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THIRD MEETING

Wednesday, 6 March 1963, at 3.20 p.m.

Chairman: Mr. GIBSON BARBOZA (Brazil)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6)

Article 28 (Use of the national flag and of the state coat-of-arms)

1. The CHAIRMAN invited debate on article 28 of chapter II of the draft articles on consular relations adopted by the International Law Commission, and drew attention to the amendments submitted.¹

2. Mr. BERGENSTRAHLE (Sweden) hoped that a schedule of work would be established, for his delegation would wish to consult experts on articles 48, 49 and 50.

3. The CHAIRMAN said that the Committee would endeavour to work out a time-table and would inform the Swedish delegation beforehand when those articles would be discussed.

4. Mr. PEREZ HERNANDEZ (Spain) said that the purpose of his delegation's amendment (L.23) to article 28 was to simplify the text.² The head of post was the embodiment of the consulate, and the right to use the national flag on the consular building or on his means of transport vested in the consul himself or, in his absence, in the person acting for him.

5. Mr. NASCIMENTO e SILVA (Brazil) said that his delegation's amendment (L.28) proposed a different solution. There was a fundamental difference between the head of a consular post and the head of a diplomatic mission, and the same privileges could not be granted equally to both of them, either with regard to the building or with regard to means of transport. The receiving State would be faced with difficult problems if the head of a consular post could, like the head of the diplomatic mission, use the national flag on his vehicles.

6. The Brazilian delegation would prefer that the article in question should not refer to the right of the head of consular post to use a flag on his motor-car, but it would certainly not suggest that he should be prohibited from doing so.

7. If his delegation's amendment were not accepted, he would consider supporting those submitted by Switzerland or Italy (L.22 and L.35).

8. Mr. EVANS (United Kingdom), asking the Committee's indulgence for the delay in submitting his delegation's amendment (L.40), explained that it had enabled him to modify the original text in the light of the amendments proposed by other delegations.

¹ The following amendments had been submitted: Switzerland, A/CONF.25/C.2/L.22; Spain, A/CONF.25/C.2/L.23; Brazil, A/CONF.25/C.2/L.28; Italy, A/CONF.25/C.2/L.35; Nigeria, A/CONF.25/C.2/L.36; United Kingdom, A/CONF.25/C.2/L.40.

² All references in this and subsequent records of the Second Committee to "L" documents are references to documents in the series A/CONF.25/C.2/L...

9. The Spanish delegation's amendment (L.23) was perhaps unduly specific in referring to the head of the consular post. The United Kingdom delegation had wished to avoid specifying whether the right to fly the national flag vested in the consulate or in the person of the consul. The Swiss delegation's amendment would subordinate that right to the practices in force in the receiving State; yet surely, according to established international practice, there was an absolute right to display the flag and coat-of-arms on the consulate building, and accordingly the convention should set out that principle explicitly.

10. He could, however, understand the reservations expressed by certain countries as regards the flying of the flag on means of transport. His delegation's amendment would make that provision subject to the laws and regulations of the receiving State, but extend it to the residences and means of transport of all consular officers.

11. Mr. DAS GUPTA (India) said that there was a lack of agreement among delegations on draft article 28. In paragraph 7 of the commentary there was a reference to article 20 of the Vienna Convention on Diplomatic Relations, 1961; but consular functions could not be placed on a par with diplomatic functions. The International Law Commission's draft provided for the right to use the flag and the coat-of-arms on the building, and his delegation considered that provision sufficient. To extend that right to the means of transport would tend to make for confusion and create difficulties for the receiving State.

12. Mr. SERRA (Switzerland) recalled that his government had already commented on the point. The right to fly the flag should not be unrestricted for, by reason of the respect due to a foreign national emblem, the receiving State was responsible for its protection at all times, and that was a heavy responsibility.

13. Mr. SPACIL (Czechoslovakia) said that draft article 28 satisfied all the essential requirements. It was proper that the right to fly the flag should vest in the head of post, and his delegation would vote against any amendments which diminished that right. It might happen that a State had no diplomatic mission in a country, but was represented by consuls, in which case the consul who performed quasi-diplomatic functions could hardly be denied the right to use the national flag. So far as vehicles were concerned, the head of post should likewise have the right to fly the national flag.

14. Mr. HEUMAN (France) said that Brazil and Spain had submitted proposals that were diametrically opposed. The best solution seemed to be that proposed in the United Kingdom amendment, or at any rate the first part of it, which he would be prepared to endorse.

15. The amendments submitted by Switzerland and Italy would in varying degrees make the right to fly the flag contingent on the law or practice of the receiving State. While not opposed to either of those texts, he said it was most important that the right to use the national flag on the means of transport should be expressly

recognized in the convention on consular relations, for it might help to ensure the safety of the consul and of his nationals in times of disturbance, war or rebellion. The French delegation would support the first part of the United Kingdom amendment. It would also endorse the amendment submitted by Switzerland, provided that the expressly recognized right to use the national flag on means of transport was referred to in the record.

16. Mr. MARESCA (Italy) said that the use of the national flag was of some importance. The police of the receiving State could not be expected to be over-watchful in ensuring respect for a national emblem. He agreed that it was occasionally necessary to fly the flag on the means of transport and, in that respect, he shared the French delegation's opinion. The United Kingdom amendment was an excellent formula, which avoided specifying whether the right to do so vested in the consulate or in the head of post.

17. Mr. KHLESTOV (Union of Soviet Socialist Republics) paid a tribute to the work of the International Law Commission and in particular to its special rapporteur, Mr. Žourek. The draft articles prepared by the Commission formed a good basis for the conclusion of the convention.

18. Article 28 laid down the generally admitted principle of the right to fly the national flag on the buildings and means of transport. That principle had been recognized in the law of the USSR ever since 1926, and Austria too, for example, had enacted provisions to the same effect.

19. In so far as the Swiss amendment (L.22) empowered the receiving State to decide in what circumstances the sending State could use its national flag, his delegation would regard the amendment as unacceptable.

20. The amendment submitted by the Spanish delegation (L.23) did not involve any great change; the first part of the Brazilian amendment (L.28) was acceptable, whereas the second part might be the subject of discussion.

21. Although he had not as yet seen the Russian text of the United Kingdom amendment, his impression was that it constituted a positive contribution. With regard to means of transport, he said there was a good case for retaining the original text of article 28, and the idea that the right to fly the flag on motor-cars should to some extent depend on the practices in force in the receiving State might be discussed.

22. His delegation would therefore support article 28 as drafted, but would welcome a re-draft taking into account the different views expressed.

23. Mr. SALLEH bin ABAS (Federation of Malaya) said that the text of article 28 was entirely satisfactory. If, however, the Committee wished to change it, his delegation would support the amendment submitted by the United Kingdom.

24. Mr. JESTAEDT (Federal Republic of Germany) said that he shared the opinion of the USSR and other delegations and would support draft article 28 or, if that text were to be amended, the United Kingdom proposal.

25. Mr. SHITTA-BEY (Nigeria) said that the International Law Commission had obviously wished to make a distinction between the consulate, which was an establishment, and the head of post, who was an individual, and article 28 conferred a privilege on that person, a privilege which should attach to the function.

26. The United Kingdom amendment seemed to him to be entirely acceptable, but he thought that the right to fly the flag should be exercised only within the limits imposed by the laws of the receiving State. The two States could agree on the circumstances in which the flag of the receiving State could be flown on the consul's residence.

27. Mr. TILAKARATNA (Ceylon) thought that the head of a consular post should be allowed to display the national flag on his means of transport, in cases where no head of diplomatic mission accredited by the same government was stationed in the same place.

28. Mr. HARASZTI (Hungary) said that the right to display the national flag on the means of transport was more important for a head of consular post than for a head of diplomatic mission and that that right should definitely be included in the Convention. He shared the views expressed by the Nigerian representative on the question of the right to fly the flag on the consul's residence.

29. Mr. PEREZ HERNANDEZ (Spain) said that he was prepared to withdraw his delegation's amendment (L.23) in favour of the United Kingdom amendment, so as to facilitate the Committee's work.

30. Mr. KAMEL (United Arab Republic) said that the right to fly the flag should be restricted to the consulate building and to the consul's residence. To permit its display on means of transport would lead to difficulties without increasing the consul's protection. His delegation took a favourable view of the United Kingdom amendment, but thought that the receiving State should not be given discretion to decide on the exercise of the right to fly the flag.

31. Mr. ZEILINGER (Costa Rica) said he would have preferred article 28 not to mention the entrance door, but only the building. Furthermore, the circumstances in which the sending State could fly its national flag and display its coat-of-arms should be defined.

32. Mr. SPYRIDAKIS (Greece) said that, since article 28 as drafted by the International Law Commission followed closely the language of article 20 of the 1961 Convention, it was preferable. If, however, the majority of the representatives should wish to amend the provision, he would, like the representative of the United Arab Republic, prefer the use of the word "shall" in place of "may" in the United Kingdom amendment.

33. He drew the United Kingdom representative's attention to the expression "consular officers", which was not defined in article 1 of the International Law Commission's draft, and asked for further information on that point. The right to fly a pennant on means of

transport should be reserved exclusively to the head of post and should not be extended to consular officials.

34. Mr. VRANKEN (Belgium) said that he could accept the United Kingdom amendment if the phrase "subject to the laws and regulations" were replaced by "in conformity with customary practice".

35. Mr. WASZCZUK (Poland) said he was inclined to accept the Nigerian amendment (L.36) to the effect that "on suitable occasions" the flag might be flown on the head of post's residence; that would be in keeping with the underlying idea of article 20 of the 1961 Convention. His delegation agreed with those who had expressed a preference for article 28, as originally drafted, but would not oppose the consideration of certain amendments.

36. Mr. EVANS (United Kingdom), in reply to the Greek representative, said that he realized that the expression "consular officers" did not actually appear in the draft articles; there was no difference in meaning between that expression and the expression "consular officials". He had, however, chosen the former designedly, since his delegation would propose that the word "officers" should be substituted for the word "officials" throughout the text.

37. The CHAIRMAN said that the point concerned terminology and should be left to the drafting committee.

38. Mr. CHIN (Republic of Korea) said that his delegation would support the United Kingdom amendment.

39. Mr. BLANKINSHIP (United States of America) said that the text as established by the International Law Commission was satisfactory; he was not, however, opposed to the United Kingdom amendment, which seemed to meet with the approval of a large number of delegations.

40. Mr. BERGENSTRAHLE (Sweden) proposed that the United Kingdom amendment, as amended by the Belgian representative, be accepted.

41. Mr. DAS GUPTA (India) said that the original text was in general acceptable. In his opinion, the use of the term "consular officers" in the United Kingdom amendment was liable to lead to confusion since it might have the effect of extending the scope of the article to too large a number of persons.

42. Mr. ZABIGAILO (Ukrainian Soviet Socialist Republic) thought that it was unnecessary to amend the draft article. He would therefore approach with caution any amendments which tended to restrict the rights of States, as did, for instance, the Swiss and Italian amendments; such restrictive provisions should not be introduced. He had not yet received the Russian text of the United Kingdom amendment, but at first sight it seemed acceptable, subject to certain improvements. More specifically, the use of the phrase "may be flown", whereas the original text spoke of a right, seemed to introduce a restriction which was not perhaps intended by the United Kingdom representative and which was not in conformity with the spirit of article 28. That

question might be left to the drafting committee. He too was of the opinion that the phrase "laws and regulations" should be replaced by the expression "customary practices". The main question was, however, whether it was desirable to amend article 28 at all.

43. Mr. KONSTANTINOV (Bulgaria) thanked the Committee for the honour that it had done to his country and himself by electing him rapporteur.

44. He was of the opinion that the International Law Commission's draft should serve as the basis for the Committee's work, but he noted that several amendments took account of the practice observed in various States. He was firmly of the opinion that the principle of the "right" to fly the flag should be inviolate.

45. The United Kingdom amendment contained two features that should be eliminated. It was incorrect to say "may be" flown, since in fact a "right" was involved. Secondly, if the number of persons using the flag was increased too greatly, the provision would go much further than the original text.

46. In short, the original text should be taken as the basis for discussion, but the amendments by the United Kingdom, Nigeria and Brazil should be taken into account. In that way it might perhaps be possible to agree on a generally satisfactory text.

47. Mr. PEREZ-CHIRIBOGA (Venezuela) said that he would support the Brazilian amendment, which improved draft article 28.

48. Mr. LEVI (Yugoslavia) said that he had no objection to article 28 as originally drafted. He was nevertheless prepared to consider amendments, more especially those submitted by Switzerland, Italy and the United Kingdom. Like that of India, his delegation could not agree to the replacement of the expression "head of post" by "consular officers".

49. Mr. RODRIGUEZ (Cuba) said that his delegation would accept the original text, but it would be prepared to agree to a provision extending the use of the flag to the residence of the head of post if the majority in the Committee so wished.

50. Mr. ANGHEL (Romania) said that article 28 was well drafted and reflected existing international practice. Nevertheless the Committee had before it amendments tending to restrict the right to fly the flag either to the consular post or to the head of post, and even to make that right subject to conditions. His delegation's view was that no change should be made in the proposed draft of article 28 that might restrict the right dealt with in that article and give rise to confusion on the subject. His delegation would therefore support the text as it stood, unless, as proposed by the USSR and Bulgarian delegations, the sponsors of the amendments submitted a re-draft of article 28.

51. Mr. DRAKE (South Africa) said he had no objection to the original text of article 28, but would consider the United Kingdom amendment, subject to the Belgian representative's suggestion that the words "subject to laws and regulations" should be replaced by the words "in conformity with customary practice".

52. He thought that the use of the flag on means of transport should be reserved exclusively for the head of post.

53. Mr. WALDRON (Ireland) said he preferred the new compromise proposal of the United Kingdom which set up the proper balance between the rights of the sending State and those of the receiving State. Thus the sending State could control the use of the flag on the consulate, and the receiving State could control its use on the residence of the consul and, more especially, on the means of transport. He could not accept the Belgian proposal that the phrase "in conformity with customary practice" be substituted for the phrase "subject to the laws and regulations"; it would be better, if necessary, to mention "laws, regulations and practices".

54. He too thought that the privilege of flying the flag on means of transport should be reserved for the head of the post.

55. Mr. SRESHTHAPUTRA (Thailand) said that, with the exception of two points, the United Kingdom proposal was very close to his delegation's point of view. First, he was doubtful whether the door to the consulate was always the right place at which to fly the flag or display the coat of arms. Secondly, like the representatives of India and Yugoslavia, he found the expression "consular officers" unacceptable. If the United Kingdom representative took account of those objections, the Thailand delegation would endorse that proposal.

56. Mr. DAS GUPTA (India) hoped that the United Kingdom delegation would provide some further explanations, for that delegation's amendment might imply that "consular officers" might have a rank equal to that of an ambassador, whereas in international practice the ambassador alone was entitled to fly the national flag.

57. Mr. EVANS (United Kingdom) said in reply that, so far as the use of the flag was concerned, the consul's status was not exactly on a par with that of the diplomat; the actual functions were different in that consuls were concerned essentially with the protection of their nationals, whereas ambassadors had the principal function of representing their governments in the receiving State. Nevertheless, in deference to the Indian representative's criticism, he would be prepared to reconsider his position on that point.

58. Mr. DAS GUPTA (India) said that in the light of the United Kingdom representative's explanations he was unable to accept the amendment in question, for the amendment might mistakenly convey the impression that the consular service ranked on a par with the diplomatic service.

59. Mr. NASCIMENTO e SILVA (Brazil) noted that there was virtually universal agreement on the text of article 28, subject to the United Kingdom amendment and to some drafting changes. He hoped that a generally acceptable revised draft would be submitted at the next meeting.

60. Mr. MORGAN (Liberia) said that he was fully able to accept article 28 as it stood so far as it related to the use of the national flag on consular buildings, though he could not take the same view of the provisions

relating to the use of the flag on means of transport in places where diplomatic missions were situated.

61. Mr. HEUMAN (France) said he would prefer the original text of article 28 to stand, though he noted that a majority of delegations seemed prepared to accept the United Kingdom's proposal, as amended. In the light of that general opinion his delegation would be prepared to accept the United Kingdom text except in one respect: the expression "may be flown", which seemed to imply an option, was too weak, for an absolute right could not be described in terms suggesting it was a mere faculty; the provision should expressly mention the sending State's right. The other amendments raised no problems.

62. Mr. SPACIL (Czechoslovakia) said that his delegation shared the doubts expressed by the representative of France. Article 28 was acceptable as drafted, but inasmuch as the majority seemed to support the United Kingdom amendment his delegation was prepared to consider it. At the same time, there seemed to be some contradiction between the United Kingdom text and the statement of that country's representative concerning an unconditional absolute right — an idea which the Czechoslovak delegation shared fully — whereas the amendment itself did not reflect that notion. Accordingly, without wishing to make a formal proposal (since he understood that the United Kingdom would revise its text), he suggested that the Committee should approve the first part of the original text of article 28 subject to slight changes and add what the United Kingdom had proposed in its original amendment. In that way the Committee would be able to specify the respective rights of the sending and of the receiving States.

63. Mr. MARESCA (Italy) said that the problem was how to balance the sending State's right to use its flag against the receiving State's right not to be expected to make too great an effort in protecting that flag. He considered that his own delegation's amendment (L.35) offered the right solution.

64. The CHAIRMAN suggested that the representatives concerned should confer with the United Kingdom representative with a view to preparing a text that could be put to the vote at the next meeting.

The meeting rose at 5.55 p.m.

FOURTH MEETING

Thursday, 7 March 1963, at 10.45 a.m.

Chairman: Mr. GIBSON BARBOZA (Brazil)

Consideration of the draft articles on consular relations adopted by the International Law Commission at its thirteenth session (A/CONF.25/6) (continued)

Article 28 (Use of the national flag and of the state coat-of-arms) (continued)

1. The CHAIRMAN recalled that there had been general support at the previous meeting for an amend-