerable progress was effected on a Convention on the Recognition and Enforcement of Judgments and a Special Session was organized in 1966 to complete a final draft. This Draft, and a separate Protocol, will be further discussed at the Eleventh Session in October 1968.

Because of the substantial success of the Convention on the Service of Documents, the United States proposed to complete the re-study and to include in the agenda of the Eleventh Session, the second of the areas listed above in the form of a revision of Chapter II of the 1954 Convention.

The United States, in support of its proposal, prepared a careful supporting Memorandum which suggested

the framework of a proposed programme. This concluded—

a methods to improve and simplify the use of letters rogatory;

b inclusion of other techniques for the taking of evidence abroad;

c methods to reconcile the differing legal philosophies of the Civil Law, Common Law and other systems with respect to the taking of evidence;

d methods to satisfy doctrines of judicial sovereignty; and

e methods to assure that evidence taken abroad would be of maximum use in the forum where the action was pending.

Following the decision of the Member Governments to include this topic on the agenda, the Secretariat of the Conference prepared a Questionnaire to Governments which sought replies within the ambit of the points mentioned above. An explanatory analysis prepared by the Secretariat, a copy of the Memorandum of the United States, and a list of existing bilateral conventions on the topic were attached to the Questionnaire. A Special Commission of Experts was convened to meet at The Hague from June the 17th to June the 22nd, 1968. Thirteen Members of the Conference, namely Austria, Belgium, Denmark, Finland, France, the German Federal Republic, Luxembourg, the Netherlands, Spain, Switzerland, the United Arab Republic, the United Kingdom and the United States sent an expert representative to the Meeting. Ten full sessions were held.

Dr Hans Arnold of the German Federal Republic was elected Chairman. Judge Abdel Salam Balbaa of the United Arab Republic was elected Vice-Chairman. Mr Philip W. Amram of the United States was elected Rapporteur. Two drafting Committees were appointed. Professor Berthold Goldman of France was appointed Chairman of the Committee which drafted the articles on letters of request: Mr Amram was appointed Chairman of the Committee which drafted the articles on consuls and commissioners. Each of these officers of the Special Commission participated actively in the debates, in his separate capacity as the Expert of his country. Prior to the opening of the Special Commission, the Secretariat had received and had transmitted to the Member Governments the responses to the Questionnaire which had been thus far received from Member Governments. At the opening session newly-received responses from several other Governments were distributed. The Special Commission was honoured by the presence of Mr de Winter, President of the Conference, who welcomed the Experts present in the name of the Netherlands Standing Government Committee. Mr de Winter emphasized that it was not essential that the Special Commission prepare a text of a draft convention for the October Session. However, the work of the Special Commission proceeded so effectively that a draft text was prepared, in both French and English, which is the subject-matter of this Report.

The Commission decided promptly to subdivide its work into three sections: first to consider the improvement of the existing system of letters of request; second, to consider the scope of the right of diplomatic and consular agents to take evidence; third, to consider the scope of the right of commissioners to take evidence.

The Commission recognized the immense value of the network of bilateral conventions negotiated by the United Kingdom beginning in 1922 and these were frequently referred to throughout the meeting.

It was also agreed that specific attention must be given to the question of the application of compulsion against

¹ *Actes et Documents de la Neuvième session*, Vol. I p. 314.

an unwilling witness and to the recognition of the privileges and exemptions of a witness from the duty to appear, to take an oath, or to produce evidence. The Special Commission approached its task in the framework of revising Chapter II of the 1954 Convention by a method paralleling the method used in 1964 when Chapter I was revised. As a result, there was immediate agreement that the 'Central Authority' concept used in the revision of Chapter I should be incorporated where possible in the proposed revision of Chapter II. Finally, the Chairman summed up the task of the Special Commission most skilfully in his statement that the techniques for the taking of evidence must be 'utilizable' in the eyes of the State where the lawsuit is pending and must also be 'tolerable' in the eyes of the State where the evidence is to be taken.

II The fundamental questions involved

As stated above, there are three possible devices for the taking of evidence abroad: (1) letters of request (2) the use of consuls and (3) the use of commissioners. Every country represented on the Special Commission, and every country which answered the Questionnaire, recognizes and applies the device of letters of request. Here, the task of the Commission was merely to 'improve' the existing practice, particularly in the areas of transmission, reduction of formalities, the language and translation problems, the privileges and immunities of witnesses and the form of the execution of the letters. No basic questions of legal philosophy and governmental concepts of sovereignty were presented. To the contrary, the other two devices directly present these basic questions. Depending on each country's legal philosophy and concepts of sovereignty, practically every permutation and combination of possible rules presently exists.

A few illustrations will suffice. The internal law and practice of some countries give unlimited freedom to a foreign consul or to a commissioner appointed by a foreign court to take evidence of anyone without compulsion. The internal law and practice of some countries forbid a consul or a commissioner from taking any evidence from anyone. The internal law and practice of some countries permit a consul to take evidence, but only of his own nationals, or sometimes nationals of third countries, other than the State where he is posted, or sometimes only if the witness testifies without an oath.

Speaking in the broadest and over-simplified terms the problem may be stated in the framework of a 'Common Law rule', and a 'Civil Law rule'.

Under the Common Law system the preparation of the case for trial and the obtaining of the necessary evidence of the witness is not a function of the judge or of the judicial machinery. It is the function of the parties and their lawyers, who do so on a 'private' basis. Under the Civil Law system, the obtaining of the evidence is a function of the judge or of the judicial machinery, in which the parties and their lawyers may be permitted to assist, but on a 'public' basis.

Because of this difference, the act of taking evidence in a Common Law country of a willing person, without compulsion, and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter, in which the host country has no interest and in which it does not wish to participate. To the contrary, the same act in a Civil Law country may be a public matter, and may constitute the performance of a public judicial act by an unauthorized person. It may violate the 'judicial sovereignty' of the host country, unless official permission is obtained.

The letter of request, of course, poses no question, because it is performed by the judge or his nominee in the State of execution. It is the action of a consul or a commissioner which poses the question.

The task of the Special Commission, therefore, was to harmonize these different concepts, and to locate a procedural device which would be acceptable to all the differing systems and which would provide the maximum in practical benefits.

The Rapporteur is of the opinion that this Report can be written most effectively by an article by article analysis of the proposed text of the draft Convention. In the discussion of each article the problems which were debated during its drafting can be presented and analyzed.

Articles 1 to 12 cover letters of request ('commissions rogatoires') and revise articles 8 to 16 of the 1954 Convention. Articles 13 to 17 are entirely new and govern the power of consuls to take evidence. Articles 18 to 20 are also entirely new and cover the power of commissioners to take evidence.

Articles 21 to 30 provide general clauses.

On the recommendation of the Chairman, the Commission agreed to proceed within the framework of the Questionnaire and the Responses and three Working Documents: (1) the 1954 Convention, (2) the Convention on Service of Documents, and (3) a draft Convention submitted by the Rapporteur and based largely upon the existing United Kingdom bilateral Conventions.

III Chapter I – Letters of request, articles 1 to 12

Article 1

The opening phrase of article 1 immediately precipitated a spirited debate on the scope of the Convention. There was no disagreement that the Convention should be limited to 'civil and commercial matters' but there was debate on the definition of a 'civil and commercial matter' and on the definition of 'obtaining evidence'. Reference had been made, in the opening discussion, to certain 'grey areas' where there might be a difference of opinion, under the internal law of a particular State, as to whether a particular matter was 'civil or commercial'.

However, the Convention on Service of Documents had used the phrase 'civil and commercial matters' without definition, after this identical debate¹. The 1954 Convention itself had done the same: the initial 1905 Convention on Civil Procedure had done the same; and the draft Convention on Recognition and Enforcement of Judgments had done the same. For over 60 years the Conference's Conventions had worked effectively without any need for a specific definition. The United Kingdom Expert knew of no case in 40 years in which there had ever been a disagreement with any of its Convention Partners as to whether a particular request dealt with a 'civil or commercial matter', this phrase being used in all of the United Kingdom bilateral Conventions without definition.

A suggestion to permit the State of execution to decide unilaterally whether the matter was 'civil or commercial' and to refuse a request for evidence was therefore rejected. President de Winter and the Secretary-General

¹ *Actes et Documents de la Dixième session*, Vol. III, p. 79-80; 159-168.

both pointed out that it would be contrary to the historic policy of the Conference to include a definition or to include a rule of conflicts to resolve a dispute between two States on such an issue.

Reference was also made to article 9, paragraph 2 of the 1954 Convention providing for the use of diplomatic negotiations for the resolution of any disputes in the application of the Convention. This is repeated in article 30 of the present Draft.

Article 1 accordingly follows the historic pattern. There is no definition of 'civil or commercial matters'.

Article 1 then limits the issuance of letters of request to 'judicial' authorities of the State of origin, and provides that they shall be issued in accordance with the provisions of its internal law. These provisions are copied *verbatim* from the 1954 Convention, to make it clear that no change is intended.

It will be noticed immediately that there is a difference between the French and English texts in the closing clauses. The French text uses the phrase 'tout acte d'instruction', the English text uses the phrase 'obtain evidence (including the taking of statements of witnesses, parties or experts and the production or examination of documents or other objects or property)'.

This is another illustration of the important fact that the texts in the two languages cannot be 'translations' of one another, but must be texts which render, in each language, an unambiguous statement of the same legal result.

With respect to the French text, the Chairman referred to the legislative history of the 1905 Convention.

At page 92 of the 'Actes' of the Fourth Conference in 1904, the phrase 'acte d'instruction' used in the French text was analyzed to include –

'...audition de témoins, de prestation de serment, d'expertise, de descente sur les lieux d'examen de livres d'un commerçant ...'

Accordingly, the use of 'tout acte d'instruction' in the French text needed no elaboration to avoid any ambiguity as to the breadth and meaning of its coverage.

To the contrary, the English text, if confined to the phrase 'obtain evidence' and in the absence of any similar prior legislative history, would not be equally unambiguous. There would be considerable room for argument as to whether the Convention was intended to include the production of documents or other tangible objects and their examination or the entry upon real property for examination or inspection.

The Anglophone group urged the inclusion of the words in parentheses for clarity in the English text. No one in the Francophone group objected. The only debate within the Francophone group related to the need for a similar amplification in the French text. After discussion, it was unanimously agreed to leave the French text without elaboration and rely on the 1904 legislative history, and recommend the inclusion of the words in the parentheses in the English text. The parentheses appear in order to emphasize the difference in the texts and to provide the basis for final decision in October.

In addition, the phrase 'd'autres actes judiciaires' appears in the French text and the phrase 'or to perform some other judicial act' appears in the English text, in each case in square brackets. These words are in the 1954 Convention, but the Special Commission did not agree definitively that they should continue to appear in the new Draft. They raise a different question of the limits of the use of the letter of request. To illustrate, should a letter, for example, be used to force an unwilling man to give blood samples in a paternity case, or to demand preventive seizure of goods, or to secure a forced sale of

personal or real property, or to demand the public advertisement of proceedings pending in the State of origin, or to demand that a foreign court conduct conciliation proceedings between a husband and wife? Or should the letter be confined more narrowly to matters which are within the conventional concept of obtaining evidence for use in the court where the proceedings are pending? The discussion indicated that some States might not be able to perform one or more of these illustrations pursuant to a letter of request. Under internal law and procedure, they could be performed only through some special procedure, and in limited circumstances. Letters of request would be inappropriate and ineffective.

The exemption in article 8, paragraph 3 (2) of the draft Convention will not resolve the problem. Some or all of these illustrations are clearly 'within the function of the judiciary'. The problem is rather whether they can be procedurally performed through a letter of request alone, without complying with other and different procedural, legislative or constitutional requirements of the State of execution.

The Experts directed that the clause be left in square brackets for decision at the October Session.

Article 2

Article 2 provides the channels for the transmission of the letters of request. Here was an excellent opportunity to improve the practice under the 1954 Convention. The Central Authority technique, which the Conference invented in 1964 in the Convention on Service of Documents, is ideally applicable to the transmission of letters of request. Additional channels should, of course, also be available.

The Commission had the choice of listing all possible methods of transmission, with the right of reservation by a State on ratification, or of listing those methods which were unanimously agreed upon, coupled with the right of individual States by internal legislation or practice or by supplementary bilateral or multilateral agreements to provide additional methods. The Commission chose the latter technique.

Initially, there was unanimous agreement that the Central Authority system be copied from the Convention on Service of Documents. Paragraph 1 of article 2 therefore carefully paraphrases article 1 of the Service Convention. It is anticipated that the same agency will be used in any State which ratifies both Conventions. The Central Authority is intended to be a *receiving* authority and not necessarily a *sending* authority. That is to say, the Convention will not require a State to direct that every letter of request emanating from its tribunals must be sent to its own Central Authority for transmission to a Central Authority abroad. This is much too arbitrary and restrictive. Paragraph 1 of article 2 merely requires each State to provide an agency which will 'undertake to receive' letters and to transmit them to the appropriate executing authority. Whether the Central Authority will also act as a transmitting agency to send letters abroad is optional in each State in conformity with its internal decision.

Paragraph 2 of article 2 directs that the letters shall be sent 'directly' to the Central Authority abroad by the issuing authority in the State of origin. This excludes deliberately the intervention of any other authority of the State of execution prior to the receipt of the letters by the Central Authority addressed. Neither the diplomatic or consular offices of the State of execution, posted in the State of origin, nor the Foreign Office nor the Ministry of Justice of the State of execution are to participate in the initial receipt of the letters in the State of execution. The Central Authority of the State of execution

will be the first agency of that State to see or receive the letters.

The Convention, however, does not specify the mechanical means by which the issuing authority sends the letters 'directly' to the Central Authority of the State of execution. The word 'directly' is not intended to limit the mechanical channels of transmission; it is intended, as explained above, to eliminate the intervention of any other authority of the State of execution.

The Special Commission recognized that the State of origin might, under its internal law, wish to control the issuance of letters by its judicial authorities and their transmission abroad. It might, by internal legislation, require that all letters of request must be given to its own Central Authority or its own Ministry of Justice for examination and approval before transmission and could exclude any other mechanical channel of transmission to a Central Authority abroad.

Further, it is not intended that the issuing tribunal must put the letters in the mail 'directly' addressed to the Central Authority abroad and that no other human hand may touch them. For example, the issuing tribunal could hand them to the lawyer for the requesting party, who could send them to a lawyer in the State of execution to present them 'directly' to the Central Authority for action. Since no other agency in the State of execution will have seen the letters, they will have gone 'directly' to the Central Authority by such hand delivery, rather than by the use of the Post Office.

Accordingly, it is not within the power of the Central Authority of the State of execution under the Convention to question the mechanical channel by which the letters of request reach it, if the letters have emanated from a judicial authority of the State of origin, and if they have gone 'directly' to the Central Authority, in the sense that no other agency of the State of execution will have previously seen them. The Central Authority may not reject the letters because they disapprove of the method of transmission used to transmit the letters to it 'directly'.

If the issuing tribunal uses the Convention, and sends the letters to a Central Authority abroad, the issuing tribunal of the State of origin should address the letters themselves to the Central Authority and not to a foreign tribunal. The Convention directs the foreign Central Authority to choose the appropriate tribunal in its country, under its own law, to execute the letters and to forward the letters to that tribunal for action. This will protect the issuing tribunal from the risk of an error in choosing an improper foreign tribunal to execute the letters because of unfamiliarity with the foreign law and procedure.

Following the pattern of the Convention on Service of Documents, paragraph 2 of article 2 also provides for the use of diplomatic and consular channels of transmission. The diplomatic or consular agent of the State of origin posted in the State of execution, unless forbidden by the internal law of his own country, has the absolute right to act as the courier of the issuing tribunal. However, he may deliver the letters only to such authorities of the State of execution as the latter may designate for that purpose.

However, the local Central Authority of the State of execution is designated in paragraph 1 of article 2 as the agency which 'will undertake to receive' letters of request without limitation. This will always permit the diplomatic or consular agent to present the letters to the local Central Authority of the State where he is posted. But the diplomatic or consular agent cannot deliver the letters directly to the foreign court, nor can he deliver them to a local lawyer or to any other per-

son or authority in the State where he is posted, in the absence of a specific designation of such other recipient by the State of execution. The effect of paragraphs 1 and 2, read together, is to give the diplomatic and consular agents the right to receive letters from the tribunals of their country and to deliver them to the Central Authority of the State to which they are posted, but to no one else in that country in the absence of specific authorization from the latter.

With respect to the use of diplomatic, as distinguished from consular, channels, the Commission inserted the phrase 'if exceptional circumstances so require' in the closing sentence of paragraph 2 of article 2. This was proposed as an alternative to total elimination of the diplomatic channel which is admittedly the least satisfactory. It was recognized that there may be unusual situations where the diplomatic channel may be needed and it was decided not to forbid its use if exceptional circumstances did so exist. However, it is the clear intent of the Convention that the consular channel shall be the normal channel within this area.

Finally, paragraph 3 of article 2 copies article 11 of the Convention on Service of Documents in authorizing States to agree upon other channels of transmission including direct transmission from tribunal to tribunal. During the debates, reference was made to the practice in some States under which the letters are given physically by the issuing tribunal to the party who requests them or to his attorney. The latter will then arrange to present them directly to the tribunal of the State of execution, usually through the services of a local lawyer abroad. This is, of course, equivalent to transmission from court to court and avoids all intervening official agencies.

The Commission elected to exclude any specific reference to this method in the text of article 2, but recognized this as a method which could be used if agreed to by the two States involved. If this method is used, proper precautions must be taken to assure the authenticity of the letters which must necessarily emanate from a judicial authority (see article 1).

Further, in order to avoid a question as to the authority of the person who presents the letters to the tribunal in the State of execution in such a case, the letters could include a specific grant of such authority in the text of the letters themselves.

It is important, at this point, to refer to article 22 of the draft Convention. This is a paraphrase of article 19 of the Convention on Service of Documents and is designed as a parallel. It provides blanket authority to use any method of transmission of letters of request which is permitted by the internal law of the State in question. It is designed to exclude an argument that the ratification of the Convention will repeal or modify any internal law of any State which is broader and less restrictive than the Convention.

In other words, a bilateral convention between two States is never needed, under paragraph 3 of article 2 to provide other methods of transmission, if the internal law of both States already authorizes such method, e.g. transmission through the parties or transmission direct from tribunal to tribunal.

It was suggested above that letters which are sent under paragraph 2 to a Central Authority should be addressed to the Central Authority and not to a foreign tribunal. Obviously, if the letters are sent under paragraph 3 directly from tribunal to tribunal, they cannot 'be addressed' to a Central Authority (which will have nothing to do with them and will never see them) but they will necessarily 'be addressed' to the foreign tribunal itself.

Article 3

Article 3 regulates the form and content of a letter of request.

Paragraph 1 follows the language of the existing United Kingdom bilateral Conventions which have been found satisfactory during the past 40 years of operation. The items listed are those which are essential to the effective execution of the letter.

The first phrase refers to a statement of the 'authority requested to execute it'. As suggested above, if the letter is sent to a Central Authority, which is to choose the appropriate tribunal, the letter might use the words 'the appropriate authority of the State of . . . '.

If the letter is sent directly from tribunal to tribunal, the addressee tribunal will be known and can be identified.

The second sentence of paragraph 1 recognizes the two alternative methods by which a witness normally may be interrogated under a letter of request: (1) the presentation of specific written interrogatories to which the witness is to respond, and (2) oral questioning of the witness by the examining officer on the basis of instructions furnished.

Article 12, *infra*, provides for 'special procedures' which may be requested by the issuing tribunal. If the letter emanates from an Anglo-American court, where the technique of oral examination and cross-examination by counsel for the parties is the normal method of obtaining evidence, it may request that the examination follow this course, instead of the normal civil law technique of examination by the judge. This is not included in paragraph 1, but is mentioned in paragraph 2.

Paragraph 2 contains three matters which are of importance in the execution of the letters: first, whether the witness should be placed under oath; second, whether the witness is entitled to specified privileges not to testify under the law of the State of origin; third, whether a special method of taking the evidence or recording it is desired by the issuing tribunal.

The paragraph is enclosed in square brackets, not because the matters are unimportant, but because the Experts did not decide definitively whether these matters must be included in the letters themselves or whether they may alternatively be included in a letter of transmission or other supplemental or auxiliary document.

The three matters are, of course, important.

If the testimony obtained will be worthless in the forum where the action is pending, if the witness has not been sworn, then the administration of an oath is essential. Without it, the time and effort occupied in executing the letters of request will be wholly wasted. The executing tribunal must be informed.

Similarly, if, under the law of the State of origin, the witness is entitled to certain privileges and exemptions from testifying, which will be recognized under article 9, paragraph 1 (*a*) *infra*, and if the issuing tribunal wishes these privileges and immunities to be upheld, the executing tribunal should be informed, since it may not, of its own knowledge, know this part of the 'foreign law' of the State of origin.

Finally, if a special procedure is requested, which is to be employed by the State of execution under article 12, *infra*, advance notice of this is obligatory. Otherwise, the State of execution could not know of the special procedure requested.

The problem is only one of draftmanship, to be decided at the October Session.

Paragraph 3 eliminates any necessity for legalization or any equivalent formality. If the document in question emanates from a judicial authority of the State of

origin, its authenticity will be presumed without the need of formal legalization.

Further, if, in an extraordinary situation, an issue should be raised that the letter of request is a forgery or otherwise lacks authenticity, airmail communications from the authority abroad to the judicial authority which is alleged to have issued the letters can dispose of such a question of authenticity simply and expeditiously.

Articles 4, 5, 6 and 7

These four articles deal with the difficult problem of language and translation, in connection with letters of request, which was the subject of extended discussion within the Special Commission. There is no easy answer to the problems of language and translation.

To illustrate, let us assume that there is a maritime proceeding pending in a Japanese court, in which the testimony of a Greek ship's officer is essential. The witness is temporarily residing in Turkey; he speaks Greek but neither Japanese nor Turkish. To secure his testimony, letters of request will have to issue from the Japanese court to the Turkish Central Authority, for transmission to a competent Turkish tribunal for execution. A lengthy set of interrogatories will accompany the letter of request, drawn up by the lawyers in the case in Japanese. Putting to one side for the moment the witness's language problem, it is clear that the Japanese original must first be translated into Turkish. Putting aside also the question of cost and expense, should the translation be made in Japan by a Japanese translator who claims to be expert in Turkish; or should the translation be made in Turkey by a Turkish translator who claims to be expert in Japanese? In either case, how large is the risk that errors in the translation of the letter itself and of the interrogatories which will accompany it may seriously misinterpret the ultimate testimony which is received by the Japanese judge in the pending action?

The United Kingdom bilateral Conventions require in every case the mandatory translation of the letters of request into the language of the State of execution. These conventions provide that the translation shall be certified by a diplomatic or consular officer of the State of origin or by an authorized translator of either of the countries concerned.

Article 10 of the 1954 Convention requires the letter to be written in, or translated into, either the language of the State of execution or a language agreed upon between the two States in question.

Certain States will accept letters without translation if written in certain designated languages. For example, the Netherlands will accept letters written in German or English; Israel will accept letters written in Hebrew, Arabic, English or French.

The Experts were, however, unanimous in their agreement that no tribunal can be required to execute a letter of request written in an incomprehensible language. This is obvious.

The Commission also recognized the question of the substantial costs that would be involved in translations particularly if the letter of request included substantial documentation.

The Commission ultimately resolved the problem by setting up two different schemes of translation dependent upon the nature of the recipient authority.

A Central Authority, organized pursuant to article 2, paragraph 1, will be a Government agency and can be expected to have competent and available translation facilities. If the issuing tribunal elects to send the letter of request to the foreign Central Authority, article 4 gives the State of origin the option either (1) of transmitting the letter in its own language with no translation, leaving the translation, if necessary, to be made in

the State of execution at the expense of the State of origin, or (2) of accompanying the letter of request with a translation made by it.

There may, as a practical matter, be some difference in cost with respect to the two methods. If the State of origin permits the translation to be made in the State of execution, it will have no direct control over the cost of the translator. If the translation is made within the State of origin, the cost of translation may be directly controlled. There would seem to be little difference between the two methods as to the risk of inaccuracy of the translation. The translator in the State of origin may be excellent or poor in his translation of the language of the State of execution, and the translator in the State of execution may be excellent or poor in his translation of the language of the State of origin.

If, pursuant to article 2, *supra*, the issuing tribunal is permitted to transmit the letter to an authority in the State of execution other than the Central Authority, e.g. directly to a foreign tribunal, then a translation into the language of the State of execution is, by article 5, made obligatory and unconditional. In this case, the translation must be certified either by a diplomatic or consular agent of either State or by a sworn translator of either State or by a person authorized to certify translations under the law of either State.

Both of these general rules (those stated in articles 4 and 5) are subject to both unilateral and bilateral modification under articles 6 and 7, and to the general preservation of less restrictive practices of article 22, *infra*.

Article 6, paragraph 1 (a) permits any State to change the rule of article 4 by a unilateral declaration insisting upon the language in which the letter of request shall be submitted to its Central Authority. It can refuse to receive the letter in the language of the State of origin.

Paragraph 1 (b) permits a similar unilateral declaration permitting a letter of request if addressed to an authority other than the Central Authority, to be written in a language other than the language of the State of execution.

Paragraph 1 (a) is restrictive, in that it authorizes a State to forbid what article 4, sentence 1 permits. Paragraph 1 (b) is the opposite; it is permissive, in that it authorizes a State to permit what article 5, sentence 1 forbids.

It will be recalled that in the discussion of article 4 it was pointed out that the State of origin has an option with respect to the language of the letter of request which it sends to the Central Authority. A declaration under subdivision (a) will in effect cancel that option and provide in mandatory form for the language in which the letter must be presented.

In the discussion of article 5 it was pointed out that it is mandatory to provide a translation into the language of the State of execution. A declaration under subdivision (b) will in effect remove the mandate and substitute an option of other languages in which the letter may be presented. The Netherlands and Israeli practice, noted above, are illustrative.

In addition, article 7 provides in the broadest terms for unlimited modifications of the language provisions through bilateral agreements between Member States, and article 22 preserves all less restrictive existing procedures.

The Commission was of the opinion that the most flexible possible system had been provided in articles 4 to 7 inclusive. The draft Convention provides two general rules governing the two different avenues of transmission of the letters. It also provides for total flexibility of modification by unilateral declaration, or by bilateral accord, or by internal practice and procedure.

Article 8

Article 8 deals generally with the execution of the letter of request by the State of execution.

Paragraphs 1, 2 and 3 of article 8, are substantially *verbatim* copies of the three paragraphs of article 11 of the 1954 Convention on Service of Documents. Paragraph 4 of article 8 is a substantially *verbatim* copy of article 13 (2) of the Convention on Service of Documents.

No proposals were made to change the provisions carried over from the 1954 Convention. No illustrations were given of situations in which they had worked badly or created difficulties either from the point of view of the State of origin or of the State of execution.

In paragraph 1, the second sentence protects the practice in certain States where a party to an action cannot be compelled to testify if he declines to do so voluntarily. The Convention will not require such a State to change its internal law on this point.

A minor change was made in paragraph 2. The corresponding paragraph in article 11 of the 1954 Convention referred to the 'party' in the singular who might be permitted to be present. The plural was substituted, to provide that 'all parties concerned' might be present. The word 'parties' will include the attorneys as well as other representatives of the parties. They will have the right to be present at the execution of the letter. It was not felt necessary to include counsel and other representatives specifically in the text.

The Commission was uncertain whether subdivision (a) of paragraph 3 of article 8 was of sufficient importance to be part of the new Convention. It has been placed in square brackets. It seems so obvious that, if the document is not genuine, it will not be a 'Letter of Request' under the Convention and will obviously not be executed. On the other hand, this exception is specifically stated in the present article 11 of the 1954 Convention. If it were now deleted, could it be argued that the Conference wished to change the substance of the article, so that this would no longer be a valid excuse for non-execution? The obvious answer is that an interpretation which would require execution of a document which is not authentic, is an 'absurd' interpretation, and therefore excluded by conventional rules of interpretation. The ultimate decision was postponed until October.

Inquiry was made during the discussion as to the meaning and purpose of subdivision (b) of paragraph 3. It was explained that this was intended to take care of the rare case where a letter might be sent directly to a tribunal which did not have the judicial power to execute it. An illustration would be the directing of a letter of request to the 'Conseil d'Etat' in France. Although this will be an extremely rare occurrence, it was decided to retain the present language of article 11 of the 1954 Convention.

Paragraph 4 of article 8 is taken from article 13, paragraph 2 of the Convention on Service of Documents. The reasons which applied to that Convention are equally applicable here ¹.

Article 9

This article is entirely new and covers a topic not touched on in either the 1905 or 1954 Conventions,

¹ *Actes et Documents de la Dixième session*, Vol. III, pages 124, 192-4, 375-6.

namely, the privileges and exemptions of witnesses from the duty to appear and testify.

The matter was first broached in the Questionnaire to Governments, but only in terms of two sets of privileges, those of the State of origin and those of the State of execution. The large majority of responses indicated that the witness was granted both the privileges and immunities given by the law of the State of origin as well as the privileges granted by the State of execution. This rule is stated in subdivision (a) of paragraph 1 of article 9.

The discussion quickly indicated that this was not a sufficient resolution of the problem. Two illustrations were posed.

First, the situation of a Swiss banker who, under the law of Switzerland, has a privilege not to disclose details of banking procedure and who would be subject to severe punishment in the event of a disclosure of certain information. Assume that this banker is on holiday in the United States and is required to testify there pursuant to a letter of request for the benefit of a French court in which litigation is pending. If he had only the privileges of France, which is the State of origin of the letter of request and the United States, which is the State of execution (neither of which recognizes such a privilege), he would find himself without the benefit of his Swiss privilege. He would have to choose between possible conviction of contempt of court for refusal to testify and disastrous results when he returned home to Switzerland, if he did testify.

Second, the law of France forbids a physician to disclose any details about his patient or even to disclose that a particular person is a patient under his care. Severe professional sanctions are imposed for violation. Assume again that the French doctor is on holiday and is called to testify in a third country where neither the law of the State of origin of the letter of request nor the law of the State of execution recognizes any such privilege. Again, he would be caught between the danger of contempt of court proceedings for refusal to testify and the possible loss of his physician's licence in France if he did testify.

The Commission was unanimous that the witness, in such situations, must be given protection.

Subdivision (b) of paragraph 1 of article 9 provides such protection in general terms. It protects the right of the witness to decline to testify if he would thereby expose himself in either the State of origin or the State of execution or a third State to either penal or disciplinary action.

Although this is stated generally, the 'third State' to which reference is made cannot be a totally strange State with which he has no connection, but whose law would be favourable to such a privilege or immunity. It must be a State with which he has such close connection that the penal or disciplinary action is a potential reality in that State.

Article 9 does not designate the details of the procedure by which the privilege or immunity may be claimed. Obviously, the normal method will be a voluntary claim by the witness, when an alleged privileged question is asked, to decline to answer it and assert his privilege or immunity. He has, of course, the burden of sustaining his privilege under applicable law.

If, however, the witness makes no claim of his privilege, the authority before whom the letter is being executed might *sua sponte* advise the witness of his privilege or immunity, if he knows of it, and decline to permit the question to be answered. This would easily take place if the privilege or immunity were one under the law of the State of execution with which the examining authority was familiar.

But, if the privilege or immunity is one created by the law of the State of origin or of a third State, it is not likely that the examining authority would have any personal knowledge of this foreign law. It would be possible in the situation where the letter of request and accompanying documents specifically referred (as provided in article 3 *supra*) to the privileges and immunities to which the witness would be entitled under the law of the State of origin.

But as to privileges granted by third States, which may fall under subdivision (b), it will be assumed that the examining authority will not know of these. Here the full burden is upon the witness, or upon a party or representative who may be present at the examination, to claim the privilege *in limine*, and to be prepared to sustain its applicability.

The Commission did not decide definitively whether paragraph 2 of article 9, which is enclosed in square brackets, was essential. It can be argued that its purpose is already included in subdivision (a) of paragraph 1. If an authorization to proceed with the questioning is required and the authorization has not been obtained, the witness would clearly seem entitled to invoke a privilege or immunity from testifying. There was some feeling that it might nevertheless be useful, for purposes of emphasis, to include this additional provision. The decision was reserved for consideration at the October Session.

Article 10

The first sentence of this article is a *verbatim* copy of article 12 of the 1954 Convention.

The second sentence contains the obvious provision that information as to such transfer of the letter from one authority to another should be given to the appropriate authority of the State of origin. If the letter has been transmitted to the Central Authority of the State of execution under article 2, paragraph 2, without the use of the consular channel, the information should be given to the judicial authority in the State of origin which originated the letter. If the letter has been transmitted to the Central Authority through a consular channel, under article 2, paragraph 2, the information should be given to the consul. If the letter has been otherwise transmitted to an authority other than the Central Authority, *e.g.* direct from court to court pursuant to article 2, paragraph 3, the information should be given direct to the issuing court.

Article 11

Article 13 of the 1954 Convention contained provisions for the case where the letter of request was not executed, but the 1954 Convention was silent on the procedure to be followed if the letter of request was effectively executed.

Article 6 of the Convention on the Service of Documents provided the appropriate procedure for the return of service where the document was served and article 11 supplies a parallel clause to overcome the omission from the 1954 Convention.

It provides, in the simplest terms, that the documents evidencing the execution of the letter of request shall be returned by the same route by which they were received.

If the letter of request was sent to the Central Authority of the State of execution from the judicial authority of the State of origin without the use of the consul of the State of origin, the document shall be returned directly to the sending authority. If, on the other hand, the consul of the State of origin was used as part of the transmission channel, the documents evidencing the execution

of the letter are to be returned to the consul for further handling by him.

Obviously, the Convention can cover only the two general systems provided for in article 2, paragraph 2. The Convention cannot provide for the return of documents if other channels are used either as the result of bilateral or multilateral agreements under article 2, paragraph 3, or pursuant to internal legislation or practice under article 22, *infra*. It is assumed that the States in question, when these other channels are utilized, will make their own arrangements for the effective return of the documents.

Paralleling article 13 of the 1954 Convention and article 6, paragraph 2 of the Convention on the Service of Documents, paragraph 2 of article 11 directs that notice shall be given either to the requesting authority or to the consul of the State of origin (as the case may be) of the non-execution of the letter and the reasons therefore.

Article 12

Article 14 of the 1954 Convention provided that the letter of request was to be executed in conformity with the procedures of the State of execution, with the proviso that if the requesting authority asked that some special procedure be used, the State of execution would comply unless the special procedure requested was 'contrary to the legislation' of the State of execution.

The Commission was not satisfied to accept this provision without modification. It was felt that the limitation to situations which were 'not contrary to the legislation' of the State of execution was too narrow. Many situations might exist where there was no 'contrary legislation' in the State of execution but where the method and procedure requested were unknown in the State of execution and where it would, as a matter of actual practice, be difficult, if not impossible, to utilize it.

Attention was called to article 5, paragraph 1 (b) of the Convention on the Service of Documents which refers to a method which is 'incompatible with the law' of the State of execution. It was obvious that the terms 'incompatible with' and 'contrary to the legislation of' are substantially different concepts.

The Chairman also referred to his experiences in the United States and in the United Kingdom, where letters of request, in some or all cases, were not executed by the judge himself, but by a commissioner or solicitor appointed by the judge for this purpose.

The French Expert gave the example of a request by a United States tribunal to a French tribunal to apply the method of cross-examination of the witness.

The Commission agreed that the phrase 'incompatible with the law' as used in the Convention on the Service of Documents was correct but was still insufficient to meet the entire problem.

At the same time the Commission recognized that this problem presents a real dilemma. In the first place the whole purpose of this Convention is to secure evidence in a foreign country in a form and by a method which will make it of effective use in the court where the action was pending. It is perfectly obvious that the time, effort and expense of obtaining the evidence abroad will be wasted if the resulting material is useless at the forum where the action was pending, by reason of the 'form' in which it is taken.

On the other hand, the Convention must give effect to the realities of the different systems of procedure in the 23 Member States. Can a State be required to execute a letter of request in a manner and in a form wholly unknown to it and to its judges and in which they have had no experience?

Yet, if every State is excused from complying with a

request for special methods, simply because the method is strange, an easy 'escape clause' is built into the Convention which will nullify the provision for special methods. This is the dilemma.

After an extended debate the Commission found no way to avoid the issue. It was finally concluded that no State should be compelled to execute a letter of request by a method which is 'incompatible' with its own law or which is 'impracticable' under its practice and procedure.

Paragraph 2 of article 12 therefore provides two 'escape clauses' which will excuse a State from complying with a special method requested: (1) if it is 'incompatible' with its law; and (2) if it is 'impracticable' in the light of the practice and procedure of the State of execution.

The phrase 'incompatible with the law' of the State of execution should create no problems. This is the identical language used in the Convention on Service of Documents.

The phrase 'impracticable on account of the practice and procedure of its courts' is less precise. It cannot mean merely that the special method is strange and not used in the courts of the State of execution. If it meant this, no special procedure could ever be used. If the special procedure were the procedure of the State of execution, it would be covered under paragraph 1 of article 12. By definition, therefore, the special procedure *must* be a procedure which is *not* the normal procedure under the domestic practice of the State of execution. Otherwise, this phrase in paragraph 2 of article 12 would be a repetitious nullity. Granted that the special procedure is different from the procedure of the State of execution, when does it become 'impracticable' to apply it? Some illustrations of the limits of the problem may be helpful.

The Chairman referred to his difficulties with the courts of the United Kingdom and some of the States of the United States. He pointed out that the German letters of request asked the court to interrogate the witness in conformity with the European practice of judge interrogation. Instead, the judges in question uniformly appoint special commissioners to execute the letters and interrogate the witnesses. But suppose these particular courts are far behind in their civil trial lists and there are hundreds of cases ready for trial and waiting eagerly for available judge time. When judge time becomes available, should it be used to execute a letter of request recently received from abroad or should it be used to take up a pending case that may have waited three years to be reached?

If the judge places the letter of request in its regular position on his open list of waiting cases, it may be a year or more before it is reached and there will be justifiable claims of delay in executing the letter. Is it therefore 'impracticable' in such a situation to have the judge execute the letter himself and 'practicable' to have him appoint a special commissioner who will execute it at once?

Or suppose this German letter of request is presented to a British or United States judge in a remote rural community who has never heard of anything but a *verbatim* stenographic transcript of a witness's testimony. He is asked to dispense with this and to prepare himself a resume of the witness's testimony in a foreign form, a task he has never before performed and the technique of which is unknown to him. Assume he has ample judicial time to conduct the examination. Having had no experience, what kind of a résumé is wanted? What is supposed to be included? How extensive shall it be? Does he include his own comments on the credibility of the witness? Is the task 'impracticable' for him and may

he have his customary *verbatim* transcript prepared and return this with the executed letters?

To reverse this illustration, suppose a letter from the United Kingdom or the United States, where a *verbatim* stenographic transcript of the testimony of the witness is the normal practice, is sent to a remote rural area of a Civil Law country where *verbatim* stenographic transcripts are unknown. Assume that there are no court stenographers available and the judge conducts the examination and prepares his own résumé of the witness's testimony in all cases. Is it 'impracticable' to furnish a *verbatim* stenographic transcript to the requesting tribunal?

In this connection, the Rapporteur noted the practice in the Federal courts of the United States, where there is a special modern rule recognizing this difficulty. The rule prevents a court from rejecting evidence obtained by letter of request abroad on the sole ground that the form of the record of the evidence is different from the normal form required under the United States practice. A further illustration discussed during the debate involved the presence of the parties or their representatives at the interrogation of the witness. There is apparently a wide variety of practices in the European system; in some States the parties or their counsel are always present and may suggest questions to the judge to ask the witness or may even ask the questions themselves; in other States the judge is alone with the witness and asks the questions himself. In a State where the presence of the parties is necessary, a special request for examination of the witness *in camera* and without the parties present, would be rejected as incompatible with the domestic law. But in a State where the judge asked the question alone, how would a request for the presence of the parties or their representatives be treated? Would this be 'impracticable' under the normal procedures of the State of execution?

The Special Commission recognized a certain risk in this exception, but they did not feel that the risk was a serious one. No State would sign and ratify the Convention, containing this 'impracticable' clause, with the reserved intention of using it so as to nullify completely paragraph 2 of article 12 in every case, by finding every case 'impracticable'. The Commission is satisfied that no State will invoke the 'impracticable' clause except in an unusual instance and in a clear case. The Rapporteur suggests, for consideration at the October Session, that article 12 might be transposed to follow article 8 and before article 9. It seems much more logical to place it with the articles dealing with the execution of the letter of request rather than the articles dealing with either non-execution or what is to happen after the execution had been completed.

IV Chapter II – Taking of evidence by consuls, articles 13 to 17

Articles 1 to 12 which have just been discussed deal with the improvement of the system of letters of request, a system which operates in all of the Member States and which is regulated by the 1954 Convention among those Member States which have ratified that Convention.

The possibility of a diplomatic or consular agent taking the evidence himself is recognized in article 15 of the 1954 Convention. Such action on his part is, however, stated in the most general and non-specific terms and is confined to situations where bilateral conventions between the States in question permit him to do so, or where, in the absence of such a bilateral convention, the State of execution does not object to his doing so. The Special Commission found this formulation unsatisfactory. It provides no norms for the power of the

consul; it does not distinguish between the nationality of witnesses; it makes no reference to the possibility of the grant of compulsion against an unwilling witness and it makes no provision for machinery to give special permission in States where the doctrine of judicial sovereignty governs. This doctrine gives to the judicial authorities of the State the exclusive control over the taking of evidence and forbids any outside person from taking evidence without the permission and control of the judicial authorities of the State.

The Commission agreed that the Convention should be positive in providing specific rules to cover these problems.

The initial decision of the Special Commission was to recognize a distinction based upon the nationality of the witness whose evidence was to be taken. Three nationalities were recognized: *a* witnesses of the nationality of the consul's State; *b* witnesses of the nationality of the State where the consul is posted and where the evidence is to be taken; *c* witnesses who are nationals of other States.

Articles 13 and 14 set out the powers of the consul for each of the three groups of witnesses.

Article 13

This article states, in positive terms, the right of a diplomatic or consular agent to take, without compulsion, the evidence of nationals of the State he represents in the State where he is posted. This positive statement is subject to the power of any ratifying State to make a reservation under article 27, *infra*.

It is essential, at the very beginning of this part of the Report, to explain the terminology which will be used. To avoid the unnecessary repetition of a long phrase, frequent reference will be made to 'the consul's State' or 'the consul's nationals' or 'his own nationals'. This phrase is used with the full understanding that many States, for reasons of economy, do not post one of their own foreign service officers as consul in a particular place, but instead appoint a local national and resident as consul of their country. As a result, the phrases used do not mean the *personal* nationality of the consul but mean the nationality of the State for whom the consul acts officially. With this explanation, there should be no misunderstanding.

In general, the use of consuls for the purpose of taking testimony of any witness is easy and inexpensive. Further, since the consul has no power of compulsion, he will normally be used only when the party seeking the evidence is satisfied in advance that the evidence will be furnished voluntarily and without any need for compulsion. With respect to taking the evidence of one of his own nationals, it is the duty of the consul to protect the interests of his own nationals when they are abroad in the country to which he is posted. There is little need for the State of execution to exercise any administrative supervision or control over the action of the consul with respect to his own nationals. Finally, the consul is an appointed governmental official subject to the consular regulations of the Foreign Office which has appointed him. He is therefore a person in whom a certain amount of confidence may be placed.

Perhaps the most important asset of the consul is his necessary knowledge of the language of his country and of the basic concepts of its legal procedure. For these reasons, he can take the evidence of his own nationals, at a minimum of expense, without the need for an interpreter or translator, and with the maximum expectation that the form in which the evidence will be taken will be the appropriate form under the procedural rules of the forum where the action is pending.

To illustrate, if the consul is acting for a State which

uses the Anglo-American system of examination and cross-examination by the lawyers for the parties, and it is desired to use this technique rather than written interrogatories in a country governed by Civil Law procedures, the consul will understand the system and will co-operate in its use. In such a case, the lawyers for the parties will travel abroad to conduct the examination of the witness, or local lawyers, familiar with the system, will be appointed to examine the witness for them. The witness, being a national of the forum where the action is pending, will also be quite familiar with the examination procedure, since it is the procedure of his own country and his own courts, and his own literature and his own radio, television and theatrical performances.

On the other hand, a non-national of the consul's State might be totally unfamiliar with the examination procedure and confused and troubled by the nature of the proceeding before the consul. This basic difference, quite apart from any doctrine of judicial sovereignty, was recognized as the reason for the separate treatment of the taking of evidence by the consul from his own nationals and from non-nationals.

Further, if the doctrine of judicial sovereignty is strictly applied, the nationality of the witness is irrelevant. The consul cannot be permitted to take the evidence even of his own nationals. Taking the testimony of any witness, no matter what his nationality, would be performing a judicial act which the consul is forbidden to perform.

The overwhelming majority of the Experts approved a positive statement, as a conventional rule, of the right of the consul to take the evidence of his own nationals without compulsion. To this was added the right of any ratifying State to file a reservation with respect to it to protect the doctrine of judicial sovereignty if applicable (see article 15 and article 27). On this basis, article 13 was unanimously adopted.

The filing of such a reservation will not mean a total prohibition of the consul's taking the evidence of his own nationals. Article 15, *infra*, provides that, if such a reservation is made, the consul may be authorized to take the evidence of his own nationals upon securing the permission of the designated authority of the State in question. The combination of articles 13 and 15 therefore means that the consul may take the evidence unconditionally of his own nationals without compulsion, if no reservation is made under article 27; and, if a reservation is made, he may take the evidence of his own nationals if permission is granted to him upon application to the appropriate authority of the State where he is posted.

This provides a conventional rule, preserves the doctrine of judicial sovereignty where it applies, and provides machinery for the grant of special permission in States where judicial sovereignty is applied.

The power of the consul has, of course, territorial limitations. He can only act in the territory of the State where he is posted. He cannot cross the border into another State, to which he is not posted, and take evidence there in his official consular capacity. Article 13 contains this specific territorial limitation.

In the discussion of article 1, *supra*, reference was made to the bracketed clause 'other judicial act', which might be included in a letter of request. The Commission was unanimous that, no matter what disposition was made of this clause in connection with letters of request, no consul should be permitted to perform any act other than the obtaining of evidence. The clause 'or to perform some other judicial act' is therefore deliberately excluded from article 13.

Several of the Experts approved the inclusion at the end of article 13 of the phrase 'in aid of civil or commer-

cial proceedings pending in the courts of his State' which appears in square brackets. Other Experts felt that this limitation was so obvious and so inherent in the entire Convention that the inclusion of the bracketed phrase was unnecessary. The Rapporteur suggests that the phrase is necessary in the absence either of a general limitation in the title of the Convention or in the Preamble, which were not drafted by the Special Commission but which are to be drafted at the October Session.

If the limiting phrase, 'in a civil or commercial matter' is necessary in article 1 dealing with letters of request it would also be necessary in article 13 which opens the independent topic of Chapter II. The same applies to 'proceedings pending in the courts of his State'. On the other hand, if either the title of the Convention or the Preamble effectively limits the scope of the entire Convention, the phrases will not be needed in Chapter I, article 1 nor in Chapter II, article 13.

Attention is again drawn to the decision of the Special Commission to preserve all existing bilateral or multilateral conventions and all internal domestic law and procedure of any State which prescribes rules less restrictive than those of this Convention in the area of the taking of evidence by consuls (see article 22, *infra*).

In all the prior discussions, the problem has been phrased in terms of the 'consul'. Article 13 uses the term 'diplomatic or consular agent', thereby including diplomatic officials of a rank other than consul. The use of any diplomatic officers other than the consul will be infrequent; some States may place the evidentiary function exclusively upon the consuls. In any event, the use of the word 'consul' anywhere in the discussion of Chapter II, articles 13 to 17, is intended to include the 'diplomatic agent' to the extent that he may have similar powers under the laws and procedures of his own State.

Article 14

Article 14 takes up the matters left open in article 13, namely, the taking of the evidence of witnesses who have a nationality other than that of the consul. Here the general principles which guided the decisions under article 13 are not present. The witness is not one whom the consul has an official duty to protect. The witness is not one who can be expected to be familiar with the procedures of the forum where the action is pending. The witness is not one who can be expected to be fluent in the language of the forum where the action is pending. Of course, the situation is identical with article 13 insofar as the consul knows the domestic procedure of the forum where the action is pending and can be expected to take the evidence in the form most effective for use in the pending litigation.

Further, there is a difference in principle between witnesses of the nationality of the State of execution and witnesses of third country nationality. The State of execution may feel a strong obligation to protect its own nationals from the burdens and risks of testifying, but may feel relatively little obligation to protect strangers who are for the moment present or resident in its territory.

The Special Commission therefore drafted separate rules for these two classes of witnesses. Paragraph (a) regulates the right of the consul to take the evidence of witnesses of third country nationality; paragraph (b) regulates the right of the consul to take the evidence of nationals of the host country to which he is posted.

In the initial discussion of paragraph (a), it was developed that a substantial majority of the States represented permit the consul to take testimony of third country nationals without compulsion and seek to exercise no control in such cases. A number of the Experts there-

fore wished the taking of the evidence of these witnesses to be made a conventional rule stated in the same terms as article 13.

In the ensuing debate, a careful presentation was made of the system of taking evidence under the Anglo-American Common Law for the benefit of the Civil Law Experts.

The Anglo-American Experts explained that the function of obtaining the evidence was primarily a burden on the parties to the action, who had the duty to collect their own evidence. Unless all parties to the action agreed to the obtaining of the evidence abroad, the moving party would be required to obtain an order of the forum where the action was pending to proceed to obtain the evidence in the foreign country.

The use of the consul abroad, at the place where the witness was located, was an effective and inexpensive method regardless of the nationality of the witness, since the consul, knowing the law and procedure of his own country, would normally obtain the evidence in a form which made it usable in the forum where the action was pending.

If the witness spoke English this would obviate any need for the expense of interpreters and translation. The consul had the power, under his own law, to administer an oath to the witness.

The Common Law countries offered open facilities to consuls of other States without requiring any reciprocity. Under the Anglo-American system, when a consul abroad was asked to take the evidence of a witness, two alternative systems were available.

First, the consul might receive a set of written questions, prepared by the lawyers for the litigating parties, to propound to the witness and the answers to which he would record and return.

Second, the testimony might be taken on an 'open commission' to the consul. In this case no written questions would be prepared, the consul would know nothing about the case, and the questioning of the witness would be conducted by lawyers for the litigating parties. If the case were important enough the lawyers might go abroad, but otherwise local lawyers in the State of execution would be briefed to conduct the examination.

It was explained in some detail that the consul could never exercise any judicial function. For example, if on an 'open commission', a dispute arose between the lawyers as to whether a certain question was proper and whether the witness should answer, the consul could never decide this question. If the witness were directed by the lawyer for one of the parties not to answer the question, the consul, if he directed the witness to answer, would in effect be exercising 'compulsion' on the witness which is strictly forbidden. Only a court can exercise compulsion.

The consul under an 'open commission' is only a neutral presiding officer at the examination and a neutral transmitter of the resulting evidence to the forum where the action is pending.

Several of the Experts of the Civil Law countries were concerned about the proper protection of a witness in the case of such 'open commissions', since the witness might be confused and harassed by vigorous examination and cross-examination. The Anglo-American Experts pointed out that lawyers representing both sides of the case were present and, in addition, the witness might have the protection of a lawyer of his own, if he wished, and if he were concerned about the protection of important interests of his own in a difficult or troublesome situation of sufficient magnitude.

Representatives of the Civil Law system then explained that their theoretical concept of the taking of the evidence was directly opposed to the Anglo-American

system. The obtaining of the evidence is not primarily a function of the parties to the action and their lawyers, but is a judicial function and the duty and responsibility of the judicial authorities. The parties and the lawyers may, of course, assist in this function but their assistance does not change the basic concept.

Accordingly, when a consul abroad takes testimony in support of an action pending in a Civil Law court, the consul is performing a part of the judicial function. The concept of the 'open commission' as described by the Anglo-American Experts is therefore not possible. The questioning would be done by the consul either on the basis of specific questions which would be furnished to him or on the basis of general instructions respecting the matter which would permit the consul properly to interrogate the witness.

There was, therefore, more built-in protection for the witness in connection with the examination.

The Commission agreed that these conceptions were so basically different that the Commission should not attempt to harmonize them. To the contrary, the Commission should attempt to find a compromise position under which each system could operate as effectively and practically as possible. It would also be necessary to alleviate the fears of the Civil Law Experts about the protection of the witness at the examination. This fear extended equally to witnesses of the nationality of the State of execution and to witnesses of third country nationality. Further, the compromise must recognize the principle of judicial sovereignty where applicable.

This led to an active debate on what was primarily a question of draftmanship. Would it make a more effective Convention to state another specific rule like article 13, subject to the possibility of partial or total or conditional reservations; or would it be more effective to provide that everything except the matters covered by article 13 should be made optional?

The Commission finally agreed upon the following novel proposal which is contained in part in article 14 and the balance in article 15. The essence of the proposal is as follows —

- 1 any State may, by unilateral declaration, permit a foreign consul to take the evidence of nationals of third States;
- 2 any State may, by unilateral declaration, permit a foreign consul to take the evidence of nationals of the declaring State;
- 3 any such declaration may be made subject to reciprocity;
- 4 the declaration may be unconditional or may contain conditions, including *inter alia* advance notice to a designated authority of the declaring State which may then have a representative present at the taking of the evidence;
- 5 the declaration may require the consul in every case to make a written application to an appropriate authority of the declaring State for permission to take the testimony, which permission may be withheld or may be given subject to such conditions and limitations as may be imposed.

This interesting proposal is broad enough to cover every contingency which was discussed during the debates in the Special Commission.

It will permit a State to prescribe the same rules for both its own nationals and third country nationals or to prescribe different rules for the different classes of witnesses.

It will permit a State to permit the unconditional taking

of the evidence of both its own nationals as well as nationals of third States.

It will permit a State to forbid the taking of the evidence of its own nationals and at the same time grant unconditional freedom to take the evidence of nationals of third States.

It will permit a State to grant permission to take the evidence of its own nationals on terms and conditions different from those applicable to nationals of third States.

It will permit a State to forbid the taking of the evidence of any witness except on application for permission and subject to the terms of the permission, if granted.

Any permutation or combination of factors can be covered in the declarations. They may be as broad or as narrow or as unlimited or as conditional as the declaring State may desire.

Further, assuming the worst, namely, an absolute refusal of an application by the consul for permission to take the evidence, the matter is not closed. In that case the consul will merely return the documents to the judicial authority which issued them informing it that he is not permitted to take the evidence under the law of the State where he is posted, and recommending that the issuing tribunal secure the evidence through letters of request. Under article 8, paragraph 3, *supra*, the court of the State of execution can refuse a letter of request only on the three narrow grounds specified. Accordingly, if the objection to the consul's acting is merely because of the application of the doctrine of judicial sovereignty by the State of execution, or fear of oppression of the witness, the taking of the evidence will not inevitably be barred. It will only be necessary to use the alternative method of letter of request.

Accordingly, paragraph 1 of article 14, contains a statement of the general rule respecting the first type of unilateral declaration. This covers the authorization of a foreign consul to take the testimony of witnesses who are nationals of third party States.

Paragraph 2 of article 14 provides the second of the optional unilateral declarations, namely, the authorization of the foreign consul to take the testimony of nationals of the declaring State.

The second sentence of the English text of paragraph 2 is incorrect. The French text correctly places the reciprocity provisions in a separate paragraph 3, to make it clear that reciprocity can be demanded as to *both* the declarations in paragraphs 1 and 2. In the English text, by including the reciprocity clause in paragraph 2 only, the reciprocity clause becomes inapplicable to a declaration under paragraph 1. The two texts are therefore different in an important substantive matter.

It is not certain that any State would be sufficiently interested in the rights of third country nationals to refuse permission to a foreign consul to take their evidence unless the consul's own State also permitted such evidence to be taken. However, the Special Commission did not wish to forbid a State from insisting on such reciprocity if it wished.

Paragraph 4 of article 14 (incorrectly paragraph 3 in the English text) provides an unlimited field for conditions in any declaration under either paragraph 1 or paragraph 2. Specifically it gives the following illustrations: (a) advance notice of the time and place of the taking of the evidence, the notice to be given to a designated authority of the declaring State (which can, of course, be the Central Authority or any judicial or administrative authority); (b) the right of a representative of the State of execution to be present at the taking of the evidence to exercise such supervision and control over the taking of the evidence as may be required to

comply with the conditions which have been set forth in the declaration.

These illustrations are not all-inclusive. They are illustrations only. The first sentence of paragraph 4 is unlimited in authorizing the 'conditions' which the declaring State 'may impose'.

Although repetitive, it must again be pointed out that all less restrictive bilateral and multilateral conventions and all less restrictive domestic practices in any State are to be preserved by the Convention. Accordingly, if any State presently gives unlimited freedom to foreign consuls to take the evidence of witnesses of any nationality, without any requirement of reciprocity, that freedom remains. No new declaration need be filed under article 14 merely to repeat what already exists.

The declarations are designed to create a device to permit simply and effectively the creation of procedures which do not already exist in any particular State.

During the discussions reference was made to the 1951 Geneva Convention on refugees and the possible effect of the guarantees in that Convention of equal treatment for refugees. The Commission was, however, of the opinion that the Geneva Convention did not forbid different rules for the taking of evidence by consuls of the nationals of various States and that these differences would not constitute illegal discriminations under the Geneva Convention.

Finally, there is no provision in article 14 for the policing of foreign consuls to prevent them from taking evidence contrary to article 14. As a practical matter, it is hardly conceivable that a foreign consul would violate the laws of the State to which he was posted by attempting to take evidence in direct violation of the conditions of the host State's declaration under the Convention. The consul would subject himself immediately to being declared *persona non grata* and recalled, with serious implications to his future career in the foreign service. The very fact that the consul is a foreign service officer will eliminate the need for supervision or control over his actions.

Article 15

Article 15, as explained in the discussion of article 14, provides for the taking of the evidence in all the cases which will be excluded pursuant to articles 13 and 14. Any State may reserve completely against article 13 (see article 27, *infra*). Any State may refuse a declaration under article 14, or may file a limited declaration under article 14, or may impose substantial conditions in its declaration under article 14. Accordingly, there may be a large number of cases in which the consul will not be permitted, under both article 13 or article 14, to take the particular evidence of a particular witness at a particular time.

Article 15 therefore permits a State to make a further declaration with respect to such excluded items. This declaration will permit the consul, in such cases, to make an application to a designated authority (administrative or judicial as the declaring State may determine) for permission to take the evidence. That permission may be withheld arbitrarily without giving any reasons, within the discretion of the designated authority; or the permission may be given subject to such conditions and limitations, and requiring performance at such time and place, as the designated authority may include in any written permission which may be granted.

The Special Commission recognized that any State may, by a combination of a reservation as to article 13, refusal to file a declaration under article 14 and refusal to file a declaration under article 15, totally forbid any consul from taking any evidence from anyone within its

territory. If this should happen, the result would be simply that the judicial authority of the State of origin will be limited to securing the evidence through a letter of request under articles 1 to 12.

No unilateral declarations under either articles 14 or 15 will be necessary if the internal law of the particular State or if the particular bilateral conventions already permit that which the declarations call for or permit even more than the declarations call for, *e.g.* the situation in Austria, Finland, the Netherlands, the United Kingdom, and the United States, where a foreign consul without compulsion, may take the testimony of anyone irrespective of his nationality.

As already noted, the subject-matter of article 15 is subject to any existing internal law or bilateral conventions which provide authorization more liberal and less restrictive than that provided by these articles.

The Rapporteur suggests, however, that the present drafting of article 22 is not sufficient to cover the problem of the internal law as to articles 14 and 15, for reasons which are discussed in the analysis of article 22, *infra*.

Article 16

Article 16 provides a limited system for the grant of compulsion in the case of an unwilling witness who refuses to appear before the consul, or appears but will not be sworn or will not affirm or will not give the evidence requested. It assumes, of course, that the consul has the authorization to take the evidence of the witness.

In the light of the universal rule that no consul ever has compulsory powers *per se*, compulsion can exist only if it is granted by a competent authority of the State of execution. Because of the endless varying possibilities, no provision can be made that the grant of compulsion shall be obligatory; to the contrary, the grant of compulsion in favour of a consul must be optional and within the discretion of the competent authority of the State of execution.

Article 16 therefore provides that a State may make a unilateral declaration with respect to the discretionary grant of compulsory assistance to the consul in the case of an unwilling witness.

In the absence of such a declaration there will be no possibility of compulsion in favour of a consul, unless the internal law of the State or an existing bilateral convention (which will be preserved by article 22, *infra*) so provides.

If the declaration is made, it may be made subject to such general conditions as the declaring State may include in the declaration. No specification of those conditions is given since the optional character of the declaration is all inclusive.

Article 16 covers all three groups of witnesses or all three possible nationality classifications. The declarations might limit the grant of compulsion to one or more, but less than all, of these groups. For example, it could be limited to witnesses of the consul's nationality only, and compulsion could be excluded if the witness has any other nationality. Also, compulsion might be refused against a party to the litigation, similar to the reservation in article 8, paragraph 1.

Most important of all, the declaration will never guarantee that compulsion will be granted. All that the declaration will do is to grant permission to the consul to ask for compulsory assistance against the unwilling witness. Whether he will receive the compulsion is entirely within the discretion of the declaring State and its authorities.

If the declaration is made, the declaring State will in-

clude a designation of the authority to which the consul is to make his application, and which will have the authority to grant the request and furnish the compulsion. Because of the provision that the authority in question is itself to 'furnish' the compulsion, it is clear that the authority must be a judicial authority, which has the power to furnish compulsion in domestic actions in the courts of the declaring State.

Only the consul may make the application for compulsory assistance; no party or representative may do so. Assuming that the application is made, the decision on the application is entirely discretionary. The application may be denied, or granted unconditionally, or granted subject to any conditions or limitations which may be provided in the order granting the application.

It was the definite intention of the Commission, and the language of article 16 accurately reflects this intention, not to provide any compulsion *per se* for any consul under any circumstances. The purpose of the article is to set up a simple system by which the consul may ask for compulsory assistance. It provides nothing further and is intended to provide nothing further.

Each State which ratifies the Convention will reserve the right to itself to deny any compulsory assistance to a consul by the simple device of filing no declaration. On the other hand, a State may elect to provide some compulsion to consuls under some circumstances, but will always have the right to deal with each application *ad hoc* and to determine in each case the extent of the compulsion, if any, which will be granted to the consul with respect to the particular witness in the particular matter at the particular time.

The optional quality of action under article 16 is all inclusive.

Article 17

Article 17 assumes that in a particular State, the foreign consul will be authorized to take evidence either of his own nationals under article 13 or of nationals of the State of execution or of a third State or both, under article 14, or of an otherwise unauthorized witness under the special allowance of article 15. Based on this assumption, article 17 specifies some of the detailed powers of the consul.

Subdivision (a) permits him to take any evidence which is not incompatible with the law of the State of execution and which is not contrary to any special allowance order which may have been issued under article 15. These obvious limitations require no detailed discussion. Subdivision (a) further grants power to the consul to administer an oath or take an affirmation, within the same limits. The mere grant of authority to a consul under articles 13, 14 or 15 does not automatically give him the right to administer an oath. For example, the law of a particular State may provide that no person other than a judicial authority or a notary may by law administer an oath under any circumstances. In such a State, the administration of an oath by a consul would be a violation of this internal law of the State, and therefore 'incompatible'.

In such circumstances, it was the intention of the Commission that the consul would request a notary or other authorized person to appear at the hearing before him to administer the oath to the witness in conformity with the internal law of the State of execution.

Subdivision (b) regulates the obvious question – how will the prospective witness know that his testimony is to be taken and that he will be asked to appear before the consul? There can be no compulsory order against the witness, under article 16, until the witness has first been asked to appear voluntarily and has either refused to appear

or has appeared and refused to be sworn or to affirm and to give the evidence requested.

In order to set the background for any taking of evidence someone must first request the witness to appear and testify. Subdivision (b) presumes that the consul will request the witness in writing to appear. It directs that such request shall be written in the language of the State of execution or be accompanied by a translation in that language, unless the recipient is a national of the State of origin. In that case, obviously, the consul will issue the request in his own language because this will also be the language of the witness.

If the witness cannot be compelled to appear and testify before the consul, because no declaration has been filed by the State of execution under article 16, and because there is no internal law of the State of execution or an existing bilateral convention, preserved by article 22 which provides for compulsion, it is then the duty of the consul to inform the witness that he need appear only voluntarily, and that he cannot be compelled to appear and give evidence if he chooses not to do so.

Several of the Experts were concerned that a witness, receiving a formal document bearing the official designation of a foreign consulate, might feel compelled to appear because of the very nature of the request. The Commission was sympathetic with this proposal and therefore added the closing phrase to subdivision (b), to avoid any indirect compulsion on the witness.

Subdivision (c) provides that the evidence may be taken by the consul in the manner provided by the law applicable to the court in which the action is pending. Even though the consul may not be a trained lawyer, it will be presumed that he will be generally familiar with the method by which evidence is produced in the courts of his country and he will, in addition, have the benefit of the instructions contained in the consular regulations issued by his own foreign service. The whole purpose of using consuls to take evidence is to take advantage of their familiarity with the local law and procedure of their own country, so as to assure to a maximum that the testimony will be taken in a form and manner which will make it of maximum utility in the litigation for which it is obtained. The only limitation is that the consul may not take evidence in a manner which is 'forbidden' by the law of the State of execution. This is obvious, because such an action by the consul would constitute a violation of local law and obviously must be excluded.

Attention is called to the fact that this limitation in subdivision (c) is different from the provisions of article 12, paragraph 2.

When a judge is asked to execute letters of request for use in a foreign tribunal, he may be asked to operate under a system of procedure which may be unknown to him, and which may be 'impracticable' in the light of the rules of practice and procedure in his court. This limitation of 'impracticability' is obviously inapplicable where the testimony is being taken by a consul for use in the courts of his own State with which he is, by definition, reasonably familiar. As long as the consul does not violate the laws of the host country in which he is posted, he should be quite free to follow to the maximum the practice and procedure of the courts of his own country.

Subdivision (d) incorporates by reference the 'sovereignty or safety' provision of article 8, paragraph 3 (3) and the provisions of article 9 respecting the privileges and immunities of witnesses. During the course of the debates it was recognized that some provision would have to be made to cover these problems.

The Commission recognized that if the sovereignty and security of the State of execution would authorize the rejection of a letter of request seeking that testimony, the

State of execution would have an equal interest in preventing the same witness from giving the same testimony before a foreign consul.

This problem cannot arise in States where unlimited freedom is given to a voluntary and willing witness to testify without supervision or control of the local authorities. If internal law or a bilateral convention (protected by article 22) gives the witness such freedom to testify, the question will not arise.

Nor will the question normally arise where the consul takes the testimony of one of his own nationals voluntarily under article 13, without intervention by the State of execution.

The problem will arise, however, where the testimony of a national of a third State or of the State of execution is taken pursuant to a declaration under article 14 or pursuant to special permission under article 15. It is inherent in these situations that a representative of a competent authority of the State of execution may be present at the taking of the evidence. The purpose of this is not merely to confine the testimony within the limits which may be fixed by the authorities of the State of execution, but also to protect any question of sovereignty or security of the State of execution which may be involved. The Commission was unanimous that a witness testifying before a consul should have the identical privileges and immunities as if he were testifying before a judicial tribunal of the State of execution pursuant to a letter of request. Because of the pressure of time the Special Commission did not draft these clauses, but requested the Secretary-General to prepare a subdivision (d) to article 17 which would incorporate these provisions.

Subdivision (d) is tentatively drafted in the form of a blanket incorporation of the relevant articles 8 and 9. Should some qualifying clause such as '*mutatis mutandis*' be included? Alternative language suggestions can be submitted at the October Session.

Finally, there was considerable discussion within the Special Commission as to the problems of false testimony and the application of the criminal penalties applicable to perjury in connection with testimony before a consul. Two questions were discussed: (1) is the giving of testimony under oath before a consul in a foreign country a violation of the law of the consul's State? (2) is it a violation of the law of the State of execution where the evidence is taken?

The Commission was unanimous in its decision that these questions are primarily questions of the internal penal law of States; they are not appropriate for an international convention on civil procedure, and that they should not appear in the text of the Convention. The Rapporteur was, however, directed to include this decision in this Report.

Chapter V – Taking of evidence by commissioners

The practice of appointing 'commissioners' to take testimony abroad is an Anglo-American procedural device.

The theory is that the court, in which the action is pending and in which the evidence is needed from abroad, will appoint some person in an official capacity to undertake to obtain the testimony in the foreign country. In lieu of requesting the judge of a foreign country to take the evidence, the court of the forum where the action is pending appoints its own official for this purpose. It is obvious that this system can be operative only in those situations where the law of the place where the evidence is to be taken will permit the commissioner to perform his function and where the commissioner may do so without violating the law of that place.

The system has obvious advantages. In the first place, if the witness to be examined is of the same nationality as the court in which the action is pending, and if the commissioner is also a national of that country, or is a person familiar with its language and its techniques of civil procedure, the testimony can be taken without the need of translation or interpreters and with a reasonable assurance that the testimony will be taken in a manner to make it of maximum utility in the forum where the action is pending.

It will appear instantly that within this definition a consul is in fact a commissioner.

The Anglo-American system however goes beyond the appointment of the consul and permits the appointment of any qualified person to perform the act of taking the evidence.

There are practical situations in which someone other than a consul should function, if the system is to operate satisfactorily. To illustrate, the nearest consular office in the State of execution may be from 100 to 500 miles distant from the place where the witness resides. It would be an unnecessary burden on the consul to ask him to leave his consular office to perform his function at that distance, and it would be an unnecessary burden and expense on the witness to require him to travel to the consular office. If an appropriate competent person, for example a reputable lawyer with offices in the same city in which the witness resides, could be appointed, he could arrange for the taking of the evidence with a minimum of burden and expense.

In the theory of the Anglo-American practice, there is no difference in principle between allowing evidence to be taken by a foreign consul and allowing it to be taken by some other qualified person duly appointed for this purpose by the court of the foreign country in which the action is pending.

Just as in the case of the consul, the functions of the commissioner will depend on the nature of the commission given to him by the court.

If the commission is one merely to submit a list of written questions and cross-questions, which will accompany the commission, the commissioner's function is simply to propose the written questions to the witness and record his answers for the use of the trial of the case. On the other hand, if the commission is an 'open commission', the commissioner will be merely a neutral supervisory officer, with no power of compulsion, and the questioning of the witness will be done by the advocates for the respective parties.

It would be most unusual for a lawyer for one of the parties to be appointed as a commissioner since this would be inconsistent with the neutrality of his position. Two methods are available for the appointment of a commissioner. The usual method is for the court where the action is pending to appoint a designated person abroad (a consul or some other qualified person) a commissioner to take the evidence. If the situation justified it, the court where the action is pending might address a letter of request to the court of the foreign country asking that court itself to appoint a commissioner to take the testimony, suggesting the language and other qualifications which the commissioner should have.

The choice between the written interrogatories and the 'open' commission with oral examination of the witness depends frequently on financial circumstances. In many cases, the parties to the action will not have the resources to send their own lawyers abroad to conduct the questioning of the witness or to employ foreign counsel, in the foreign State, to interrogate the witness for them. No commissioner ever has any powers of compulsion. If a witness will not appear voluntarily, or will not testify, the commissioner is powerless to force him to do so.

His sole remedy is to apply to the tribunal of the place where the evidence is to be taken, and request that tribunal to give him assistance in compelling the appearance and testimony of the witness.

The United Kingdom Expert also pointed out that in many, if not all, of the United Kingdom bilateral Conventions provision was made for commissioners. In effect, the provisions in these Conventions obliged the Contracting Parties to let the commissioner act without hindrance.

Perhaps the most spectacular illustrations of the use of commissioners are three recent instances in the United States, in the Federal courts, for the benefit of Italian and German litigation.

In these cases, the United States Federal court, on application, appointed visiting German and Italian judges as commissioners, authorizing them to take the testimony of designated witnesses within the jurisdiction of the United States court, authorizing them to proceed to interrogate the witnesses in their own language and in conformity with their own procedure, and granting *sub poenas* compelling the witnesses to appear before these foreign judges to testify.

It is difficult to conceive of more complete 'judicial assistance' by the court of one State to the court of another State in aid of the latter's litigation.

The Special Commission was unanimous in its decision to introduce the system of commissioners into the draft Convention, but on a solely optional basis and subject to more local control by the State of execution than in the case of consuls.

The factor that motivated the Special Commission to permit tighter controls is the difference in official status between a consul and a non-consular commissioner. In the case of the consul, he is an officially accredited foreign service officer, subject to official consular regulations and subject to disciplinary recall if he exceeds his privileges. With respect to his own nationals, he has an official duty to protect their interests in the State where he is posted. This puts him in a different category from an ordinary person selected by a foreign court and armed with the substantial authority of an official commissioner.

Accordingly, it was decided that the general rule of article 13 which permits a consul to take the evidence of his own nationals on an unrestricted basis and without the need of a declaration by the State of execution should not be made applicable to the non-consular commissioner. Instead, all action by the commissioner is made subject to a permissive declaration by the State of execution, irrespective of the nationality of the witness. Articles 18, 19 and 20 therefore provide optional provisions closely comparable to those contained in articles 14 to 17.

Article 18

This article contains the basic provisions with respect to the taking of evidence by non-consular commissioners.

In the first place no commissioner may act, regardless of the nationality of the witness, unless if a declaration permitting him to act has been filed, excepting of course those situations where the local internal law or existing bilateral conventions (which are preserved in article 22) permit the commissioner to act.

The discussion of the following articles is necessarily limited to those situations where there is no such internal law and where there are no bilateral conventions which govern.

No State is required to permit a commissioner to act on its territory. Simply by declining to make any declaration, the practice will be forbidden.

The first sentence of article 18 refers only to the situation where the commissioner is appointed by the court of the State where the action is pending. Appointment by the court of the State of execution, as in the case of the appointment of the German and Italian judges by the United States courts mentioned above, is not included in article 18. Such an appointment would be included within the articles governing letters of request. The State of origin, in a letter of request, might specifically ask the court of the State of execution to appoint such a commissioner. Such action by the State of execution would constitute the execution of a letter of request, rather than the recognition of a commissioner appointed by the State of origin.

If a declaration permitting the operation of commissioners is filed, the first sentence provides that the declaring State may include 'such general conditions' as it may wish in the declaration. There are no fixed limits to the scope of these conditions. However, the second sentence of article 18 specifically permits the inclusion, in the conditions, of the requirement of a written application by the commissioner to an appropriate authority designated by the declaring State for permission to take the evidence of the named persons.

There is, of course, no duty on the declaring State to include any particular conditions. It may, if it wishes, file a declaration giving the commissioner a status identical to that of a foreign consul. If this is done, the commissioner will have every power that a consul has in that State, no more and no less. Or the declaration may give the commissioner unlimited right to take the testimony of willing witnesses without compulsion as in the Anglo-American countries. At the other end of the scale, the declaration may confine the commissioner within the narrowest limits, for example, requiring an application for permission in every case and limiting him to taking the evidence of nationals of the State of origin.

Two options are available to the declaring State with respect to the rules governing the commissioner. The declaration may include the most meticulous details in the declaration itself specifying therein all of the limitations and conditions it wishes to impose. Or the declaration may merely provide a general requirement of an application for permission in every case. The details will be prescribed *ad hoc* for each particular case, giving the maximum flexibility to prescribe the particular limitations, conditions, rules and regulations which are to be applicable to each particular case.

On balance, it would seem much more practical to avoid excessive detail in the declaration itself and to permit the widest flexibility in fixing the details in the permissive orders which will be granted.

The second sentence of article 18 specifies the right of the declaring State to include, in the declaration, the requirement that a written application must be filed in every case for permission to take the evidence. The application will be directed to an agency of the State of execution named in the declaration. The persons whose evidence is to be taken, are to be named in the application. The third and fourth sentences further provide that the order granting permission may limit the time and place and the conditions on the taking of the evidence and also may prescribe how and by whom the oath or affirmation of the witness shall be taken. It may also prescribe the rules of conduct for the commissioner to follow in carrying out his mandate.

Article 19

Article 19, also in optional form, provides the possibility of compulsory assistance from the tribunals of the State of execution identical with that which is made available to the consul under article 16.

Here again, in the absence of internal law or bilateral convention, no application for compulsory assistance may be made by a commissioner, and no compulsory assistance will be given him in the absence of a declaration of the State of execution and only on such general conditions as may be included in that declaration.

Even in that situation, the right of the commissioner is merely to make a request similar to a request which a consul may make under article 16. This grants nothing definitively since the right of the consul to compulsory assistance is entirely optional and discretionary. It may be refused entirely, or limited by the conditions or limitations imposed in the order granting it.

The commissioner's possible right to compulsory assistance is therefore parallel to that of the consul. It is subject to the same rules of discretion and to the imposition of conditions and limitations by the competent authority of the State of execution designated to rule on such requests.

Article 20

If a commissioner is authorized to act, his powers, in the absence of rules of internal law or bilateral conventions, will be strictly limited within the scope of the order of permission issued under article 18 discussed above.

Within the limits of the conditions and limitations of that approving order, article 20 provides that the powers of the commissioner and the performance of his functions shall be governed by the identical rules which apply to the consul under article 17.

In other words, the commissioner is made as closely as possible parallel to a consul except to the extent that the authority which authorizes him to take the evidence may impose more restrictive rules on the commissioner than apply in the case of the consul.

As has been pointed out in the introductory remarks to this chapter, from the point of view of strict logic the commissioner is really a broader concept than that of the consul. Every 'consul' falls within the broader scope of 'commissioner', whereas every 'commissioner' is certainly not a 'consul'. Therefore, in a strictly logical presentation, the topic of the commissioner would be dealt with as the general rule, and the consul would be considered as merely a special kind of commissioner.

Nevertheless, as a result of the discussions within the Special Commission, and because of the fact that there has been considerable experience in the taking of testimony by consuls but relatively little experience in the use of commissioners, it was thought better to put pure logic to one side. The draft Convention deals with consuls independently and does not consider them as merely one kind of commissioner. The end result seemed quite satisfactory to the Special Commission.

Chapter VI – General clauses

The general clauses, articles 21 to 30, were prepared by the Secretary-General, under instructions of the Special Commission, subsequent to the close of the meeting of the Commission. Because of the shortage of time, the Special Commission did not participate in their drafting and did not debate their substance, other than the content of articles 22, 26, 27 and 30, which will be briefly discussed in this Report. The remaining articles will be left for consideration at the October Session.

Article 22

This article was intended to cover the point, made many times during the debates in the Special Commission, and referred to several times previously in this Report, that

internal legislation in any State which provides a system more liberal than and less restrictive than that provided in the Convention should be preserved. It parallels article 19 of the Convention on Service of Documents. The article as drawn in the text is too narrow. As drawn, it relates only to the protection of the methods of transmission of letters of request. It does not refer to the important matters of the form, scope and execution of letters of request, the right of consuls and commissioners to take evidence and the right of consuls and commissioners to receive compulsory assistance against recalcitrant witnesses. All of these may be the subject of more liberal and less restrictive internal legislation and practice, or of more liberal and less restrictive bilateral or multilateral conventions.

Reference has previously been made to the United States legislation of 1964 under which foreign consuls and foreign commissioners have the unlimited right to take the testimony of any willing witness of any nationality on any topic at any time, at any place and by any method with which the witness will agree. The procedure in the United Kingdom is identical.

Similarly, Austria, Denmark, Finland, the Netherlands and Spain give a foreign consul the free right to take the testimony of a willing witness who is a national of a third State; and Luxemburg permits this also provided that the witness testifies without an oath.

Similarly, Austria, Finland and the Netherlands permit such testimony to be taken by a foreign consul from a national of their own State.

Certainly, those countries should not be required to repeat this existing permission, under their internal law, by filing new declarations under articles 14 and 15. Further, to the extent that the internal law of any of these countries provides for the grant of compulsion by a method less restrictive than that contained in article 16, no State should be required to file a further declaration under article 16.

Finally, the Parties to the United Kingdom's network of bilateral conventions should not be required to file new declarations under any of the articles 13 to 20 where these matters are already provided for on a basis less restrictive than that called for in those articles.

The problem of the bilateral conventions seems to be well taken care of in article 26, *infra*, but no adequate provision is made for the problem of the internal legislation. Further, the format of article 22 varies from the format of article 19 of the Convention on Service of Documents.

The Rapporteur therefore proposes that the present text of article 22 be revised to read substantially as follows—

To the extent that the internal law or practice of a Contracting State permits methods of transmission into its territory of letters of request, or methods of execution thereof, other than those provided for in this Convention, or permits methods of taking evidence other than those provided for in this Convention, or permits any action provided for in this Convention to be performed upon conditions less restrictive than those provided for in this Convention, this Convention shall not affect the operation of such internal law or practice within its territory.

With a provision of this kind, the Convention will protect existing more favorable procedures and no Contracting State will be held to have inadvertently modified or restricted its pre-existing legislation, which may be less restrictive than the provisions of the Convention.

Article 26

As mentioned in the discussion of article 22, *supra*, this

article properly protects the network of United Kingdom bilateral conventions, as well as all of the other existing bilateral conventions between signatory States, including those listed in the Memorandum of the Secretariat which was included as an annex to the Questionnaire to Governments.

Article 27

In the discussion of article 13, *supra*, it was pointed out that the power of a consul to take the testimony of one of his own nationals is stated in article 13 in general affirmative terms, but subject (as stated in article 15) to the right of any Contracting State to limit this general clause by filing a reservation under this article 27. The reservation may either (1) veto completely the application of article 13 or (2) permit the consul to take such testimony only on such conditions as may be set forth in the reservation.

This article was inserted in recognition of the problem, in some States, created by the breadth of their doctrine of judicial sovereignty and the problems which would thereby be created if a consul were permitted to take evidence even of his own nationals.

Article 30

This article is copied directly from the Convention on the Service of Documents and article 9, paragraph 2 of the 1954 Convention.

It presents no problems which require discussion in this Report.

Chapter VII – Undecided and open questions

A number of questions were raised during the meeting of the Special Commission which could not be resolved either because of the shortage of time or because they were not brought up until the closing hours of the meeting when a quorum was not present and official action could not be taken.

Some or all of them should be discussed at the October Session and some or all of them should be included in the final text of the Convention.

These questions will be briefly noted for the October Session.

a The question of costs and of free legal aid

Article 16 of the 1954 Convention provides that a State executing a letter of request may not charge taxes or fees. However, the State of origin may be requested to refund (1) the costs paid to witnesses or experts, (2) the expenses incident to the compulsion of a witness and (3) the expenses incident to the use of a special procedure requested by the State of origin.

Similarly, article 12, paragraph 2 of the Convention on the Service of Documents requires the reimbursement of the costs occasioned by the employment of an official server in the State of destination and the costs incident to the use of a special method of service.

During the brief discussion of costs by the Special Commission, it was assumed that translators and interpreters would be included within the provision for 'experts' in the cost provisions of the 1954 Convention.

It was also suggested that it might be appropriate under certain circumstances, for the authorities of the State of execution, to request a reasonable advance deposit of costs if those authorities had no available funds which they could advance for that purpose, pending future reimbursement. This problem might be very substantial in the event of the requirement of the translation by the Central Authority of the State of execution of a large bulk of documents under article 4.

The point was also made that, to the extent that the Anglo-American courts used commissioners, appointed by them, to execute letters of request received from abroad, considerable additional expense was added. Should these expenses likewise be reimbursable? Where consuls or commissioners are used, should the State of execution bear any of the expense under any circumstances? The consul will make no charge for his services in taking the evidence. The commissioner is appointed by the court at the request of one of the parties and, accordingly, his expenses are to be borne by the party requesting his appointment. The cost of translations and stenographic assistance, if any, and the travelling expenses of the parties and their legal representatives, and the cost of appointing foreign lawyers abroad to act for the parties under an 'open' commission are also private expenses to be borne by the parties respectively.

If the witness appears voluntarily before the consul or commissioner, the State of execution would not be involved in any way and there should be no reimbursable expenses. But if compulsion is needed to compel the witness to appear before the consul or the commissioner, expenses will be incurred in the State of execution which should perhaps be reimbursed.

During the discussion, several Experts referred to the provisions of articles 20 to 24 in Chapter IV of the 1954 Convention.

The question was immediately raised whether this draft Convention, which is a revision of Chapter II, should deal at all with Chapter IV. It was also noted that the problems of this form of free judicial assistance are much more complex than in 1954 because there are so many different judicial systems involved in the present expanded membership of the Conference.

The Special Commission reached no final decisions on any of the issues of costs or of free judicial assistance, and no provisions for it appear in the present draft Convention.

The Rapporteur was directed by the Commission to note, for the benefit of the October Session, the various points discussed.

b Immunity of a witness from arrest or service of process

During the Meeting a proposal was introduced to provide in the Convention for the immunity of a witness from arrest or from service of process, when he comes into the territory of the State of execution for the purpose of testifying, and until a reasonable time following the close of his evidence.

The Commission had no opportunity to consider the basic question of whether this topic should be included as part of this Convention and, if so, what should be the exact limitations and conditions for the witness's immunity.

The Rapporteur was directed to note the question in this Report for consideration at the October Session.

c Effect of refusal of a witness to appear

A proposal was made to include in the Convention a provision that the refusal of a witness to appear before a consul or a commissioner and give evidence, if no order of compulsion had been issued against him, should not render the individual liable to any penalty or prejudice in the proceedings for which the evidence is required. Such a provision appears in the United Kingdom-Denmark bilateral Convention.

There was no opportunity for a full explanation of the reason for the provision or effective debate on it. It was, however, immediately noted that the situation seems very

different if the person who refuses to appear and testify is a mere witness, or if he is one of the parties to the action. If a mere witness in a foreign land refuses to appear voluntarily and no compulsion order is issued against him, it is not clear how he could be subject to any penalty or prejudice personally in proceedings in another country to which he is not a party.

On the other hand, if a party who is abroad refuses to testify, there will obviously be the possibility of prejudice against him in the court where the action is pending. The absence of his testimony may result in his loss of his case at the trial. How can the Convention regulate this? Should the Convention permit a party to refuse to testify in a civil or commercial matter and demand that the judge hearing the controversy excuse him from any prejudice to his case because of such refusal? The Commission reached no decision on this question, but instructed the Rapporteur to include these comments in the Report.

d Alternative procedures available

In all of the United Kingdom bilateral Conventions, a clause appears to protect the moving party if he begins by seeking the evidence before a consul or a commissioner, and fails because the witness will not appear and testify voluntarily and no compulsion is granted. The bilateral Conventions provide that the moving party may thereafter start over again and seek to obtain the testimony by letters of request where compulsion will be available.

The Working Paper introduced on the first day of the Meeting contained this provision but there was no debate or discussion of it until the final day and at a time when a quorum was not present. The language contained in the Working Paper was an adaptation of article 6 of the United Kingdom-Norway Convention of January 30, 1931. Similar or identical language appears in at least 14 other of the United Kingdom bilateral Conventions.

The Special Commission therefore was without power to consider the question which raises no policy problems of substance.

The Rapporteur was requested to note the question as one reserved for the October Session.

e The problem of dual nationality

As already discussed in detail, articles 13 and 14 provide differing rules for the taking of evidence by a consul based on the nationality of the witness. But suppose the witness is a dual national?

Since these articles of the Convention provide for the nationality of the consul, the nationality of the State of execution and the nationality of third States, it is obvious that several different combinations are available which would cast the witness within the coverage of two of the provisions. If he does fall within two of the provisions, should he be governed by the rule least restrictive to taking the evidence or the rule most restrictive?

The Commission reserved discussion of this point and directed the Rapporteur to note it for consideration in October.

f Proceedings before administrative tribunals

Article 1 relates to the action of 'a judicial authority' in a civil or commercial matter, in issuing a letter of request. The material in square brackets at the end of article 13 refers to civil or commercial proceedings 'pending in the courts'. Article 18 refers to a commissioner appointed 'by a court'. These choices limit the international assistance under this Convention to judicial

proceedings in the courts. The language deliberately does not provide, in any article, for similar assistance in connection with administrative or other non-judicial proceedings pending before administrative or other non-judicial tribunals in the State of origin.

The Rapporteur was directed to note this limitation in this Report for further consideration at the October Session.

g Penal provisions

During the debates, the Special Commission noted the penal problems which may arise in connection with the taking of evidence abroad. The most common are—

- 1 failure of refusal of a witness to obey the order of a competent tribunal;
- 2 false testimony by a witness.

The Commission was unanimous in excluding all reference to these problems from the Convention. They raise questions of internal penal law of the affected States not appropriate for this Convention. They may also involve questions of jurisdiction between the State of origin and the State of execution.

The Rapporteur was directed to note in this Report the deliberate decision of the Special Commission to exclude any reference to these problems in the Convention.