

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1961

Volume I

*Summary records
of the thirteenth session*

1 May — 7 July 1961

UNITED NATIONS



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INTRODUCTORY NOTE

The summary records which follow were originally distributed in mimeographed form as documents A/CN.4/SR.580 to A/CN.4/SR.627. They include the corrections to the provisional summary records that were requested by the members of the Commission and such drafting and editorial modifications as were considered necessary.

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The documents pertaining to the work of the thirteenth session of the Commission are reproduced in volume II of this publication.

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MEMBERS OF THE COMMISSION

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Rapporteur: Mr. Ahmed Matine-Daftary

Mr. Yen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

AGENDA

[Document A/CN.4/133]

[26 January 1961]

The Commission adopted the following agenda at its 581st meeting, held on 2 May 1961:

1. Filling of casual vacancies in the Commission (article 11 of the Statute)
2. Consular intercourse and immunities
3. State responsibility
4. Law of treaties
5. Co-operation with other bodies
6. Planning of future work of the Commission
7. Date and place of the fourteenth session
8. Other business

List of documents pertaining to the thirteenth session of the commission

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/925	Report of the International Law Commission covering the work of its first session	<i>Official Records of the General Assembly, Fourth Session, Supplement No. 10</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1949.
A/1858	Report of the International Law Commission covering the work of its third session	<i>ibid.</i> , <i>Sixth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1951, vol. II.
A/2456	Report of the International Law Commission covering the work of its fifth session	<i>ibid.</i> , <i>Eighth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1953, vol. II.
A/2693	Report of the International Law Commission covering the work of its sixth session	<i>ibid.</i> , <i>Ninth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1954, vol. II.
A/3159	Report of the International Law Commission covering the work of its eighth session	<i>ibid.</i> , <i>Eleventh Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1956, vol. II.
A/3623	Report of the International Law Commission covering the work of its ninth session	<i>ibid.</i> , <i>Twelfth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1957, vol. II.
A/3859	Report of the International Law Commission covering the work of its tenth session	<i>ibid.</i> , <i>Thirteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1958, vol. II.
A/4169	Report of the International Law Commission covering the work of its eleventh session	<i>ibid.</i> , <i>Fourteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1959, vol. II.
A/4425	Report of the International Law Commission covering the work of its twelfth session	<i>ibid.</i> , <i>Fifteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1960, vol. II.
A/4843	Report of the International Law Commission covering the work of its thirteenth session	<i>ibid.</i> , <i>Sixteenth Session, Supplement No. 9</i> ; also reproduced in <i>Yearbook of the International Law Commission</i> , 1961, vol. II.
A/CONF.13/L.52	Convention on the Territorial Sea and the Contiguous Zone	See <i>United Nations Conference on the Law of the Sea, Official Records</i> , vol. II: plenary meetings.
A/CONF.13/L.53	Convention on the High Seas	<i>ibid.</i>
A/CONF.20/11	Vienna Convention on Diplomatic Relations: Optional Protocol concerning Acquisition of Nationality	Mimeographed.
A/CONF.20/13	Vienna Convention on Diplomatic Relations	Mimeographed.

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/23	Law of treaties: report by J. L. Brierly, Special Rapporteur	See <i>Yearbook of the International Law Commission</i> , 1950, vol. II.
A/CN.4/43	Law of treaties: second report by J. L. Brierly, Special Rapporteur	ibid., 1951, vol. II.
A/CN.4/54	Law of treaties: third report by J. L. Brierly, Special Rapporteur	ibid., 1952, vol. II.
A/CN.4/63	Law of treaties: report by H. Lauterpacht, Special Rapporteur	ibid., 1953, vol. II.
A/CN.4/87	Law of treaties: second report by H. Lauterpacht, Special Rapporteur	ibid., 1954, vol. II.
A/CN.4/96	State responsibility: International responsibility: report by F. V. García Amador, Special Rapporteur	ibid., 1956, vol. II.
A/CN.4/101	Law of treaties: report by Sir Gerald Fitzmaurice, Special Rapporteur	ibid.
A/CN.4/106	State responsibility: International responsibility: second report by F. V. García Amador, Special Rapporteur	ibid., 1957, vol. II.
A/CN.4/107	Law of treaties; second report by Sir Gerald Fitzmaurice, Special Rapporteur	ibid.
A/CN.4/108	Consular intercourse and immunities: third report by J. Žourek, Special Rapporteur	ibid.
A/CN.4/111	State responsibility: International responsibility: third report by F. V. García Amador, Special Rapporteur	ibid., 1958, vol. II.
A/CN.4/115 (and Corr.1)	Law of treaties: third report by Sir Gerald Fitzmaurice, Special Rapporteur	ibid.
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	ibid., 1959, vol. II.
A/CN.4/120	Law of treaties: fourth report by Sir Gerald Fitzmaurice, Special Rapporteur	ibid.
A/CN.4/124	Report by Dr. Yuen-li Liang, Secretary of the Commission, on the proceedings of the Fourth Meeting of the Inter-American Council of Jurists	ibid., 1960, vol. II.
A/CN.4/125	State responsibility: International responsibility: fifth report by F. V. García Amador, Special Rapporteur	ibid.
A/CN.4/130	Law of treaties: fifth report by Sir Gerald Fitzmaurice, Special Rapporteur	ibid.
A/CN.4/131	Consular intercourse and immunities: second report by J. Žourek, Special Rapporteur	ibid.
A/CN.4/133	Provisional agenda	Adopted without change. See page xi above.
A/CN.4/134	International responsibility: Responsibility of the State for injuries caused in its territory to the person or property of aliens; reparation of the injury: sixth report by F. V. García Amador, Special Rapporteur	See <i>Yearbook of the International Law Commission</i> , 1961, vol. II.
A/CN.4/135 (and Add.1)	Filling of casual vacancies in the Commission: Note by the Secretariat	ibid.
A/CN.4/136 (and Add.1-11)	Consular intercourse and immunities: Comments by governments on the draft articles concerning consular intercourse and immunities	ibid.
A/CN.4/137	Consular intercourse and immunities: second report by J. Žourek, Special Rapporteur	ibid.
A/CN.4/138	Planning of future work of the Commission: resolution adopted by the General Assembly regarding future work in the field of the codification and progressive development of international law	ibid.
A/CN.4/139	Report on the fourth session of the Asian-African Legal Consultative Committee, by F. V. García Amador, observer for the Commission	ibid.
A/CN.4/140	Letter dated 26 June 1961 addressed to the Chairman of the International Law Commission by Mr. Hafez Sabek, observer for the Asian-African Legal Consultative Committee	ibid.
A/CN.4/141	Report of the International Law Commission covering the work of its thirteenth session	Same text as A/4843.
A/CN.4/L.86	Consular intercourse and immunities: provisional draft articles submitted by J. Žourek, Special Rapporteur	See <i>Yearbook of the International Law Commission</i> , 1960, vol. II.

<i>Document No.</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.94	Communication regarding matters of interest to the International Law Commission discussed at the United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961	ibid., 1961, vol. II.
A/CN.4/L.95 (and Add.1, Add.1 Corr.1 and Add.2)	Draft report of the International Law Commission covering the work of its thirteenth session	Mimeographed.
A/CN.4/L.96	List of reports on the law of treaties	See <i>Yearbook of the International Law Commission</i> , 1961, vol. II.
E/2573	Report of the Commission on Human Rights (tenth session)	<i>Official Records of the Economic and Social Council, Eighteenth Session, Supplement No. 7.</i>
E/3511	Report of the Commission on Permanent Sovereignty over Natural Resources	Mimeographed.
E/CONF.17/5/ Rev.1	United Nations Conference on the Status of Stateless Persons: Final Act and Convention relating to the Status of Stateless Persons	United Nations publication, Sales No.: 1956.XIV.1.

INTERNATIONAL LAW COMMISSION
SUMMARY RECORDS OF THE THIRTEENTH SESSION
Held at Geneva, from 1 May to 7 July 1961

580th MEETING

Monday, 1 May 1961, at 3 p.m.

Chairman: Mr. Luis PADILLA NERVO

Later: Mr. Grigory I. TUNKIN

Opening of the Session

1. The CHAIRMAN declared open the thirteenth session of the International Law Commission.

Tribute to the late Mr. Georges Scelle

2. The CHAIRMAN said that the Commission had suffered a grievous loss by the death of its eminent French member, Mr. Georges Scelle.

The members of the Commission observed a minute of silence in tribute to the memory of Mr. Georges Scelle.

Filling of casual vacancies in the Commission

(article 11 of the Statute)

(A/CN.4/135 and Add.1)

[Agenda item 1]

3. The CHAIRMAN said that communications had been received from Sir Gerald Fitzmaurice and Mr. Yokota, tendering their resignations.

4. The letter from Sir Gerald Fitzmaurice, dated 6 December 1960, stated that his recent election to the International Court of Justice compelled him, with regret, to resign from the Commission. The importance of the role played by the Commission in the development of international law had become quite evident, and recent events had emphasized it. In that way the Commission also made a significant contribution to the maintenance of peace and security, which could only exist on the basis of a well-developed body of international legal rules recognized and respected by all States. The Commission played an indispensable part in the United Nations; to its great credit, it had always endeavoured to work in a scientific spirit, and although differences of view based on the different national backgrounds of its members existed, they had never been allowed to affect its work in any significant manner.

5. Sir Gerald paid a tribute to the work of the Commission's secretariat and in particular to that of its Secretary, Dr. Liang.

6. The letter from Mr. Yokota, dated 1 April 1961, tendered his resignation from the Commission in view of the burden of work imposed on him as a result of his appointment as Chief Justice of the Supreme Court of Japan, and conveyed to the Chairman and members of the Commission his gratitude for their co-operation during his term of office as Vice-Chairman at the twelfth session.

7. The CHAIRMAN said that copies of the two letters of resignation would be circulated to members of the Commission.¹ He had replied to both Sir Gerald Fitzmaurice and Mr. Yokota congratulating them on their election to high office and expressing the Commission's regret at their withdrawal.

8. Mr. LIANG, Secretary to the Commission, read a telegram dated 28 April 1961 from Mr. Jiménez de Aréchaga announcing that he would arrive in Geneva on 15 May 1961; a letter from Mr. Hsu, dated 21 April 1961, expressing regret at being unable to attend the early part of the session; and a letter from Mr. García Amador, dated 27 April 1961, stating that he would be able to arrive in Geneva in three or four week's time.

Election of officers

9. The CHAIRMAN called for nominations for the office of Chairman.

10. Mr. VERDROSS proposed Mr. Tunkin, whose valuable services to the Commission were known to all the members and who was eminently qualified for the office.

11. Mr. AGO seconded the proposal.

12. Mr. SANDSTRÖM, Mr. AMADO, Mr. PAL, Mr. MATINE-DAFTARY, Mr. ZOUREK, Mr. BARTOS and Mr. YASSEEN supported the proposal.

13. The CHAIRMAN, speaking as a member of the Commission, likewise supported the proposal.

Mr. Tunkin was unanimously elected Chairman and took the chair.

14. The CHAIRMAN, thanking the members for having elected him, said that it was a great honour for him to succeed so distinguished a diplomat and jurist as Mr. Padilla Nervo. He hoped that the Commission would be guided by the spirit of co-operation and the sincere desire to contribute to the maintenance of international peace and the development of friendly relations among nations.

¹ Subsequently circulated as document A/CONF.4/135/Add.1.

15. He called for nominations for the office of First Vice-Chairman.

16. Mr. AMADO proposed Mr. AGO, the distinguished professor of the University of Rome, whose ability and experience eminently qualified him for the office.

17. Mr. BARTOŠ, Mr. VERDROSS, Mr. PAL, Mr. YASSEEN and Mr. MATINE-DAFTARY supported the proposal.

Mr. Ago was unanimously elected First Vice-Chairman.

18. The CHAIRMAN called for nominations for the office of Second Vice-Chairman.

19. Mr. ŽOUREK proposed Mr. Jiménez de Aréchaga, the distinguished Latin American jurist who, although he had only recently become a member of the Commission, had already made a valuable contribution to its work.

Mr. Jiménez de Aréchaga was unanimously elected Second Vice-Chairman.

20. The CHAIRMAN called for nominations for the office of Rapporteur.

21. Mr. VERDROSS proposed Mr. Martine-Daftary, the eminent professor of international law in the University of Teheran.

22. Mr. AMADO seconded the proposal.

23. Mr. PAL, Mr. BARTOŠ, Mr. YASSEEN, Mr. AGO and Mr. PADILLA NERVO supported the proposal.

Mr. Matine-Daftary was unanimously elected Rapporteur.

The meeting rose at 4 p.m.

581st MEETING

Tuesday, 2 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Resolutions of interest to the Commission adopted by the United Nations Conference on Diplomatic Intercourse and Immunities

(A/CN.4/L.94)

1. The CHAIRMAN said that the United Nations Conference on Diplomatic Intercourse and Immunities held recently at Vienna had adopted two draft resolutions of interest to the Commission (text in A/CN.4/L.94). One paid a tribute to the Commission's work, which had been the basis of the Conference's deliberations. The other related to the subject of special missions, which had been referred to the Conference by General Assembly resolution 1504 (XV), and recommended that the subject

should be referred back to the Commission for further study.

2. Mr. AGO, supported by Mr. MATINE-DAFTERY, said that the Commission should express its thanks to Mr. Verdross, who had presided over the Vienna Conference with such distinction. The success of the Conference had been in great measure due to him.

3. The CHAIRMAN expressed the belief that all members of the Commission would wish to join in paying a tribute to Mr. Verdross.

4. Mr. VERDROSS thanked members for their appreciative remarks.

Adoption of the agenda

(A/CN.4/133)

5. The CHAIRMAN invited comments on the provisional agenda (A/CN.4/133).

6. Mr. AGO, supported by Mr. MATINE-DAFTARY, suggested that for the time being the best course would be for the Commission to adopt its agenda provisionally, subject to revision in the light of developments. That session was the last of the Commission as then constituted, and there would be little advantage in embarking upon new topics which would subsequently have to be taken over by a Commission with possibly a different membership. Clearly, the session's first task should be the completion of the work on consular intercourse and immunities: little more than a general discussion of the other items on the provisional agenda would be possible.

7. The CHAIRMAN recalled that at its twelfth session (571st meeting, para. 4) the Commission had decided to complete at its thirteenth session its draft on consular intercourse and immunities and also take up the question of State responsibility. In the meantime, Mr. Ago's suggestion might well be followed.

It was so agreed.

Filling of casual vacancies in the Commission

(article 11 of the Statute)

(A/CN.4/135)

(concluded)

[Agenda item 1]

8. The CHAIRMAN proposed that discussion of item 1 of the agenda be held in private session.

It was so agreed.

The meeting was suspended at 10.30 a.m. for private discussion and resumed at 11.40 a.m.

9. The CHAIRMAN announced the election of Sir Humphrey Waldock to fill the vacancy caused by the election of Sir Gerald Fitzmaurice to the International Court of Justice, that of Mr. André Gros to fill the vacancy caused by the death of Mr. Georges Scelle and that of Mr. Senjin Tsuruoka to fill the vacancy caused by the resignation of Mr. Kisaburo Yokota.

The meeting rose at 11.45 a.m.

582nd MEETING

Wednesday, 3 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-9, A/CN.4/137)

[Agenda item 2]

DRAFT ARTICLES (A/4425)
INTRODUCTORY DISCUSSION

1. The CHAIRMAN invited the Commission to consider the topic of consular intercourse and immunities in the light of the comments from governments (A/CN.4/136 and Add.1-9) and the Special Rapporteur's third report (A/CN.4/137).
2. Mr. ŽOUREK, Special Rapporteur, introducing his third report, recalled that, in conformity with articles 16 and 21 of its statute, the Commission had transmitted its draft articles on consular intercourse and immunities (A/4425) to governments for their comments. At the fifteenth session of the General Assembly, although the draft articles had been submitted for information only, an exchange of views on the draft as a whole had taken place in the Sixth Committee (657th, 660th and 662nd meetings). In general, the draft had been favourably received as conforming to the practice and meeting the requirements of States, and several delegations had paid a tribute to the Commission's work. Since the articles had been submitted to governments for their comments, the delegations had not as a rule commented on the text. Some delegations, however, had voiced an opinion on certain articles of the draft, and he had therefore summarized in his third report the views expressed.
3. A very large majority of delegations in the Sixth Committee of the General Assembly had approved the Commission's decision to prepare a draft which would provide a basis for the conclusion of a multilateral convention on the subject.
4. Comments had been received from a number of governments and probably more would arrive in the course of the session. In addition, the Government of Niger had stated that it had no comments to make and the Government of Chad had indicated that it was not in a position to submit comments.
5. On the whole, the draft articles were regarded by the governments as an acceptable basis for the conclusion of a multilateral convention. The Government of Guatemala had actually indicated its readiness to accept the draft as it stood, but the other governments had made a number of comments on the various articles of the draft. In his report (Introduction, para. 5), he had subdivided the comments into four groups: (1) proposals for the deletion of certain articles, (2) proposed amendments or additions, (3) proposals for new articles, (4) comments giving particulars requested by the Commission.
6. In the light of the comments of governments, he had made new proposals which he hoped would facilitate the Commission's task. He had refrained from taking up a position in regard to government proposals for the deletion of certain articles — merely reproducing the arguments set forth by governments — though he would, of course, discuss those proposals in connexion with the various articles.
7. One general conclusion could be drawn from the comments: the Commission could consider the draft as forming the basis of a multilateral convention, confirming its decision taken at its twelfth session (*ibid.*, para. 24).
8. With regard to procedure, he suggested that consideration of article 1 be postponed until the other articles had been drafted in final form. In the first place, some comments had arrived only recently and others would certainly be received during the discussions; secondly, the Commission was familiar with the terminology as defined in article 1 and would find it convenient in practice to use that terminology for the time being; thirdly, not until the end of the consideration of the other articles would it be possible to settle the most suitable definitions.
9. A question of procedure also arose in regard to the proposals for the deletion of certain articles. It might perhaps be more logical for the Commission to deal with all proposals for deletion before considering the draft article by article, since the deletion of a particular article might well affect not only the articles which followed it, but also some articles which preceded it. If, however, the Commission preferred to take the draft article by article, that procedure would be quite acceptable to him.
10. Lastly, it was only after the preparation of his third report that he had been able to examine the text of the Vienna Convention on Diplomatic Relations (A/CONF.20/13). He considered that so far as appropriate the Commission should take the terms of that Convention into account. Of course, in view of the differences between the status of diplomatic and of consular officers, the text of the Vienna Convention would not always influence the wording of the corresponding articles concerning consuls, but, in particular with regard to customs and fiscal exemption, much of the work done at Vienna would be of great value to the Commission in that it showed how far governments were prepared to go.
11. The CHAIRMAN said that if there were no objection, he would take it that the Commission agreed to postpone consideration of article 1 until the other articles of the draft had been disposed of.
It was so agreed.
12. The CHAIRMAN invited comments on whether the proposals for the deletion of certain articles should be considered by the Commission before it studied the draft article by article.
13. Mr. SANDSTRÖM expressed a preference for an immediate discussion of the draft article by article.

14. Mr. EDMONDS said that there was much to be said for the method of taking up the question of deletions first. Once the Commission had decided which articles it wished to delete, it could set to work on the main body of the remaining articles and on the suggestions and proposals concerning them.

15. Mr. VERDROSS said that it was more logical to discuss the articles in sequence.

16. Mr. AGO feared that the immediate consideration of proposed deletions might lead to hasty decisions without a thorough inquiry into all the questions involved.

17. Mr. BARTOŠ said that the whole structure of the draft might be affected by a decision *ab initio* to delete specific articles. The most constructive method would be to consider each specific proposal for the deletion of a particular article at the time when that article came under discussion. In fact, even if in the course of its discussion of the draft article by article the Commission were to decide to delete a particular article, it would still have to consider whether some of the ideas contained in that article should not be included elsewhere in the draft.

18. The CHAIRMAN said that the Commission appeared to be in general agreement not to consider the question of deletions first. If there were no objection, he would therefore take it that the Commission agreed to consider the draft article by article, commencing with article 2.

It was so agreed.

ARTICLE 2 (Establishment of consular relations)

19. Mr. ŽOUREK, Special Rapporteur, said that there were two categories of comment on article 2. First, those concerning the existing text of the article. Secondly, those relating to the proposed paragraph 2, on which at the twelfth session the Commission had reserved its decision (576th meeting, para. 44).¹ He proposed to deal separately with the question of paragraph 2 and to deal at that stage only with the observations regarding paragraph 1.

20. The Government of Norway (A/CN.4/136) proposed the deletion of article 2, mainly because it objected to the use of the expression "consular relations", which in its opinion had no precise meaning in international law; it stated that legal consequences followed from the unilateral or mutual consent to establish one or more specific consulates. The Norwegian Government further proposed that the expression "consular relations" be deleted in all other articles where it was used.

21. As a matter of fact, both in State practice and in the writings of learned authors, the expression "consular relations" was well established; it described the relationship which arose between States as a result of the exercise of consular functions within the territory

of the receiving State by bodies of the sending State. He referred to the passage in his report (A/CN.4/137, section II, paras. 1 and 2) dealing with that particular point. Article 2 should be retained as it stood.

22. Mr. SANDSTRÖM said that the arguments of the Norwegian Government left him unconvinced. However, too much stress might have been laid on the need for mutual consent; perhaps it had not been sufficiently appreciated that such mutual consent could be quite informal and result merely from the fact that a consulate had been established.

23. Mr. YASSEEN said that article 2 should stand. The expression "consular relations" aptly described the relations between States in the matter. He could not accept the suggestion that such relations could be established by unilateral action; the consent, albeit tacit, of the States was essential for their establishment, as was the consent of the receiving State for the establishment by the sending State of a consulate.

24. Mr. PAL said that in addition to the Norwegian proposal that article 2 should be deleted, which he could not support, there had been some comments on the proposed paragraph 2. Czechoslovakia (A/CN.4/136) and the Union of Soviet Socialist Republics (A/CN.4/136/Add.2) had favoured the inclusion of such a provision; the Netherlands, on the other hand (A/CN.4/136/Add.4) had not. A case had not been made for the proposed additional paragraph and it should be dropped.

25. Mr. AMADO observed that in the French text the word "*mutuel*" in the expression "*accord mutuel*" was redundant. However, there could be no doubt that the consent of the States concerned was an essential element in the establishing of consular relations, which fact was admitted by the Norwegian Government, so that its suggestion was largely concerned with drafting. The expression "consular relations" had become well established by usage.

26. Mr. BARTOŠ pointed out that the Norwegian comment, which seemed to imply that consular relations could be established by unilateral action through the establishment of a consulate by a decision of the sending State or by consent of the States concerned, i.e. either on a contractual basis or on a unilateral, non-contractual basis, was at variance with the recognized principles of existing international law, which required the contractual basis, regardless of the form of consent. The Commission had been perfectly correct in stating that the mutual consent — or simply consent — of the States concerned was necessary for the establishment of consular relations.

27. Mr. LIANG, Secretary to the Commission, said that in the course of a discussion which had been both useful and necessary, there had been perhaps some misconception regarding the language of the Norwegian comment. The Norwegian Government had never suggested that a consulate could be established by unilateral action on the part of the sending State.

28. He recalled that at the Vienna Conference on Diplomatic Intercourse and Immunities proposals had been made to delete the word "*mutual*", as being

¹ For summary records of the twelfth session (526-579th meetings), see *Yearbook of the International Law Commission, 1960*, vol. I (United Nations publication, Sales No.: 60.V.1, vol. I).

redundant, in the expression "mutual consent" used in article 2 of the Vienna Convention on Diplomatic Relations. The expression, however, had been retained as it stood. Legal technicalities, even in empty form, tended to survive. In regard to that expression, at least in English and American treatises on the law of contract, the expression "mutuality of consent" was often used.

29. A government might well consent to the establishment of consulates by another country without requiring that country to consent to the opening of consulates on its territory by the consenting government. In theory and in practice, the engagement to establish consular relations in a treaty and the establishment of consulates in fact were not coeval. There was some analogy in private law which, for example, recognized two separate types of contract: the contract to sell and the contract of sale. The text of article 2 was quite satisfactory, particularly in its use of the expression "consular relations". Further legal consequences could, and would in fact, follow from the engagement to establish consular relations, and not only from the actual establishment of a consulate.

30. Mr. YASSEEN said that, whereas the expression "mutual consent" was satisfactory in English, in French the word "*mutuel*" was redundant in the expression "*accord mutuel*".

31. Mr. AGO suggested that the Drafting Committee should be asked to examine carefully the English and French texts of article 2, with a view to bringing them into line with the corresponding texts of the Vienna Convention on Diplomatic Relations. In the French text of article 2 of that Convention, the expression used was "*consentement mutuel*" and not "*accord mutuel*".

32. The CHAIRMAN said that the Commission appeared to be unanimous in its desire to retain article 2. If there were no objection, he would therefore consider paragraph 1 of the article as adopted.

It was so agreed.

33. The CHAIRMAN invited the Commission to consider the proposed paragraph 2.

34. Mr. ŽOUREK, Special Rapporteur, said that at the eleventh session, owing to lack of time the Commission had been unable to take a decision on article 2, paragraph 2 (498th meeting, para. 13). At its twelfth session, and for the same reason, it had reserved its decision (576th meeting, para. 44).

35. In the course of the discussions in the Sixth Committee of the General Assembly and in written comments, some governments had supported and some had opposed the proposed paragraph. Indonesia, the Ukrainian SSR,² the Union of Soviet Socialist Republics (A/CN.4/136/Add.2), Czechoslovakia (A/CN.4/136) and Belgium (A/CN.4/136/Add.6) had expressed themselves in favour of the inclusion of paragraph 2. The United States (A/CN.4/136/Add.3) had objected to that inclusion, without giving specific grounds; the

Netherlands (A/CN.4/136/Add.4) had opposed paragraph 2 on the grounds that it did not consider that the establishment of diplomatic relations automatically included that of consular relations.

36. In that connexion, he drew attention to article 3, paragraph 2, of the Vienna Convention on Diplomatic Relations: "2. Nothing in the present convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

37. Since the Vienna Conference had thus recognized the possibility of consular functions being performed by a diplomatic mission, it would be appropriate to provide in the draft under discussion that the establishment of diplomatic relations included the automatic establishment of consular relations. In that regard, a clear distinction should be drawn between the functions of consuls on the one hand and the ways and means by which those functions were exercised on the other.

38. The rule set forth in the proposed paragraph 2 did not imply in any way that the sending State had the right to establish consulates without the consent of the receiving State. Such an interpretation of the paragraph would be completely at variance with the provisions of article 3, paragraph 1, which explicitly stated: "No consulate may be established on the territory of the receiving State without that State's consent." Nor did the proposed paragraph 2 mean that a diplomatic mission would *ipso facto* have the right to deal directly with the local authorities. Obviously, if a diplomatic mission exercised consular functions, it had to conform with the local legislation and usage. Some countries admitted the possibility of the mission in that case dealing direct with the local authorities, whereas others did not. Moreover, it was a rule of international law, recognized both in State practice and by learned writers, that the severance of diplomatic relations did not *ipso facto* involve the severance of consular relations; the Commission had confirmed that rule by approving article 26 of the draft (572nd meeting, para. 31). Unless it were agreed that the establishment of diplomatic relations included that of consular relations, it was difficult to see how the latter could survive the former. Lastly, in the course of two years of research he had not been able to trace a single case in State practice that argued against the terms of the proposed paragraph 2.

39. Mr. VERDROSS recalled that at the eleventh session he had expressed doubt concerning paragraph 2 (497th meeting, para. 17). However, since the adoption of the Vienna Convention on Diplomatic Relations and the terms of its article 3, paragraph 2, the position had materially altered.

40. In principle, the establishment of diplomatic relations meant that certain consular functions could be exercised. That fact, however, did not imply that all consular functions could be exercised without the special authorization of the receiving State. Paragraph 2 was therefore acceptable, subject perhaps to the inclusion of a proviso safeguarding any provisions of the local legislation which might require a special permission for the performance of certain consular functions.

41. Mr. AGO said that during the Vienna Conference

² 657th and 660th meetings of the Sixth Committee, cited in A/CN.4/137, *ad* article 2.

he had opposed article 3, paragraph 2 of the Convention on Diplomatic Relations because of its ambiguity. It merely specified that nothing in the Convention should be construed as preventing the performance of consular functions by a diplomatic mission. The Commission, however, was expected to decide specifically whether the receiving State's consent was required for the exercise of consular functions by a diplomatic mission.

42. In practice, it was generally recognized that ambassadors exercised certain consular functions; those functions could, however, also be considered as diplomatic functions and, in fact, all the examples cited in support of article 3, paragraph 2 of the Vienna Convention fell into that class. It was also generally agreed that there were certain consular functions, such as the registration of marriages, which could not be performed by an ambassador without the express consent of the receiving State. It would, of course, be easy for the Commission to adopt a formula such as that adopted by the Vienna Conference, which really left the question completely open. Preferably, however, the Commission should state clearly what the position actually was, *viz.* that certain consular functions could be exercised when once diplomatic relations had been established, but that not all consular functions could be so exercised.

43. He did not find the argument based on article 26 very convincing, since the rule embodied in that article — that the severance of diplomatic relations did not necessarily include that of consular relations — in fact showed that the two types of relations were independent of each other.

44. In conclusion, it would not be wise for the Commission to take a decision on the basis of the existing text, which did not satisfy many of the members. It would also be a mistake not to include any provision on the subject. He therefore suggested that members should have more time to work out an improved formula which might prove more generally acceptable.

45. Mr. AMADO said that nothing would convince him that the establishment of diplomatic relations necessarily included that of consular relations. In fact, the contrary was true in many cases. The establishment of consular relations very often preceded, and prepared the ground for, that of diplomatic relations. Admittedly, according to the modern trend the establishment of diplomatic relations often carried with it that of consular relations, and frequently consular sections were established in embassies. He therefore agreed that an improved formula should be sought to reflect accurately the existing position. Lastly, in paragraph 1 the expression "mutual consent" (*consentement mutuel*) was indispensable.

46. Mr. BARTOŠ, recalling that at the twelfth session he had opposed the inclusion of paragraph 2 (576th meeting, paras 33-37) said that article 3, paragraph 2 of the Vienna Convention had not materially altered the situation. In fact, the formula devised by the Drafting Committee at the Vienna Conference was a neutral one designed to secure majority support in the face of the opposition aroused by the Spanish delegation's proposal

that consular functions should be mentioned among the normal functions of a diplomatic mission.

47. However, the Special Rapporteur's text might eventually prove acceptable if a provision were inserted concerning the legal status of consular sections of diplomatic missions, since the general trend was to form consular sections inside the embassies. The rules governing such sections differed from one receiving State to another; some required the head of section to obtain the *exequatur*, whereas others only required that the name of the head of section be notified to the Ministry of Foreign Affairs.

48. He agreed that more time was needed for reflection and that the Commission should proceed with caution in deciding whether or not to follow the modern trend in its task of promoting the progressive development of law.

49. Mr. FRANÇOIS said that he had little to add to the arguments expounded by Mr. Ago and Mr. Amado. If the Special Rapporteur's thesis was correct, the proper place for the provision contained in his proposed paragraph 2 would have been the Vienna Convention: but that solution had been explicitly rejected at the Vienna Conference. The unhappy wording of article 3, paragraph 2 of the Vienna Convention could certainly not be construed to support the Special Rapporteur's thesis, since it did no more than indicate that States were not debarred from concluding an agreement allowing their respective diplomatic missions to perform consular functions. It had never been suggested that diplomatic functions automatically comprised consular ones. He was quite unable to follow Mr. Verdross's reasoning that certain consular functions were implicit in diplomatic functions, and he could not support the deduction from that premise that the establishment of diplomatic relations included the establishment of consular relations. Admittedly, because they lay within the diplomatic field certain consular functions could be performed by diplomatic missions without the express consent of the receiving States; but others were exercisable exclusively by consuls or consular officials.

50. Similarly, he failed to see the force of the Special Rapporteur's argument concerning the severance of diplomatic relations which he had put forward in support of the principle enunciated in his proposed paragraph 2. He did not consider that, because the severance of diplomatic relations did not necessarily result in the severance of consular relations, it was proved that consular functions necessarily formed part of diplomatic functions.

51. Mr. MATINE-DAFTARY said that at the Vienna Conference he had had considerable doubts about the wisdom of the text finally adopted in article 3, paragraph 2 of the Vienna Convention, but had eventually voted in its favour because it did not state that the establishment of diplomatic relations included the establishment of consular relations, but simply indicated that consular functions could be performed by a diplomatic mission, *i.e.* duality of function was permissible, a statement which was consistent with the practice of many

countries of including a consular section in a diplomatic mission primarily with the object of reducing expense.

52. At the Commission's eleventh session (497th meeting, para. 20), he had doubted the usefulness of paragraph 2 as proposed by the Special Rapporteur and nothing had occurred since then to remove his doubt. What purpose would be served by such a provision? In particular, what was meant by the word "includes"? If it meant that the establishment of diplomatic relations *ipso facto* implied the establishment of consular relations, the clause might be construed as suggesting that consulates could be established anywhere in the receiving State, which was patently incorrect, for that State's special consent was required in each case, as was provided in the following article of the draft.

53. Like Mr. François, he interpreted draft article 26 to mean the opposite of what the Special Rapporteur thought it meant. Diplomatic and consular relations were quite distinct from each other. If it was assumed that the Special Rapporteur's proposed article 2, paragraph 2 stated a correct principle, then it would follow that the severance of diplomatic relations necessarily caused consular relations to be severed. The Commission should give the matter careful thought before reaching a decision.

54. The CHAIRMAN, speaking as a member of the Commission, explained that the text of article 3, paragraph 2 of the Vienna Convention was the outcome of a compromise. The exercise of consular functions by a diplomatic mission had been regarded as a matter regulated by customary law and no one had denied that it was a general practice. There were many instances of States not establishing consulates at all. For example, there were no consulates in Moscow and many countries had not established them elsewhere within the Soviet Union. Consular sections, however, had been set up in the diplomatic missions. To endorse the theory that the exercise of consular functions by diplomatic missions needed the express consent of the receiving State would be to create an unnecessary obstacle to the discharge of such functions. Whereas he knew of no case where objections had been raised to consular functions being carried out by diplomatic missions, he appreciated that the manner in which those functions were performed varied from one country to another.

55. In fact, the establishment of consular relations became an issue in those cases only where no diplomatic relations existed between the two States concerned; in those cases specific agreements were, of course, required, but even they did not automatically entitle the sending State to establish consulates within the territory of the receiving State. Indeed, many bilateral agreements which provided for the establishment of consular relations expressly stipulated that the establishment of consulates required the receiving State's consent.

56. It would appear, then, that in modern practice the establishment of diplomatic relations, which were more far-reaching, included the establishment of consular relations. In the interests of the progressive development of international law, the Commission should

accordingly adopt paragraph 2 as proposed by the Special Rapporteur. Nevertheless, as there was still some divergence of view, he was prepared to support Mr. Ago's suggestion (para. 44 above) that the decision on the additional paragraph should be postponed so that members could have time for further reflection and informal discussion.

57. Mr. ŽOUREK, Special Rapporteur, said that not a single instance of practice deviating from the rule laid down in his proposed paragraph 2 had been cited during the discussion. In the course of his extensive researches he had not come across any cases where the special consent of the receiving State was required for the purpose of enabling a diplomatic mission to exercise consular functions. In some States, it was true, the head of a consular section or an official of a diplomatic mission responsible for performing consular functions could not approach the local authorities unless he held an *exequatur* (A/CN.4/137, *ad* article 2, para. 6).

58. As examples of the modern practice he cited first the position in Paris, where consular functions were performed by eighty-one diplomatic missions and consulates. Of that number, thirty-two were diplomatic missions performing consular functions as a regular part of their duties, twenty-two were consulates directed by consulates directed by a consul. In Brazil, diplomatic official on the diplomatic list, and twenty-seven were consulates directed by a consul. In Brazil, diplomatic missions normally performed consular functions and were allowed to deal direct with the local authorities, though not with the courts (which had to be approached through the Ministry of Foreign Affairs). In Italy, the special consent of the receiving State was required only if a foreign diplomatic agent exercising consular functions wished to approach the local authorities. At Prague, all the diplomatic missions exercised consular functions without having to obtain the special consent of the Government of Czechoslovakia, and only one State had established a consulate only and was not represented by a diplomatic mission. It was true that some receiving States required the Ministry of Foreign Affairs to be notified if a consular section of a diplomatic mission exercised consular functions, but that was a matter of procedure which did not affect the principle on which paragraph 2 was based. Those examples were indicative of the prevailing trend, which should be given due weight if the Commission intended in its draft to promote the progressive development of international law. The fact that in some instances diplomatic missions did not carry out all consular functions was not an argument for rejecting paragraph 2. Besides, in the absence of diplomatic relations between two States, consulates sometimes did not perform all consular functions, but even in those cases consular relations indubitably existed. The Commission should not confuse the establishment of consular relations with the scope of consular functions.

59. He would be interested to know what cases Mr. François had had in mind in saying that certain specific consular functions were exercisable in law exclusively by consuls and never by a diplomatic mission; for his part he knew of none.

60. In answer to Mr. Matine-Daftary's question as to the purpose of paragraph 2, he said that its inclusion was important for theoretical and practical reasons because without the clause the draft would be too narrow in that it would then apply solely to the activity of consulates proper, not to that of consular sections of diplomatic missions.

61. His contention that the provisions in article 26 concerning the severance of diplomatic relations argued in favour of including paragraph 2 had not been rebutted. For instance, if State A had established in State B a diplomatic mission performing consular functions, and if State B had established in State A both a diplomatic mission and a consulate, then, in the event of the severance of diplomatic relations between the two, could it really be maintained that State B would continue to perform consular activities, whereas State A, whose mission would have been closed, would be compelled to discontinue them? The problems raised by such a case merited consideration. In the case in question, a solution observing the equality of States would seem to be called for.

62. With regard to Mr. Verdross's suggestion (para. 40 above), such a proviso already existed in article 4 and it would suffice to make reference to it in the commentary to article 2.

63. Mr. PAL considered that the proper place for a provision in the categorical form currently proposed by the Special Rapporteur as paragraph 2 of article 2 would have been the Vienna Convention. Any implication in that respect ascribed to article 3, paragraph 2 of the Convention was not tenable under any canon of construction applicable to that paragraph. If a provision on the lines of that contained in article 3, paragraph 2 of that Convention were acceptable, an analogous provision might perhaps be inserted in article 4 of the draft. He too considered that the Commission should not take a hasty decision.

64. Mr. ERIM said that he still remained to be convinced of the need for the paragraph 2 proposed by the Special Rapporteur and asked for a further explanation of its precise purport. He noted that article 3, paragraph 2 of the Vienna Convention referred to the exercise of consular functions, whereas the Special Rapporteur's paragraph 2 spoke of the establishment of consular relations.

65. In cases where neither diplomatic nor consular relations existed between two States, the establishment of the former surely did not necessarily entail establishment of the latter. If the meaning of paragraph 2 was that diplomatic missions could sometimes perform consular functions, he would have thought such a statement superfluous since that had never been in doubt. But from the legal point of view there was a great difference between the exercise of consular functions where consular relations already existed and the establishment of such relations, for which a specific and separate agreement between the two States was necessary.

The meeting rose at 1 p.m.

583rd MEETING

Thursday, 4 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1 to 9, A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 2 (Establishment of consular relations) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 2 as proposed by the Special Rapporteur (A/CN.4/137).

2. Mr. VERDROSS, referring to the remarks of Mr. François (582nd meeting, para. 49) said that in his capacity as President of the Vienna Conference he had had to preside only at plenary meetings and had therefore not been present when article 3, paragraph 2 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) had been discussed in the Committee of the Whole and in the Drafting Committee of the Conference; he had nothing to add to what the Chairman had said (582nd meeting, para. 54) about the final compromise that had been reached. He understood the provision to mean that the Convention did not debar a diplomatic mission from exercising consular functions and that an express agreement between the two States for the purpose was not required. Conversely, however, it followed that, since the exercise of certain consular functions by diplomatic missions might conflict with the usage or legislation of the receiving State, the provision in article 3, paragraph 2 did not exclude such restrictions.

3. Mr. ŽOUREK, Special Rapporteur, replied in the affirmative to Mr. Erim's question (*ibid.*, paras. 64 and 65) whether the discharge of consular functions by a diplomatic mission *ipso facto* implied the establishment of consular relations. The right of a diplomatic mission to exercise such functions was indisputable and if consular functions could be performed, then by definition consular relations must exist, just as *mutatis mutandis* diplomatic relations existed if diplomatic functions could be performed. The principle was a fundamental one, because if neither diplomatic nor consular relations existed, there was no legal basis for the exercise of either diplomatic or consular functions.

4. He could not agree with Mr. Ago (*ibid.*, para. 42) that certain acts performed by diplomatic agents could be described as consular functions. That the two types of function were intrinsically distinct was proved by the difference between diplomatic and consular protection. For example, if rights under an international labour convention concerning the workers of the sending State

were denied to one of the sending State's nationals employed in the receiving State, it would be an act of consular protection to approach the local authorities in the matter; but if, local remedies having been exhausted, without redress, the matter were taken up with the Ministry of Foreign Affairs of the receiving State, such a step would be an act of diplomatic protection.

5. The scope of article 3, paragraph 2 of the Vienna Convention had been belittled. That text must be read in the context of the other provisions of the Convention, in particular the fifth preambular paragraph, which affirmed that "the rules of customary international law should continue to govern questions not expressly regulated . . .". Thus interpreted, the provision in question constituted, in relation to existing practice, clear and unequivocal confirmation of the right of diplomatic missions to exercise consular functions within the limits of their normal powers.

6. The CHAIRMAN, speaking in his personal capacity (*ibid.*, para. 54), and Mr. Verdross (*ibid.*, paras. 39 and 40) had replied to the questions raised concerning article 3, paragraph 2 in the Vienna Convention. That provision should, of course, be read in conjunction with the last paragraph of the preamble to the Convention; in the light of the practice of States it could not be interpreted otherwise than as confirming the generally accepted right of diplomatic missions to exercise consular functions.

7. Mr. ERIM said that the Special Rapporteur had not quite understood the purport of his question. He had wished to discover whether the mere act of establishing diplomatic relations implied that the two States concerned established consular relations, even if they made no express declaration to that effect. That seemed the only possible interpretation of the Special Rapporteur's wording as it stood.

8. The CHAIRMAN suggested that after the useful exchange of views which had taken place the Commission should defer its decision concerning article 2, paragraph 2 for a few days, as suggested by Mr. Ago (*ibid.*, para. 44) so as to give time for further reflection and informal discussion.

It was so agreed.

ARTICLE 3 (Establishment of a consulate)

9. Mr. ŽOUREK, Special Rapporteur, drew attention to the comments of governments (A/CN.4/136 and Add.3, 4, 6 and 9) and to his own proposal concerning article 3 (A/CN.4/137).

10. The United States (A/CN.4/136/Add.3) and Yugoslavia (A/CN.4/136) had both suggested that the definitions contained in paragraphs (7) and (8) of the commentary should be inserted either in article 3 or elsewhere in the text. He could accept that proposal: the appropriate place might be article 1, but that was a question which could be deferred.

11. Mr. YASSEEN said that he did not agree with the Special Rapporteur's proposal that paragraph 5 of the

article should be deleted. The argument that the consul's exercise of consular functions in more than one State was a matter of concern only to the sending State was hardly tenable. Surely it was of concern also to the receiving State, for it largely depended on that State's relations with the third State and might affect those relations. The discussion at the Vienna Conference on the provision concerning the parallel situation in the field of diplomatic relations had revealed the desire of many States for greater clarity in the matter. The original text of article 5 of the Commission's draft articles on diplomatic intercourse and immunities (A/3859), referring to the absence of objection, had been amended to provide due notification of the receiving States in advance and the final text, article 5, paragraph 1 stipulated that "The sending State may, after it has given due notification to the receiving States concerned, accredit a head of mission . . . to more than one State, unless there is express objection by any of the receiving States." But that text was the result of a compromise, for some States had wished to go even further and require the express consent of all the States concerned. Although they were not absolutely identical, the position of consuls and that of heads of diplomatic missions had sufficient points in common to justify a similar stipulation in the draft under consideration.

12. The CHAIRMAN, speaking as a member of the Commission, said that manifestly the receiving State had the right to object to the foreign consul's simultaneous exercise of consular functions in a third State and was entitled to enforce its objection. But it was hardly necessary to stipulate expressly that the sending State had to secure the receiving State's consent in advance. Such a requirement would not be consistent with existing practice and might impede the development of consular relations. He was therefore in favour of deleting paragraph 5. The deletion would have the added advantage of forestalling any argument about the receiving State's right to object to any arrangements which the sending State might wish to make concerning the scope of the consul's functions.

13. Mr. SANDSTRÖM suggested that a provision should be inserted on the lines of that contained in article 5, paragraph 1 of the Vienna Convention.

14. Mr. BARTOŠ said that, although he agreed with the views expressed by the Chairman, he was not in favour of deleting paragraph 5.

15. The exercise of consular functions by a consul in more than one State had sometimes given rise to problems, particularly when there had been frontier changes between the two receiving States concerned and the sending State's action had been inspired by political motives and had been intended as a demonstration in favour of the original boundary lines.

16. Mr. ERIM considered that paragraph 5 should be redrafted in less categorical terms. As it stood, it was too restrictive and would require the prior consent of the first receiving State before the consul could begin to exercise functions in the third State.

17. Mr. VERDROSS advocated a provision on the lines of article 5, paragraph 1 of the Vienna Convention.

18. The CHAIRMAN pointed out that article 5, paragraph 1 of the Vienna Convention was wider in scope, since it related not only to heads of diplomatic missions but also to diplomatic staff. The clause under discussion should be restricted to consuls only. It appeared to be the general view that it should be revised and modelled on the provision in the Vienna Convention. He suggested that the Drafting Committee be instructed to prepare a redraft. The Drafting Committee might also consider whether the provision should form part of article 3 or, since it dealt with a rather different subject, be embodied in a separate article.

It was so agreed.

19. Mr. YASSEEN suggested that the Drafting Committee should also be asked to standardize the expression "mutual consent" in the draft.

20. Mr. ŽOUREK, Special Rapporteur, said that to judge by their comments some of the governments had evidently misunderstood the purpose of the words "Save as otherwise agreed" in article 3, paragraph 4. The Drafting Committee would have to bear in mind that they were meant to cover the case where a consul was empowered to exercise his functions outside his district by virtue of a bilateral agreement between the two States or of the existing articles, in particular articles 18 and 19.

21. Mr. FRANÇOIS asked what were the Special Rapporteur's views about the Netherlands Government's proposal (A/CN.4/136/Add.4) to transfer paragraph (3) of the commentary to the article itself.

22. Mr. ŽOUREK, Special Rapporteur, said that he would have no objection to that change since the Commission had endorsed the principle stated in paragraph (3) of the commentary.

23. The CHAIRMAN suggested that the Drafting Committee be instructed to prepare an appropriate text based on paragraph (3) in the commentary for inclusion in article 3.

It was so agreed.

24. Mr. ŽOUREK, Special Rapporteur, said that the additional paragraph proposed by the Japanese Government (A/CN.4/136/Add.9) was a most-favoured-nation clause. For the reasons he had given in his second report (A/CN.4/131, part II, para. 38), he did not consider such a clause appropriate in a multilateral convention; States would, of course, be free to include it in bilateral conventions.

Article 3 was referred to the Drafting Committee for amendment in the light of the discussion.

ARTICLE 4 (Consular functions)

25. Mr. ŽOUREK, Special Rapporteur, said that a number of governments had commented on the general character of the text adopted by the Commission for article 4 and it had been recognized that the version

reproduced in the Commission's commentary provided a more detailed enumeration of consular functions.

26. He drew attention to the remarks of delegations in the Sixth Committee and to the written comments of governments (A/CN.4/137, *ad* article 4; A/CN.4/136 and Add.1 to 9).

27. With regard to the Indonesian delegation's remarks, he pointed out that the protection of nationals had always been understood as applying both to individuals and to bodies corporate (cf. his own observations in A/CN.4/137). Admittedly, there were wide divergencies in municipal law concerning the mode of determining nationality of bodies corporate: under the law of some countries, nationality was determined by the head office of the body corporate, under the law of others the place of incorporation was decisive, and under the law of yet others the decisive test was that of the nationality of the persons effectively controlling the company. It should be borne in mind, however, that similar divergencies existed in the rules for determining the nationality of individuals; some countries applied the *jus soli*, others the *jus sanguinis* and others yet a combined system. If questions of conflict of nationalities gave rise to a dispute, it should be settled by one of the pacific means for the settlement of international disputes, and possible difficulties in that regard did not constitute a cogent argument for limiting the scope of the article.

28. On the other hand, the scope of the consular functions could not be so broadened as to include stateless persons domiciled in the sending State among the persons to whom consular protection might be extended. If a special convention providing for such protection had been concluded between the two States concerned, stateless persons would, of course, be covered, but such a provision should not be included in the article. His opinion was confirmed by the fact that in order to determine the legal status of stateless persons, it had been necessary to conclude in September 1954, the Convention relating to the Status of Stateless Persons.

29. The main point to be settled was the form of the definition of consular functions. As the comments of governments were clearly in favour of an amplification of the general definition adopted at the Commission's previous session, he was proposing a redraft which added certain illustrative examples, which should not be regarded as in any way exhaustive, of typical consular functions (A/CN.4/137). Without some such amplification, the definition would be unduly abstract.

30. Mr. ERIM observed that the Special Rapporteur's new text of article 4 represented a compromise between several opinions expressed in the Commission at the eleventh and twelfth sessions. The Commission's text as adopted at the twelfth session should be amended only slightly, since a radical departure from that form would lead to interminable discussions on the consular functions. Paragraph 1 of the article, in particular, should be drafted in general and flexible terms.

31. He drew the Special Rapporteur's attention to the suggestion of the Government of the United States concerning cases where a consul might be called upon

to protect the interests of nationals of a third country if that country had broken off consular relations with the receiving State. Perhaps a reference to that function might be included in article 4.

32. Mr. ŽOUŘEK, Special Rapporteur, said there would be no difficulty in amending article 4 in the sense suggested by Mr. Erim, but that it might be unwise to go quite so far as that suggestion seemed to imply. Article 7 already provided that a consul could not carry out functions on behalf of a third State without the consent of the receiving State. That was a special case. If article 7 were retained, a very brief reference to that function in article 4 would suffice.

33. Mr. YASSEEN, referring to the form of the definition, said that general definitions were usually preferable to enumerations. Nevertheless, the case of article 4 seemed to be one in which a few illustrations might be useful. He reserved the right to give his views on each of the examples included by the Special Rapporteur, if the Commission decided to follow that method.

34. Mr. BARTOŠ said that, although he was inclined to favour the definition approved by the Commission at the twelfth session, he would not strongly oppose a majority decision in favour of a detailed enumeration. It was essential, however, that the Commission should decide which of the alternatives it preferred before it commented on the text. He had some observations to make both on the general and on the enumerative definition, which latter, incidentally, had not been studied in detail by the Commission.

35. Some comments of governments, especially those of the Government of the United States, should be studied in connexion with the Hague draft convention of 1960 dispensing with the legalization of foreign public documents,¹ which distinguished between legal, administrative, and notarized documents. It would be unwise to take a decision without examining that instrument, especially since it had been prepared by the Hague Conference on Private International Law, an inter-governmental organization having certain relations with the United Nations.

36. The CHAIRMAN invited comment on the type of definition to be given in article 4.

37. Mr. VERDROSS said that he would not oppose the inclusion of a few examples of consular functions, if the majority of the Commission wished such examples to be given in article 4. He would point out, however, that the article as it stood already contained a number of examples and was prefaced by a clause indicating that the enumeration was not exhaustive. Moreover, if further illustrations were added, two difficulties were bound to arise: in the first place, the Commission would of necessity spend considerable time discussing the merits of the examples, and, secondly, the article would become so cumbersome as to be unacceptable to many delegations at the forthcoming international conference on the subject.

38. Mr. SANDSTRÖM, agreeing with the previous speaker, said that if an opportunity were offered to add to the existing enumeration, there would be no logical end to the proposals that could be made. In any case, all the necessary examples were already given in the commentary.

39. Mr. PAL considered that a general definition was preferable, in order to keep the article as flexible as possible. The term "consular functions" was well known to the international community at large. Prospects of any definition, by enumeration or otherwise, to capture the whole concept, were nil. The purposes of clarity and certainty would be sufficiently served by a definition of the kind adopted for diplomatic intercourse. He suggested that article 4 should be recast along the lines of article 3 of the Vienna Convention.

40. Mr. PADILLA NERVO said that he was in favour of a general definition. The enumeration in the Special Rapporteur's third report mentioned a number of functions concerned with the consul's action vis à vis his own government; if the definition were expanded, it would be wise to refer only to consular functions in the territory of the receiving State. Otherwise, the article would be unnecessarily burdened with references to matters governed exclusively by the municipal law of the sending State. Moreover, some of the items in the Special Rapporteur's detailed definition, such as providing assistance to nationals in need and, where appropriate, arranging for their repatriation, related to functions which could not be exercised without special instructions. Accordingly, he preferred a general definition and, if the majority of the Commission decided to amplify the article, he would stress that only consular functions producing their effects in the receiving State should be mentioned.

41. Mr. AMADO fully agreed with Mr. Padilla Nervo's remarks. The enumeration, like most enumerations, omitted many important functions and included such absolutely unnecessary ones as furthering trade and promoting commercial and cultural relations and reporting to the government of the sending State on the economic, commercial and cultural life of the consular district. If a general definition were adopted, he agreed with Mr. Pal that the words "*inter alia*" should be included in the introductory clause.

42. The CHAIRMAN, speaking as a member of the Commission, considered that the definition should be neither too general nor too detailed. An unduly general definition might be of little value in a draft on consular intercourse and immunities, which differed from diplomatic intercourse and immunities in that the problems concerned were much narrower in scope and less important. Consuls dealt with many specialized problems, some of which were relatively insignificant; it would therefore be inadvisable to adopt a definition conforming too closely to article 3 of the Vienna Convention. On the other hand, an attempt to elaborate the details might also be unsuccessful, in view of the variations in law and practice from country to country. A compromise solution should therefore be sought, and the Special

¹ *Nederlands Tijdschrift voor Internationaal Recht*, vol. VIII (1961), January 1961, pp. 98 *et seq.*

Rapporteur's latest draft of article 4 struck a happy balance.

43. It was not quite clear whether the members who preferred a general definition had in mind the text as reproduced in the report on the Commission's twelfth session (A/4425); the consensus of the Commission seemed to be that the article should not be strictly general, but should contain a few examples.

44. Mr. SANDSTRÖM and Mr. VERDROSS confirmed that, in referring to a general definition, they had meant the text approved by the Commission at its twelfth session.

45. Mr. MATINE-DAFTARY said it was essential to bear in mind the true character of the consular function. A consul was not a representative of the sending State, but an official acting within the limits of the powers vested in him by his government. He entirely agreed that sub-paragraphs (e) and (f) embodied an exaggerated conception of the role of consuls. A consul was chiefly concerned with the protection of the interests of his nationals with regard to their family life and to the activities which they could lawfully carry on in the receiving State.

46. It would serve no useful purpose to give a detailed enumeration of the functions of consuls. A consul could perform certain functions only if he were given the power to do so by the sending State; mentioning those functions in article 4 would not cover the point. Of course, functions vested in the consul by the sending State could be exercised only to the extent allowed by the law of the receiving State.

47. In the light of those considerations, he suggested that paragraph 1 should begin by emphasizing that consuls exercised the functions which were vested in them by the sending State and which could be exercised without breach of the law of the receiving State. The paragraph could go on to mention, by way of example, the functions set forth in sub-paragraphs (a), (b) and (c).

48. Mr. ŽOUREK, Special Rapporteur, pointed out that the draft articles were intended to take the form of a multilateral convention. That convention would constitute the framework within which normal consular functions would be exercised. Outside that framework, the sending State could grant its consul more extensive or less extensive powers, provided that the exercise of them did not conflict with the legislation of the receiving State.

49. He recalled that he had submitted a more elaborate description of the consul's ordinary functions in response to government comments. Some governments, including many of those prepared to accept a general definition, had indicated a preference for a more detailed description of the functions mentioned in sub-paragraphs (a) to (f) as approved at the twelfth session. For example, sub-paragraph (c), which simply stated that a consul could act as notary and registrar, and exercise other functions of an administrative nature, was not very informative to a person not well versed in consular law. It was for that reason that he had proposed in his third

report the insertion of the examples given in sub-paragraphs (c) (aa) to (hh) (A/CN.137).

50. The examples included in his third report had been partly taken from government comments, but any that were not acceptable to other members of the Commission could easily be omitted. Similarly, other examples could be added, if members so wished. The enumeration was in no case exhaustive.

51. The CHAIRMAN said that the discussion had shown that the Commission was practically unanimous in favouring a general definition, accompanied by some examples given for the purpose of clarification. He therefore took it that the Commission agreed to proceed to the discussion of the substance of article 4 on the basis of the 1960 draft, together with the proposals of the Special Rapporteur.

It was so agreed.

52. In reply to Mr. ERIM, Mr. ŽOUREK, Special Rapporteur, said that the comments of governments would be taken up in connexion with the sub-paragraphs to which they related.

53. The CHAIRMAN invited consideration of the opening sentence of article 4, paragraph 1.

54. Mr. MATINE-DAFTARY recalled his suggestion that the sentence should begin with some such words as "A consul exercises the functions vested in him by the sending State . . .".

55. Mr. FRANÇOIS said that the formula proposed by the Netherlands — "To the extent to which . . ." — (A/CN.4/136/Add.4) would meet the point raised by Mr. Matine-Daftary.

56. Mr. BARTOŠ said that the discussion had raised two different questions. First, the question of a general framework within which consular functions were to be exercised. Second, that of the actual authority to perform certain functions. The general framework would be laid down by the draft articles and by any relevant agreement in force, such as a regional or bilateral consular convention. The actual authority to perform certain functions was dependent on two factors: (1) the power given to the consul to perform those functions, either in general terms by the legislation of the receiving State, or by a specific authorization from his government; (2) the fact that the receiving State had no objection to the functions in question being performed. In regard to the latter point, if the receiving State had agreed in an international convention that certain functions could be performed, it was bound to respect that undertaking and allow them to be exercised.

57. For those reasons, he favoured the language of the first sentence of paragraph 1 as it stood; it specified the framework within which a consul exercised his functions, to the extent to which those functions were vested in him by the sending State. The sending State could not, of course, go beyond the limits laid down by the general framework specified in the draft articles as a whole.

58. Mr. YASSEEN said that paragraph 1 should place the emphasis on defining the limits of consular func-

tions. Within those limits, the sending State could vest greater or lesser powers in its consul. In addition, the sending State could give its consul other powers, provided, of course, that the receiving State had no objection.

59. He considered that the content of the consular function could be defined only by international law; that content could not depend merely on the instructions given by the sending State.

60. Mr. ERIM drew attention to the comments of Finland (A/CN.4/136), to the effect that article 4, paragraph 1 was too broad and that some further general restrictions were desirable. Finland was the only State to have made such a comment.

61. Article 4, paragraph 1 was satisfactory in that it retained the idea of mutual consent in the matter of the delimitation of consular functions. The provision laid down two general restrictions: first, any extension by the sending State of the powers of its consul beyond the prescribed limits required the consent of the receiving State; second, the functions set forth in sub-paragraphs (a) to (f) were described as those "ordinarily exercised by consuls". Under the first of those restrictions, it was possible for a receiving State to limit the functions of consuls, provided that it did so without breach of the provisions of the draft articles.

62. His preference went to paragraph 1 as it stood in the 1960 draft.

63. Mr. MATINE-DAFTARY said that the views expressed by Mr. Bartos on the one hand and by Mr. François and himself on the other could be reconciled by drafting the first sentence of the paragraph along the following lines:

"Subject to any relevant agreement in force, a consul exercises within his district such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State."

64. Mr. BARTOŠ said that Mr. Matine-Daftary's proposal was acceptable.

65. The CHAIRMAN, speaking as a member of the Commission, said that the rule set forth in paragraph 1 had always been understood to be permissive, not mandatory, for the sending State. That State was under no obligation to authorize its consul to exercise all the specified functions. The provision meant simply that within the specified framework the sending State could choose the functions which it wished to vest in its consul.

66. The position of the receiving State was different. The rule in question imposed an obligation upon that State to permit the exercise of the specified functions.

67. That being so, a provision which merely stated that a consul could perform such functions, vested in him by the sending State, as could be exercised without breach of the law of the receiving State would have little value as an objective rule of international law.

68. Mr. AMADO expressed surprise at the Finnish Government's comment that the terms of paragraph 1 were too broad. That paragraph specified two restric-

tions: first, that the functions should be those vested in the consul by the sending State; second, that it should be possible to exercise those powers without breach of law of the receiving State.

69. He would reiterate that the definition of the consular functions should be couched in general terms and be followed by a few examples, leaving out those which suggested an unduly general and important role, such as those set forth in sub-paragraphs (e) and (f). Whereas a diplomatic agent exercised broad functions throughout the territory of the receiving State, a consul exercised only limited functions within a small district.

The meeting rose at 1.5 p.m.

584th MEETING

Friday, 5 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Mr. André Gros, whose experience and knowledge would, he was sure, make a valuable contribution to the Commission's work.

2. Mr. GROS, thanking the Chairman for his kind words of welcome, said that it would be a great honour for him to participate in the work of the Commission, although it was difficult for him to imagine that he could in any way replace his eminent teacher, the late Mr. Georges Scelle. He knew that Mrs. Scelle had deeply appreciated the tribute rendered to the memory of Professor Scelle at the opening meeting of the session.

3. Mr. LIANG, Secretary to the Commission, said that he had received a letter from Mrs. Scelle in reply to his telegram conveying the tributes paid by the Commission to the late Mr. Scelle. She thanked the Commission for its message and recalled her husband's long and close association with its work.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-9, A/CN.4/137)

DRAFT ARTICLES (A/4425) (*continued*)

[Agenda item 2]
(*continued*)

ARTICLE 4 (Consular functions) (*continued*)

4. The CHAIRMAN invited the Commission to resume its consideration of article 4 of the draft on consular intercourse and immunities (A/4425).

5. Mr. YASSEEN said that the itemization of consular functions in an international convention would give rise to international obligations as between the parties. The

receiving State would have a duty to permit the exercise of those functions; it could not, for example, prevent a consul from lending assistance pursuant to the convention to the nationals of the sending State. The sending State, for its part, would be debarred from entrusting non-consular functions to the consul. It would be free, of course, to entrust to him consular functions other than those specified, provided that those functions could be exercised without breach of the law of the receiving State.

6. There were therefore two categories of function: first, those to the exercise of which the receiving State could not object; second, those which could be exercised only in the absence of conflict with the law of that State. Lastly, it should be borne in mind that the itemization of consular functions by an international convention did not oblige the sending State to entrust to its consul all the functions itemized.

7. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had before it four different formulations for the opening sentence of article 4, paragraph 1. First, the 1960 text (A/4425); second, the text submitted in his third report (A/CN.4/137); third, the text proposed by the Belgian Government (A/CN.4/136/Add.6) and fourth, the one proposed by the Netherlands Government (A/CN.4/136/Add.4).

8. The 1960 text was not altogether clear. The second sentence specified that the functions described in sub-paragraphs (a) to (f) were the principal functions ordinarily exercised by consuls. That sentence could be construed as relating back not only to the first phrase of the first sentence ("the functions provided for by the present articles and by any relevant agreement in force"), but also to the second phrase (which spoke of the functions vested in the consul by the sending State). It might be inferred that not all the functions set forth in sub-paragraphs (a) to (f) were recognized as consular by modern international law. Indeed, that appeared to be the inference drawn in the Philippine comments (A/CN.4/136), where the view was expressed that the phrase "the principal functions ordinarily exercised by consuls are:" was no more than just a statement or a declaration and could not, where countries had no bilateral agreement or had domestic laws which did not touch on consular functions, be a source of consular power invocable under the proposed convention.

9. In his third report (A/CN.4/137), he had replied to that argument by pointing out that paragraph 1 mentioned not only the functions specified in the relevant agreements in force and those vested in consuls by the sending State, but also the functions provided for "in the present articles". If therefore article 4 were adopted, it would constitute a direct source of rights and duties for States in the matter of consular law. Article 4 could not, in any circumstances, be interpreted as meaning that the receiving State could, for example, prevent a consul from acting as registrar or from lending assistance to his nationals.

10. It was precisely in order to avoid such misconceptions concerning the import of paragraph 1 that, in the new text which he proposed in the third report, he

had removed the phrase "such functions vested in him by the sending State as can be exercised without breach of the law of the receiving State" from the opening sentence of paragraph 1 and incorporated its substance in a new paragraph 2. In that manner, it would be made clear that sub-paragraphs (a) to (f) enumerated functions recognized by international law as properly exercisable by consuls.

11. The Belgian proposal was taken from paragraph 1 of the second alternative text appearing in the commentary (11) to article 4 in the Commission's 1960 report. That proposal would incorporate the substance of sub-paragraphs (a) and (b) into the first sentence of paragraph 1. It would also make into a separate paragraph the phrase concerning the consular functions vested in the consul by the sending State. He had no objection to the Belgian proposal, for it was based on his own original proposal, but he feared that by dispensing with sub-paragraphs (a) and (b), it departed too much from the definition adopted by the Commission.

12. He could not accept the Netherlands text, which was unlikely to receive the support of governments. That text might be misconstrued as suggesting that the receiving State had the right to prevent the exercise of certain consular functions recognized by international law on the grounds that its legislation did not authorize that exercise.

13. The United States Government had proposed (A/CN.4/136/Add.3) that the reference to the functions which could be exercised without breach of the laws of the receiving State should be broadened to include those on which the law was silent and to which the receiving State did not object. Such a provision would be too broad; by enabling the receiving State to permit the consuls of some countries to exercise functions which it denied to others it opened the door to arbitrary action. It was always open to the receiving State to promulgate supplementary regulations placing certain restrictions on the exercise of consular functions by the consuls of all States in the cases in question.

14. Mr. PAL said that he favoured the proposed Netherlands text, subject to the addition of the words "*inter alia*" after the word "exercises" in order to emphasize that the list of functions was not exhaustive. Under paragraph 2 of the new draft submitted by the Special Rapporteur or other similar texts proposed, it might be possible for the sending State to ask its consul to carry out duties which were not part of the recognized consular function at all. It was essential to stress that the only latitude which the sending State had was that of giving more or fewer powers to its consul within the framework of the consular functions recognized by international law. That idea was very well expressed in the Netherlands text, which commenced with the words "To the extent to which they are vested in him by the sending State . . ."

15. Mr. SANDSTRÖM said the 1960 draft was not clear. It enumerated certain consular functions while at the same time suggesting that it was for the sending State to choose the functions to be vested in its consul.

The Belgian text, which began with a clear statement of the basic functions of a consul, was to be preferred. However, he would not object to the adoption of the Netherlands text as an alternative to the Belgian formulation.

16. The CHAIRMAN, summing up, said that the Commission was substantially in agreement on the following points:

- (1) that article 4 should lay down an objective rule of international law setting forth certain consular functions as constituting the framework within which the sending State could give wider or narrower powers to its consul;
- (2) that the enumeration given should not be deemed to be exhaustive;
- (3) that reference should be made to other functions vested in the consul by the sending State which could be exercised without breach of the law of the receiving State;
- (4) that a reference should be made to relevant agreements in force.

17. He therefore suggested that the Drafting Committee be instructed to prepare a draft for the opening passage of article 4, paragraph 1 in the light of the agreement on those points and taking into consideration the 1960 text, the new text proposed by the Special Rapporteur in his third report and the Netherlands text. The last-named did not affect substance, but expressed in different words the ideas on which the Commission was agreed. If there were no objection, he would take it that the Commission agreed to the course which he suggested.

It was so agreed.

18. The CHAIRMAN invited the Commission to consider sub-paragraph (a) of article 4.

19. Mr. ŽOUREK, Special Rapporteur, referred to his comments (583rd meeting, para. 27) on the Indonesian suggestion that the expression "nationals of the sending State" should apply only to individuals and exclude corporate bodies and also to the Norwegian proposal that the expression in question should cover stateless persons who had their domicile in the sending State.

20. He had already dealt with the Belgian proposal for deleting sub-paragraph (a) as a consequence of the Belgian Government's proposal that the concept contained in that sub-paragraph be embodied in the opening sentence of paragraph 1.

21. The United States Government had proposed the addition of the words "and of third States of which it is agreed he may accord protection". He had no objection to the United States proposal, but the term "agreed" should be clarified so as to show that the receiving State's consent was necessary, as stated in article 7. That, however, was a special case and a specific reference to article 7 would suffice.

22. In the new text which he proposed for sub-paragraph (a) in his third report, he had introduced, as sub-paragraphs (aa), (bb) and (cc), a number of concrete examples of the consular protection of the interests of nationals. The introduction of those examples was all the

more necessary since in the course of the discussion in the Sixth Committee of the General Assembly opinions had been voiced showing that the question had not been properly understood. The protection of nationals could never mean that the authority of the consul would be substituted for that of the local authorities. It was necessary to make it clear by specific examples that the protection envisaged in sub-paragraph (a) in no way implied a revival of the methods used at the time of the capitulations system. That protection implied only the duty of the consul to safeguard the interests and rights of nationals within the framework of the municipal law of the receiving State and of relevant international conventions. The examples given in the sub-paragraphs which he had introduced would make that meaning perfectly clear.

23. He had introduced only three sets of examples, which were to be found in a large number of consular conventions. A fourth example could be added, on the basis of the comments recently received from governments — the right of a consul to take the necessary steps to safeguard the interests of the heirs of a national of the sending State who died in the receiving State.

24. Mr. MATINE-DAFTARY proposed that some such adjective as "legitimate" be introduced before the word "interests". He would have preferred a statement to the effect that the consul's function was to protect the rights of his nationals, rather than their interests. However, if the word "interests" were to be retained, it should be expressly stated that only legitimate interests deserved protection. At the very least, an explanation should be added in the commentary.

25. Mr. YASSEEN recalled the terms of article 15 (1) of the Universal Declaration of Human Rights: "Everyone has the right to a nationality." Statelessness was a deplorable anomaly, harmful both to the human beings who suffered from it and to international society at large. One of the unfortunate consequences of statelessness was that a stateless person was deprived of consular protection. Therefore, even if only for humanitarian reasons, he urged that due consideration be given to the Norwegian proposal (A/CN.4/136) to the effect that sub-paragraphs (a) and (b) be amended so as to enable a consul to protect not only his nationals but also stateless persons who had their domicile in the sending State.

26. It was undeniable that, under the rules of existing international law, a consul could only protect nationals of the sending State. But as a matter of progressive development of international law, the Norwegian proposal was an interesting one.

27. The proposal did not concern the protection of stateless persons in general, but only that of stateless persons domiciled in the sending State. In that connexion, considerable importance was attached to domicile by the legislation of a large number of States, many of which actually applied the law of domicile in all family and succession matters. It was worth noting that the concept of permanent residence had been introduced into some of the provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), which accordingly

reflected a tendency to give to permanent residence an importance almost equal to that attached to nationality. There was therefore nothing particularly revolutionary in stating that, in the absence of a nationality, the domicile of the person concerned could qualify him for consular protection.

28. Mr. FRANÇOIS said that the additional provisions proposed by the Special Rapporteur were open to some criticism. For example, the proposed sub-paragraph (aa) seemed to suggest that the sending State could take action to see that the interests of its nationals were protected, even in the absence of any request by the nationals concerned. In fact, the position was that it was for the national himself to decide whether he wished his interests to be protected by his consul. The proposed sub-paragraph (bb) was open to the same criticism. It appeared to set forth the right of the sending State to safeguard the rights and interests of its nationals regardless of their wishes. That sub-paragraph had its origin in a proposed additional article, reproduced in commentary (12) to article 4 which would have had the effect of enabling a consul to represent the nationals of the sending State without producing a power of attorney. That article had been opposed in the Commission and had not been adopted. As to the proposed sub-paragraph (cc), questions of guardianship in private international law were notoriously complex; it had been found necessary in every case to conclude special conventions in order to enable consuls to act. He therefore doubted the wisdom of introducing that sub-paragraph.

29. Sub-paragraph (a) therefore should be left as drafted in 1960, without the additions proposed by the Special Rapporteur.

30. Mr. AMADO reiterated his strong opposition to the elaborate enumeration which was being proposed. A consul was an official of the sending State established in a city — usually a port — for the purpose of exercising mainly economic functions. The 1960 text seemed to place the emphasis on the right of the sending State to define the powers to be vested in its consul. Instead, the Special Rapporteur's new text, omitting the reference to functions vested in the consul by the sending State, commenced with the statement that a consul exercised within his district the "functions provided for by the present articles and by any relevant agreement in force". In the light of that formulation, it was not necessary to include sub-paragraph (a), the essence of which was already contained in the initial sentence. In addition, the expression "to protect the interests of the nationals of the sending State" was much too broad and vague and could only weaken the more precise language of the opening passage of paragraph 1.

31. In conclusion, he wished to place on record his objection to the vague formulation of sub-paragraph (a), although, if the majority accepted it, he would consent to its inclusion in article 4, paragraph 1.

32. Mr. VERDROSS supported the new text proposed by the Special Rapporteur. He agreed with Mr. Matine-Daftary's remark concerning the term "interests"; it would be preferable to refer to rights rather than to

interests, even legitimate interests. It would be giving consuls excessively broad functions to authorize them to protect the interests rather than the rights of their nationals.

33. With regard to the Norwegian proposal on the protection of stateless persons domiciled in the sending State, he did not agree with the analogy drawn by Mr. Yasseen from certain provisions in the Vienna Convention on Diplomatic Relations. The provisions in question concerned the position of permanent residents in relation to the local authorities of the receiving State. In the Norwegian proposal, what was involved was the protection of a stateless person in a country outside his place of residence. He did not think that international law warranted the suggestion that a consul could protect an alien resident of his country.

34. Mr. YASSEEN replied that he had not attempted to draw an analogy from the Vienna Convention, but had merely said that certain provisions of that Convention reflected the increasing importance attached in international law to the concept of permanent residence. Of equal importance was the fact that under the rules of conflict applicable in private international law in a great many countries domicile, rather than nationality, was decisive in family and succession cases.

35. Lastly, the Norwegian proposal did not mean that any alien resident in the sending State would be eligible for protection by that State's consuls abroad; it was concerned strictly with persons without any nationality who were domiciled in the sending State. He saw no reason why, in the absence of a nationality, domicile in the sending State should not qualify the person concerned for the protection of that State's consuls.

36. Mr. SANDSTRÖM expressed the opinion that a consul could certainly intervene to protect a national of the sending State, even before an interest could be regarded as having become a right.

37. He shared the views expressed by Mr. François and Mr. Amado about the wording of sub-paragraph (a).

38. The question of the protection of stateless persons should not be dealt with in the draft under consideration. The Commission's draft convention (A/2693) prepared at its sixth session, when it had discussed the topic of statelessness, under which stateless persons should be placed under the protection of the State of domicile had not been adopted by the General Assembly on the grounds that such persons were under the protection of the High Commissioner for Refugees.

39. Mr. BARTOŠ said that sub-paragraph (a) should be retained as drafted and that its scope should not be restricted. Interests often had to be protected before they assumed the character of rights in the legal sense. For example, nationals of the sending State travelling through the receiving State should be protected against possible interference with their rights as individuals in the course of formalities applied by the receiving State.

40. In the past his government had sometimes been compelled to address a special request to the receiving State to allow Yugoslav consuls to exercise their functions in cases where Yugoslav citizens had been unable to

invoke their rights to protection because of inability to communicate with their consuls.

41. The Commission should certainly consider the possibility of providing for consular protection for stateless persons by consuls of the State of domicile in all countries except the country of origin. Possibly, following the example of certain international conventions, a separate article might be devoted to that matter.

42. There were no general rules of international law regulating the question of dual nationality, but there were a number of bilateral agreements and arrangements on the subject. For example, under the arrangement between Yugoslavia and the United States of America, Yugoslavs with dual nationality who went to the United States with Yugoslav passports were regarded as Yugoslav nationals in that country, and United States citizens with dual nationality who had retained their Yugoslav nationality on return to Yugoslavia while still holding United States passports were considered by Yugoslavia as United States citizens until such time as they took up permanent residence. However, problems of consular protection for persons with dual nationality should not be dealt with in article 4, which should relate to the more general type of function performed by consuls.

43. Sub-paragraph (a) should also apply to bodies corporate.

44. The CHAIRMAN, speaking as a member of the Commission, considered that the suggestion made by the United States Government to extend consular functions to include the protection of the interests of nationals of third States was a useful one, but should be taken up in connexion with article 7.

45. In view of the fact that explanations in the commentary would not appear in the text of any multilateral convention ultimately adopted, the Drafting Committee would have to consider whether the word "nationals" covered "bodies corporate" or whether some more explicit reference to them would be necessary.

46. He was not in favour of a provision concerning the protection of stateless persons, for it would raise numerous and thorny problems.

47. With regard to the point made by Mr. Matine-Daftary, the Commission might follow the wording of article 3, paragraph 1 (b) of the Vienna Convention, since to judge by the discussions at the Vienna Conference the wording of sub-paragraph (a) was likely to give rise to objections.

48. He had been surprised by Mr. François's criticism of the Special Rapporteur's proposed new sub-paragraph (aa), which simply stated a rule of international law concerning relations between States. Of course, the extent to which a consul was entitled to exercise his right of protection was in each case determined by the law of the sending State.

49. Sub-paragraph (a), although general in form, was acceptable and sub-paragraphs (aa), (bb) and (cc) would serve a useful purpose in that they specified, though not exhaustively, some of the functions ordinarily performed

by consuls. There was no reason why the draft should not be explicit where that was feasible.

50. Mr. ERIM considered that sub-paragraph (a) in its general form was adequate and should not be amplified by a detailed enumeration of the kind proposed by the Special Rapporteur, which could not be exhaustive and was unlikely to facilitate relations between the consul and the receiving State. Indeed, it could have the opposite effect of creating difficulties, particularly as it was impossible to foresee what kind of functions consuls might have to perform in the future.

51. He shared Mr. Matine-Daftary's view that some formula should be worked out expressly stating that a consul was only concerned with protecting the "legitimate" interests of nationals of the sending State, despite the safeguard provided by article 53.

52. He had considerable sympathy both on humanitarian and on legal grounds for Mr. Yasseen's suggestion about the protection of stateless persons. If the State of domicile agreed to protect stateless persons so much the better, and there was no reason why the Commission should not include a special provision on that matter. Such action would be in line with the efforts made by the United Nations on other occasions to find a means of providing protection, whether national or international, for such persons.

53. Mr. LIANG, Secretary to the Commission, suggested that article 65 of the Commission's 1960 draft was relevant to the discussion. It would be remembered that the most far-reaching solution proposed for article 65 had been inspired by the view that a multilateral convention would automatically abrogate existing bilateral agreements on the same subject and would preclude States from subsequently adopting any provisions inconsistent with the former. The first and the second variant reflected the view that existing bilateral agreements could remain in force in one way or another and that the multilateral convention would regulate only questions not covered by them.

54. At the twelfth session he had had occasion to point out — and that view had been supported by Sir Gerald Fitzmaurice — that the Commission's draft in some respects was too detailed, and in others not detailed enough (560th meeting, paras. 29-33 and 43-49). That criticism could certainly be levelled against article 4, which had been framed in very general terms as compared to analogous provisions in bilateral conventions. The Special Rapporteur's new proposals, though they amplified the text, could also give rise to difficulties. For instance, with the introduction of the concept of safeguarding rights and interests in the new sub-paragraph (bb), the Special Rapporteur advocated that a consul could have the right to implement the more general right of protection. Sub-paragraph (cc) was surprisingly detailed when considered in juxtaposition with the two preceding sub-paragraphs.

55. In the matter of consular relations, customary international law, by contrast with the provisions of bilateral conventions, did not develop an abundance of detailed rules, and hence a statement on the lines of that contained in the last paragraph of the preamble

to the Vienna Convention on Diplomatic Relations might not suffice. He would therefore suggest that the original text of article 4 was preferable.

56. The Convention relating to the Status of Stateless Persons¹ adopted by the United Nations Conference on the Status of Stateless Persons in 1954 was not very helpful in the discussion of the suggestion made by Mr. Yasseen because that Convention did not provide for the protection of stateless persons outside the territory in which they resided.

57. Mr. MATINE-DAFTARY welcomed the support of Mr. Verdross and Mr. Erim for his suggestion. He would remind Mr. Sandström and Mr. Bartos of the doctrine equating right and right of action and advancing the thesis that a right could be either static or dynamic; it became dynamic when it was contested, but remained static when it was not. Accordingly, the replacement of the word "interests" by the word "rights" would meet Mr. Sandström's and Mr. Bartos's objections. A consul could not take any action in excess of that taken by a legal counsel; some counsel refused to plead a case which they did not regard as just, but if every counsel took that course, there would be no more justice in the world.

58. He supported the Chairman's suggestion that nationals of the sending State should be further qualified as individuals and bodies corporate.

59. Mr. PADILLA NERVO said that the text of paragraph 1 (a) as approved by the Commission at its twelfth session (A/4425, para. 28) was fully adequate, since it established a general principle. He agreed with the Secretary, however, that if the first text of article 65 was adopted, and existing bilateral consular conventions were not automatically maintained in force, it would be wise to include in the draft some of the principles and consular functions enumerated in bilateral agreements; on the other hand, if the second text of article 65 was adopted, and pre-existing bilateral agreements remained in force, it would be wiser to retain in article 4 only the basic principles of consular law on which bilateral agreements would be based.

60. He could not agree with the suggestion for the replacement of the word "interests" by "rights". The term "interests" had a wider meaning than "rights"; moreover, the context of the convention and the provisions of other articles made it perfectly clear that only legitimate interests were at issue, since the consul could not exercise functions which constituted a breach of the municipal law of the receiving State. The situation was made clear by a number of bilateral conventions. For example, the Consular Convention between Mexico and the United Kingdom² provided in its article 18 that a consular officer was entitled, within his district, to protect the nationals of the sending State and their property and interests. The article then listed four ways in which the consul could exercise protection, including

enquiry into any instance which had occurred affecting the interests of any such national, and ended with the provision that a national of the sending State should have the right, at all times, to communicate with the appropriate consular officer and, unless subject to lawful detention, to visit him at his consulate. The Convention further provided, in another article, that a consul could, within his district, promote the commercial, economic and cultural interests of the sending State.

61. With regard to the position of stateless persons, the question was mainly humanitarian and, hence, a matter to be settled by special conventions and not by general rules of international law. Inclusion of a reference to stateless persons would, moreover, give rise to disputes of a political character at the conference and would cause governments to make reservations to the convention.

62. Mr. GROS observed that paragraph 1 (a) as approved by the Commission at its twelfth session confirmed the widely-recognized interpretation of consular protection as protection of interests, before any question of the violation of rights arose. The reference to rights, therefore, might result in a restriction of existing practice, which no member of the Commission would surely advocate. He would point out to Mr. Matine-Daftary that a consul's activities differed from those of legal counsel in that a consul acted as an official of the sending State in the exercise of the right of protection of the State for its nationals. In fact, there were three guarantees against the abuses which Mr. Matine-Daftary seemed to fear. In the first place, the action of consuls was only one case of normal relations between the sending and the receiving State which presupposed the principle of good faith; accordingly, the interests protected by consuls must be assumed to be legitimate. Secondly, consuls were required to respect the municipal law of the receiving State. Lastly, they were bound under the convention to act in conformity with the rules of international law.

63. Mr. FRANÇOIS said he agreed with most of the Chairman's remarks, with the exception of the statement that, under international law, the sending State itself could decide how far to go in safeguarding the interests of its nationals. That thesis seemed to ignore the fact that through the consul the sending State exercised its competence in the territory of the receiving State, which also had to have its say in the matter. Thus, if the sending State went so far as to safeguard the interests of its nationals before the courts of the receiving State against their will, the municipal law of the receiving State had to be taken into account.

64. Mr. EDMONDS said that it would be best to retain the reference to interests in paragraph 1 (a), and not to refer to rights or legitimate interests. In many cases, the validity of the position of a national of a sending State might be unknown, and the consul could not be expected to decide at the outset — and before the local courts had decided — whether or not that position was correct. Moreover, the consul's function was not to protect illegal or improper claims, but to protect the national of a sending State at least to the

¹ E/CONF.17/5/Rev.1 (United Nations publication, Sales No.: 56.XIV.1).

² United Nations Treaty Series, vol. 331 (1959), No. 4750, pp. 22 *et seq.*

point where his position could be determined as being in conformity with the municipal law of the receiving State. A reference to rights would be both disadvantageous to the relationship between the consul and the national of the sending State and not in accordance with existing practice in the matter.

65. Mr. AGO agreed with the members who believed that the term "legitimate interests" should not be used. In the first place, the term "legitimate interests" had a precise meaning in the law of some countries, and its use in a general definition might lead to confusion. Secondly, as Mr. Edmonds had pointed out, it was not for the consul, but for the local courts to judge whether or not the interests concerned were legitimate. As a rule, the consul could not of course intervene if the interests of the national were manifestly non-legitimate. However, the use of the term would raise a delicate questions in cases where the national's interests were not legitimate under the law of the receiving State, but where that law was itself not in conformity with international law; the consul might be prevented from justly intervening in such cases. In view of those considerations, the phrase "within the limits permitted by international law", used in article 3, paragraph 1 (b) of the Vienna Convention on Diplomatic Relations, should be used in paragraph 1 (a).

66. Mr. ŽOUREK, Special Rapporteur, replying to comments made by members, said that he intended to define the word "national" to include both individuals and bodies corporate. In that connexion, he would refer to his third report (A/CN.4/137).

67. With regard to Mr. Yasseen's suggestion, which coincided with the observations of the Norwegian Government, it would not be advisable to insert any reference to stateless persons. Such an important problem could not be solved in a context dealing with consular protection; moreover, the majority of States would be unable to accept such an innovation in positive law. Furthermore, it was stated in paragraph 16 of the Schedule to the Convention relating to the Status of Stateless Persons that the travel document for stateless persons did not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue, and did not *ipso facto* confer on those authorities a right of protection.

68. With regard to the suggestion that the word "rights" should be substituted for "interests", he recalled the discussion on the subject during the eleventh session, when he had proposed the expression "rights and interests" (517th meeting, para. 1; and A/4169, p. 118, commentary). It had been decided, however, to conform with the wording of the draft on diplomatic intercourse (A/3859) which referred to interests only, and to state in the commentary that interests included rights. The fact that article 3 of the Vienna Convention referred to interests only seemed to indicate that that wording should be retained in the article relating to consular functions in the draft under consideration.

69. With regard to the question whether examples of typical consular functions should be included, an unduly general definition would be open to misinterpretation.

In expressing a preference for the text of article 4, paragraph 1 of the 1960 draft, Mr. Erim had evidently wished to draw attention to the drawbacks of an enumeration. Admittedly, there were dangers in any allegedly exhaustive enumerations; but if it was expressly stated that certain functions were listed as examples only, the drawbacks vanished. Nor could it be maintained that enumeration could create difficulties for consuls vis-à-vis the receiving State. If the article was drafted in general terms, a consul might, for example, propose to the authorities of the receiving State the appointment of a trustee for a national of the sending State, and those authorities might refuse on the grounds that their understanding of the consular functions was more restrictive. That was the reason why he had added some typical functions, which the Commission might regard as being in the interests of the development of consular relations, advantageous to both the States concerned and tending to eliminate friction between them.

70. Nor could he agree with the argument that the problem would be solved by the operation of the second text of article 65 (maintaining in force existing bilateral consular conventions). A detailed enumeration of consular functions would be in no way prejudicial to the provisions of existing bilateral conventions; moreover, there was a widespread tendency to ignore the fact that bilateral conventions covered only a very small sector of consular relations between States, particularly since so many new States had been established. Lastly, the Commission could not ignore the many requests in the comments of governments for the insertion of references to specific functions. While agreeing with Mr. François that a number of complex problems were involved, he believed that the Commission should choose from the provisions of bilateral conventions the elements which were generally acceptable. It should not be too difficult to agree on examples which would render the convention more acceptable to the States requesting an illustrative definition.

71. Mr. VERDROSS suggested that all members of the Commission, both those who regarded the term "interests" as too broad and those who found the term "rights" or "legitimate interests" too restrictive, would be satisfied by the use of the wording of article 3, paragraph 1 (b) of the Vienna Convention on Diplomatic Relations.

72. Mr. ERIM said that, although the Special Rapporteur's explanations had answered some of his stronger objections to an enumeration, he still had some doubts on the wisdom of using examples; sub-paragraphs (aa), (bb) and (cc) could create difficulties in connexion with existing bilateral conventions and with the municipal law of the receiving State.

73. For example, the verb "to see that" in sub-paragraph (aa) was extremely vague, and added nothing to the verb "to protect" in sub-paragraph (a). Similarly, the reference to safeguarding the rights and interests of the nationals of the sending State in sub-paragraph (bb) was included in the protection which was the acknowledged consular function in international practice. Those additions were bound to necessitate further

explanations and might lead to disputes. Finally, the institution of guardianship and trusteeship, referred to in sub-paragraph (cc), was in most countries regulated by the civil code, and guardians and trustees were appointed by the judge. Accordingly, the provision might be regarded as introducing a new practice, not in conformity with the existing legislation of potential signatories of the convention.

74. Mr. ŽOUREK, Special Rapporteur, said that he could not agree with Mr. Erim that the verb "to see that" was less precise than the verb "to protect". Moreover, protection had in the past had certain disagreeable connotations. Although he did not insist on the use of the term "to see that", he thought it better to use the most precise wording possible. Nor could he agree that the verb "to safeguard" was too strong, particularly if it was remembered that, obviously, the consul had to proceed in accordance with the municipal law of the receiving State. For example, if the receiving State allowed a consul to appear before the courts, he could do so to safeguard the rights and interests of a national of the sending State; otherwise, he must instruct counsel to do so. Similar considerations applied to the consul's role in the appointment of guardians and trustees (sub-paragraph (cc)). It was true that guardians and trustees were usually appointed by the judge; but very often the consul's function under sub-paragraph (cc) was merely to propose a person for such appointment. The status of minors and persons lacking full capacity who were nationals of the sending State was determined by the municipal law of that State; the consul was therefore entitled to take provisional measures for their protection. Even if the municipal law of the receiving State did not provide for that contingency, it would be modified by the multilateral convention which would be signed and would become law between the contracting States. Accordingly, the insertion of that example could only lead to reciprocal advantage for the States concerned. Also, paragraph 1(a) should be expanded to include a provision concerning the consul's functions with regard to the estates of deceased persons nationals of the sending State.

75. The CHAIRMAN said that the Commission should reach a decision on the type of definition it wished to include in article 4. He called for a vote on the Special Rapporteur's proposal that some examples of typical consular functions should be included in paragraph 1 of the article.

The Special Rapporteur's proposal was rejected by 11 votes to 4.

76. The CHAIRMAN suggested that the Drafting Committee, in preparing a new text of article 4, paragraph 1(a), should be instructed to take into account article 3, paragraph 1(b) of the Vienna Convention on Diplomatic Relations and also the comments made during the debate.

It was so agreed.

The meeting rose at 1.10 p.m.

585th MEETING

Monday, 8 May 1961, at 3.15 p.m.

Chairman: Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Sir Humphrey Waldock, whose experience and knowledge would, he was sure, make a valuable contribution to the Commission's work.
2. Sir Humphrey WALDOCK thanked the Chairman for his kind words of welcome. He expressed his admiration for the Commission's recent achievements and his appreciation of the honour done to him in inviting him to participate in its work.

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137) (continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 4 (Consular functions) (continued)

3. The CHAIRMAN referred to the Commission's decision (584th meeting, para. 73) that article 4, paragraph 1(a) should not mention examples. In the light of that decision, he asked the Special Rapporteur whether he would withdraw some of the examples that he had suggested for the subsequent paragraphs.
4. Mr. ŽOUREK, Special Rapporteur, said that, in preparing his third report on consular intercourse and immunities (A/CN.4/137), he had felt obliged to add some of the most typical examples of consular functions under paragraph 1(b). He must, however, point out that his role in that second reading of the draft was different from that at the previous session, since he had to analyze and systematize the comments of governments and, where necessary, with a view to facilitating the debate and the adoption of a generally acceptable text, submit proposals. With those considerations in mind, it was for the Commission to decide whether or not it was necessary to include examples, and the Special Rapporteur was not obliged to defend the opposite point of view. Since the Commission had decided not to include examples in paragraph 1(a), he would not urge discussion of the examples under paragraph 1(b). That would save time and he therefore proposed that the Commission proceed to consider paragraph 1(c), on which a number of governments had commented.
5. The CHAIRMAN suggested that, since the Special Rapporteur was prepared to withdraw his proposed examples to paragraph 1(b), the text of that paragraph,

as approved by the Commission at its twelfth session (A/4425), should be adopted.

It was so decided.

6. Mr. ŽOUREK, Special Rapporteur, referring to the comments of governments on paragraph (c), said that the Government of the United States (A/CN.4/136/Add.3) observed that the functions of a notary in the United States were not comparable to those of a notary in certain other countries. The difficulty, however, could be obviated by redrafting the provision, particularly since the expression "notarial functions and services" was common, even in consular conventions concluded by the United States. The Drafting Committee could no doubt find a satisfactory text. The same Government said that the words "civil registrar" were not easily identifiable in United States Law. That was also a drafting point which could be dealt with without too much difficulty. Finally, it stated that "administrative" was an ambiguous word, not really descriptive of functions to be performed. In that case, it might be more difficult to find another generic term describing the administrative functions performed by a consul; he would welcome suggestions from members of the Commission, for the United States Government had not proposed an alternative.

7. The Government of Poland (A/CN.4/136/Add.5) did not consider it exact to regard the actions of a notary as being of an administrative nature. To overcome the objection, paragraph 1 (c) might be divided into two parts, the first concerning the consul's function of acting as notary and as registrar of births, marriages and deaths, and the second relating to his exercise of functions of an administrative nature. An alternative might be to delete the word "other", but a division of the clause would be both more elegant and more accurate, particularly in view of the wide field covered by both the functions in question.

8. The clause proposed by the Government of the Netherlands (A/CN.4/136/Add.4) for insertion after paragraph 1 (c) appeared as paragraph 1 (c) (hh) in his third report, with the addition of the words "in the manner specified . . .". He had thought that the best solution for the Netherlands proposal related to a relatively minor function and to give it greater prominence would disturb the balance of paragraph 1. Alternatively, if paragraph 1 (c) were to be divided into two, the additional clause could become a sub-paragraph of the first part. In any case, it was for the Commission to decide, as it had done with earlier paragraphs, whether paragraph 1 (c) should contain examples of typical consular functions.

9. Mr. MATINE-DAFTARY, referring to the taking of evidence on behalf of courts of the sending State, observed that in national law letters rogatory were communicated by one judge to another. He doubted whether a court could ask a consul as such to execute letter rogatory; it was certainly inadmissible under Iranian law. The whole question depended on the wording of the opening clause of article 4; if the sending State were free to extend such powers to its consuls, the provision

could stand, but if the power were extended to all consuls, the provision would be inadmissible.

10. Mr. ŽOUREK, Special Rapporteur, drew Mr. Matine-Daftary's attention to the qualifying phrase "in the manner specified . . ." which he had added to the Netherlands proposal. In drafting that provision, he had borne in mind the existing practice in accordance with the international Convention of 1905 relating to civil procedure, as revised in 1954.¹ Article 6 of that Convention stipulated that the provisions of the preceding articles were without prejudice to the right of each State to have documents addressed to persons abroad served directly through its diplomatic or consular agents. The article further provided that the right in question should be deemed to exist only if it was recognized in conventions between the States concerned or if, in default of such conventions, the State in whose territory service was to be effected did not object. That State could not object if the document was to be served on a national of the requesting State without duress. While that provision applied to the service of documents, the conditions stipulated by the said Convention in the case of letters rogatory were similar. Accordingly, if the legislation of the receiving State disallowed the execution of letters rogatory by the consul, they could be executed in that State only pursuant to conventions concluded between the States concerned or, in the absence of any such convention, if the receiving State raised no objection.

11. Mr. LIANG, Secretary to the Commission, observed that as drafted paragraph 1 (c) left it in doubt whether notarial functions to be exercised by the consul were intended to produce their effect in the receiving or in the sending State. Naturally, the courts of the receiving State could only give effect to the acts of a notary authorized to act as such in that State, and it was very unlikely that the receiving State would allow a consul to be appointed a notary. The same applied to the registration of births, deaths and marriages. Although the Special Rapporteur had clarified that particular function in clause (dd), it was still left in doubt whether the consul's functions in those respects were intended to take effect in the sending or in the receiving State. The Drafting Committee should therefore make it quite clear that the consul would not presume to act as a notary public of the receiving State.

12. With regard to the Special Rapporteur's paragraph 1 (c) (ff), the issue of passports and visas was a very frequent and important consular function. It was difficult to conceive of it as being included among "functions of an administrative nature" as described in paragraph 1 (c). Since the scope of that function seemed to go well beyond the administrative field, he would suggest that in order to emphasize its importance it should be made the subject of a separate paragraph.

13. Mr. SANDSTRÖM expressed the view that paragraph 1 (c) should be amplified as suggested by the

¹ United Nations *Treaty Series*, vol. 286 (1958), No. 4173, p. 265 (where references to published text of the 1905 Convention are given in footnote 4).

Special Rapporteur in clause (hh), for two reasons. In the first place, the institution of notary was not highly developed in some countries, including his own; secondly, since the competence of consuls in connexion with the service of judicial documents and the taking of evidence on behalf of courts was a specific function, it might be useful to mention it separately.

14. Mr. YASSEEN opined that the qualifying phrase "of an administrative nature" was too broad and that it might be better to use the expression "similar functions of an administrative nature".

15. He agreed with the Secretary that the function of issuing passports and visas was so important as to deserve a separate paragraph. Indeed, that was the function with which the layman most usually associated the consul.

16. Mr. BARTOŠ criticized the use of the word "other" in the description of functions of an administrative nature. In general legal theory, the notary was not regarded as an administrative official; the question whether a notary was a ministerial judicial official or an auxiliary official of the judiciary had been discussed at length at the recent Hague Conference on Private International Law in connexion with the draft convention dispensing with the legalization of foreign public documents,² and it had been decided, on the proposal of the Austrian delegation to the Conference, to create a special category for documents drawn up by notaries. In view of the considerable divergence of opinion on the matter, it was therefore dangerous to include notarial functions among functions of an administrative nature. In his opinion, the second part of paragraph 1 (c) should read "and to exercise certain functions of an administrative nature". While his objection might be regarded as somewhat academic, it was clear from some of the comments of governments, particularly those of the Government of the United States, that there were several different concepts of notarial functions. To avoid controversy, the draft should take all the legal systems into account.

17. He also had some doubts concerning the Special Rapporteur's paragraph 1 (c) (dd), for it could not be said to be a rule of customary or general international law that consuls had authority to record and transcribe documents relating to births, marriages and deaths. Under the law of some countries consuls were not qualified to perform such acts.

18. The functions of receiving for safe custody money and securities belonging to nationals of the sending State, referred to in paragraph 1 (c) (ee) was also treated differently in different countries. That power was conferred on the consuls of some States by separate conventions, but the whole question was debatable, particularly where currency control was involved.

19. He agreed with Mr. Matine-Daftary's objections to paragraph 1 (c) (hh). Despite the Special Rapporteur's reference to the Conventions on Civil Procedure, great caution should be used in extending to consuls general

powers of serving judicial documents and taking evidence on behalf of courts of the sending State. Certain limiting factors, such as the nationality of the parties concerned and duress, had to be taken into account in cases where the national concerned might fail to respond to the consulate's summons. Accordingly, it should be expressly provided that a response to a consulate's summons should in all cases be voluntary; otherwise, the abuses of the capitulations system, only too well known in Balkan history, might be given free rein. It should be expressly stipulated that the provision concerning letters rogatory should operate only as between nationals of the sending State, and never in cases where the courts of the receiving State were competent. In the absence of a special convention on the subject, a provision allowing the consul to execute letters rogatory could be construed as impairing the sovereignty of the receiving State. Without specific provisions safeguarding the competence of the courts and the sovereignty of that State, there would be a danger of interference by the sending State in the domestic affairs of the receiving State through the execution of letters rogatory on behalf of courts of the sending State. In an international code such as the Commission was drafting, the proliferation of illustrations proposed by the Special Rapporteur was liable to obscure the fundamental principle of the sovereignty of the receiving State; the Commission should take that aspect of its work extremely seriously.

20. Mr. MATINE-DAFTARY fully supported Mr. Bartoš's view that a notary's functions could not be regarded as administrative only. The function of executing letters rogatory on behalf of courts of the sending State was a purely judicial, and in no way an administrative, function. It was also true that to confer that judicial power upon consuls would be tantamount to perpetuating the capitulations system. Accordingly, it might be advisable to mention the function of serving judicial documents among those exercisable by the consul, but to specify that the function of executing letters rogatory was not, unless expressly provided for in bilateral conventions, an ordinary consular function. A codification of the general rules of international law concerning consular relations was not the right context for a provision empowering the consul to execute letters rogatory.

21. Mr. ŽOUREK, Special Rapporteur, said that he had drafted paragraph 1 (c) (hh) in order to incorporate the proposal of the Netherlands Government. The proposal was therefore not his proposal, but that of the Netherlands. However, there were no grounds for the concern expressed by certain members that the provision might recall vestiges of the capitulations régime. The proviso "in the manner specified by the conventions in force . . ." clearly meant that on no account would a consul perform any judicial functions otherwise than with the concurrence of the receiving State; the sovereignty of that State was therefore fully safeguarded.

22. It was worth noting that under the provisions of the Hague Conventions relating to Civil Procedure of 1905 and 1954, judicial documents could be served and letters rogatory executed on behalf of courts by a dip-

² *Nederlands Tijdschrift voor Internationaal Recht*, vol. VIII (1961), January 1961, pp. 98 *et seq.*

lomatic or consular agent if the conventions in force between the States concerned admitted such a procedure, or, in the absence of any such convention, if the receiving State did not object.

23. It was of considerable practical importance to make provision for the exercise of such functions by consuls, where possible, because in such a case it would suffice if the form prescribed by the procedural laws of the sending State were observed. A great many consular conventions contained such provisions.

24. Lastly, he agreed with Mr. Yasseen that the function of issuing passports and visas was an extremely important consular function. In view of that importance, the Drafting Committee might perhaps be authorized to decide whether the example in paragraph 1 (c) (ff) should form the subject of a separate paragraph of the article.

25. Mr. ERIM emphasized that the service of judicial documents constituted a judicial, or in some cases quasi-judicial, act. Hence it did not come within the general terms of paragraph 1 (c), which mentioned notarial functions; registration of births, marriages, and deaths; and functions of an administrative nature.

26. For those reasons the Special Rapporteur's paragraph 1 (c) (hh) should constitute a separate clause and not a subdivision of paragraph 1 (c). As to the wording of the proposed provision, the objection of Mr. Matine-Daftary and Mr. Bartos was met by the qualifying phrase "in the manner specified . . .". That phrase made it an essential condition that the act in question had to be permitted by the legislation of the receiving State.

27. Mr. AGO proposed that paragraph 1 (c) as approved at the previous session should be adopted, subject to the substitution of the word "certain" for "other" before "functions of an administrative nature". That wording would avoid the difficulty which had arisen because the 1960 draft suggested that the functions of a consul as notary and registrar were administrative in character.

28. He proposed that the examples given in the Special Rapporteur's draft paragraph 1 (c) (aa) to (ee) and (gg) be omitted. The functions of notaries and registrars varied from country to country and it was therefore not only unnecessary, but even dangerous, to give those examples in a multilateral instrument. In any case, some of those examples were even outside the scope of the general terms of paragraph 1 (c); thus the functions specified in (ee) (custody of money and securities) came not under the heading of notarial functions, but rather under the general heading of "assistance to nationals" covered by paragraph 1 (b).

29. The function of issuing passports and visas, on the other hand, was so important that it should form the subject of a separate clause.

30. Lastly, with regard to the acts referred to in the Netherlands proposal, he said that two possible situations might arise. First, the consul might merely transmit the request to the judicial authorities of the receiving State, who served the document or took the evidence themselves. Secondly, there was the possibility that the consul might himself serve the document or take evidence.

In either case, the acts should form the subject of a separate clause, for they could not be considered as part of some general administrative function.

31. Mr. FRANÇOIS said it was his impression that the Netherlands proposal contemplated both the case where a consul merely transmitted a request to the judicial authorities of the receiving State and the case where the consul himself performed the functions in question.

32. With the proviso "in the manner . . ." introduced by the Special Rapporteur, there was no danger of the functions in question being exercised otherwise than with the concurrence of the receiving State and in agreement with its legislation. He thought that the Special Rapporteur's draft paragraph 1 (c) (hh) constituted a useful addition to the article.

33. Mr. BARTOŠ drew attention to the words "in the manner specified" placed before the words "by the conventions in force" and the words "in any other manner" before the words "compatible with the laws of the receiving State" in the paragraph 1 (c) (hh) under discussion. That language merely covered the question of form; it would not exclude the possibility of a consul's performing the acts in question in cases which were not specified in a convention in force or in the laws of the receiving State. Conceivably, the municipal law of the receiving State might debar a consul from performing such functions.

34. In practice, it was rare that such a prohibition was laid down expressly by legislative provision. Rather, what happened in international practice was that the receiving State was dissatisfied and objected to the consul's exercising certain functions not specified in the conventions. In modern international practice, if the receiving State raised objections to the exercise of certain functions, the consul must discontinue to exercise them. That was why he took the view that consular functions not specified in the conventions could not be exercised by the consul in face of objection by the receiving State, and that it was not necessary that the prohibition must be laid down in the laws. The exercise of functions by a consul was not always of legal character; very often it was political in nature.

35. Mr. ŽOUREK, Special Rapporteur, said the provisions of article 53 on the duty of consuls to respect the laws and regulations of the receiving State covered the question of substance.

36. Mr. ERIM pointed out that the functions of notaries varied from country to country. In many common law countries, a notary public could receive evidence in the form of an affidavit. The notary public might thus perform the function of taking evidence on behalf of a court.

37. Admittedly, the issuing of passports and visas was an essential consular function, but it was covered by the term "administrative functions": it was therefore not absolutely essential to specify it separately.

38. Mr. ŽOUREK, Special Rapporteur, said that the certification of commercial invoices was also an impor-

tant day-to-day function of consuls, but if it were to be specified separately it should, like that of issuing passports and visas, be mentioned under the general heading of administrative functions.

39. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed on paragraph 1 (c) as contained in the Special Rapporteur's third report, subject to the replacement of the words "other functions" by some such expression as "certain functions" or "similar functions". The actual wording could be left to the Drafting Committee.

It was so agreed.

40. The CHAIRMAN said that the Commission had before it a proposal to delete the examples given in paragraph 1 (c) (aa), (bb), (cc), (dd), (ee) and (gg) of the Special Rapporteur's draft. If there were no objection, he would take it that the Commission agreed on the deletion of those examples.

It was so agreed.

41. The CHAIRMAN said that the Commission appeared to be in general agreement that paragraph (c) (ff) should form the subject of a separate clause, because the issuing of passports and visas was one of the consul's most important functions. If there were no objection, he would take it that the Commission wished the Drafting Committee to prepare a suitable text.

It was so agreed.

42. The CHAIRMAN said that some members had suggested that the example given in the Special Rapporteur's draft paragraph 1 (c) (hh) should be omitted, while others wished it to stand. A further suggestion had been made that the provision in question should constitute a separate clause.

43. Mr. PAL supported Mr. Ago's proposal to the effect that the example in (hh) should constitute a separate provision from sub-paragraph (c).

44. Mr. AMADO said that the example in question was most necessary. The Netherlands proposal proceeded from an unrivalled experience in consular matters and the proviso introduced by the Special Rapporteur would ensure that in no circumstances would a consul perform the acts in question otherwise than in keeping with the laws of the receiving State.

45. The correct context for the proposed provision was of course outside paragraph 1 (c), because the functions envisaged were not administrative in character.

46. Mr. YASSEEN, with reference to the remarks by Mr. Bartos, proposed that the Drafting Committee should be asked to amend the language of the proviso "in the manner . . ." so as to cover not only form, but also substance. The draft should specify that consuls could serve judicial documents or execute letters rogatory in those cases only in which they were authorized to do so by the relevant conventions or by the municipal law of the receiving State.

47. Mr. SANDSTRÖM pointed out that the first sentence of article 4, paragraph 1 as approved at the twelfth session provided that a consul exercised the

functions which were vested in him by the sending State in so far as they could be exercised without breach of the law of the receiving State. That provision appeared to be general enough to subordinate any act of the consul to the condition that it must not break the law of the receiving State.

48. Mr. YASSEEN in reply said that the passage cited by Mr. Sandström did not cover all the functions entrusted to the consul. In particular, it did not apply to the functions conferred upon the consul "by the present articles". The exercise of the functions specified in the various sub-paragraphs and, in particular, in the proposed additional sub-paragraph, would not, therefore, be subject to the proviso in question.

49. Mr. ŽOUREK, Special Rapporteur, reiterated that the question of substance was covered by article 53 on the duty of consuls to respect the laws and regulations of the receiving State. If the law of that State precluded the consul from serving judicial documents on behalf of the courts of the sending State, the provision proposed in paragraph 1 (c) (hh) would not apply.

50. However, he had no objection to the Drafting Committee being asked to review the draft provision in question from the point of view of substance as well as of form.

51. Mr. MATINE-DAFTARY said that if the text in clause (hh) were to be retained it should be removed from paragraph 1 (c), for it dealt with judicial and not with administrative functions.

52. The CHAIRMAN said that it seemed to be generally agreed that the text in clause (hh) of the Special Rapporteur's draft article 4, paragraph 1 (c) should be separated from its existing context. If there were no objection, he would take it that the Commission agreed that the Drafting Committee should be asked to prepare a suitable text.

It was so agreed.

53. The CHAIRMAN invited debate on article 4, paragraph 1 (d) as proposed by the Special Rapporteur in his third report.

54. Mr. ŽOUREK, Special Rapporteur, said that he had followed the Norwegian Government's suggestion (A/CN.4/136) that sub-paragraph (d) should refer explicitly to crews. The Japanese Government (A/CN.4/136/Add.9) had proposed the deletion of the words "and boats" on the ground that they were covered by the word "vessels". He had originally proposed such wording so as to conform with the distinction made in French between "*navire*" and "*bateau*" in certain international conventions. In English, a single term would probably suffice.

55. The Norwegian Government had found paragraph 1 (d) as approved at the twelfth session too vague and believed that some of the functions listed in the commentary to the second variant were so important that they should be mentioned in the body of the article itself. He had accordingly done so in his proposed new clauses (bb), (cc) and (dd).

56. Mr. YASSEEN favoured the insertion of a refer-

ence to crews in paragraph 1 (d) since it was in the obvious interest of the flag State of a vessel or of the State in which an aircraft was registered that the consul should extend necessary assistance to the crews. Regarded as an undertaking, the vessel or aircraft was dependent on its crew, and such a reference was all the more necessary because some members of the crew might not be nationals of the sending State.

57. Mr. VERDROSS expressed the view that the scope of paragraph 1 (d) (dd), laying down as it did a rule of customary law, was far wider than that of paragraph (d) itself; the provision should accordingly stand on its own and not in its present subordinate position.

58. Mr. SANDSTRÖM, agreeing with Mr. Yasseen, said that Mr. Verdross's argument was equally applicable to clauses (aa), (bb) and (cc), which dealt with functions that could hardly come under the heading of assistance and were more in the nature of judicial functions.

59. Mr. GROS, referring to the drafting amendment proposed by the Japanese Government, considered that as far as the French text was concerned the word "*navires*", which was sometimes used in Conventions relating to inland waterways navigation — on the Rhine, for example — would suffice if it were explained in the commentary that the expression included river craft.

60. Mr. ERIM said he was not convinced by the Norwegian Government's arguments. All the examples mentioned in that government's comment were covered by the general definition given in paragraph 1 (d).

61. He had no objection to the addition of a reference to crews, if needed in the interests of clarity.

62. Mr. AGO agreed with Mr. Verdross that clause (dd) should be separate, but was not of the same opinion as Mr. Sandström concerning clauses (aa), (bb) and (cc) which dealt with matters that were essentially procedural. Sub-paragraphs (d) and clause (dd) were the only ones that need be retained in the article itself.

63. Sir Humphrey WALDOCK said that the term "vessel" was generic and would cover "boats" in the English text.

64. He agreed with the Norwegian Government on the need to spell out certain additional functions in paragraph 1 (d) and, though recognizing that the function referred to in (dd) was the most important of those in the Special Rapporteur's enumeration, he considered that Mr. Sandström was right in thinking that others should also be mentioned. For instance, consuls might be called upon to conduct investigations in a vessel in port concerning an incident which had occurred on the high seas. Such an investigation would be an internal matter for the flag State and was not covered by clause (dd). Some general reference should be made to the fact that consuls could legitimately exercise functions of wider scope than those specified in (dd).

65. Mr. AMADO considered that paragraph 1 (d) should be amended, for the matters referred to in the succeeding clauses were not all connected with the giving of assistance.

66. Mr. BARTOŠ said that the right of a consul to inspect vessels of the sending State was universally recognized in modern maritime law. The question of the application of sanctions for failure to observe certain rules was another matter. Some reference to that important function should certainly be made.

67. Mr. SANDSTRÖM believed that the essence of clauses (aa), (bb) and (cc) could be conveyed in a text on the following lines: "To take statements and note the customary particulars."

68. The CHAIRMAN suggested that, since no objection had been raised as to the substance of paragraph 1 (d) and its sub-clauses as proposed by the Special Rapporteur, they could be referred to the Drafting Committee for redrafting in the light of the discussion.

It was so agreed.

69. The CHAIRMAN invited comments on article 4, paragraph 1 (e).³

70. Mr. ŽOUREK, Special Rapporteur, said that paragraph 1 (e) had not given rise to any comment by governments.

71. The CHAIRMAN, speaking as a member of the Commission, proposed that the paragraph 1 (e) be referred to the Drafting Committee with a request that it give some consideration to modifying the text, which was tautologous in that it referred both to furthering trade and to promoting the development of commercial relations.

It was so agreed.

72. The CHAIRMAN called for comments on article 4, paragraph 1 (f).³

73. Mr. ŽOUREK, Special Rapporteur, said that there were no comments from governments on paragraph 1 (f).

74. The CHAIRMAN, speaking as a member of the Commission, proposed that the Drafting Committee be instructed to take into account the wording of article 3, paragraph 1 (d) of the recently adopted Vienna Convention on Diplomatic Relations (A/CONF.20/13) when reviewing the text of article 4, paragraph 1 (f) of the draft.

75. The CHAIRMAN called for comments on paragraph 2 of article 4 as proposed in the Special Rapporteur's third report.

76. Mr. ŽOUREK, Special Rapporteur, said that he had inserted the new paragraph 2 at the Norwegian Government's suggestion. Certainly such a provision would make for greater clarity and would obviate the article 4 being misconstrued.

77. The CHAIRMAN, speaking as a member of the Commission, pointed out that at its previous session the Commission had in fact approved such a proviso. It could appropriately follow the statement of general functions in paragraph 1 of the article.

³ The text of article 4, paragraphs 1 (e) and (f), included in the draft as adopted at the twelfth session (A/4425, para. 28), is reproduced unchanged in the Special Rapporteur's third report (A/CN.4/137).

78. Mr. BARTOŠ said that from the purely academic point of view he was not opposed to such a provision. However, it could not be maintained in regard to consular functions that anything not expressly prohibited by the laws of the receiving State was permissible, and the Commission would be unwise to overlook the influence of political considerations. The Commission's task was not only to find an acceptable legal formula, but also to take into account the realities of the modern world and of inter-State relationships. Paragraph 1 specified the normal functions exercised by consuls, and in his opinion the restriction stipulated in paragraph 2 was inadequate to protect the interests of the receiving State. It would therefore be necessary to add a further safeguard in paragraph 2 stipulating that a consul might perform additional functions provided that there were no objection on the part of the receiving State.

79. Mr. ŽOUREK, Special Rapporteur, stated that the Governments of the Netherlands and Poland (A/CN.4/136/Add.4 and 5) both considered that the provision appearing as paragraph 3 of his third report was redundant on the ground that the relations between the consul and the authorities of the receiving State were regulated in article 37. The Commission would remember that the provision contained in that paragraph had been inserted in article 4 for the reason that a consul's contact with the local authorities was one of the salient features of the consular function. However, reference to that question in article 4 was not indispensable and he would have no objection to the paragraph being omitted.

80. Mr. YASSEEN believed that the paragraph should be dropped. As it dealt with the method of exercising consular functions it had no place in an article concerned with the nature of those functions.

The meeting rose at 6.5 p.m.

586th MEETING

Tuesday, 9 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137) (continued)

DRAFT ARTICLES (A/4425) (continued)

[Agenda item 2]

ARTICLE 4 (Consular functions) (continued)

1. The CHAIRMAN invited further debate on article 4, paragraph 2, as proposed in the Special Rapporteur's third report (A/CN.4/137).
2. Mr. MATINE-DAFTARY said that it was conceivable that the sending State might authorize its con-

suls to carry out "additional" functions which, though not expressly prohibited by the laws of the receiving State, might be at variance with the latter's economic or political interests; in such circumstances the safeguard provided in paragraph 2 would be inadequate. If paragraph 1 specified that the functions which it enumerated were not exhaustive, paragraph 2 would become superfluous.

3. Mr. ŽOUREK, Special Rapporteur, endorsed the Norwegian Government's suggestion that the provision in question should form part of article 4 (A/CN.4/136).

4. The suggestion made by Mr. Bartos (585th meeting, para. 34) that the exercise of additional functions should be contingent on the absence of objections from the receiving State, though at first sight it appeared reasonable, might have the consequence that a receiving State would arbitrarily raise objections to the exercise of certain functions in a specific case without applying the same objections to other consuls. The Commission had consistently taken the view that the measures taken by the receiving State with regard to foreign consuls within its territory must be applicable to all consuls within its territory. In that connexion, there was an example in the last two sentences in paragraph (3) of the commentary to article 46 (A/4425) concerning exemption from customs duties. He urged Mr. Bartos to give further thought to the implications of his suggestion.

5. It had been argued that the reference to the "law" of the receiving State in the first sentence of article 4 as approved at the twelfth session might be construed narrowly to mean strictly statute law. Perhaps if the word "law" were replaced by the words "laws and regulations", the interests of the receiving State would be fully protected without any need for the further safeguard suggested by Mr. Bartos.

6. Mr. AMADO expressed the hope that the Drafting Committee would carefully review the wording of article 4, which in some respects was very defective; for example, in paragraph 1 (c) the expression "to act as notary" was inappropriate in the context; it would be preferable to speak of the consul performing notarial functions.

7. Mr. PAL pointed out that paragraph 2 of the Special Rapporteur's new text had become necessary because of the modifications he had made in the opening passage of paragraph 1. To the best of his recollection the Commission had not accepted the new text during the current debate, but had approved, subject to some drafting changes (584th meeting, para. 16), the introductory part of paragraph 1 as adopted in 1960, a text which was more comprehensive and provided some sort of definition. The fate of the new paragraph would hinge upon the drafting changes made in the opening paragraph. If that earlier text stood as adopted at the twelfth session, then the Special Rapporteur's new paragraph 2 would become unnecessary and misleading. Clearly, the additional functions referred to in the new paragraph 2 had to be consular functions, of which paragraph 1 gave only some examples. As formulated, the new paragraph 2 would be wide enough to include new consular assignments also.

8. The CHAIRMAN observed that the Commission had not taken any decision about retaining the wording of the 1960 text of paragraph 1, but had simply agreed that article 4 would specify the main consular functions and provide that some additional ones could be performed provided that they were not in breach of the law of the receiving State. That proviso could be embodied in paragraph 1 or in a separate paragraph; the precise wording could be settled by the Drafting Committee.

9. Mr. BARTOŠ assured the Special Rapporteur that he had carefully reflected on the implications of his suggestion before making it and had indeed discussed the matter with legal experts in his own country who had wide practical experience. The suggestion had been prompted by the fact that not infrequently consuls either sought to evade the legislation of the receiving State or to perform functions which were not provided for in its legislation. Moreover, it was rare that the receiving State promulgated laws dealing with the activities of consuls. That State was very often taken unawares by such activities, because its laws for preventing the malpractices of undesirable consuls could be enacted only after such practices had begun. Since the sending State was not bound to notify the receiving State of the functions vested in its consuls, certain functions could be assigned to them by means of confidential instructions, and some time might elapse before the local authorities realized that such functions were being carried out and before they could take any necessary counter measures. Such cases were not comparable to those where the sending State sought to intervene for the purpose of protecting human rights. If, as often happened, consular activities were inspired by political motives, the receiving State should have the right to lodge its objection, which usually took the form of a semi-official warning to the consul that he refrain from such activities, or of an official protest to his Government. Of course, the right to make such an objection must be exercised without discrimination.

10. He did not believe that the Special Rapporteur's analogy with exemptions from customs duties was valid, since fiscal questions were qualitatively different from the question of a consul's competence, which was, in essence, a political issue. It was no answer to say that the receiving State could rely on its general regulations for the purpose of objecting to some particular activity on the consul's part, for the objectionable activity would probably have its origin in confidential instructions and might be clandestine. Such cases were really political. The receiving State must be allowed discretionary, though not discriminatory, powers to put an end to activities which it regarded as undesirable.

11. He had not been convinced by the Special Rapporteur's arguments against his suggestion.

12. Mr. AGO said that he shared some of the fears expressed by Mr. Bartos. The introduction to paragraph 1 as approved at the twelfth session, by making the proviso concerning additional functions ("and also such functions...") complementary to the statement about the exercise of normal consular functions, had

given the matter less prominence than it would receive if the Special Rapporteur's new paragraph 2 were approved. In cases where certain functions were not expressly prohibited by law — and such a prohibition seemed to be very unusual — the legal position might give rise to disputes between consuls and the receiving State which would be most undesirable. Perhaps a solution might be found in a negative formula on the lines suggested by Mr. Bartos.

13. The CHAIRMAN, speaking as a member of the Commission, said that he also had some doubts about the new paragraph 2. The exercise of additional functions was subject to an express or tacit agreement between the two States concerned, and the new paragraph 2 went far beyond that proposition.

14. Mr. AGO, while agreeing with the Chairman that all consular functions were exercisable by virtue of an agreement between the States concerned, said that it would be excessively restrictive to stipulate that only those additional functions could be performed which were specifically provided for by a "relevant agreement in force". In the future, consuls might well be called upon to exercise new and useful functions which were not specified either in a multilateral convention of the type under discussion or in bilateral agreements in force. It should be possible to work out a text that would take that point into account as well as others raised during the discussion.

15. Mr. MATINE-DAFTARY said that the Chairman's remarks had confirmed his opinion that the new paragraph 2 was unnecessary; its purpose would be fulfilled by stating in paragraph 1 that the functions enumerated were not exhaustive. He agreed with the view that the exercise of additional functions specified by the sending State should be contingent on the absence of objections on the part of the receiving State: an express proviso to that effect should certainly be included.

16. Mr. BARTOŠ agreed with the Chairman that all consular functions were exercised by virtue of an agreement between the States concerned, but he also held, as did Mr. Ago, that for practical reasons consuls should be enabled to perform additional functions, particularly of a specialized nature, if there was no objection on the part of the receiving State. His government, for example, had had no objection whatever to United Kingdom consuls at one period selecting from amongst refugees in Yugoslavia applicants for resettlement in countries of the British Commonwealth not represented by diplomatic missions at Belgrade, although normally all matters concerning refugees were part of the duties of the United Nations High Commissioner for Refugees. The Yugoslav Government had seen no need for any special supplementary agreement with the United Kingdom covering the exercise of such functions and had considered a simple notification to be enough. It had, however, objected to the malpractices of certain consulates which had acted as depositories for some migrants desiring to evade the regulations for the normal transfer of funds, even though there had never been any provision on the matter directly addressed to consuls.

17. Mr. GROS supported Mr. Bartos's suggestion that it would be in conformity with present practice and the needs of modern international life that consuls should be able to undertake additional functions, possibly of an *ad hoc* character, provided that there was no objection from the receiving State. Ultimately, the exercise of such additional functions, as much as that of ordinary consular duties, depended on agreement between the two States.

18. Sir Humphrey WALDOCK said that in general he agreed with Mr. Bartos, but could not subscribe to Mr. Pal's view. Although Mr. Ago was right in emphasizing that allowance must be made for cases where consuls undertook new functions in future, for that purpose it would surely be sufficient if the enumeration in paragraph 1 were expressly declared not to be exhaustive. In the form which that paragraph was being contemplated, it would not preclude the development of consular functions in new directions. On the other hand, it would seem somewhat inconsistent to add a provision on the lines of that contained in the new paragraph 2 allowing consuls to engage in activities which, by definition, did not belong to consular functions proper. If such activities as those mentioned by Mr. Bartos in the example he had given were generally undertaken by consuls, they would, in the course of time, be assimilated to regular consular functions.

19. Mr. VERDROSS shared Mr. Ago's concern that a provision should be drafted enabling consuls to exercise certain obviously useful functions which had not been foreseen at the time when bilateral conventions had been concluded. It should be possible to meet all the views expressed by some appropriate wording for inclusion in the introductory part of paragraph 1. That would be preferable to a separate clause concerning additional functions.

20. Mr. LIANG, Secretary to the Commission, observed that the consular functions enumerated in general terms as proposed both in the 1960 draft and in the new text, though not exhaustive, were intended apparently as the basis in an international convention for the exercise of those functions. Despite the qualification in the second sentence, the effect of the first sentence in paragraph 1, if taken in conjunction with the new paragraph 2, might prove too restrictive. The first sentence of paragraph 1 referred to relevant agreements in force; but if the draft articles ultimately became a general multilateral convention, what was to be the position of two States which became parties to it and between which no bilateral consular convention had been concluded?

21. It would certainly be difficult to claim that the present draft articles or existing bilateral conventions covered the whole range of possible consular functions. There was another source of functions, namely, customary international law. That had been mentioned in a similar context in the preamble to the Vienna Convention on Diplomatic Relations (A/CONF.20/13). There seemed to be a case for amending the new paragraph 2 so that it referred to customary international law rather than to the laws of the receiving State since, to the

best of his knowledge, no such laws existed prohibiting the exercise of certain consular functions.

22. Mr. SANDSTRÖM voiced his concern at the absence of a reference to instructions from the sending State, taking into account the agreements in force and any possible objection by the receiving State. He would not, however, propose a specific amendment in that connexion.

23. Mr. PADILLA NERVO considered that the difficulty encountered by the Commission was not due to the new paragraph 2 as such. In the case of bilateral agreements where consular functions were set forth in detail, such a paragraph would fill a definite need by admitting the possibility of temporary or additional functions which consuls might exercise. Under certain bilateral conventions, consuls could perform additional functions, provided that they were in conformity with existing rules of international law or practice. Another condition was that those functions should not be contrary to the laws of the receiving State and that the authorities of the receiving State should not object to their exercise. It was obvious that those conditions related only to additional functions, and not to the functions expressly enumerated in article 4 or in bilateral conventions.

24. The difficulty lay in the fact that the enumeration in that article was not exhaustive, but merely set forth somewhat general principles with a few examples; accordingly, it had been deemed necessary to include the sources of consular functions in the introductory part of paragraph 1. If that passage had been followed by an exhaustive enumeration of ordinary consular functions, then any reference to other, unspecified, additional functions would have had to be qualified by a proviso subordinating the exercise of such additional functions to the general principles of international law, custom, local law and the absence of objections on the part of the receiving State. As it stood, however, the general language of the provision could not be said to suffice for the purpose of the exercise of additional, unspecified, functions, and he agreed, therefore, with Mr. Bartos that a provision should be included concerning the receiving State's consent to the performance of additional functions.

25. In that connexion, he would cite article 34 of the Consular Convention between Mexico and the United Kingdom,¹ in which in which the provisions of articles 18 to 32 relating to the functions exercisable by a consular officer were declared not to be exhaustive, and under which a consular officer was also permitted to perform other functions, provided that (a) they were in accordance with international law or practice relating to consular officers as recognized in the territory, or (b) they involved no conflict with the laws of the territory and the authorities of the territory raised no objection to them. Those provisos were applicable to additional functions, which were not specified in the bilateral agreement, but which might arise from time to time and

¹ United Nations Treaty Series, vol. 331 (1959), No. 4750, pp. 22 *et seq.*

could be performed, provided that the three conditions stipulated were fulfilled.

26. Mr. AGO said that the Commission was, in a manner of speaking, contradicting itself. If the enumeration in paragraph 1 (a) to (f) had been intended to be exhaustive, it would have been logical to add a clause on additional functions, but since the enumeration was acknowledged to be illustrative only, there seemed to be no need to include a provision on the lines of new paragraph 2. Moreover, the sources of definition of consular functions were described in paragraph 1 as being the articles of the convention and any relevant agreement in force; there was no mention of the rules of customary international law as a source and there was no need at all for such a mention. The best solution might be to bring the article closer into line with article 3 of the Vienna Convention on Diplomatic Relations; the statement that consular functions consisted, among others, of those described as the principal functions in the 1960 text would enable the Commission to avoid contradiction.

27. Mr. VERDROSS observed that, whereas there was no country whose law expressly prohibited any consular function, in a number of cases consular functions were expressly authorized by the municipal law of the receiving State.

28. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Verdross, but pointed out that the qualifying words ("provided that . . . not prohibited . . .") applied only to additional functions, and not to those cited as examples under paragraph 1. The difficulty was due to the fact that the Commission at its twelfth session had decided to refer to such functions vested in the consul by the sending State as could be exercised without breach of the law of the receiving State. A clarification of that point would represent a step towards agreement on a generally acceptable text. Mr. Ago's solution seemed the best.

29. The CHAIRMAN noted that the Commission seemed to be moving towards agreement. The agreed text which seemed likely to materialize would probably be more acceptable to the forthcoming international conference. Accordingly, the Drafting Committee might be instructed to prepare a text of article 4 along the lines of article 3 of the Vienna Convention and insert the paragraphs which the Commission had approved. Reference to bilateral conventions seemed to be unnecessary in view of article 65, and additional functions would undoubtedly be performed by consuls, with the consent of the receiving State, whether or not they were mentioned in the Convention. Accordingly, the omission of paragraph 2 would not result in the loss of any legal provision and would considerably simplify the issue.

30. Mr. MATINE-DAFTARY said he agreed in principle with Mr. Ago's proposal, but would point out to the Drafting Committee that there was a considerable difference in law between diplomatic and consular missions. The text of article 3 of the Vienna Convention could be followed, but it should be borne in mind that a consul was an official of the sending State, and not

its representative, and that his functions were therefore subject to the consent of the receiving State.

31. Mr. ŽOUREK, Special Rapporteur, said that he could not agree with Mr. Matine-Daftary because the differences between the position of diplomatic and that of consular officials were attributable to the degree and importance of their respective functions and not to their representative or other character. Since in most cases consuls were appointed by the Head of State or Minister of Foreign Affairs, it could not be denied that they represented the sending State in the consular district in order to protect the rights and interests of that State and of its nationals. It had long been recognized that consulates were organs of the State in the field of foreign relations. In any case, the Drafting Committee would no doubt study Mr. Matine-Daftary's remarks.

32. Mr. BARTOŠ endorsed Mr. Matine-Daftary's view that a consul was not the representative of the sending State, but was appointed to protect certain interests of that State. That was the current general conception of the consular status.

33. The CHAIRMAN observed that that issue had been discussed previously on a number of occasions. As Mr. Matine-Daftary had made no specific proposal, he proposed that the Drafting Committee should be instructed to prepare a text of article 4 along the lines of article 3 of the Vienna Convention on Diplomatic Relations, taking into account the proposals on individual paragraphs approved by the Commission during the current debate.

It was so agreed.

Article 4 was referred to the Drafting Committee for amendment in the light of the discussion.

ARTICLE 5 (Obligations of the receiving State in certain special cases)

34. Mr. ŽOUREK, Special Rapporteur, referred to the relevant passage in his third report (A/CN.4/137) and drew attention to a number of comments by governments on article 5. The proposal of the Japanese Government (A/CN.4/136/Add.9) would simplify the text of paragraph (a) and would therefore probably be acceptable to most members.

35. With regard to the United States Government's comment that it would seem enough for local authorities to seek out next-of-kin when minors or incompetents were in difficulties (A/CN.4/136/Add.3, *ad* article 5), he would point out that the cases in question were always urgent and required emergency measures of protection. Since the search for next-of-kin might take a long time, it would be better to retain the Commission's text.

36. The Governments of Yugoslavia, the Soviet Union and the Netherlands (A/CN.4/136 and Add.2 and 4) had suggested that the scope of paragraph (c) should be extended to include aircraft of the sending State, a course that he found acceptable.

37. The most controversial point had been raised by the Government of Belgium, which proposed the inser-

tion of a new sub-paragraph (A/CN.4/136/Add.6) extending the receiving State's duty of notification. While he had no objection to that extension, regarding it as a most useful provision for the protection of the interests of the nationals of the sending State, he doubted whether it would be acceptable to the majority of participants in the plenipotentiary conference.

38. Mr. ERIM said that the Belgian Government's proposal gave rise to considerable practical difficulties. How could the authorities of the receiving State know, at the time of the probate of a will of one of its nationals, whether a national of the sending State was a beneficiary? The notary or the court concerned might know, but the government authorities were unlikely to hear of all such cases. At the twelfth session Mr. Edmonds had criticized paragraph (a) on the grounds that it imposed too heavy a burden on the authorities of the receiving State (545th meeting, para. 49) the difficulties of implementing the paragraph proposed by the Government of Belgium would naturally be even greater. The new paragraph proposed by that government should not therefore be inserted in paragraph 5.

39. Mr. SANDSTRÖM, concurring, said that difficulties would inevitably arise if the receiving State were to be required to report to the consulate every case of the kind contemplated by the Belgian Government's amendment. Such cases arose, of course, but it was not advisable to deal with them in article 5.

40. With regard to the placing of the article, he agreed with the Netherlands comment that both article 5 (Obligations of the receiving State in certain special cases) and article 6 (Communication and contact with nationals of the sending State) were out of place in section I of chapter I, which dealt with consular intercourse in general; their proper context was section II of chapter II, which dealt with the facilitation of the work of the consulate.

41. Mr. AMADO expressed surprise at the Belgian proposal that the competent consul should be advised "without delay" of the existence in his district of an estate in which one of his nationals might be interested. He asked whether any existing consular convention placed a duty of that kind on the receiving State. It would be unwise to attempt to deal with the question in article 5.

42. Mr. EDMONDS said that the difficulties arising in connexion with article 5 were attributable to the imperative terms of the opening passage: "The receiving State shall have the duty." In the case of countries having a federal constitution, difficulties would inevitably arise if such a specific obligation were to be imposed upon the federal government. In the United States, for example, the federal Government had no access to vital statistics and was not in any way concerned in the questions relating to minors. All functions in those matters were entirely within the jurisdiction of state and local authorities. The provisions of sub-paragraphs (a) and (b), introduced by the mandatory language of the opening passage, were entirely unworkable as far as the United States of America was concerned.

43. For those reasons, he suggested that the Drafting Committee should be asked to consider the possibility of drafting the opening words of article 5 in less categorical terms, possibly along the following lines: "The receiving State shall, if records are available to it (a) in the case of the death in its territory of a national of the sending State, send a copy of the death certificate to the consulate . . ."

44. Mr. BARTOŠ said that there was nothing strange in the Belgian suggestion in so far as the countries which had adopted the Klein system of judicial procedure were concerned. In that system, in cases of inheritance, before either of the claimants had instituted court proceedings for the adjudication of the dispute, the courts or the notary exercised jurisdiction in non-contentious matters (*jurisdiction gracieuse*). There should be no difficulty, under that system, for a court or notary to advise the competent consul whenever it became apparent that one of his nationals had an interest in the estate of a deceased person.

45. In reply to Mr. Amado's question, several of the countries which had adopted the Klein system of judicial procedure had included in consular conventions or in conventions on judicial co-operation a provision along the lines proposed in the Belgian comment.

46. For those reasons, he had for his part no objection to the Belgian suggestion. The conference of plenipotentiaries would show how much government support there was for the proposal.

47. With reference to the question raised by Mr. Edmonds, he realized that a federal government would find it hard to give effect to a provision of the type of article 5. He understood that, in the United States of America, the courts of the eastern states had generally taken the view that consular conventions entered into by the federal Government were binding upon them except where a "federal clause" had been specifically included in the convention concerned. The Supreme Court of California, and those of a number of western states tended to take the opposite view and did not regard the terms of consular conventions as directly binding upon state courts if state laws contained different rules and reserved to the courts the right to interpret the meaning of the conventions. In a very recent case, in which the Yugoslav Government was interested, however, and in which the State Department had argued for the binding character of a consular convention, the Supreme Court of the United States had ruled that the provisions of the consular convention concerned were binding upon the authorities and courts of the constituent states of the Union.

48. Mr. EDMONDS agreed with Mr. Bartoš that a consular convention was binding upon the courts of the constituent states of a federal union in so far as substantive law was concerned. In such matters as property rights, such provisions must be — and indeed were — respected by all the authorities of the states. In fact, he had himself written opinions in the Supreme Court of California to that precise effect. The question at issue, however, was a different one. It concerned not a matter of substantive law but the gathering of information

which was scattered in many places and which was not accessible to the federal Government. Considerable difficulties would arise if a duty were to be placed upon the federal authorities to give information which could only be obtained by inspecting records that were outside their control. It was for that reason that he had suggested a more flexible formulation for article 5.

49. Mr. GROS said that the question raised by Mr. Edmonds was not one of mere drafting but an important question of principle. The point to be decided was whether all States parties to the proposed convention would assume a legal obligation to transmit the information referred to in article 5. In the case of a federal State, it was the responsibility of the federal authorities to make the necessary legal and material arrangements to enable it to carry out its obligations, in each case taking account of the special relationship between the federal and the state authorities. That obligation raised no new problem and in 1930 the federal question had been discussed in connexion with State responsibility at the Conference for the Codification of International Law. He noted that Brazil also was a federal State and that Mr. Amado had not suggested any similar difficulties in regard to his country.

50. Mr. AGO said that the problem mentioned by Mr. Edmonds arose whenever a federal State signed a treaty. Perhaps the problem would appear less formidable if it were remembered that the expression "the receiving State" did not mean only the federal authorities in the case of a federal State. It covered all the authorities of the signatory Party, including federal, state and local authorities. The distribution of powers as between those various authorities was a purely internal matter; it was for the municipal law concerned to determine whether the consul would be advised by a local or by a federal authority in the cases specified in article 5. It would be illogical to set forth in article 5 a duty only for the cases where the federal authorities had jurisdiction. The duty in question should be placed upon the contracting parties themselves; in each case, there should be some authority in the country concerned having the power to give the information to be communicated to the consul under article 5.

51. The Belgian proposal might be acceptable in principle, but in practice it would give rise to much difficulty. A State could be required to advise a consul of the death of one of his nationals because it was comparatively easy in most cases to determine the nationality of a deceased person. But it was an altogether different matter to require the consul to be notified of all cases in which one of his nationals happened to have an interest in an estate left in the receiving State. For those reasons, the Belgian proposal was not practicable.

52. Mr. LIANG, Secretary to the Commission, said that he would not discuss the question of the extent of the duty of a federal government to enforce the obligations contracted by the State as such. That was a problem of a general character which could not well be considered in detail at that stage. The position in legal theory was that the federal government was always regarded as the "societal agent" of the State, to quote

the expression used by Professor Borchard. The federal government usually made arrangements with the constituent states to see how international obligations could be carried out by them.

53. The question raised by Mr. Edmonds had been settled by means of a provision, along the lines of the article 5 under discussion, in the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany, signed at Washington on 8 December 1923. That treaty contained an article XXIV, the first paragraph of which provided:

"In case of the death of a national of either High Contracting Party in the territory of the other without having in the territory of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform the nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the parties interested."²

54. Apparently, some arrangements had been possible in that case whereby the federal Government of the United States of America could carry out a provision of the type of article 5.

55. Mr. AMADO said that he had been impressed by the statement of Mr. Sandström regarding the placing of article 5 and he agreed that the proper place for that article was before article 34.

56. The CHAIRMAN said that the first question to be decided was whether an additional sub-paragraph along the lines proposed by the Belgian Government should be introduced into article 5. The great majority of members had expressed themselves against the proposal. If there were no objection, he would therefore take it that the Commission agreed not to include the proposed additional sub-paragraph.

It was so agreed.

57. The CHAIRMAN said that the consensus of the Commission was to retain article 5 in the form agreed to in 1960, with the amendment proposed by Japan to sub-paragraph (a) (A/CN.4/136/Add.9) and with the inclusion of a reference to aircraft in sub-paragraph (c).

58. Mr. BARTOŠ said that inland waterways craft should also be mentioned. The Drafting Committee should also consider mentioning internal waterways, in addition to the territorial sea of the receiving State.

59. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to entrust to the Drafting Committee the drafting of article 5 with the proposed changes, as well as the decision on the placing of the article.

It was so agreed.

² *Laws and regulations regarding diplomatic and consular privileges and immunities*, United Nations, *Legislative Series*, vol. VII (United Nations Publication, Sales No.: 58.V.3), pp. 435-436.

ARTICLE 6 (Communication and contact with nationals of the sending State)

60. Mr. ŽOUREK, Special Rapporteur, said that the comments on article 6 were contradictory. Some governments held that the article went too far, whereas others considered that it was not sufficiently comprehensive and failed to provide the consul with adequate scope. At that stage, he proposed to deal with only the first type of comment: he would deal with the others if the Commission decided to retain article 6.

61. He recalled that at the twelfth session the adoption of article 6 had been preceded by a long discussion.³ For his part, he had expressed reservations regarding the article because its provisions gave too much scope to a particular consular function (534th meeting, para. 14). In addition, those provisions seemed to go too far on certain points.

62. A number of governments, including those of Denmark and Norway (A/CN.4/136 and Add.1), considered that the provisions of article 6 went too far. The Czechoslovak Government proposed the deletion of article 6 on the grounds that the powers of the consul to protect the interests of his nationals were regulated already in general terms by the provisions of article 4 on consular functions and that detailed regulation of the questions referred to in article 6 was a matter falling within the exclusive competence of the internal legislation of the receiving State (A/CN.4/136).

63. The United States Government had criticized article 6 on the grounds that its provisions appeared to give validity to procedures whereby a prisoner might be held *incomunicado*. Accordingly, that government had suggested that a maximum period of forty-eight or seventy-two hours be agreed upon for the purpose of that type of custody (A/CN.4/136/Add.3).

64. The opinions expressed by the seventeen governments which had sent in their comments showed that there was a wide divergence of views on the substance of article 6. It was therefore extremely unlikely that agreement would be reached on the provisions of the article in a future conference of plenipotentiaries at which as many as a hundred States might be represented. The conclusion to be drawn was that the subject dealt with in article 6 was not ripe for codification in a multilateral convention, and he therefore suggested that the Commission should carefully consider whether the article should be retained.

The meeting rose at 1 p.m.

587th MEETING

Wednesday, 10 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

[Agenda item 5]

1. Mr. LIANG, Secretary to the Commission, read a telegram dated 7 May 1961 from Mr. Charles Fenwick, Executive Secretary of the Inter-American Council of Jurists, to the effect that Mr. José Joaquín Caicedo Castilla had been designated as observer for the Inter-American Juridical Committee to attend the present session of the Commission.

2. The CHAIRMAN welcomed Mr. Caicedo Castilla.

3. Mr. Caicedo CASTILLA, Observer for the Inter-American Juridical Committee, thanked the Chairman for his kind words of welcome.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1 to 10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 6 (Communication and contact with nationals of the sending State) (continued)

4. The CHAIRMAN invited the Commission to resume its discussion of article 6 of the draft on consular intercourse and immunities (A/4425).

5. Mr. YASSEEN urged that article 6 be retained as in the 1960 draft. Its provisions, in particular those set forth in paragraph 1 (a) and (b), were absolutely necessary.

6. The freedom of the nationals of the sending State to communicate with and to have access to their consul, and the consul's freedom of communication with his nationals, were not guaranteed by article 4, which dealt with consular protection. Those freedoms were an essential condition for the exercise of the consular function of protection, as recognized by the opening words of paragraph 1 ("With a view to facilitating the exercise of the consular functions . . ."). It was therefore necessary to safeguard them by means of an explicit provision in the terms of paragraph 1 (a).

7. Equally important was the duty set forth in paragraph 1 (b) of the competent authorities of the receiving State to inform the consul if one of his nationals was committed to custody pending trial or to prison. Unless

³ 534-537th meetings; article 6 was there discussed as additional article 30A.

so informed, the consul would have great difficulty in finding out whether one of his nationals had been arrested and hence in performing his duty to protect the national.

8. The right of the consul to visit his imprisoned national, set forth in paragraph 1 (c), was largely covered by the general function of protection. That right was, however, extremely important and was connected with one of the most essential human rights: that of the right of defence of an accused. It was therefore desirable that it should be mentioned explicitly.

9. Paragraph 2 of the article, which specified that the freedoms referred to in paragraph 1 should be exercised in conformity with the laws and regulations of the receiving State, and added that those laws and regulations should not nullify those freedoms, served a three-fold purpose: first to obviate any possible abuse on the part of the consul or his nationals of the freedoms in question; in the second place, to preclude any arbitrary application of the laws and regulations of the receiving State on the part of its authorities, who were required to give effect to the freedoms embodied in those laws and regulations; and, thirdly, to avoid any abuse on the part of the receiving State itself of its legislative and regulatory powers by specifying that it must not enact any laws and regulations which might render the freedoms in question inoperative.

10. He supported article 6 as a well-balanced text which took into account the various conflicting interests involved, but reserved his right to comment on drafting changes.

11. Mr. VERDROSS also supported article 6. The protection of the nationals of the sending State in their relations with the local authorities was possibly the most important of all consular functions. That traditional function could be performed only if the consul were free to communicate with his nationals and to visit them if they were detained. The freedoms mentioned in article 6, paragraph 1, were an essential corollary to the right of protection set forth in article 4. The recognition of the right of protection should therefore carry with it that of the means to exercise that right.

12. The wording of paragraph 2 should be improved. Instead of providing that the freedoms referred to in the article should be exercised in conformity with the laws and regulations of the receiving State, it should be stipulated that those laws and regulations could regulate only the manner of exercising such freedoms.

13. Mr. FRANÇOIS said that he shared the views expressed by the two previous speakers. He could not follow the Special Rapporteur's suggestion (586th meeting, para. 64) that the provision be dropped from the draft merely because a few governments had expressed objections to it. Of course, the Commission took into consideration all government comments, but those comments emanated from only a small number of governments and it would be an altogether unsatisfactory system to give, in effect, to two or three States the possibility of deleting an article from the draft, thereby depriving the great majority of States from expressing

their views on that article in the diplomatic conference which would be convened to examine the draft.

14. In fact, the government replies showed that many States favoured article 6 and considered it as one of the most important articles of the whole draft. Some Government comments even suggested that the provisions of the article should be strengthened; for example, the Netherlands Government had proposed (A/CN.4/136/Add.4) that the expression "without undue delay" in paragraph 1 (b) should be supplemented by the words "and in any case within one month". Although that amendment might perhaps make the provision unduly broad, the fact that it had been proposed showed the importance attached by the Netherlands Government to the freedoms set forth in paragraph 1.

15. Mr. EDMONDS said that he would strongly support the retention of article 6. He would go even further and broaden the terms of its provisions. In particular, in connexion with the right of a consul to visit his national who was in custody or imprisoned, promptness was necessary in order to ensure the effectiveness of the consul's action. Unless a consul could visit his national at the outset of the difficulties, he could not make proper arrangements for legal representation. It would serve little purpose to permit such a visit only after the accused had been held for weeks in secret confinement.

16. In article 6, the Commission dealt with a very fundamental human right and it should not retreat from the position which it had taken at its twelfth session. Rather, it should endeavour to take a step forward along the course which it had set itself.

17. Mr. PADILLA NERVO said that article 6 was perhaps the most important of all the provisions relating to consular functions. The rights therein set forth were intimately connected with the consul's exercise of his duties within his jurisdiction. If the consul were not allowed to communicate with his nationals throughout his district, his jurisdiction would in fact be limited within the narrow bounds of the city or port where the seat of the consulate was situated.

18. The consul's freedom to communicate with his nationals, and their right to communicate with their consul, constituted the cornerstone of the whole structure of consular relations. As far as Mexico was concerned, the inclusion of an explicit provision guaranteeing those facilities of communication constituted a condition *sine qua non* for the signing of any bilateral consular convention. Those facilities were of great practical importance in the case of a country whose nationals travelled or worked abroad in large numbers.

19. For those reasons, he supported article 6 in its entirety, but wished to place on record his interpretation of paragraph 2, which stated that the freedoms referred to in paragraph 1 would be exercised in conformity with the laws and regulations of the receiving State. In his opinion, that provision could only mean that the consul's right to visit or to communicate with a prisoner was subject to whatever regulations were in force in the prison where the person in question was held. The provi-

sions of paragraph 2 could not have the wider meaning that the freedom of communication in general, as expressed in paragraph 1 (a), could be restricted by the receiving State.

20. The CHAIRMAN, speaking as a member of the Commission, recalled that article 6 had been adopted at the twelfth session after a long and difficult discussion.¹ The majority of the members appeared to favour retaining the article and he suggested it would not be wise to attempt to change materially the substance of a compromise formula which represented such a delicate balance between different views.

21. Nevertheless, a number of minor improvements could be made and he suggested the following alterations:

(i) The adoption of the Netherlands proposal that in paragraph 1 the word "consul" should be replaced by "consulate" or, where appropriate, by "a consular official" or "officials of the consulate". That change would be in keeping with the form adopted in the Vienna Convention on Diplomatic Relations (A/CONF.20/13), which referred to the diplomatic mission as such. If the Commission approved, a similar change might be made in other articles of the draft for the sake of uniformity of terminology.

(ii) In paragraph 1 (a), the words "Nationals of the sending State shall be free to communicate with and to have access to the competent consul, and" might be deleted, so that the provision would read: "(a) The consul shall be free to communicate with and, where appropriate, to have access to the nationals of the sending State." That amendment would be consistent with the general tenor of the article, which referred to the consulate's freedom to communicate with its nationals and not to the rights of aliens in the receiving State.

(iii) In paragraph 2, the passage "subject to the proviso, however . . ." should be deleted, since it constituted an explanatory remark more suited to a commentary than to the text of the article. A decision along those lines had been taken in connexion with the article on freedom of movement in the Commission's draft on diplomatic intercourse (A/3859, commentary to article 24).

22. Mr. ERIM said that he supported the retention of article 6. Paragraph 1 was largely a codification of existing international law, and any attempt to delete such provisions as those of paragraph 1 (b) and (c) would represent a distinctly retrograde step in international practice.

23. The contents of paragraph 1 represented to some extent progressive development of international law, but such innovations as it contained were all sound and useful.

24. He agreed with the Chairman that no attempt should be made at that stage to alter materially the substance of an article which represented a delicate compromise, but he could not agree with the Chairman's suggestion that the final proviso of paragraph 2 should

be relegated to the commentary. The proviso was extremely important and should appear in the article itself.

25. Mr. ŽOUREK, Special Rapporteur, explained that he had not disputed the importance of the question mentioned in article 6. He had only expressed doubts about its inclusion in the general structure of the draft convention and about the article's chances of acceptance by the necessary majority at the conference which was to prepare a multilateral convention. In view of the conflicting opinions expressed by governments on article 6, he was very sceptical of its chances of acceptance, but if the majority of the Commission nevertheless wished to retain article 6, he would not oppose the detailed consideration of the comments of governments.

26. He went on to consider in detail the government comments on the provisions of article 6. The Norwegian Government (A/CN.4/136) had found the freedoms provided for in paragraph 1 too extensive. That criticism was justified; article 6 was much broader than even the provisions of bilateral conventions which dealt with freedom of communication. Nevertheless, the Norwegian Government had suggested that freedom of communication might be extended so as to make it applicable in such cases of forced detention as quarantine or committal to a lunatic asylum. A similar suggestion had been made by the Netherlands and might be considered by the Commission.

27. The other Netherlands suggestion, that the expression "without undue delay" in paragraph 1 (b) be supplemented by the words "and in any case within one month", would make the paragraph much too strict and so further lessen its chances of general acceptance.

28. A number of comments, including those of Japan (A/CN.4/136/Add.9) suggested the insertion of the words "at his [sc., the prisoner's] request" in connexion with the right of a prisoner to communicate with his consul. The question had been discussed at the twelfth session and the majority view had been that it was undesirable to limit the right of communication in that manner because the prisoner might be unaware of his right to communicate with his consul.

29. Lastly, the Belgian Government had suggested (A/CN.4/136/Add.6) a drafting amendment to paragraph 1 (c), which might be referred to the Drafting Committee.

30. Mr. AGO agreed with the Chairman that it would be undesirable to make any important changes in a text which reflected a compromise achieved with some difficulty.

31. There was, however, another reason for accepting article 6 without any substantial change. The majority of the governments which had sent in comments had not expressed any objection to article 6. Only the Government of Czechoslovakia had proposed the deletion of the article (A/CN.4/136), not so much because it had any objection to its substance but largely on the grounds that its contents were already covered by the provisions of article 4 on consular functions.

32. The Norwegian Government had taken the view

¹ 534th-537th meetings; article 6 was there discussed as additional article 30A.

(A/CN.4/136) that article 6, paragraph 1, set forth certain freedoms in extremely broad terms, but that the important and ill-defined reservations in paragraph 2 made those freedoms illusory. He understood the concern of the Norwegian Government, but it would not be easy to remedy that situation. If the provisions of paragraph 1 were made too categorical, they might command less support from governments because in certain cases they would give the consul broader rights than the law of the receiving State would allow. Moreover, a remedy against the danger indicated by the Norwegian Government was to be found in the last phrase of paragraph 2.

33. He agreed with the Netherlands suggestion that the references to the consul should be replaced by references to the "consulate" or to "a consular official". On the other hand, he could not agree with the Belgian suggestion that article 6 should expressly specify the consul's right to address correspondence to nationals of the sending State who were in custody or imprisoned. Freedom of communication implied freedom of correspondence, and it was unnecessary to go into such great detail.

34. Nor could he support the Japanese Government's proposal that a consul's right to be advised of the arrest of one of his nationals and to communicate with him should be qualified by the condition that the national concerned must have made a request that the consul be informed. It might happen that a prisoner did not wish to be protected by his consul, but it was better to ignore that rare case rather than to run the risk of giving the local authorities a ready excuse for not advising a consul of the arrest of one of his nationals. The suggestion by Norway and the Netherlands that the consul's right to communicate with his nationals should be exercisable in all cases where a person was deprived of his freedom, including such cases as committal to a lunatic asylum, was a useful one and the Drafting Committee could be instructed to prepare a suitable formula to cover those cases, using perhaps the wording suggested by the Netherlands.

35. As to the Belgian Government's proposed redraft of paragraph 1 (c), the second sentence of that redraft would have the effect of giving the consul the same rights with respect to a national imprisoned in pursuance of a judgement as he had with respect to a national who was awaiting trial. He did not think that the two situations could be equated in that way. In the case of a prisoner who was serving a sentence, the consul's visit was mainly of a humanitarian character and did not have the same degree of urgency as his visit to arrange for the defence of an accused awaiting trial.

36. Mr. BARTOŠ said he could not agree to the proposed replacement of the references to "consul" by references to "consulate" in paragraph 1. The status of a consulate was completely different from that of a diplomatic mission; it was not the consulate as such, but the consul who had rights and duties in international law. It was significant that it was the consul personally who was granted an exequatur by the receiving State. In some countries, not only the head of the consular post,

but all consular officers, were required to obtain an exequatur before they could perform their duties.

37. He could not agree with the Chairman's suggestion for the deletion from paragraph 1 (a) of the reference to the right of the nationals of the sending State to communicate with and to have access to their consul. From his recent experience, he could recall grave cases of Yugoslav nationals who had in fact been deprived of consular protection because they had not been allowed to communicate with their consul. Unless a consul could be reached by his nationals, it was difficult for him to be informed of their fate and of any difficulties in regard to which they might require his assistance.

38. He also strongly opposed the suggestion that the consul's right to be informed of the arrest of one of his nationals and to communicate with him should be made conditional on that national's request. Any such limitation would make it possible for the local authorities to scrutinize a request for consular protection and to claim perhaps that it was baseless or frivolous.

39. He supported the proposal for broadening the scope of paragraph 1 so as to cover all cases of deprivation of freedom. He had known cases where, on the pretext of quarantine, persons had been detained and not allowed to communicate with their consul. It was important not to be impressed by the name given to a form of deprivation of freedom and to guarantee freedom of communication with the consul to any foreigner in all such cases.

40. It was of the utmost importance that the consul should be informed without delay of the arrest of one of his nationals, for only if he was informed promptly was he able to take the necessary steps to ensure the legal representation of his national before proceedings were instituted against him. Such was the practice, for example, in the relations between Italy and Yugoslavia. No less than two million persons annually crossed the frontier between the two countries without passports, and the few inevitable cases of incidents and arrests which occurred gave rise to so few difficulties that the joint supervisory committee established by the two countries had had practically no cases to consider.

41. Lastly, he could not agree with the suggestion by the Special Rapporteur that certain proposed changes should be left to the Drafting Committee. The Commission itself should give the Drafting Committee precise directives on all points of substance and take a decision if it wished to make any changes to the 1960 text.

Mr. Ago, First Vice-Chairman, took the Chair.

42. Mr. SANDSTRÖM said that he agreed with nearly all the arguments put forward in support of article 6 as adopted at the twelfth session and agreed that the right of nationals of the sending State to communicate with the competent consul should be specified, since that was the chief means of obtaining information.

43. He was in favour of extending the application of paragraph 1 (b) to other types of detention.

44. Sir Humphrey WALDOCK said that his own views

approximated closely to those of other members. Having studied the records of the discussion at the twelfth session, he had reached the conclusion that there was an overwhelming case for maintaining paragraph 1. His only doubt related to the form in which it had been drafted. If the Commission had intended sub-paragraph (a) to have a wider application than to the case of a national of the sending State detained or in prison, perhaps it would be desirable to re-cast the article into three paragraphs, the first stating the general principle, the second containing the substance of sub-paragraph (b) and (c) and the third dealing with the subject of paragraph 2.

45. Mr. PAL said that article 6 should be retained. There was no force in the reasoning that, because article 4 particularized several functions, the execution of each of which would more or less involve similar detailed ancillary provision, there was no occasion to select only one such particular function for such detailed treatment as was done in article 6. The functions with which article 6 was concerned might well require special mention.

46. There was, however, one matter — more or less of drafting — to which he would draw the Commission's attention. Article 4 in its paragraphs 1 (a) and 1 (b) drew a distinction between "protecting" and "helping and assisting". So far as that distinctive treatment stood, perhaps article 6 should expressly mention functions aimed at helping and assisting as well as protecting nationals of the sending State following the distinction made in article 4. The ancillary matters dealt with in article 6 were certainly pertinent also in relation to the function of "helping and assisting", as particularized in paragraph 1 (b) of article 4.

47. The CHAIRMAN noted that the Commission seemed to be generally agreed that article 6 should stand; even the Special Rapporteur was prepared to accept that course. It therefore remained for the Commission to discuss in greater detail the instructions to be given to the Drafting Committee.

48. In reply to a question by the CHAIRMAN, Mr. PAL confirmed that he wished to propose the inclusion of the words "and help and assistance to" after the words "protection of" in paragraph 1.

49. Mr. ŽOUREK, Special Rapporteur, voiced his doubts of the necessity for the amendment, since the very general term "protection" could be taken in that context as including help and assistance.

50. Sir Humphrey WALDOCK observed that by referring to "protection" only the introduction to paragraph 1 seemed to narrow the application of sub-paragraph (a) to those cases envisaged in sub-paragraphs (b) and (c), whereas it seemed likely that the Commission had intended to give sub-paragraph (a) a wider scope.

51. The CHAIRMAN, speaking as a member of the Commission, suggested that the essential purpose of article 6 was to ensure that consuls could exercise their function of protecting nationals of the sending State. Clearly, the receiving State could not prevent them from giving help and assistance. While understanding the

object of Mr. Pal's amendment, he believed it might alter the purpose and structure of the article.

52. Mr. PAL said that, although in general parlance the word "protection" would probably be regarded as including help, if the distinction made between the two in article 4 were not carried over to article 6, the scope of the latter might be open to misconstruction.

53. Mr. ŽOUREK, Special Rapporteur, said that Mr. Pal's amendment might have precisely the effect which he had wished to avoid, in that it might make article 6 inapplicable in those instances where the consul needed to communicate with a national of the sending State, but not for the purpose of providing either protection or assistance.

54. Mr. SANDSTRÖM believed the difficulty could be overcome by deleting the words "the protection of".

55. Mr. BARTOŠ said that Mr. Pal's amendment had great practical value because in the cases contemplated in sub-paragraphs (b) and (c) help and assistance were often needed as well as protection, as, for example, if the person detained had to make the necessary arrangements for his defence. It was essential to ensure freedom of communication between the persons concerned and their consuls in all cases.

56. Mr. ŽOUREK, Special Rapporteur, expressed the fear that the inclusion of Mr. Pal's amendment would give rise to misunderstanding of the purpose of article 6. The only way of meeting Mr. Pal's point seemed to be by deleting the reference to protection in the introductory words.

57. The CHAIRMAN observed that there were two alternatives: either to delete the words "the protection of" in paragraph 1, or to redraft the article so as to incorporate the substance of sub-paragraph (a) in the first paragraph, thereby establishing the general principle of freedom of communication, and then to insert in the second paragraph an introduction more or less on the lines of the existing one to paragraph 1, followed by sub-paragraphs (b) and (c).

58. Mr. YASSEEN said that he was inclined to favour Mr. Sandström's amendment to paragraph 1, which would make the article more general and would probably be more consistent with its purpose.

59. Mr. BARTOŠ expressed his preference for the second alternative outlined by the Chairman with the modifications in sub-paragraphs (b) and (c) already agreed upon.

60. Mr. PADILLA NERVO said that he also favoured the second alternative on the grounds that the freedom of communication was the cornerstone of the article and should be stated in paragraph 1 so that it would govern the subsequent provisions. It certainly should take precedence over those concerned with protection. The freedom of communication was expressly laid down in Mexico's consular conventions with the United States of America and with the United Kingdom.

61. Mr. ŽOUREK, Special Rapporteur, said that he would prefer to retain the article as drafted, with the deletion of the reference to protection in paragraph 1,

because the introduction to that paragraph constituted a link with the preceding articles. An introductory sentence in such a general form would govern sub-paragraphs (b) and (c) as well as sub-paragraph (a).

62. Mr. YASSEEN expressed doubts whether a general introduction of the kind favoured by the Special Rapporteur would meet Mr. Pal's point that the cases dealt with in sub-paragraph (b) and more particularly sub-paragraph (c) were more likely to call for assistance than for protection.

63. Mr. SANDSTRÖM recalled the suggestion (586th meeting, para. 40) that articles 5 and 6 should be transferred to chapter II, section II. Perhaps it would be wiser to wait until that had been settled before taking any final decision about the structure of article 6, which would probably be affected by its position in the draft.

64. The CHAIRMAN, speaking as a member of the Commission, said that the facilities dealt with in chapter II, section II, were of a different nature from the principle laid down in article 6, which was fundamental to the exercise of consular functions. He doubted whether it would be appropriate to transfer article 6 to that section; its importance would be better brought out by leaving it where it stood.

65. As there was no great difference between the two alternative solutions, and since some members preferred to keep the present structure, it would perhaps be preferable to retain article 6 in chapter I.

It was so agreed.

66. The CHAIRMAN drew attention to the Netherlands Government's amendment (A/CN.4/136/Add.4) to paragraph 1 (a). If the Commission accepted that amendment, the paragraph might be referred to the Drafting Committee.

It was so agreed.

67. Mr. FRANÇOIS drew attention to the Netherlands Government's observation on paragraph 1 (b).

68. Mr. GROS pointed out that the addition of the specific time limit of one month might have effects contrary to the intention of the Netherlands Government, since junior officials might interpret the phrase as meaning permission to postpone providing the required information for the maximum period of a month.

69. Mr. ERIM, Mr. YASSEEN and the CHAIRMAN, speaking as a member of the Commission, concurred with that view.

70. The CHAIRMAN proposed that paragraph 1 (b) should be referred to the Drafting Committee, with the Netherlands Government's proposed amendment consequential to its amendment to paragraph 1 (a) and with instructions to expand the paragraph to cover all cases of forced detention, such as quarantine, hospitalization and committal to mental institutions.

It was so agreed.

71. Mr. ŽOUREK, Special Rapporteur, expressed the view that the sentence proposed by the Belgian Government (A/CN.4/136/Add.6, *ad art.* 6, 1 (c)) concerning

the consul's right to correspond with any national of the sending State who was serving a prison sentence was covered by the general provision on the right of communication in paragraph 1 (a).

72. He drew attention to the Netherlands Government's proposed amendment to paragraph 1 (c).

73. The CHAIRMAN proposed that paragraph 1 (c) should be referred to the Drafting Committee with instructions to incorporate the Netherlands Government's amendment.

It was so agreed.

74. Mr. MATINE-DAFTARY opined that in paragraph 2 as drafted the passage "in conformity with the laws and regulations" was too elastic and would be open to abuse. Perhaps the Drafting Committee could find a formula providing a more specific safeguard.

75. Mr. VERDROSS suggested the phrase "in the manner provided for in the laws and regulations in the receiving State".

76. Mr. ERIM observed that, if paragraph 2 were intended to qualify the entire paragraph 1, it would have to be amended in some respects, for communication between the consul and nationals of the sending State should, in principle, always be free. Paragraph 2 should relate only to the consul's visits to detained persons under paragraph 1 (c). If communications, which generally meant exchanges of letters, were made subject to the provisions of the laws and regulations of the receiving State, then, for example, the government of that State would be entitled to open the consul's correspondence addressed to his nationals in cases where the mail of aliens was censored.

77. Mr. MATINE-DAFTARY said that the main object of restricting the scope of paragraph 2 to the authorization in paragraph 1 (c) would be to avoid abuse of visits by a consul in cases where the examining magistrate had prescribed a period of isolation for the detained person. In order not to restrict unduly the other freedoms set forth in the article, it might be best to delete paragraph 2 and to draft the opening phrase of paragraph 1 (c) to read: "The consul shall be permitted, in conformity with the laws and regulations of the receiving State, to visit . . .".

78. Mr. ERIM, supported by Mr. MATINE-DAFTARY, held that paragraph 2 should be retained in order that the proviso in the second part of the paragraph should not be lost. The paragraph should, however, be rendered applicable to paragraph 1 (c) only, since paragraph 1 (a) related to a fundamental freedom and paragraph 1 (b) to an obligation of the authorities of the receiving State.

79. The CHAIRMAN, speaking as a member of the Commission, said he had some doubts concerning the application of paragraph 2 to paragraph 1 (c) only. For example, if the government of the receiving State declared a curfew, it could hardly be maintained that nationals of the sending State could have access to their consulate at all times.

80. Mr. ŽOUREK, Special Rapporteur, pointed out

that, according to the commentary on article 6, the Commission at its twelfth session had intended paragraph 2 to apply to all the sub-divisions of paragraph 1. Moreover, article 53 provided that, without prejudice to the privileges and immunities recognized by the Convention or by other relevant international agreements, it was the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State. The two basic ideas in article 6, on the other hand, were to set forth the right of communication and to make it clear that that right must be exercised in conformity with the laws and regulations of the receiving State. Those basic concepts could not be changed without reopening the whole debate. The Drafting Committee could probably work out a satisfactory text, in the light of the comments made by governments and members of the Commission.

81. Mr. AMADO said that all questions relating to communication and contacts between consuls and the nationals of the sending State should be examined within the framework of observance of the laws of the receiving State. Moreover, respect for the laws and regulations of the receiving State was the subject of article 53.

82. There was a serious error in the drafting of article 60. It would be seen that the only freedom mentioned in that article was the freedom of communication, dealt with in paragraph 1 (a); paragraph 1 (b) dealt with a duty of the competent authorities of the sending State, while paragraph 1 (c) was in effect an authorization. Nevertheless, paragraph 2 referred to "freedoms" in the plural. He could not agree with the Special Rapporteur that paragraph 2 applied to the whole of paragraph 1; the best course would be to relegate paragraph 2 to the commentary.

83. The CHAIRMAN, speaking as a member of the Commission, suggested to Mr. Amado that it would be unwise to eliminate from the article the proviso in the second part of paragraph 2.

84. Mr. ERIM recalled that, during the twelfth session, it had been pointed out (534th meeting, para. 27) that an examining magistrate might prohibit communication with a detained person. Paragraph 2 had been inserted to meet that objection; the last phrase of the paragraph had been included to provide against cases where the receiving State might wish to abolish all visits to detained persons. He agreed with Mr. Amado that the only freedom referred to in the article was that set forth in paragraph 1 (a); since paragraph 1 (b) referred to action by the local authorities of the receiving State, paragraph 2 obviously applied only to paragraph 1 (c), and could not be regarded as restrictive of any freedom.

85. The CHAIRMAN observed that, if the Commission wished to restrict the application of paragraph 2 to paragraph 1 (c), the first phrase of paragraph 2 should begin with the words "The authorization referred to in paragraph 1 (c) of this article . . .".

86. Mr. ŽOUREK, Special Rapporteur, maintained that it was quite clear that paragraph 2 referred to the whole of paragraph 1. If its application were restricted to paragraph 1 (c), there would be a contradiction of

other articles of the convention, particularly article 53. For example, where paragraph 1 (b) was concerned, if a national of the sending State were imprisoned and held *incomunicado* in conformity with the laws and regulations of the receiving State, the consul could not communicate with him. A number of other special circumstances and emergency regulations in the interests of the security of the receiving State might affect communications between the consul and nationals of the sending State. Accordingly, the application of paragraph 2 could not be limited to paragraph 1 (c).

87. Mr. PADILLA NERVO endorsed the views expressed by Mr. Erim and Mr. Amado. The only freedom referred to in article 6 was that of communication under paragraph 1 (a), and that was obviously subject to the provisions of article 53. Under paragraph 1 (c), however, the consul was given an express authorization, and a special reference to the laws and regulations of the receiving State therefore seemed indicated. He would support the wording suggested by the Chairman.

88. Mr. SANDSTRÖM endorsed Mr. Padilla Nervo's remarks.

89. The CHAIRMAN proposed that paragraph 2 should be referred to the Drafting Committee, which would take into account the wishes expressed by the majority of the Commission.

It was so agreed.

The meeting rose at 1 p.m.

588th MEETING

Friday, 12 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 7 (Carrying out of consular functions on behalf of a third State)

1. The CHAIRMAN invited debate on article 7 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that the only government which had commented on article 7 was that of the Netherlands (A/CN.4/136/Add.4). The amendment proposed by that government extended the scope of the article but did not alter its basic purpose, and accordingly the Commission might accept it. He would draw attention, however, to the Commission's

decision on the structure of the draft; the articles in the first part related only to heads of post and not to other consular officials.

3. Sir Humphrey WALDOCK said he had no comment to make on the substance of the article, but had some doubt as to its form. In the first place, it was better to use the positive, rather than the negative, form wherever possible. Moreover, the commentary to article 7, which described cases in which the carrying out of consular functions on behalf of a third State might be valuable, was drafted in positive language. Another reason for altering the form was that an analogous provision was stated positively in article 46 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

4. Lastly, in keeping with the same article of the Vienna Convention, article 7 should specify that it was for the sending State — rather than for the consul — to obtain the prior consent of the receiving State.

5. Mr. SANDSTRÖM endorsed Sir Humphrey Wal-dock's remarks.

6. Mr. VERDROSS also agreed with Sir Humphrey Waldock, but pointed out that the Commission had unanimously adopted the present text of article 7. The Special Rapporteur should be asked whether he had any objection to the proposed amendments.

7. Mr. AGO said he had no objection to using a positive wording for the article. Nevertheless, he would point out that the analogy with article 46 of the Vienna Convention was false: article 46 dealt with temporary protection of the interests of the third State in Special situations, whereas article 7 of the consular draft related to regular and permanent exercise of functions.

8. The CHAIRMAN observed that article 6 of the Vienna Convention seemed to be more closely analogous to article 7 of the draft under consideration.

9. Sir Humphrey WALDOCK pointed out that article 7 might cover more than one situation. It could be held to refer not only to cases of the continuing representation of a third State, but to temporary protection as well; it might even relate to cases where a consul was commissioned by two separate States to act for both. In addition, a State having consular relations with another might be asked to take over consular representation of a third State which had no consular establishments in the receiving State. Finally, the article might be invoked in special cases, such as those of temporary breach of diplomatic relations. Three different situations seemed therefore to be covered in a short formula; it seemed that analogies with more than one of the articles in the Vienna Convention were involved.

10. Mr. ŽOUREK, Special Rapporteur, doubted the advisability of changing the text. In the first place, no government had objected to the form of the article. Secondly, although it was true that there were usually some advantages in adopting a positive formula, in the particular case the negative wording seemed to emphasize better the general rule. While he had no strong feelings on the subject, he thought it would be desirable not to change provisions on which no government had

commented, unless such changes became necessary in consequence of other modifications of the draft.

11. Mr. PADILLA NERVO said he did not see any danger in changing the form of article 7 from the negative to the positive, particularly in view of the positive formulation in the commentary. Moreover, it was unnecessary to follow the wording of article 46 of the Vienna Convention; the Drafting Committee might be instructed to word the article along the following lines: "With the consent of the receiving State, the consul may carry out consular functions on behalf of a third State."

12. Mr. PAL said that he had originally been inclined to agree with the two points made by Sir Humphrey Waldock. Further interventions had, however, led him to the conclusion that article 7 should be kept in its existing form. The negative form was preferable, as there would be other requisites for taking up the functions and the negative form would not affect them. He agreed with Mr. Ago that the analogy with article 46 in the Vienna Convention was not tenable, since article 7 was comprehensive enough to cover both the cases of the temporary exercising of such functions for a third State, the single person retaining his character as consul of the original sending State only, and of the permanent functioning as consul of the third State in addition to the original assignment. Moreover, if the consent of the receiving State had to be sought by the sending State, and not by the consul himself, considerable delays might occur. Since no government had commented on the article, it would be best to leave it unaltered.

13. Mr. ERIM observed that, even if article 7 were to be retained in its negative form, some modification was needed to clarify its intention. Article 46 of the Vienna Convention expressly provided that the request for the temporary protection of the interests of the third State and of its nationals should come from that State. It was theoretically possible that a consul might wish to exercise consular functions on behalf of a third State, that the receiving State might give its consent, but that the third State might know nothing of the matter; while that hypothesis was unlikely, provision should be made for it in a legal text.

14. With regard to form, he did not believe that it would make much difference whether the article was drafted in negative or in positive terms.

15. Mr. AGO said he was glad that the Chairman had drawn attention to article 6 of the Vienna Convention as presenting a closer analogy to article 7 than article 46 of that Convention. In fact, the two articles of the Convention had nothing in common; not only did article 6 refer to continuing functions and article 46 to temporary functions, but under the former article the diplomatic agent concerned acted as ambassador of two States, while under the latter he acted as the representative of one State only and in that capacity took care also of the interests of another State. Article 7 could not cover both situations, and should be brought closer into line with article 6 of the Vienna Convention. Mr. Erim's point should be taken into account and, moreover, it should be borne in mind that under that

article 6 two or more States might accredit the same person as head of mission to another State; the idea that the consent of the receiving State should be obtained by the sending State and not by the official concerned should be introduced into article 7 of the draft concerning consular intercourse.

16. Mr. SANDSTRÖM said he could not agree with the Special Rapporteur that the absence of government observations was a cogent argument for leaving the text of any article unchanged. On the other hand, he supported Mr. Ago's views that certain questions of substance were involved.

17. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Ago had given a correct explanation of the different situations covered by articles 6 and 46 of the Vienna Convention. Article 7 of the draft on consular intercourse, as worded, could be construed as covering both of those situations; however, the carrying out of consular functions on behalf of two States was more closely analogous to the situation described in article 6 of the Vienna Convention than to that described in article 46, for under article 46 the diplomatic agent concerned would be acting exclusively as the representative of the sending State. The situations (viz. that of the consul of State A who, under his government's instructions, protected also the interests of State B in the receiving State; and that of one and the same person acting as consul for two States) were clearly different from the juridical point of view, and hence it might be advisable to draft separate articles to cover the different situations.

18. Mr. ŽOUREK, Special Rapporteur, considered that the pointed raised by Mr. Erim might be dealt with in the commentary.

19. It should be borne in mind that article 7 set forth a general rule which could cover both of the cases cited by Mr. Ago and the Chairman, whereas the special case of temporary protection was dealt with in article 28 of the draft on consular intercourse. It might be possible to redraft article 7 to correspond to article 6 of the Vienna Convention only; as that provision stood, however, it set forth the general rule to which special application was given in article 28.

20. Further, a positive wording of article 7 would not cover all the cases that would arise if the Netherlands amendment were accepted. If it were provided that two States might appoint the same person as consul, cases where a consular official other than the head of post was appointed to act on behalf of the third State would not be covered. He therefore reiterated his preference for the negative formulation of the article.

21. Mr. YASSEEN agreed with previous speakers that two different situations were involved. In the first place, a consul might be instructed by the sending State to carry out certain functions in the receiving State on behalf of a third State, on a temporary or on a continuing basis; in that case, the official remained the consul of the sending State. Article 7 seemed to apply to such cases, since the commentary showed that the Commission had not contemplated the possibility of one

and the same person being appointed consul by two States. That situation should be governed by a separate article; since the participants in the Vienna Conference had accepted the idea that a diplomatic agent could be a diplomatic agent of several States, it should be all the easier to envisage the idea of a consul being simultaneously consul of two or more States.

22. Mr. MATINE-DAFTARY considered that the choice between the negative and positive form of article 7 was a matter of drafting only. That applied also to Mr. Erim's logical suggestion.

23. Other members, however, had raised matters of substance. He believed that article 7 of the draft under discussion and articles 6 and 46 of the Vienna Convention all related to completely different situations. When article 6 of the Vienna Convention had been adopted, Mr. Bartos, as representative of Yugoslavia to the Conference, had pointed out that the article represented an innovation in international law, and many representatives had explained their votes in the light of that statement. It was in fact unprecedented in a number of legal systems that the same person should be capable of representing two different States. If the Commission wished to perpetuate that innovation in the draft on consular intercourse, it should do so in a separate article, since the wording of article 7 as it stood in no way resembled that of article 6 of the Vienna Convention.

24. A comparison between the present article 7 and article 46 of the Vienna Convention showed that they, too, contemplated different situations, although there was a slight similarity between them. Under article 46, a sending State might undertake the temporary protection of the interests of a third State and of its nationals; that situation usually occurred after the temporary severance of diplomatic relations between the third State and the receiving State, a case which was dealt with in article 28 of the draft under discussion, and not in article 7. Accordingly, he suggested that article 7 might be redrafted along the following lines: "With the consent of the third State and the receiving State, a consul may, provisionally or in special cases, undertake the temporary protection of the interests of a third State and of its nationals."

25. Mr. PADILLA NERVO said that he had agreed with Sir Humphrey Waldock's remarks in so far only as they related to the formulation of article 7, and not in so far as Sir Humphrey had suggested innovations on the basis of articles 6 and 46 of the Vienna Convention. After all, the draft under discussion did not deal so much with the representation of the sending State throughout the territory of the receiving State, as with consular functions exercised in clearly defined districts of that State. Article 7 therefore related mainly to cases where certain specific functions were to be carried out, at the request of a third State and with the consent of the receiving State, within certain well-defined limits, if the third State had no consular establishments which could take action in those cases. That was the meaning of the relevant provision of the Caracas Agreement of 1911 cited in paragraph (1) of the commentary to

article 7.¹ Whereas Sir Humphrey Waldock had spoken about form, Mr. Ago, the Chairman and Mr. Erim had spoken on substance. If the elements of articles 6 and 46 of the Vienna Convention were to be introduced, the entire debate on article 7 would have to be reopened. Instead, it would be better to leave article 7 as it stood, particularly since no government had objected to the negative wording.

26. Sir Humphrey WALDOCK said that one of the reasons why he had advocated a positive formulation of article 7 was the clear distinction between the different cases envisaged. As previous speakers had pointed out, the same individual might be commissioned by two States to act for them, perhaps even with two exequaturs; on the other hand, if a consul were commissioned by one State only, he was merely instructed by the sending State to make its facilities for protection available to the nationals of the third State.

27. He was not impressed by the argument that the absence of government observations on the article made it unnecessary to modify it. The fact that analogous provisions had been included in the Vienna Convention, and that the articles concerned had been formulated positively was a much stronger indication that the Commission should follow the example of the Conference. The probable reason for the absence of government observations was that there was no difference of opinion on the substance of article 7. The Drafting Committee should accordingly be instructed to prepare a new text in the light of the comments made during the debate.

28. Mr. AMADO pointed out that the basic purpose of article 7 was that the consent of the receiving State must be obtained to enable a consul to carry out consular functions on behalf of a third State. That was so obvious a proposition that the negative form merely served to emphasize it. There could be no strong objection to using the positive form; but references to articles of the Vienna Convention only complicated what was in fact a perfectly simple provision. Any attempts to elaborate the article would delay the adoption of a fundamental general rule.

29. The CHAIRMAN said that in fact three situations could arise. First, that envisaged in article 6 of the Vienna Convention of two States appointing one and the same person to represent them. Second, the situation contemplated in article 46 of the Vienna Convention, where the sending State undertook the temporary protection in the receiving State of the interests of a third State. Third, the case of the severance of relations, in which a State could entrust the protection of its interests and those of its nationals to another State acceptable to the receiving State: that case was envisaged by article 45 of the Vienna Convention. That third situation was envisaged in the draft on consular intercourse by

article 28 on the protection of consular premises and archives and of the interests of the sending State.

30. Accordingly, the Commission should concentrate on the two other situations which he had mentioned and, in that connexion, arrive at a decision on two points. First, whether it wished to make provision for both of them. Second, whether separate articles or paragraphs should be drafted or else a single formula to cover both situations.

31. Mr. GROS said that the provisions of article 7 were quite clear as they stood. The Commission, by adopting that text, had intended to cover the case, which was current in existing State practice, of one State being entrusted with the protection of the interests of another, with the concurrence of the receiving State concerned. On the substance of the question, no serious difficulty could arise: what was involved was simply the representation of the interests of one State by another. A consul was called upon to exercise his normal functions for the benefit of the nationals of a third State, and the receiving State would have with him the same relations in respect of those nationals as in respect of the nationals of the consul's sending State.

32. Such representation of the interests of a third State could be either on a temporary or on a continuing basis. From the legal point of view, there should be no special difficulty; the position with regard to causes or effects was similar in the two cases. However, in order to cover explicitly both cases, he suggested the insertion, after the words "to carry out consular functions" of the words "on a continuing or temporary basis".

33. Mr. LIANG, Secretary to the Commission, said that the legal consequences resulting from the case mentioned in article 6 of the Vienna Convention were different from those arising from the two situations covered in articles 7 and 28 of the consular draft.

34. If the Commission wished to contemplate the case where one and the same person was appointed as consul by two different States — the case similar to that covered by article 6 of the Vienna Convention — the internal law of the receiving State would come into operation. Under articles 9 and 10 of the draft on consular intercourse, the consul concerned would probably need separate recognitions under the internal law of the receiving State.

35. It would, of course, be easier for the receiving State merely to grant permission to a consul to carry out certain functions on behalf of a third State, as contemplated in article 7.

36. The commentary to article 7 mentioned the Caracas Agreement of 18 July 1911, which provided (in its article VI) that the consuls of each of Bolivia, Colombia, Ecuador, Peru and Venezuela residing in any other of those contracting Republics could exercise their functions on behalf of persons belonging to any other contracting Republic not having a consul in the particular place. The effect of that type of contractual provision seemed to be that the receiving State waived the need for separate recognition. In the absence of such an agreement, however, and on the basis of customary inter-

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations, *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 417-419.

national law, the consent of the receiving State, given under the provisions of its legislation, was necessary in every case.

37. In view of the foregoing considerations, it would be eminently useful to include in the consular draft a provision to cover, in the case of consuls, the situation dealt with for diplomatic agents in article 6 of the Vienna Convention.

38. Mr. AGO said that it would be comparatively easy to draft a provision to cover the case of temporary or continuing representation of the interests of one State by the consul of another. The appropriate place for such a provision would be immediately after article 28 which dealt with the protection of the interests of the sending State in the case of the severance of consular relations or the absence of a consulate of the third State concerned.

39. A new problem had arisen, however: should an article be included to cover the case of a single consul acting for two sending States in the same manner as one ambassador could represent two States by virtue of article 6 of the Vienna Convention? A provision of that type was most desirable and should be placed in article 7. It would not represent any great innovation because it was already the practice of certain small States to appoint a single person to act as consul for two of them. Moreover, even if it were considered as something of an innovation, it would be a much less grave one than in the case of an ambassador. And since the Vienna Conference had accepted the idea that a single ambassador might represent two sending States, there should be no difficulty in accepting the less important case of a consul acting for two sending States.

40. Mr. MATINE-DAFTARY, referring to Mr. Gros's remarks, said that the existing practice referred to the representation by one State of the interests of another. The suggestion that a single person might act for two states and thus be accredited by both of them would represent an innovation. The two situations differed in their consequences. In the case where a single person representing State A assumed protection of the interests of State B on the orders of his government, he would cease doing so if he were recalled by his government. But if he were accredited by States A and B, and one of the two States terminated his mission, he would remain at his post on behalf of the other. He agreed, however, that the innovation did not have the same importance as in the case of diplomatic agents and, since the Vienna Conference had accepted article 6 of the Vienna Convention, he saw no objection to a similar provision being included in the consular draft.

41. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Erim, said that the terms of article 7 implied that the third State had requested the consul to carry out consular functions on its behalf.

42. Article 7, as drafted, referred only to the possibility of a consul carrying out consular functions, temporarily or otherwise, on behalf of a third State as envisaged, for example, in the Caracas Agreement of 1911.

43. If it were desired to cover the case where a single person might be appointed consul for two different sending States, it would be necessary to draft an explicit provision to that effect. The situation was completely different from that of the mere exercise of consular functions on behalf of a third State. He therefore suggested that the Commission should take a decision on that point and, if it were decided to include such a provision, that the Drafting Committee should be instructed to prepare a text.

44. The CHAIRMAN said that the Commission appeared to be in agreement to consider article 7 as covering a situation similar to that envisaged in article 46 of the Vienna Convention. He proposed that the Drafting Committee be instructed to prepare a text of article 7 in the light of article 46 of the Vienna Convention and to consider the proposal that its provisions be formulated in positive language.

It was so agreed.

45. The CHAIRMAN said that there appeared to be general agreement that a separate provision should be included in the consular draft to cover the case where one and the same person was appointed consul for more than one sending State. If there were no objection, he would take it as agreed that the Drafting Committee should prepare a new article along the lines of article 6 of the Vienna Convention.

It was so agreed.

ARTICLE 8 (Classes of heads of consular post)

46. Mr. ŽOUREK, Special Rapporteur, said that article 8 was an important article of the draft. None of the governments which had sent in comments had expressed any objection to its provisions. However, the United States Government (A/CN.4/136/Add.3), while not actually opposing article 8, had questioned the advisability of formulating a rule codifying the titles of heads of consular posts.

47. He recalled that, as its twelfth session, the Commission had not had at its disposal sufficient information on the class of "consular agents" and had, in commentary (4) to article 8, specifically asked governments for detailed information.

48. The information supplied by governments showed that many States still made use of the institution of consular agents. Belgium (A/CN.4/136/Add.6) had given particulars of the form of appointment of its consular agents, and the limited powers conferred upon them; they were in all cases honorary agents. Many countries, including Norway (A/CN.4/136) and Sweden (A/CN.4/136/Add.1) had indicated that they did not employ consular agents at that time. Poland (A/CN.4/136/Add.5) had indicated that the institution of consular agents or consular agencies was disappearing from its consular practice and Belgium had mentioned that the institution had begun to play in recent years a dwindling part in its consular representation abroad. The Netherlands Government (A/CN.4/136/Add.4/Annex) had given a list of consular agents from various countries

residing in the Netherlands, Surinam, and the Netherlands Antilles. Yugoslavia (A/CN.4/136) had asked whether consular agents belonged to the same class as consuls or to a special category of consular officials. Lastly, the United States Government had indicated that its consular officials were not necessarily full-time government employees and were sometimes engaged in outside business activities (A/CN.4/136/Add.3).

49. The information received showed that, despite the different modes of appointment, the class of consular agents still existed, although it appeared to be used less than formerly. In the circumstances, he could not agree with the suggestion made by the Government of Sweden (A/CN.4/136/Add.1) that the reference to consular agents should be dropped because the country concerned did not use that class of consular officer. As stated in commentary (2) to article 8, the enumeration of four classes of heads of consular posts in no way meant that States accepting it were bound to have all four classes in practice. A State might well dispense with one or other of the classes mentioned, but it was necessary to mention all four classes because two or more of them might be used by States. The situation was somewhat similar to that of ministers plenipotentiary in the case of diplomatic agents. Although fewer such ministers were being appointed, the Vienna Conference had felt it necessary to mention that category of heads of diplomatic missions in article 14 of the Convention on Diplomatic Relations.

50. Mr. YASSEEN said that he had some doubts about the wisdom of including class (4) since the practice of appointing consular agents was fast disappearing. He also doubted whether consular agents could ever be regarded as heads of post in the widest sense of that term: they usually exercised functions assigned to them by a consul and remained under his supervision.

51. There had been a considerable amount of discussion at the Vienna Conference before it had been decided to include ministers in the classification of heads of missions, but far more States still appointed ministers than consular agents. He believed it would be preferable to delete class (4) in article 8.

52. Mr. MATINE-DAFTARY agreed with Mr. Yasseen. In his own country at the time of the capitulations regime, when consuls had had much to do and their districts had been extensive, consular agents had been appointed to help them. Such agents had been subordinate officials and never heads of post. They had worked under the instructions of consuls and had not needed a separate exequatur. Currently, there was not a single consular agent in Iran, nor had the Iranian Government appointed any recently.

53. If there were any cases of consular agents being appointed heads of post and directly responsible to the sending State, they must be very rare and the reference to them in article 8 should therefore be deleted.

54. The practice of appointing consular agents in order to assist consuls in their functions could be mentioned in another article.

55. Some provisions should also be inserted in recogni-

tion of the fact that in certain consulates there was — apart from the head of post — a consul or vice-consul for whom a separate exequatur did not have to be obtained.

56. Mr. ŽOUREK, Special Rapporteur, referring the Commission to paragraph (7) of the commentary, emphasized that article 8 in no way sought to restrict the power of States to determine the titles of consular officials working under a head of post. Practice and legislation in that regard varied widely. Article 8 dealt solely with the classes of heads of posts.

57. The last point mentioned by Mr. Matine-Daftary would be discussed under article 14.

58. Mr. ERIM asked the Special Rapporteur whether at that time there were many consular agents who were heads of posts. If the answer was in the affirmative, class (4) should certainly be retained in article 8, since the codification of rules of customary international law was one of the Commission's major tasks.

59. He criticized the expression *sont partagés* in the French text of the article.

60. Mr. VERDROSS observed that at the Vienna Conference the general view had been that the practice of appointing ministers plenipotentiary was dying out, but in the instance under consideration the Commission could not overlook the fact that a number of States still appointed consular agents. He was therefore in favour of retaining the text of article 8 as it stood.

61. Mr. AMADO said that part of the difficulty over class (4) had arisen because the term "consular agents" was a generic one, frequently used in international instruments. Although his country made no use of such a category of consular officials, he recognized that since it still existed it must be mentioned in article 8.

62. The CHAIRMAN, speaking as a member of the Commission, agreed with those members who believed it necessary to maintain class (4) since consular agents still existed and, as indicated by the replies from governments, continued to be appointed heads of post. Under Soviet law such appointments could be made, but in fact none had been made for some twenty years. The fact that some States did not appoint consular agents as heads of post was certainly no reason for deleting class (4) from article 8.

63. Mr. PAL agreed with the Chairman that class (4) should be retained in article 8. In that connexion, the annex to the observations of the Government of the Netherlands was of relevance.

64. Mr. GROS also agreed with the Chairman; he mentioned that France had often appointed consular agents to be heads of post, for example in some Brazilian and African ports. The practice had a long history, and had been particularly important for some States in the coastal countries of the Mediterranean and Africa.

65. Mr. AGO, referring to paragraph (4) of the commentary and the deferment of a final decision pending the receipt of the comments of governments, said that since governments had been on the whole in favour of

retaining class (4) there was no reason why it should be deleted.

66. He agreed with Mr. Erim's criticism concerning the French text.

67. He also thought it desirable to insert a second paragraph containing a provision on the lines of that appearing in article 14, paragraph 2, of the Vienna Convention.

68. Mr. MATINE-DAFTARY said that in the light of the remarks of Mr. Gros, which showed that consular agents were still of some importance, he would withdraw his proposal for the deletion of class (4) in article 8.

69. Mr. ŽOUREK, Special Rapporteur, suggested that a statement based on paragraph (7) of the commentary might appear in the body of the article, indicating that States were entirely free to determine the titles of the consular officials and employees who worked under the direction of the head of post.

70. In reply to Mr. Erim, he remarked that consular agents were placed on the same footing as consuls-general, consuls and vice-consuls in numerous conventions; that fact was enough to justify retaining class (4) in article 8. The extent to which States still appointed consular agents was not after all the decisive consideration. There were no statistics on the matter.

71. At first sight it would seem difficult to follow Mr. Ago's suggestion and include in article 8 a provision modelled on article 14, paragraph 2, of the Vienna Convention, for article 8 covered both career and honorary consuls. He would have thought it impossible not to differentiate between those two categories.

72. Mr. AGO expressed the belief that such a provision could be inserted without risk since it would stipulate only that there should be no distinction between heads of posts by reason of their class.

73. The CHAIRMAN proposed that the Special Rapporteur be requested to consider Mr. Ago's proposal for the addition of a new paragraph and to inform the Commission of his conclusions at a later meeting. He might be also asked to draft a provision concerning precedence of the members of consular staff, taking into account the provisions of article 17 of the Vienna Convention.

74. Subject to further consideration of those two questions article 8 could be referred to the drafting committee.

It was so agreed.

Appointment of a drafting committee

75. The CHAIRMAN proposed that the Commission should appoint a Drafting Committee consisting of the following members: Mr. Ago (Chairman), Mr. Matine-Daftary (Rapporteur), Mr. Žourek (Special Rapporteur), Mr. Gros, Mr. Padilla Nervo (who, when unable to attend, would be replaced by Mr. Jiménez de Aréchaga), and Sir Humphrey Waldo.

It was so agreed.

The meeting rose at 12.55 p.m.

589th MEETING

Monday, 15 May 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 9 (Acquisition of consular status)

1. The CHAIRMAN invited discussion on article 9 of the draft on consular intercourse and communities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that three governments, those of Belgium, Norway and the Netherlands, had submitted comments on article 9. He could accept without great difficulty the Belgian Government's proposal (A/CN.4/136/Add.6) that the words "the State in whose territory he is to carry out his functions" should be replaced by the words "receiving State" for the sake of terminological uniformity, although in the case in question this term "receiving State" could not be used until after the consular official had been admitted by the State concerned.

3. He could not share with the Norwegian Government's view (A/CN.4/136) that article 9 was unnecessary; the article stated a fundamental rule concerning the conditions which had to be satisfied in order that a person could be considered a consul in international law. That fundamental rule was followed by others relating to the exequatur, provisional recognition and the obligation to notify the authorities of the consular district.

4. The text as it stood had been adopted with the express object that it should also cover those special cases where consuls who were not heads of post were granted a consular commission and obtained an exequatur.¹ The Netherlands Government had proposed an alternative text (A/CN.4/136/Add.4) which would restrict the application of article 9 to heads of post only. As the legal status of consular staff who were not heads of post was dealt with in articles 21 and 22, the requisite modifications could be made in those articles and the Netherlands Government proposal for article 9 could be adopted.

5. He agreed with the Netherlands Government's comment concerning the use of the word "consul" in the draft. It would probably be necessary to indicate in

¹ For earlier discussion of the provision, see A/CN.4/SER.A/1959. 508th meeting, paras. 2-19 (where it is discussed as article 4 of the then draft).

article 1 the cases in which the provisions of article 9 did not apply.

6. Mr. AGO considered that article 9 was somewhat ambiguous because it was not clear whether the official referred to must be a head of post. Probably, given the general structure of the draft, article 9 should refer solely to heads of post.

7. Mr. ERIM doubted whether article 9 was necessary at all, for precisely the same rule was reproduced in clearer language in article 10. Perhaps the two articles could be combined.

8. Mr. YASSEEN supported the Belgian amendment, which would make for greater uniformity.

9. It would appear from article 9 as drafted that the receiving State's recognition was a constituent element of consular status, whereas — and that view seemed to be shared by the Netherlands Government — it was rather the exercise of consular functions that was conditional on recognition. He therefore favoured the Netherlands amendment.

10. Mr. BARTOŠ, referring to Mr. Erim's comment, pointed out that articles 9 and 10 dealt with two very different matters: the former laid down the conditions for the acquisition of consular status, and the latter with the competence to appoint and recognize consuls. However, the two articles could be combined while maintaining the distinction between these two entirely separate elements.

11. For him the difficulty raised by article 9 was a different one, namely, whether it should cover the practice of common law countries in which a consular official who was not head of post had to have a separate consular commission and obtain the exequatur for the purpose, for example, of appearing in court.

12. If, following continental practice, article 9 were to relate solely to heads of post, it could be combined with article 10.

13. Mr. ŽOUREK, Special Rapporteur, said that Mr. Bartos had provided the answer to Mr. Erim's question. He did not, however, favour combining articles 9 and 10: the Commission had deliberately stated each rule in a separate article.

14. With regard to the point raised by Mr. Bartos, he suggested that it could be taken up in conjunction with articles 21 and 22. The Commission had decided to make article 9 applicable to heads of post, but at the same time had taken into account the practice of the common law countries.

15. Sir Humphrey WALDOCK said that as a new member of the Commission coming fresh to the text, he had been at a loss to decide which articles applied to heads of post and which to consuls in general, including officials in subordinate positions. For example, article 1 (f) seemed to be of general application as were articles 9, 10, 11, 15, 17, 18 and 19. Articles 8, 12, 13 and 14 were expressly limited to heads of post. Surprisingly enough, though article 13 was limited to heads of post, article 20 appeared to be of general application. The position would have to be clarified.

16. With regard to the practice of common law countries mentioned by Mr. Bartos, some ten consular conventions concluded by the United Kingdom with other States which he had examined contained rules similar to those of the draft and applicable not only to heads of post but to consular officials in general.

17. Mr. VERDROSS, dissenting from Mr. Yasseen's conclusion, said that for purposes of international law recognition by the receiving State was one of the constituent elements of the acquisition of consular status, the second being appointment by the sending State. He therefore supported the existing text.

18. Mr. AGO said that, as the discussion proceeded, his doubts about the usefulness of article 9 increased. If it was essentially identical with the definition of "consul" in article 1 (f) it was redundant, but if it departed in any degree from that definition then it was at variance with article 1 and must be revised. For obvious reasons definitions should all be grouped together under article 1.

19. He agreed with Sir Humphrey Waldock that there should be no confusion about which articles applied only to heads of post.

20. Mr. SANDSTRÖM said it would be clearer if article 9 dealt only with heads of post and if the point raised by Mr. Bartos concerning the position of the consular staff were discussed in connexion with articles 21 and 22.

21. Mr. PAL remarked that that the purpose of article 9 was not to repeat or supplement the definition of a consul, but to give a substantive provision for appointment. If the wording suggested by the Netherlands Government were accepted, article 9 would fulfil a useful purpose, for it would deal with the appointment of consuls and would not be merely a definition.

22. Mr. MATINE-DAFTARY said that the Netherlands text for article 9 and the text of the existing article 13 should be combined, since they dealt with the same problem and, indeed, if read together, showed that recognition was more or less synonymous with the granting of an exequatur.

23. Mr. ŽOUREK, Special Rapporteur, said that it might be preferable to deal in one of the later articles concerning consular staff with the question of the acquisition of consular status by persons who were not heads of post.

24. Sir Humphrey WALDOCK said that he had no objection in principle to that course, but would point out that some of the rules specified in articles 9 and 10 might have to be made applicable to subordinate staff.

25. Mr. AGO proposed that further consideration of article 9 should be deferred until the Commission took up article 1.

26. Mr. ŽOUREK, Special Rapporteur, said that in any case article 1 (f) would have to be amended because in regard to some articles, e.g. article 51, the definition would not apply.

27. Mr. Ago's earlier objections would have been relevant to the text of article 9 as it stood, but were not

relevant to the Netherlands amendment. However, he had no objection to deferring further discussion and taking up article 9 in conjunction with article 1.

28. Mr. AMADO said that Mr. Matine-Daftary had usefully drawn attention to the connexion between article 13 and article 9, linking the exercise of functions with recognition by the receiving State. The important rule about recognition was stated in article 9. He favoured the Netherlands text and agreed with Mr. Ago that it could be discussed in connexion with article 1 (f).

29. Mr. GROS remarked that if the purpose of article 9 was to define the persons who were the subject of the provisions laid down in the draft, its proper place was among the definitions in article 1. The importance of article 9 lay in the fact that it specified the two conditions that had to be fulfilled for the acquisition of consular status, appointment and authorization to carry out his functions.

30. However, he had some doubts about the reference to recognition, a term which in several instances had been used unnecessarily. In article 9 it was not recognition in the legal sense of the term that was involved, but authorization given by the receiving State to a consul for the exercise of his functions within the territory of that State.

31. He supported the proposal that consideration of the article should be held over until the Commission discussed the article on definitions.

32. Mr. ERIM said that as it stood article 9 seemed to create confusion and should be carefully reconsidered, as should the following six articles. He agreed with Sir Humphrey Waldock that it should be made clear which articles were applicable to heads of post only.

33. Mr. PADILLA NERVO observed that, since article 1 (f) related to the whole draft, the Commission would have to specify more precisely what was meant by the term "consul". Some express provision should be inserted in the draft stipulating that the conditions laid down in article 9 might apply to consular officials who were not heads of post, since under many bilateral agreements subordinate staff, in order to exercise consular functions, had to obtain an exequatur.

34. The text proposed by the Netherlands Government should be adopted: the question of its position in the draft could be considered when the Commission took up article 1.

35. The CHAIRMAN proposed that the Commission should follow Mr. Ago's proposal that further consideration of article 9 should be deferred until it took up article 1, at which time it could decide whether such a provision was necessary and, if so, whether the Netherlands text was acceptable.

It was so agreed.

36. Mr. BARTOŠ suggested that article 17, paragraph 4, which had some relevance to the practice of common law countries which he had mentioned, might be taken into account.

ARTICLE 10 (Competence to appoint and recognize consuls)

37. Mr. ŽOUREK, Special Rapporteur, introducing the article, referred to his third report (A/CN.4/137) and to the comments of governments. The Government of Norway had observed that it saw no compelling reason for including those provisions in the draft. The United States Government had also considered the article superfluous or, alternatively, that its substance should be incorporated in another article (A/CN.4/136/Add.3). The Netherlands Government had proposed that the word "consuls" should be replaced by "heads of post" and the words "internal law" by "municipal law" (*législation nationale*). As to the first of the Netherlands amendments, the reasons for using the word "consul" had been debated at length in the Commission and it seemed unnecessary to repeat those arguments; it should be borne in mind, however, that the scope of articles 9 and 10 was limited to heads of post. With regard to the other Netherlands amendment, he said that the expression "internal law" had been chosen intentionally to cover also non-statute law. Lastly, the Government of Belgium proposed that the closing passage of paragraph 1 should read: "... is governed by the internal law and usages of the sending State" and that paragraph 2 should be amended in the light of the fact that the matters with which article 10 dealt were also referred to in articles 12 *et seq.*

38. The need for article 10 was clearly set forth in the commentary. Reference had been made to competence solely in order to eliminate possible difficulties in the future. It seemed desirable to specify that the question which was the authority competent to appoint consuls and the mode of exercising that right was within the domestic jurisdiction of the sending State, and also that the question which was the authority competent to grant recognition, and the form of such recognition, were governed by the municipal law of the receiving State. In that way, any possibility of dispute would be forestalled. So far as the wording of the article was concerned, the Netherlands amendment limiting the article to heads of posts and both the suggestions of the Belgian Government might be accepted.

39. Mr. YASSEEN said that article 10 was a very useful provision in that it contained no definition, but represented a distribution of competence. With regard to the first of the Netherlands amendments, the expression "internal law" (*droit interne*) was meant to cover both written and unwritten law. He could not agree with the Belgian Government's suggestion that an express reference to usage should be added, for the competence of the sending State should be exercised on the basis of rules of international law. The second Belgian amendment, however, seemed to be pertinent and should be accepted.

40. The CHAIRMAN, speaking as a member of the Commission, said that the retention of article 10 might be justified from a practical point of view. From the theoretical point of view, however, he was opposed to the inclusion of the article, for it might be misinterpreted

to mean that the draft international convention conferred a certain competence upon the sending State and the receiving State.

41. Mr. MATINE-DAFTARY agreed in principle with members who wished to retain the article and with those who thought the expression "internal law" should stand. He also endorsed Mr. Gros's objection to any reference to "recognition" in article 9; some such word as "accepted" or "admitted" would be better. Finally, he asked the Special Rapporteur whether the form of recognition (article 10, para. 2) was in fact governed by internal law or by international law. The case was probably one where international law referred back to the rules of internal law.

42. Mr. AGO agreed with the Chairman that nothing would be lost by omitting the article. He further agreed with Mr. Matine-Daftary that the case at issue was one where internal law only was concerned, but the article was wrong in suggesting that the "competence" in the matter was granted to internal law by international law. The sending State's appointments were manifestly governed by nothing but its municipal law. However, in the case of the appointment of a diplomatic agent, which was obviously of greater international importance, the Vienna Convention on Diplomatic Relations did not expressly specify that such appointment was governed by municipal law. Accordingly, the statement that the appointment of consuls was governed by internal law could be dispensed with in the draft under discussion.

43. Mr. YASSEEN said he could not agree with Mr. Ago's interpretation. Although a consul was an official of the sending State, he exercised international functions, and should therefore be appointed in accordance with rules of international law. The purpose of article 10 was to make it clear that the consul, in exercising international functions, was appointed in accordance with the municipal law of the sending State and was accepted by the receiving State in accordance with the latter's municipal law. In his opinion, that clarification was essential for the avoidance of friction in the future.

44. Mr. BARTOŠ said it was self-evident that the form of the appointment and recognition of consuls was governed by the municipal law of the States concerned, within the limits of the rules of international law. He therefore agreed with Mr. Ago that the article added nothing to the draft.

45. He drew attention to article 1 (d), in which the term "exequatur" was defined as the final authorization granted by the receiving State to a foreign consul to exercise consular functions in the territory of the receiving State, whatever the form of such authorization. Furthermore, article 13 provided that the recognition of heads of consular posts was given by means of an exequatur. The only point of international law involved in article 10 was, in his opinion, the fact that the form of recognition was chosen by each State; thus, under the law of some countries, the exequatur was given by the head of State and under the law of others by a different authority. Accordingly, the logical place for

the rule concerning the choice of the form of recognition was in article 13; paragraph 1 of article 10, however, seemed to be superfluous.

46. Mr. PADILLA NERVO said that he would agree with Mr. Ago and Mr. Bartos that there was a case for deleting article 10, but a decision depended to a large extent on the decision concerning article 9. The sending State's competence to appoint a consul was unquestionable and could not be in any way dependent on accession to the convention. With regard to the form of appointment, article 2 of the Convention regarding consular agents, adopted by the Sixth International American Conference,² provided that the form and requirements for appointment, the classes and the rank of the consuls, were regulated by the domestic laws of the respective State.

47. Mr. ERIM said that he was in favour of retaining article 10, which represented a codification of the existing practice of States in the matter. He agreed with Mr. Padilla Nervo that there was a close relationship between articles 9 and 10; article 10 might have to be reviewed in the light of a possible redraft of article 9. It seemed useful, however, to set forth the existing practice in international law, particularly in order to meet possible objections by a sending State to the method of recognition used by the receiving State. He would draw attention to article 7 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), which provided that the sending State could freely appoint the members of the staff of a diplomatic mission; that wording fully conveyed the idea underlying article 10 of the present draft.

48. Mr. VERDROSS observed that, although the provisions of article 10 were self-evident, it could not be denied that the question of the identity of a consul, at the international level, could be resolved only by stating that international law referred back to the municipal law of the sending State in the case of appointment, and to the municipal law of the receiving State in the case of recognition.

49. Mr. GROS suggested that the main difficulty lay in the form of the article. Mr. Ago had rightly criticized its wording on the ground of the implication that the competence of the States concerned had been fixed and consequently established by the text of the draft convention. Perhaps the difficulty could be avoided by redrafting both paragraphs of the article to begin with some such words as "It is recognized in international law that . . .", in order to make it clear that the article was a codifying provision of existing law.

50. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, said that the provision concerning the form of recognition had been included because recognition was given in different ways. The exequatur, for example, was granted in the form of orders emanating from the Head of State and signed by the Head of

² *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations, *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 422-425.

State, orders from the Head of State but signed by the Foreign Minister, certified copies of such orders, simple notification and publication in the official gazette of the receiving State. The main reason for including the article had been to avoid the confusion that might arise with the provisions of diplomatic law in the matter; diplomatic agents were always accredited by the head of State, and some countries might hold that practice to be applicable to consular officials also. Such claims had in fact been advanced as a matter of doctrine, and even in practice. The draft contained no other provision on that specific point. He agreed with Mr. Gros that the article should not give the impression of attributing competence to the State; the wording Mr. Gros had suggested would avoid that misinterpretation.

51. Mr. SANDSTRÖM pointed out that a provision of the type of article 7 of the Convention on Diplomatic Relations had been necessary in the case of diplomatic agents because of the limitations existing in the matter of their appointment. The position in regard to consuls was not the same, and article 9 of the draft, which stated that the consul was appointed by the sending State and was recognized as such by the receiving State, appeared to contain all the essentials. Article 10 should perhaps put the emphasis on the form of appointment and recognition.

52. Mr. AGO stressed that article 7 of the Vienna Convention dealt with the appointment of members of the staff of a diplomatic mission and thus included not only the chief of mission but also the members of the diplomatic staff, of the administrative and technical staff and of the service staff of the mission. As far as consular relations were concerned, articles 9 and 10 of the draft under discussion referred to consuls only. The question of the appointment of members of the consular staff was governed by article 21.

53. Article 9 and article 1 made it clear that a consul was appointed by the sending State and was recognized in that capacity by the receiving State. The only thing which could be added by article 10 was a statement to the effect that the appointment of the consul was effected in the form laid down by the internal law of the sending State and that recognition was given in the form laid down by the internal law of the receiving State. To his mind, those two statements were self-evident and specific provisions thereon were unnecessary. The appointment of a consul could not be made in a form other than that laid down by the law of the sending State, nor could the recognition be given in a form other than that prescribed by the law of the receiving State.

54. Sir Humphrey WALDOCK agreed that the substance of article 10 was contained by implication in the provisions of other articles of the draft, which made it clear that the sending State could order the matter of appointment as it desired and that the same was true of the receiving State in regard to recognition. However, he saw no harm in including a provision along the lines of article 10 because the draft articles were intended to codify the international law relating to consular relations. It would be understood that the intention was to codify existing practice.

55. Mr. AMADO said that article 10 should be drafted along the following lines:

"Consuls are appointed, and exercise their functions, in accordance with rules laid down by the internal law of the sending State; they are recognized as such in accordance with rules laid down by the internal law of the receiving State."

56. The article should make no reference to the question of competence. The competence of States to appoint and to recognize consuls existed independently of any multilateral instrument.

57. On the whole, he was inclined to favour the deletion of article 10, since article 9 already stated that the consul was appointed by the sending State and was recognized in that capacity by the receiving State.

58. Mr. MATINE-DAFTARY drew a distinction between two different operations involved in the appointment of a foreign service officer. The administrative act of appointing a diplomat or a consul was a purely internal matter; the appointment might be made by a decree of the Head of State or of the Minister for Foreign Affairs (in most countries that was essential in order that public funds could be drawn on for the payment of the salary of the official concerned). The presentation of the officer to the country or international organization concerned was, however, an international act. For example, when he had represented his country at the two United Nations Conferences on the Law of the Sea and at the recent Vienna Conference, he had been appointed by an Imperial Decree, but the Minister of Foreign Affairs of his country had notified the Secretary-General of the United Nations of the appointment in writing.

59. While clearly the actual appointment of a consul by the sending State was therefore a purely internal matter, the manner of advising the receiving State might well be a proper matter for regulation by international law.

60. Mr. YASSEEN could not agree with the suggestion that article 10 should be deleted on the ground that its contents appeared self-evident. The provision contained in the article seemed self-evident precisely because it reflected the consistent and recognized practice of States; it had therefore all the elements of a rule of customary international law. And surely it was the Commission's primary duty to give written form to rules of customary international law.

61. There was also a practical reason for including article 10. A receiving State might object to the appointment of a consul, alleging that the form of the appointment, which was in accordance with the municipal law of the sending States did not meet its requirements. It was therefore useful to state that, under international law, the form of appointment was governed by the internal law of the sending State.

62. Mr. PADILLA NERVO said that if the majority of the Commission wished to retain article 10, it was essential to delete all references to competence. The article should only refer to the manner in which a consul was appointed and to the authority which recognized

him. That wording would be in keeping with the Commission's earlier intention, as explained in the commentary to article 10. The commentary showed that the whole discussion by the Commission of the article had revolved around the question of the manner of appointment of consuls, the authority which granted recognition to a consul and the form of that recognition.

63. Lastly, with regard to drafting, he suggested that the Drafting Committee should take into consideration the wording of article 6 of the Havana Convention of 1928.³

64. Mr. SANDSTRÖM said that the drafting of article 10 would be influenced by the wording which would finally be adopted for article 9.

65. The Commission had postponed its decision on article 9 and that article was the subject of an amendment proposed by the Netherlands. If the Commission were to adopt that amendment, article 10, paragraph 1, would hardly be necessary.

66. Similarly, the paragraph 2 proposed by the Netherlands Government covered some of the ground which the provisions of article 10, paragraph 2, were meant to cover.

67. Mr. VERDROSS, agreeing with Mr. Sandström, proposed that the Commission should postpone its decision on article 10 and consider that article, and article 9, in connexion with the definitions article.

68. The CHAIRMAN said that there was general agreement that the idea contained in article 10 reflected existing practice.

69. It was also agreed that the wording of article 9 was not satisfactory and a number of suggestions had been made in regard to its drafting.

70. In the circumstances, he proposed that the Drafting Committee be instructed to find suitable wording for article 10, omitting all reference to "competence". In that manner, the article would refer to the modes of appointment and recognition, and would thereby serve a useful practical purpose.

71. Lastly, it would be for the Drafting Committee to decide on the appropriate context. It might consider whether the provisions of article 10 should be merged with those of other articles. If there were no objection, he would take it that the Commission agreed to those suggestions.

It was so agreed.

ARTICLE 11 (Appointment of nationals of the receiving State)

72. Mr. ŽOUREK, Special Rapporteur, said that there had been no objection by governments to the rule set forth in article 11. However, the Netherlands (A/CN.4/136/Add.4) and Belgium (A/CN.4/136/Add.6) had proposed a more elastic formula to express the idea underlying the article. The Chilean Government (A/

CN.4/136/Add.7) had proposed some drafting changes which might be referred to the Drafting Committee.

73. It should be emphasized that article 11 referred only to consular officials and not to employees of the consulate who performed administrative or technical work in a consulate or belonged to the service staff.⁴

74. The formula used in the corresponding provision (article 8, paragraph 2) of the Vienna Convention on Diplomatic Relations was much stricter than article 11 of the draft. For that reason alone, it would be difficult to liberalize the provisions of article 11, a carefully worked out compromise formula. Besides, if the Commission were to change the text of the article, other governments would certainly object to the new text.

75. Other questions to be considered were whether a provision should be prepared concerning employees of the consulate who were nationals of the receiving State; and whether a provision along the lines of article 8, paragraph 3, of the Vienna Convention (nationals of a third State) should be added.

76. However, the Commission could consider the possibility of such additional provisions at a later stage and concentrate for the time being on the adoption of article 11. He urged the Commission to adopt the article as it stood.

77. Mr. FRANÇOIS said that the question raised in article 11 was perhaps not very important for career consuls, but would seriously affect honorary consuls. He drew attention in that connexion to article 54, paragraph 1, which stated that the provisions of chapter I (articles 1 to 28) applied to honorary consuls.

78. Under that clause, the provisions of article 11 would apply to honorary consuls and in so far as it was to apply to such consuls the text as it stood was too categorical. A more elastic provision along the lines proposed by the Netherlands and Belgian Governments would be preferable for the purpose of the applicability of the article to honorary consuls.

79. If, therefore, the Commission were to adopt article 11 as it stood, it would have to make an exception for honorary consuls.

80. Article 11 would gain by being drafted in less rigid terms so that it could apply both to career consuls and to honorary consuls.

81. The CHAIRMAN, speaking as a member of the Commission, said that there had been a clear tendency at the Vienna Conference to tighten up the provisions concerning the appointment of a national of the receiving State as a diplomatic agent of another State. As a result, the International Law Commission's draft article 5 on that particular subject (A/3859) had been amended. An entirely new paragraph had been introduced in the Vienna Convention as article 8, paragraph 1, and paragraphs 2 and 3 of that article both contained stricter provisions than those originally contemplated by the Commission.

82. The Commission should take that tendency into

³ *Ibid.*, p. 423.

⁴ See article 21, commentary (3).

account in its debate and in taking a decision on article 11 should be guided by the provisions of article 8 of the Vienna Convention.

83. Mr. AGO said that he saw no objection, with regard to career consuls, to the adoption of an article following closely the terms of article 8 of the Vienna Convention. It would, however, be necessary to specify that the provisions of the article did not apply to honorary consuls.

84. He could not agree with the suggestion that restrictions should be placed on the appointment of nationals of the receiving State as employees of the consulate. In that connexion, the provisions of article 8 of the Vienna Convention did not apply to members of the administrative and technical staff or to members of the service staff of diplomatic missions.

85. Mr. YASSEEN emphasized the difference between diplomatic agents and consular officials. It could be safely asserted that a diplomatic agent should in principle be of the nationality of the sending State. It was not quite so obvious that a consular official should necessarily be of the nationality of the sending State. Also, it was easy to understand the strong objections to the idea of a citizen of one State being accredited to it as a diplomatic agent of another State. It would, on the other hand, be admissible for a national of one State to serve within the territory of that State as consular official of another State.

86. For those reasons, he supported article 11 as it stood and saw no reason for extending its provisions to the nationals of a third State.

87. Mr. SANDSTRÖM agreed with the views expressed by the previous speaker.

The meeting rose at 6 p.m.

590th MEETING

Tuesday, 16 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 11 (Appointment of nationals of the receiving State) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of article 11 of the draft on consular intercourse and immunities (A/4425). The only specific proposal submitted (589th meeting, para. 83) concerning

the article was Mr. Ago's proposal that article 11 should be revised along the lines of article 8 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

2. Mr. SANDSTRÖM recalled Mr. Yasseen's and his own proposal (589th meeting, paras. 86 and 87) that article 11 be retained as it stood.

3. Sir Humphrey WALDOCK asked what harm would be done if the article were redrafted along the lines of article 8 of the Vienna Convention.

4. Mr. SANDSTRÖM replied that an important reason for establishing a difference of treatment between diplomatic and consular officials was that a diplomatic officer, unlike a consul, represented the sending State in political matters.

5. Mr. VERDROSS recalled the remark of Mr. François (*ibid.*, para. 79) that there could be no objection to reformulating article 11 along the lines of article 8 of the Vienna Convention if the provisions of the article were not to apply to honorary consuls.

6. The CHAIRMAN said that the chapter of the draft under discussion dealt only with career consuls.

7. Mr. YASSEEN pointed out that, under article 54, paragraph 1, of the draft, the rules laid down in article 11 would apply also to honorary consuls.

8. In reply to Sir Humphrey Waldock, he said that, in view of the political functions entrusted to diplomats, conflicts of allegiance were likely to arise if nationals of the receiving State appointed diplomatic agents of a foreign State to perform their functions in their own country. The position was quite different so far as consuls were concerned, and there was no equally cogent argument for saying that consuls should always be nationals of the sending State.

9. As to the appointment of nationals of a third State as consular officials, there was no need to require the express consent of the receiving State to such appointments, for no conflict of allegiance of concern to the receiving State could arise.

10. For those reasons, article 11 should be retained as it stood. Its provisions were necessary in order to specify that the consent of the receiving State was needed for the purpose of the appointment of one of its nationals as a foreign consul.

11. Sir Humphrey WALDOCK remarked that there was no difference of substance between article 11 and article 8, paragraphs 1 and 2, of the Vienna Convention. In both cases, the express consent of the receiving State was required.

12. It had been his understanding that article 11 applied to career consuls only and on that understanding he saw no harm in adopting the formulation used in article 8 of the Vienna Convention.

13. Mr. LIANG, Secretary to the Commission, submitted that there was very little difference as to substance between article 11 of the draft under discussion and article 8 of the Vienna Convention. The latter represented merely an accentuated version of the same

provision. At the Vienna Conference there had been a strong feeling in favour of imposing restrictions on the appointment of a person who was not a national of the sending State. That sentiment had found its expression in paragraphs 1 and 3 of article 8 of the Vienna Convention.

14. The question at issue was not whether any harm would be done if article 11 were to be formulated along the lines of article 8 of the Vienna Convention. It was rather one of practicability, bearing in mind particularly financial considerations. The size of staff involved in the case of consulates was much larger than in the case of diplomatic missions, and if the sending State were to be required to appoint in principle only its own nationals, that might impose upon it a heavy financial burden. It should be emphasized that that consideration would be valid in regard not only to the appointment of honorary consuls, but also to that of career consular officials.

15. For those reasons, it might be useful to keep article 11 as it stood, particularly since its provisions safeguarded adequately the position of the receiving State by requiring its express consent.

16. Mr. PAL, concurring, observed that if article 11 were to be redrafted along the lines of article 8 of the Vienna Convention, particularly with the inclusion of paragraph 1 of that article, it would mean that the appointment of a person who was a national of the receiving State was rare and exceptional. In the case of consuls, however, he understood that there was nothing exceptional in such appointments.

17. Mr. AGO replied that it was very rare for a career consul to be appointed from among the nationals of the receiving State. If the application of article 11 were to be limited to career consuls, it would be desirable that its provisions should be redrafted along the lines of article 8 of the Vienna Convention. If, however, the intention was to cover also honorary consuls, he would favour the retention of article 11 as it stood.

18. Mr. BARTOŠ pointed out that, in the case of a head of post, the need to obtain an exequatur rendered the provisions of article 11 virtually unnecessary. Those provisions served a purpose only in the case of the consular officials commonly known as subordinate consuls.

19. He did not favour the assimilation of career consuls to diplomats, but he recalled that at the Vienna Conference it had been decided to amend the original draft articles on diplomatic relations so as to require advance notification of the actual appointment of a diplomatic agent. The intention had been to make it possible to ascertain whether the person in question was acceptable before he was even appointed, and not merely before he was sent to the receiving State.

20. Since article 11 was intended to cover not only heads of post, who required an exequatur, but also other consular officials, article 11 should be left as it stood. By requiring the express consent of the receiving State before the actual appointment of one of its nationals, the article rendered a service in practice. In the event of the receiving State's withholding consent, the sending

State would simply not make the appointment, instead of having to revoke an appointment already made.

21. Mr. ERIM said that there was an important difference of approach between article 8 of the Vienna Convention and article 11 of the draft. The former specified that, in principle, members of the diplomatic staff of the mission should be of the nationality of the sending State. If a provision of that type were included in the consular draft, it would mean that the receiving State could refuse its consent to the appointment of one of its nationals without giving any reason; it would also mean that the sending State would be required to explain why it was unable to appoint one of its own nationals. That situation would not arise with the existing wording of article 11.

22. For those reasons, he agreed with those speakers who had favoured the retention of article 11. The Commission should take an explicit decision on the question whether it desired to include a provision along the lines of article 8, paragraph 1, of the Vienna Convention.

23. Mr. PADILLA NERVO said that two questions arose in connexion with article 11: whether it applied to honorary consuls or not, and whether it applied only to heads of post or to all consular officials.

24. Under article 9, the appointment of any consul, whatever his nationality, was subject to recognition by the receiving State. In the circumstances, the only meaning which could be placed on article 11 was that it served to emphasize the exceptional character of the appointment of a national of a receiving State.

25. Unless the inclusion of a provision along the lines of article 11 meant that, in principle, a consul should have the nationality of the sending State, there would be no need for the article. All the questions which arose were already settled by the provisions of article 9 and of those articles which in regard to honorary consuls, laid down exceptions regarding certain consular privileges for the case where the honorary consul was a national of the receiving State.

26. Mr. ŽOUREK, Special Rapporteur, said that, as drafted, article 11 had been meant to cover both career and honorary consuls, but in order to facilitate reaching an agreement it was desirable to limit the discussion on article 11 to career consuls at that stage and to reserve the question of honorary consuls.

27. There was not much difference in substance between article 11 of the draft and article 8, paragraphs 1 and 2, of the Vienna Convention. Both texts required the consent of the receiving State to the appointment of one of its nationals and whereas article 8, paragraph 1, of the Vienna Convention expressly provides that members of the diplomatic staff should in principle be of the nationality of the accrediting State, article 11 of the draft implied, in regard to the appointment of consular officials, that, in principle, the person appointed should be a national of the sending State. Also, under both provisions, the receiving State would not be required to give any explanation if it refused to accept the appointment of one of its nationals.

28. The purpose of article 11 was to enable the receiving State to object to such an appointment because of the conflict which would arise between the consular official's duties towards a foreign State and his allegiance to his own country. The position of consular officials in that respect was similar to that obtaining in the case of diplomatic officers.

29. As to Mr. Padilla Nervo's comments, the provisions of article 9 concerned the recognition of a head of post as an organ of the sending State. Article 11 referred to a different question when it specified that the receiving State's express consent was necessary for the appointment of one of its nationals. The Vienna Conference had shown how strong was the feeling in favour of asserting that right of the receiving State.

30. The provisions of article 11 applied only to consular officials, i.e. to persons who belonged to the consular service and exercised a consular function. They did not apply to the employees of the consulate.

31. Lastly, the only difference of substance between the two texts was that relating to the appointment of a national of a third State, which was the subject of article 8, paragraph 3, of the Vienna Convention.

32. Mr. MATINE-DAFTARY pointed out that article 8, paragraph 1, of the Vienna Convention did not apply to the head of mission, but only to members of the diplomatic staff, who were defined in article 1 (d) of the same Convention as the members of the staff of the mission having diplomatic rank. That expression, unlike that of "diplomatic agent" (defined in article 1 (e)) did not include the head of mission. The reason for leaving the head of mission outside the scope of article 8 was that, under article 4 of the Vienna Convention, the sending State was required to make certain that the *agrément* of the receiving State had been given before appointing him, and the *agrément* could always be refused.

33. By contrast, the provisions of article 11 of the draft under discussion applied to all consular officials, including the head of post, who needed an exequatur in order to enter upon his duties.

34. Mr. ŽOUREK, Special Rapporteur, admitted that article 11 was more necessary for subordinate consular officials than for the head of post. Even in the case of the latter, however, it was desirable to specify the need for the express consent of the receiving State to the appointment of one of its own nationals; that provision constituted a separate and prior safeguard, distinct from the granting of the exequatur, which applied to any head of consular post.

35. The CHAIRMAN explained that, in the case of the head of a consular post, the sending State did not need the *agrément* of the receiving State before making the appointment. It was, therefore, appropriate to specify that the express consent of the receiving State was necessary in the event of the appointment of one of its nationals.

36. The position with regard to article 11 was that there had been a cleavage of opinion regarding the

advisability of redrafting the article along the lines of article 8 of the Vienna Convention. Some members favoured that course, while others preferred to retain article 11 as it stood. As a general rule, a vote was hardly the best means of settling differences of opinion within the Commission: it was generally preferable to seek a compromise formula which could receive unanimous support. In that instance, however, the difference of substance between the two formulations proposed was not very great and it would perhaps be simpler to settle the question by means of a vote.

37. Mr. VERDROSS emphasized that there was a material difference of substance between the two proposed texts. Unlike article 11 of the draft, article 8 of the Vienna Convention dealt, in its paragraph 3, with a question of the appointment of a national of a third State.

38. Mr. PADILLA NERVO also observed that the introduction into article 11 of a provision along the lines of paragraph 8 of the Vienna Convention would represent the injection of a totally new idea. If the Commission intended to deal with the appointment of nationals of a third State, it should draw a distinction between persons who were residents of the receiving State and non-residents. A resident alien was subject to certain obligations vis-à-vis the State in which he lived, and the Commission would have to consider whether, in adopting a provision on the question of the appointment of a national of a third State, it should not draw a distinction between persons who resided in the receiving State and persons who did not.

39. The CHAIRMAN said that the problem of permanent residents had been discussed in the Vienna Conference in connexion with several provisions of the Convention. As far as he could recollect, the question had been mentioned in connexion with article 8, but it had been decided to draw no distinction in that article on the basis of residence.

40. In the case of consuls, it was perhaps all the more desirable to follow that example and not to enter into too much detail.

41. Mr. AGO pointed out that the question raised by Mr. Padilla Nervo was relevant only to honorary consuls. The Commission, however, appeared to be agreed that the application of article 11 should be limited to career consuls.

42. He proposed that the Commission should take two separate votes on the introduction into article 11 of the ideas contained in paragraphs 1 and 3 respectively of article 8 of the Vienna Convention.

43. The CHAIRMAN said that the Commission would vote on the understanding that article 11 dealt only with career consuls and not with honorary consuls. Also, that it dealt not only with the head of the consular post, but also with consular officials.

44. He would put to the vote first the question of maintaining article 11 as it stood. Since the article did not differ materially from article 8, paragraph 2, of the Vienna Convention, its adoption would not preclude a

decision on whether to include or not the ideas contained in paragraphs 1 and 3 of article 8 of the Vienna Convention.

Article 11 was adopted unanimously.

45. The CHAIRMAN put to the vote the proposal that the idea contained in article 8, paragraph 1, of the Vienna Convention should be introduced into article 11.

The proposal was adopted by 11 votes to 4, with 1 abstention.

46. The CHAIRMAN put to the vote the proposal that the idea contained in article 8, paragraph 3, of the Vienna Convention should be introduced into article 11.

The proposal was adopted by 14 votes to 2.

47. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to entrust the Drafting Committee with the drafting of article 11 so as to include: (1) the idea contained in article 8, paragraph 1, of the Vienna Convention; (2) the text of article 11 of the consular draft; and (3) the idea contained in article 8, paragraph 3, of the Vienna Convention.

It was so agreed.

ARTICLE 12 (The consular commission)

48. Mr. ŽOUREK, Special Rapporteur, said that the substance of article 12 had not given rise to any objection; the comments of the Governments of Belgium, the Netherlands, Spain and the United States on the article were mainly of a drafting character.

49. Both the Belgian and the Spanish Governments (A/CN.4/136/Add.6 and Add.8) had pointed out that the expression "full powers" was too wide, since consular functions were clearly limited. The expression had indeed provoked lengthy debate in the Commission, but no better alternative had been found.

50. The Belgian Government had proposed that paragraph 2 should provide for the communication to the government of the receiving State not only of the consular commission, but also of the "similar instrument".

51. The Netherlands Government (A/CN.4/136/Add.4) had expressed the view that paragraph 2 should apply to heads of post only.

52. The United States Government (A/CN.4/136/Add.3) had made a suggestion concerning the notification of the limits of consular districts; but that suggestion related to article 3, paragraph 2, of the draft rather than to article 12.

53. The Governments of Belgium, Norway, Sweden and the United States had replied in the affirmative to the question posed in paragraph (3) of the commentary whether the general practice was to require the issue of a new commission when a consul was appointed to another post within the territory of the same State. The Belgian Government had added that under Belgian law the head of post was furnished with a new commission on promotion or when the boundaries of his district were changed.

54. Mr. MATINE-DAFTARY said that the expression "full powers" was too broad in the context and should be deleted. The opening passage of paragraph 1 might be redrafted to read: "The head of a consular post shall be furnished by the State appointing him with a commission or similar instrument."

55. Mr. VERDROSS suggested for consideration by the Drafting Committee the following wording: "The head of a consular post shall be furnished by the State appointing him with a document stating his powers."

56. Mr. AGO said that he preferred the wording suggested by Mr. Matine-Daftary to that of Mr. Verdross because it was not for a consular commission to indicate what were the consul's powers. Those powers were determined by rules of international law, bilateral agreements or a multilateral convention of the kind under discussion.

57. Sir Humphrey WALDOCK endorsed Mr. Ago's view.

58. Mr. AMADO suggested that in the interests of uniformity the words "the sending State" should be substituted for the words "the State appointing" throughout the article.

59. The CHAIRMAN observed that, as there appeared to be general agreement that article 12 should be retained, it could be referred to the Drafting Committee together with the comments of governments and those made in the course of the discussion.

It was so agreed.

ARTICLE 13 (The exequatur)

60. Mr. ŽOUREK, Special Rapporteur, explaining the fundamental purpose of article 13, recalled that after lengthy discussion (508th meeting, paras. 55-63, and 509th meeting, paras. 7-27) the Commission had decided, as explained in paragraph (7) of the commentary to article 13, that only the head of post had to obtain an exequatur, and the exequatur automatically covered the members of the consular staff working under him. However, as stated at the end of that comment, there was nothing to prevent the sending State from applying for an exequatur for other officials with the rank of consul.

61. No objection of principle had been raised to the substance of article 13, but the United States Government had proposed that the words "officers of consular posts" be substituted for the words "heads of consular posts"; the amendment would mean that an exequatur would be necessary for each official who exercised consular functions. The Commission should therefore decide whether it wished to retain the basic concept of the rule as set forth in the text as it stood. In his opinion article 13 should stand and its application should be limited to heads of post. The case where, for internal reasons depending on the laws of the sending State, an exequatur had to be obtained for consular officials who were not heads of post could be dealt with by a suitable provision in article 21, though it should be made clear

that such a provision was permissive. That solution would accord with the concept of the consulate as a unit and would be consistent with the law and practice of most countries, e.g. Poland (A/CN.4/136/Add.5), under which the exequatur could be granted only to a head of post.

62. He could accept the Czechoslovak Government's proposal (A/CN.4/136) that the first sentence in paragraph (7) of the commentary should be embodied in the article itself, since that change would make the meaning clearer.

63. In answer to the Finnish Government's question whether, in cases where the sending State asked for an exequatur for officials other than the head of post, those officials could enter upon their duties before the exequatur had been given, he had stated in his third report (A/CN.4/137) that they could do so provided that the head of post had already obtained his exequatur, for the request for an exequatur for consular officials working under a head of post who had already obtained one was an optional and supplementary measure.

64. He would draw attention to the redraft of article 13 which he proposed in his third report.

65. Mr. BARTOŠ said that he agreed with the Special Rapporteur that the exequatur should be granted only to the head of the consular post. Nevertheless, some States took a different view; in unifying international law in the matter, the Commission should consider whether it should insert a supplementary provision to cover the case where the exequatur was required for other consular officials as well. From the practical point of view, if a receiving State required all consular officials who had dealings with the local authorities to obtain the exequatur, that requirement affected consular relations between States, and was not merely a matter of internal law. For example, Yugoslavia had a consul-general in New York who held the internal rank of minister plenipotentiary and had several consuls and vice-consuls working under him; each subordinate consular official who entered into contact with local authorities was obliged to produce evidence of his capacity to act. The Government of Finland had therefore asked a pertinent question, which in fact related to the date on which such officials began to exercise purely consular functions. If the exequatur were required for all consular officials, they might begin to perform their functions at the consulate, which might be regarded as purely internal, upon their arrival, but if they were to act on behalf of the head of post *vis-à-vis* the authorities of the receiving State, the date from which their acts might produce their effects in the receiving State would be that of the grant of the exequatur. The United Kingdom was a case in point; it allowed subordinate consular officials to exercise purely internal functions without an exequatur, but required an exequatur for functions involving contact with the local authorities. In that connexion, some purely practical difficulties might arise. Thus, on one occasion, when the Yugoslav consul in a British possession had died, the vice-consul in the territory had not been in possession of an exequatur. A special application had had to be made to the Foreign

Office and a Yugoslav official to whom an exequatur had been granted had been sent from London to perform consular functions, because an exequatur in the United Kingdom was given by the Sovereign, who had been absent at the time.

66. The Special Rapporteur's new text took into account the Czechoslovak Government's suggestion that the first sentence of paragraph (7) of the commentary should be inserted in the body of the article, thus laying down one of the possible systems as a general rule of international law. The Special Rapporteur had said that the practice of requiring the exequatur for subordinate consular officials was optional; in fact, however, the practice was one followed by a number of sovereign States. Accordingly, while he was in favour of unifying parallel systems wherever possible in the draft, he would point out that in the Vienna Convention the form of submitting letters of credence was left to the choice of the Contracting Parties. While that question might be regarded as one of protocol, the relevant rule had certain practical consequences, since it determined the date of the beginning of the functions of a diplomatic agent. In view of the widespread tradition of requiring subordinate consular officials to obtain the exequatur and of the number of States which followed that system, article 13 of the draft under discussion should be recast so as not to imply that one system was compulsory and the other optional.

67. The CHAIRMAN, speaking as a member of the Commission, said that, just as article 12 spoke of the consular commission "or similar instrument", so a reference to the exequatur "or similar instrument" might be inserted in paragraph 1 of the Special Rapporteur's new draft article 13. Such an addition would, moreover, be more in conformity with existing practice. With regard to the word "recognition", he agreed with Mr. Gros's remarks on the subject in connexion with article 9 (589th meeting, para. 29). The word was not used in the Vienna Convention and had the disadvantage of being used rather loosely by some jurists. The Drafting Committee should be asked to find a different term.

68. With regard to the Special Rapporteur's proposed paragraph 2, the expression "members of the consular staff" was hardly accurate in article 13, since it was defined in article 1 (k) as meaning the consular officials (other than the head of post) and the employees of the consulate. The employees of the consulate carried out no consular functions and did not require authorization to do their work; those functions might be regarded as covered by the exequatur of the head of post.

69. Finally, he agreed with Mr. Bartos that, although, generally speaking, uniform rules were desirable, in the case under consideration some wording should be found to cover the two existing practices. The Special Rapporteur's paragraph 2 might be redrafted along the following lines:

"The grant of the exequatur to the head of consular post covers *ipso jure* the consular officials working under his orders and responsibility, unless the legislation of the receiving State requires separate exequaturs for subordinate consular officials."

70. Mr. AGO said that the Chairman's praiseworthy attempt at a compromise solution ran counter to the basic theory, agreed upon by the Commission, that the consent of the receiving State was a condition of the appointment of the head of post himself, and not of that of other consular officials. Article 21 (Appointment of the consular staff) stated quite clearly that the sending State could freely appoint members of the consular staff and for such persons the receiving States had only the possibility of declaring them "not acceptable" under article 23. Under the Vienna Convention also the *agrément* was required as a condition of appointment in respect of the head of the diplomatic mission, and in that Convention, as in the draft under consideration, the receiving State had the option of declaring subordinate officials not acceptable. The express provision that the exequatur, which was a form of consent, could be previously required for the appointment of all officials would upset the structure of the draft. In any case, a choice was necessary. If it offered two different rules, the draft convention would no longer answer the description of a treaty.

71. The comment of the Government of Finland might have been provoked by some looseness in the wording of paragraph (7) of the commentary. The last sentence of that paragraph referred to the sending State's option of obtaining an exequatur for one or more consular officials with the rank of consul, but said nothing about the possibility that the receiving State might require such officials to obtain the exequatur. The Commission should choose which of two rules it would insert in article 13, and that choice should be consistent with the general context of the draft convention.

72. Finally, he doubted the wisdom of inserting in paragraph 2 a provision stating that the grant of the exequatur to the head of post automatically covered the consular officials working under him, for such a provision would obscure the fact that the exequatur was required for the head of post only.

73. Sir Humphrey WALDOCK said that the Chairman's points concerning the word "recognition" and the form of the exequatur were to some extent taken account of in article 1 (d), under which the term exequatur meant the final authorization granted by the receiving State to a foreign consul, whatever the form of such authorization.

74. From the substantive point of view, the Commission was faced with a serious problem, since there was a considerable body of practice requiring the exequatur for subordinate consular officials. He had found such requirements in ten consular conventions signed by the United Kingdom, and no doubt it occurred in a number of others. He was therefore in favour of stating the general rule with the qualifying "unless" clause suggested by the Chairman.

75. Furthermore, if the Commission were to adopt the Special Rapporteur's wording of paragraph 2 without any reference to the municipal law of the receiving State, it would be departing from the principle accepted by it in article 10 that the conditions for granting an authorization for the discharge of consular functions were laid

down by municipal law. The Commission ought not therefore to impose on the receiving State the rule proposed by the Special Rapporteur.

76. Mr. LIANG, Secretary of the Commission, drew attention to the difference between consular and diplomatic practice. While the accreditation of the head of a diplomatic mission meant that all the subordinate staff of the mission would have the authority to act under that accreditation, a consul-general was often in charge of a large district, and consuls and vice-consuls who were not heads of post might have to perform consular functions in their own name in order that they should be valid under the law of the receiving State. Some States therefore required exequaturs for subordinate personnel in such situations.

77. Mr. YASSEEN expressed his appreciation of the Chairman's attempt to provide a compromise solution, but thought that it did not quite meet Mr. Ago's objections. He therefore suggested that paragraph 2 be redrafted along the following lines:

"If the receiving State requires the recognition of consular officials other than the head of post, the recognition of the head of post shall extend automatically to these consular officials, unless this extension conflicts with the law of the receiving State."

78. Sir Humphrey WALDOCK said that in practice the difficulties might not be as great as they seemed, in view of the terms of article 14 (Provisional recognition), under which the head of consular post could begin to exercise his functions pending the granting of the exequatur. Under some consular conventions also consular officials were allowed to exercise functions pending recognition.

79. The CHAIRMAN, summing up the debate on article 13, suggested that the Special Rapporteur's paragraph 1 might be adopted as drafted, subject to the replacement of the word "recognition" by some alternative to be found by the Drafting Committee.

It was so agreed.

80. The CHAIRMAN said that the consensus of the Commission seemed to be that article 13 should contain a formula covering both the existing practices in the matter of the grant of the exequatur. He proposed that the Drafting Committee be instructed to find appropriate wording to cover those situations in the light of the suggestions made during the meeting.

It was so agreed.

The meeting rose at 1 p.m.

591st MEETING

Wednesday, 17 May 1961, at 10.15 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 14 (Provisional recognition)

1. The CHAIRMAN invited the Commission to discuss article 14 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, drew attention to the comments of the Government of the United States (A/CN.4/136/Add.3), which made it clear that the United States required specific recognition of all consular officials. That was confirmed by the same Government's comments on article 16. Nevertheless, the wording of both observations gave grounds for the hope that the position of the United States on that point did not completely exclude that country's agreement with the Commission's position, based on the principle that only the head of consular post should be granted the exequatur and that the sending State was free to appoint other consular officials, in accordance with the rules of the draft. That view seemed to be substantiated by the last two sentences of the United States Government's comments on article 16.

3. Accordingly, it did not seem that article 14 needed any radical change, for it stated a rule frequently found in consular conventions and had not been criticized by governments.

4. Mr. BARTOŠ said that it would be in keeping with the position adopted by the Commission in connexion with earlier articles if article 14 were made applicable, according to the practice of certain States, to consular officials other than the head of post.

5. The CHAIRMAN, speaking as a member of the Commission, observed that article 14 would have to be brought into line with article 13. The Drafting Committee should be instructed to find some wording which would cover cases where subordinate consular officials were granted the exequatur.

6. Speaking as the Chairman, he suggested that article 14 be referred to the Drafting Committee for revision in the light of the observations made.

It was so agreed.

ARTICLE 15 (Obligation to notify the authorities of the consular district)

7. Mr. ŽOUREK, Special Rapporteur, referring to his proposal in his third report (A/CN.4/137) and to

the comments of governments, said that the Yugoslav Government (A/CN.4/136) had suggested that the text of paragraph (2) of the commentary to article 15 should be incorporated in the article itself. He had drafted a new paragraph in compliance with that proposal, in the event of the Commission being willing to complete the article in that respect. The United States Government had observed that publication in an official gazette was the only form of notification in respect of which governments could accept any obligation. The Netherlands Government (A/CN.4/136/Add.4) had proposed that the word "consul", meaning the head of post, should be replaced by "consular officials"; and the Belgian Government (A/CN.4/136/Add.6) had proposed a clarification which applied to the French text only.

8. The main question to be decided in connexion with article 15 was whether the addition proposed by the Yugoslav Government should be approved.

9. Mr. PAL said that he failed to appreciate the need for paragraph (2), and further regarded the wording of that paragraph as not entirely clear. Article 12 required the sending State to communicate the commission of appointment to the receiving State. Article 15 imposed on the receiving State the obligation to notify the competent local authorities. For either purpose the default, if any, would be that of the States. It was therefore difficult to see who would be the "higher authorities" within the meaning of the suggested paragraph.

10. Sir Humphrey WALDOCK observed that the proposed additional paragraph in fact weakened the position of a head of post who had already obtained his exequatur. It implied that the government of the receiving State had to take some kind of action in order to make the powers of the head of post effective, whereas in article 13 the intention was clearly that, the exequatur once granted, the head of post was authorized to assume all his functions. Article 15 contained a useful provision, which would facilitate the exercise of consular functions, but it was unnecessary to add any clause implying that the commencement of the exercise of those functions depended in any way on the fulfilment of the obligation concerned.

11. Mr. SANDSTRÖM endorsed the views expressed by Mr. Pal and Sir Humphrey Waldock.

12. Mr. FRANÇOIS said that the proposed additional paragraph was useful, since it related to cases where the authorities of the receiving State had to enter into contact with the consul on their own initiative. It was obviously necessary for those authorities to know to whom they should apply in such cases.

13. Mr. BARTOŠ observed that, in practice, difficulties sometimes arose for consuls who had obtained the exequatur and wished to get in touch with the local authorities in cases where notification to those authorities had been unjustifiably delayed. He did not wish to advocate any particular form of notification with regard to the appointment of subordinate consular officials; nevertheless, a consul might be hampered in carrying out his functions if the local authorities disclaimed all knowledge of his appointment. It seemed important

to state that the consul could himself present his consular commission and his exequatur to the higher authorities of his district.

14. Sir Humphrey WALDOCK said that he had no substantive objections to the proposed addition, but, read together with article 15 as it stood, it practically suggested two stages of the commencement of consular functions, the first being notification by the government of the receiving State to the local authorities and the second the consul's assumption of his functions. If such a paragraph were to be added, the first sentence of paragraph (2) of the commentary, which expressly stated that the commencement of the consul's function did not depend on the fulfilment of the obligation to notify the local authorities should also be added.

15. Mr. YASSEEN expressed the view that the proposed new paragraph had much practical value, because administrative routine might result in unjustifiable delays in notification. Busy local authorities might regard the question as unimportant, but the consul's exercise of his functions might be seriously hampered by such delays.

16. The CHAIRMAN, speaking as a member of the Commission, said that he shared some of Sir Humphrey Waldock's doubts concerning the advisability of including the new paragraph. In any case, if it were decided to include such an explanatory clause, paragraph (2) of the commentary should be inserted *in toto*. Article 13 made it perfectly clear that a consul entered upon his duties as soon as he received the final authorization in the form of the exequatur; there were, and should be, no other express or implied conditions.

17. Article 15 merely stated the obligation of the receiving State to take steps to facilitate the assumption of consular functions. Indeed, the whole article was not strictly indispensable. It was for the receiving State to find ways and means of fulfilling the obligations clearly imposed on it by the provisions of the draft. Although the article might be regarded as redundant, it was not without some practical use; but an explanation of the consequences of failure to fulfil the obligation concerned went beyond those practical requirements and might weaken the text by laying it open to misinterpretation.

18. Mr. AMADO said that he shared Sir Humphrey Waldock's view that the additional paragraph would weaken the text. Moreover, so far from concerning himself with the minutiae to which paragraph (2) of the commentary related, the Chairman had even raised the question of the necessity of including article 15 in the draft. The second sentence of the article as it stood stated categorically that the government of the receiving State should ensure that the necessary measures were taken to enable the consul to carry out the duties of his office; it was the exequatur that endowed the consul with international status, and the receiving State must be trusted to take full responsibility for the granting of such an important document.

19. Mr. PADILLA NERVO said that he had serious doubts concerning the value of the additional paragraph. It was unquestionable that a consul could begin to discharge his functions as soon as the exequatur was

granted to him. If, however, in dereliction of its duty, the government of the receiving State failed to inform the local authorities of the consul's recognition, then the consul himself could inform those authorities of his appointment and was fully entitled to exercise his functions on a provisional basis. In practice, most consuls entering upon their duties informed the local authorities of their arrival and produced the documents authorizing them to exercise their functions either provisionally or finally. The additional paragraph might provide at least a temporary excuse for the central government not to fulfil its obligations. Besides, it would enable the consul to do nothing more than present his exequatur to the higher authorities of his district; and conceivably the local authorities might plead the absence of notification from the central government as a pretext for hampering him in the exercise of his functions. He therefore agreed with Sir Humphrey Waldock and Mr. Amado that the addition would considerably reduce the flexibility of the article.

20. Mr. AGO observed that the additional paragraph might well have effects very different from those intended by its proponents, whose object was merely to avoid administrative delays. A consular official who was not the head of post might not have an exequatur or commission, in which event the additional clause might prevent him from exercising his functions even provisionally, for it said that the "consul may . . . present his . . . commission and his exequatur . . .". Furthermore, the local authorities were bound by the directives of the central government; if the government failed to inform them, and a consul presented his exequatur or commission, the local authorities would be placed in an awkward position.

21. Mr. MATINE-DAFTARY pointed out that article 15 was not the only provision of the draft in which the obligations of the receiving State were involved. In all other cases, it was assumed that the States concerned would fulfil their obligations, and there seemed to be no reason to make an exception of that article. In practice, when a consul arrived at his post, he informed the local authorities that he had an exequatur or consular commission. If the authorities had not received notification from their government, they would certainly request instructions, but it was doubtful whether they could act solely on the basis of the exequatur. It would be wiser not to complicate matters by going into detail and not to provide for the contingency of the receiving State's failing to fulfil obligations.

22. Mr. GROS remarked that the debate had shown the logical need to retain article 15. While it was true that the receiving State's obligation to ensure that the necessary measures were taken to enable the consul to carry out his functions existed from the moment of the grant of the exequatur, that obligation should be repeated in such a complete set of rules as the Commission was drafting. Perhaps the difficulty could be eliminated by changing the wording of the second sentence: the expression "to enable the consul to carry out the duties of his office" implied that the consul would be prevented from exercising all his functions by a delay in the notification

to the local authorities, whereas in actual fact only part of those functions would be affected.

23. Sir Humphrey WALDOCK reiterated his view that the adverse effect of the additional paragraph proposed by the Special Rapporteur would be largely removed if it were expanded to include the first sentence of paragraph (2) of the commentary to article 15.

24. Mr. BARTOŠ said that the difficulty lay in the fact that there were two different systems of notification. Under the first, the central government notified the local authority of the appointment of a consul, and under the second the consul himself presented his consular commission or exequatur to the local authorities. At the Special Rapporteur's proposal,¹ the Commission had chosen to base article 15 on the former system. It was all the more important, therefore, to add the provisions of paragraph (2) of the commentary. In any case, whether or not the Commission decided to add that clause, it was essential to retain article 15 in order to lay down the obligation of the receiving State. The fundamental provision of the article was set forth in the first sentence, and the second sentence and the possible addition were consequential upon the basic rule that the receiving State which granted the exequatur should notify the competent authorities that the consul was authorized to assume his functions.

25. The CHAIRMAN, speaking as a member of the Commission, said that the proposal to include paragraph (2) of the commentary in the article, with or without the first sentence of that paragraph, proceeded from the assumption that the obligation set forth in article 15 would not be fulfilled by the receiving State. He strongly doubted the need of such an assumption. To state that the non-fulfilment of the obligation in question would not prevent the consul from exercising his functions implied the possibility of non-fulfilment, and even hinted at the intentional non-fulfilment of the obligation in order to prevent the exercise of consular functions. Moreover, the deviation from the accepted structure of the draft that such an addition would entail was unjustifiable. He would therefore prefer the article to be left unchanged.

26. Mr. GROS said that if article 15 were redrafted, it would be necessary to supplement article 13 by a sentence specifying that, from the moment when the exequatur was granted, the consul entered upon his duties. In that manner, the consul's position would be safeguarded; whether the local authorities had been notified by the government of the receiving State or not, he would be able to carry out his duties.

27. If the article were to be retained, on the other hand, a paragraph along the lines of commentary (2) should be included, but the new paragraph should contain both sentences of that commentary and not only the second one.

¹ For the text originally proposed by the Special Rapporteur, see his first report (A/CN.4/108), where the corresponding provision appears as article 10.

28. The CHAIRMAN explained that no proposal had been made to delete article 15. The only proposal made had been that of the Yugoslav Government to add to the article a second paragraph along the lines of commentary (2).

29. Mr. VERDROSS pointed out that, in accordance with the Commission's practice, the commentary was deemed to constitute an integral part of the draft. Those members who objected to the contents of the proposed new paragraph should logically also be opposed to commentary (2).

30. He took the view that it was necessary to specify what would happen if the government of the receiving State failed to notify the competent authorities that the consul had been authorized to enter upon his duties. It would therefore be logical to insert the text of commentary (2) in the article itself.

31. Mr. AGO said that he could not accept the argument of Mr. Gros. The first sentence of article 13 made it clear that the head of a consular post was entitled to enter upon his duties upon obtaining the exequatur. Obviously, that right was not dependent upon the notification to the authorities of the consular district specified in article 15. It was quite normal to explain that fact in a commentary and there was no need to include a provision on the subject in the article itself.

32. Article 15 should therefore be retained as it stood, subject only to the redrafting of the second sentence as suggested by Mr. Gros.

33. Mr. PADILLA NERVO said that the problem which needed attention was not that of the possible failure on the part of the receiving State to carry out its obligations under article 15, but rather that of determining a consul's position during the time which might elapse between the grant of the exequatur and the receipt by the authorities of the consular district of a notification from the central government. Undoubtedly, the consul was entitled to carry out his duties during that intervening period. Many of those duties were of concern only to his own nationals and were intended to produce effects in the sending State only; there was therefore no reason why the consul should not be allowed to carry them out. Where the consul needed to deal with a local authority, he could of course exhibit the exequatur to attest his status. It could happen, however, that the local authority might not consider him as consul until it had been advised by the central government. In practice, it had occurred that, subsequently to the grant of the exequatur but prior to the notification to the local authorities, the boundaries of the consular district had been altered. The local authority might therefore be justified in awaiting the notification in order to grant full recognition to the consul in his consular district.

34. If it were felt necessary to clarify the matter by inserting an appropriate sentence in the article, the sentence should be drafted more or less along the following lines: "Pending such notification to the local authorities, the consul may (or 'shall be entitled to') carry out his duties."

35. Such an additional sentence did not seem to be

regarded because it would merely repeat the provision contained in the first sentence of article 13.

36. Mr. AMADO pointed out that article 15 was addressed to States, not to consuls. Its purpose was to set forth the duties of the receiving State, first to notify the competent authorities of the consular district that the consul had been authorized to enter upon his duties, and secondly to ensure that the necessary measures were taken to enable him to carry out those duties. When that article became part of a multilateral convention, each contracting party would undertake to carry out the duties in question in its capacity as a receiving State. It was unthinkable that a contracting party would fail to carry out those duties.

37. He agreed with Mr. Ago that it was not advisable to expand the provisions of the article by inserting a new paragraph along the lines of commentary (2). In that connexion, he could not agree with the approach of Mr. Verdross to the commentaries; those commentaries were not on the same footing as the articles themselves.

38. Mr. VERDROSS pointed out that some members had opposed the substance of the idea contained in commentary (2). Even if the commentary was not recognized as an integral part of the text, it could not be denied that it provided an accurate interpretation of it. Those members should therefore be opposed to the commentary.

39. Mr. YASSEEN supported the view put forward by the previous speaker. The commentaries adopted by the Commission were deemed to constitute, for the members of the Commission, the true interpretation of the articles to which they were appended.

40. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of a commentary by the Commission did not mean that the members were ready to include its contents in the text of the articles. The commentaries constituted an interpretation, while the articles set forth the rules of law. Besides, because of the pressure of time, the commentaries could not receive the same thorough consideration as the text of the articles themselves. Hence, certain members who otherwise approved of a commentary would not be acting inconsistently in doubting the advisability of incorporating its contents into the text of an article of the draft.

41. Mr. ŽOUREK, Special Rapporteur, said that, in proposing the insertion as a second paragraph for article 15 of a passage from the commentary, his only concern had been the preparation of a text for the Commission's consideration. Since, however, the majority of the Commission did not appear to favour the proposed additional paragraph and Mr. Bartos himself had not pressed for its inclusion, he would withdraw the proposal.

42. He proposed that article 15 as it stood, together with the drafting suggestions made, should be referred to the Drafting Committee.

43. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to

adopt article 15 and to refer to the Drafting Committee the various drafting points which had been raised.

It was so agreed.

ARTICLE 16 (Acting head of post)

44. Mr. ŽOUREK, Special Rapporteur, said that the comments on article 16 dealt with three questions. First, who could be appointed acting head of post? Second, should the receiving State have the right to refuse to accept a particular person as acting head of post? Third, what was the legal status of the acting head of post?

45. On the first question, it had been maintained by Indonesia (A/CN.4/137, *ad* article 16) that only consular officials, and not all members of the consular staff, should be eligible for appointment as acting head of post. As explained in his third report (*ibid.*), he did not concur with that suggestion and thought that the possibility should be left open of selecting the acting head from among the employees of the consulate as provided for in article 9 of the Havana Convention of 1928² regarding consular agents. There was a considerable difference between a diplomatic mission and a consulate: consular functions were less important than diplomatic functions and could therefore be performed by an employee in case of necessity; in addition, many of them were connected with day-to-day business, such as the legalization of documents, which it was both inconvenient and unnecessary to delay. Lastly, the staff of a consulate was often small; not uncommonly, it consisted only of one consul and one employee.

46. Also on the first question, it had been proposed by the Netherlands Government that the words "shall be temporarily assumed" should be amended to read "may be temporarily assumed". The reason for that proposal was that the sending State might prefer to close the consulate temporarily because of the lack of personnel.

47. On the second question, Finland (A/CN.4/136) has suggested that the receiving State should be given the right to refuse to accept as acting head of post a person considered unacceptable and the Yugoslav Government (*ibid.*) thought that the Commission should consider whether, and in what cases, provisional recognition would be required even for the acting head of post, especially in cases where the acting head of a consular post was called upon to serve in that capacity for a long period. As he had said in his third report, he could not agree with those suggestions; it would defeat the whole purpose of the article to stipulate recognition for an acting head of post. If the acting head were to be placed in the same position as the titular head of a consular post and be unable to discharge his duties in the absence of recognition, there would be little purpose in appointing him as an acting head. It was for that reason that none of the bilateral consular conventions which had come to his knowledge specified the need for

² *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 423.

recognition in the case of an acting head of post. Of course, the receiving State had, in respect of the acting head of post, the same rights as in respect of any consular officer. If his conduct constituted serious grounds for complaint, that State could avail itself of its rights under the various articles of the draft.

48. On the third question, the Belgian Government (A/CN.4/136/Add.6), in addition to suggesting some drafting changes in paragraph 1, had pointed out that, under Belgian law, the acting head of post was not entitled to the tax privileges mentioned in articles 45, 46 and 47 if he did not himself fulfil the conditions laid down in those articles. The Belgian Government had therefore expressed reservations regarding paragraph 2. It was possible that there were other countries in the same position as Belgium, but his view was that article 16, paragraph 2, should nevertheless be retained because it would serve to unify the practice of States in the matter. The acting head of post had all the duties of a titular head of post, including the social duties connected with his office, and it would be unjust to deny him the corresponding privileges.

49. To sum up, except for some drafting changes, article 16 should be retained as it stood. The Drafting Committee could take into account the language used in article 19 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) in addition to the drafting amendments proposed by the Belgian and Netherlands Governments.

50. Mr. VERDROSS said that the system proposed in paragraph (3) of the commentary, whereby a consular official or one of the employees of the consulate could be designated acting head of post, was acceptable.

51. The second problem raised by article 16 — whether the receiving State's consent was necessary to the designation of an employee as acting head of post — was more difficult. Unlike the Special Rapporteur, he considered that article 19, paragraph 2, of the Vienna Convention should be followed because it was essential that the person acting as head of post should enjoy the confidence of the receiving State.

52. The third problem — whether an acting head of post was entitled to privileges and immunities — should be dealt with when the Commission came to discuss chapter II of the draft articles.

53. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 19, paragraph 2, in the Vienna Convention had drawn a distinction between a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission designated to take charge of the current administrative affairs of the mission: in the latter case the receiving State's consent was required. Hence there was an essential difference between that article and article 16 of the present draft.

54. It would be wrong, in the case of the acting head of a consular post, to prescribe a more stringent rule than that laid down for the acting head of a diplomatic mission in article 19, paragraph 1, of the Vienna Convention, under which the consent of the receiving State

was not required. Of course, inasmuch as the receiving State could declare any member of a diplomatic mission or of a consulate *non grata*, its consent might be said to be an implied condition.

55. Mr. YASSEEN said that article 16 was an important one since it was imperative to ensure that there were no interruptions in the exercise of consular functions. Therefore, on practical grounds, it was preferable not to impose excessively strict conditions. Most consulates had a small staff and the sending State should not be too restricted in its choice for an acting head of post. In case of need he could be chosen from among the employees of the consulate, though not from among the service staff. The functions of employees acting as heads of post should be strictly limited to the conduct of the consulate's administrative affairs as they could certainly not perform consular functions in the proper sense of the term. The distinction in article 19 of the Vienna Convention should be maintained in the present article as between consular officials and consular employees.

56. Mr. VERDROSS considered that article 19 of the Vienna Convention provided a perfect analogy. He agreed with the Chairman that the consent of the receiving State was not necessary for the designation of a consular official as acting head of post, but it did seem necessary in the case of the designation of an employee of the consulate because the *exequatur* of the head of post covered only consular officials and not employees.

57. Mr. AGO said that he was in general agreement with the Special Rapporteur that the conditions laid down in the article should not be too stringent; the system proposed was on the whole acceptable. His only doubts had arisen as a result of the discussion (590th meeting, paras. 60-80) in connexion with article 13 on the question whether the express "recognition" of the receiving State was needed for consular officials other than heads of post. If the Commission decided that recognition had to be given to heads of post only, then article 16 as it stood would be a logical consequence of such a decision. The consent of the receiving State for other categories of consular officials would then result from the mere fact of having raised no objection.

58. However, it was the practice in a number of countries, and the practice was reflected in numerous consular conventions, to require separate *exequaturs* for officials who were not heads of post. He would like to know whether such countries would accept a provision allowing a consular official to act as head of post, even provisionally, without the explicit consent of the receiving State. That issue was likely to come up in connexion with other articles and must be considered.

59. As far as paragraph 1 of article 16 was concerned, it would be desirable to follow paragraph 1 in article 19 of the Vienna Convention as faithfully as possible, indicating who was responsible for making the notification.

60. In the presumably rare cases where an employee of the consulate was to be designated acting head, it might be wiser to be a little more strict and follow the

Vienna Convention in stipulating that in those instances the consent of the receiving State had to be obtained.

61. Mr. ŽOUREK, Special Rapporteur, said that the Chairman had clearly expounded the difference between the case envisaged in article 19, paragraph 2, of the Vienna Convention and that dealt with in article 16 of the draft. In view of the different nature of diplomatic and consular activities, it did not seem that the distinction drawn between a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission designated to take charge of its current administrative affairs was relevant to article 16. The division of work as between heads of post and consular staff had never been as rigid as that applied in a diplomatic mission. Moreover, for practical reasons it was undesirable to adopt in the draft the rule laid down in article 19, paragraph 2 of the Vienna Convention, because of the interruption that might result in the functioning of the consulate while the consent of the receiving State was being obtained. A further delay might occur if the consent were not granted and another person had to be brought in from the sending State or from elsewhere to act as head of post. After all, it was also in the interests of the receiving State that no such interruption should occur.

62. For those reasons and in line with a number of consular conventions, including the Havana Convention of 1928, it should be open to the sending State to select acting heads of post from among employees as well as from consular officials. Of course, the Drafting Committee could be asked to devise suitable wording which would make it clear that a member of the service staff could not be designated acting head of post.

63. Mr. SANDSTRÖM associated himself with the Special Rapporteur's views.

64. He asked whether the reference to "competent authorities" in the plural in paragraph 1 of article 16 was appropriate.

65. Mr. BARTOŠ expressed strong disagreement with the Special Rapporteur. In the classical theory of consular relations there were two institutions corresponding to a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission in charge of its current administrative affairs. They were the acting head of post and the person known as pro-consul. The first was given recognition by the receiving State either in the form of an exequatur or by virtue of appearing on the consular list. The second was not empowered to perform certain important functions and did not enjoy consular privileges, not being of consular rank. Under the internal law of a number of countries certain notarial and other functions could only be performed by officials of consular rank. An acting head of post could be a subordinate official of the consulate or an official sent from another consulate or a member of a diplomatic mission. A pro-consul was a member of the administrative or technical staff of a consulate and could not be chosen from among the service staff. The distinction between those two categories had been made in a number of bilateral conventions concluded by Yugoslavia with other States.

66. He urged the Commission and the Special Rapporteur, who had made no mention of the institution of pro-consuls in his draft, to give the matter careful consideration, particularly in view of the new provision that had been added in article 19 of the Vienna Convention in its paragraph 2. Though in the course of his researches he had found frequent mention of the institution of pro-consuls, he had not come across any general rule of international law governing their status.

67. Presumably the requirement contained in article 19, paragraph 2 of the Vienna Convention had been inserted on the grounds that the consent of the receiving State had to be obtained before the persons there mentioned could exercise functions different from those they normally performed. The Special Rapporteur, in defence of his thesis, had argued that to require the consent of the receiving State to the designation of an acting head of post might involve delay and frustrate the performance of consular functions. Surely, however, the answer was that an official from the sending State's diplomatic mission could be assigned to the consular post.

68. The Special Rapporteur had always sought jealously to protect the interests of the sending State, sometimes overlooking those of the receiving State. Article 16 would have to be drafted with great care in view of the danger of acting heads of post remaining in that capacity on a more or less permanent basis. Legal advisers with wide practical experience had informed him that acting heads of post chosen from the administrative and technical staff of consulates had on a number of occasions made exaggerated claims for consular privileges and caused other difficulties to a far greater extent than acting heads chosen from consular officials. In common law countries that could not happen, since persons not holding an exequatur could not perform consular functions.

The meeting rose at 1 p.m.

592nd MEETING

Thursday, 18 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]

(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 16 (Acting head of post) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 16 of the draft on consular intercourse and immunities (A/4425).

2. Sir Humphrey WALDOCK, referring to a question raised by Mr. Ago about the practice of States which normally required an exequatur to be obtained for subordinate staff (591st meeting, para. 58), said that, in general, the conventions concluded by those States treated the death of a consul or his absence for some other reason as a special situation calling for a special solution. On the whole, the conventions were very liberal in allowing another officer to act temporarily. He cited the terms of article 7 of the Consular Convention between the United Kingdom and Italy,¹ which recognized, on condition that the government of the receiving State were notified, the general right to assign temporarily another consular official or even an employee for the discharge of consular duties.

3. As to privileges, that convention was less generous than a number of others which he had examined and which extended to employees acting as heads of post the same privileges as those enjoyed by the person they were replacing.

4. The most recent of the Conventions he had consulted was that between Austria and the United Kingdom of 24 June 1960,² which was a little less liberal. Article 6 of that convention read:

"1. If a consular officer dies, is absent or is otherwise prevented from fulfilling his duties, the sending State shall be entitled to appoint a temporary successor and the person so appointed shall be recognized in this capacity upon notification to the appropriate authority of the receiving State. Any such person shall during the period of his appointment be accorded the same treatment as would be accorded to the consular officer in whose place he is acting or as he would himself receive if the appointment were a permanent one, whichever is the more favourable.

"2. The receiving State shall not, however, be obliged by virtue of paragraph 1 of this article:

"(a) To regard as authorized to perform consular functions in the territory any person whom it does not already recognize in a diplomatic or consular capacity; or

"(b) To extend to any person temporarily acting as a consular officer any right, privilege, exemption or immunity the exercise or enjoyment of which is under this Convention subject to compliance with a specified condition unless he himself complies with that condition."

5. Under that Convention, the receiving State was not obliged to recognize an employee temporarily appointed to carry out the duties of the consulate as qualified to perform consular functions.

6. Mr. VERDROSS proposed that a new subparagraph in the following terms should be added in article 16, paragraph 1:

"In cases where no consular or diplomatic official is present, an administrative and technical employee of the consulate may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the consulate."

7. The purpose of the additional clause was to remove the contradiction between the statement in paragraph (7) of the commentary to article 13 that the exequatur granted to the head of post covered consular staff only and the statement in paragraph (3) of the commentary to article 16 according to which, if no consular official was available, a consular employee could be chosen as acting head of post. In his opinion, an employee could only be put in charge of the current administrative affairs of the consulate and could certainly not perform all consular functions.

8. Mr. ERIM said that article 16, paragraph 1 would be acceptable if redrafted in such a way as to stipulate that an acting head of post must be chosen from amongst the consular officials of the post concerned or of another post or from the staff of the diplomatic mission.

9. The amendment proposed by Mr. Verdross would be too restrictive and would not allow for the appointment of a consular official from another post or of a diplomatic official.

10. Mr. PADILLA NERVO said that the effect of Mr. Verdross's amendment would be retrograde. A number of bilateral consular conventions required the sending State to notify the receiving State in advance of the names of all members of the consular staff, whether officials or employees. They also allowed for the direction of the consulate to be temporarily assumed by a consular employee in the event of the death, absence or inability to act of the head of post. The receiving State's recognition of such acting heads of post was provisional.

11. As an illustration of current practice which did not bear out the thesis propounded by Mr. Verdross he cited article 7 of the Consular Convention of 1954 between the United Kingdom and Mexico.³ A similar provision was contained in article 1, paragraph 4 of the Consular Convention of 1942 between the United States and Mexico.⁴

12. Another objection to Mr. Verdross's amendment was that, by contrast with the case of a diplomatic mission, it would be difficult in the case of a consulate to draw the dividing line between strictly consular functions and current administrative affairs.

13. The Commission should not impose detailed restrictions regarding the category of persons from amongst whom the acting head must be chosen, for

¹ The terms of article 7 of that convention are identical with those of article 7 of the Consular Convention between the United Kingdom and Sweden, for which see *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 470. The Anglo-Swedish Convention is also reprinted in *United Nations Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 158 *et seq.*

² *Cmd.* 1300.

³ *United Nations Treaty Series*, vol. 331 (1959), No. 4750, pp. 22 *et seq.*

⁴ *United Nations Treaty Series*, vol. 125 (1952), No. 431, pp. 302 *et seq.*

such a regulation might constitute undue interference in the sending State's sovereign power to determine how the consulate's work should be carried on when for one reason or another the head of post could not exercise his functions. The Commission should be guided by the latitude allowed under existing conventions.

14. For all those reasons he could not accept Mr. Verdross's amendment.

15. Mr. ŽOUREK, Special Rapporteur, replying to a question asked by Mr. Sandström concerning the "competent authorities" mentioned in article 16, paragraph 1 (591st meeting, para. 64), said that it would not be possible to be more specific because practice varied widely. The question to whom the notification had to be addressed was answered by the internal law. For instance, in a federal State the notification might have to be sent to the authorities of the constituent state in which the consular district was established. If the consular district was confined to the area of a port, it might have to be addressed to the city authority.

16. With regard to the interesting question whether a distinction should be drawn between the direction of the consulate and the conduct of its current administrative affairs, particularly in cases where a consular official was not available for appointment as acting head of post, he maintained his view that it was undesirable to be too stringent since the situation was purely temporary. The examples of current practice mentioned by Mr. Padilla Nervo supported such an approach and showed that States allowed considerable latitude in the choice of persons to act as heads of post. The distinction should not therefore be made in the draft, especially since he could not recall a single instance of that being done in recent conventions. Nor had he met it in doctrine.

17. Mr. AMADO said that the examples cited by Sir Humphrey Waldock and Mr. Padilla Nervo were very illuminating and indicated that the sending State could appoint consular employees to assume the temporary direction of a consulate.

18. He might be guilty of heresy, but he felt bold enough to ask whether there was any point in introducing into the present draft the institution of "acting head of post", which so far as he knew did not exist in the theory of consular relations. He recognized of course that provision should be made for the temporary exercise of consular functions when they could not be performed by the head of post himself.

19. The CHAIRMAN, speaking as a member of the Commission, said that as practice varied considerably the Commission would have to make a choice between a more restrictive and a less restrictive system. After hearing the arguments on either side he was inclined to favour a liberal approach and saw no advantage in adhering too closely to article 19 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

20. There seemed to be no need to create a new institution on the lines of that provided for in article 19, paragraph 2 of the Convention. Moreover, as Mr. Padilla Nervo had rightly pointed out, it would not be

easy to differentiate between consular business proper and the current administrative affairs of the consulate. Of course, in a diplomatic mission a *chargé d'affaires ad interim* could discharge any functions normally performed by an ambassador, such as the conduct of important political negotiations, but since a consul was not concerned with such political matters there would be no danger in allowing the acting head of a consular post to be chosen from a wider category of persons.

21. Paragraph 1 of article 16 might be accepted on the understanding that the wording were modified so as to meet the concern expressed by Mr. Erim, who feared that the present text was open to misconstruction as allowing service staff to assume the temporary direction of a consulate. It should also be made clear that an official from another consulate or from a diplomatic mission or a person sent specially from the sending State could be designated acting head of post. Presumably, in the case of a person specially sent out the usual formalities would have to be complied with, but in that of the others nothing more than notification to the receiving State would be necessary. If the Commission could agree that the Drafting Committee should revise the text on those lines, he would also suggest that the wording of the first sentence in article 19, paragraph 1 of the Vienna Convention should be followed as far as possible, for it made specific reference to the provisional character of such an arrangement, for the duration of which the acting head would be able to exercise all the functions of the regular head of post and could benefit from the same rights.

22. Mr. AGO said that the examples of present practice mentioned by Sir Humphrey Waldock seemed to indicate that the consent of the receiving State was not usually required for the appointment of an acting head of post.

23. As to whether a distinction should be made between the appointment of a consular or diplomatic official and that of a member of the administrative or technical staff of a consulate to act as head of post, at first sight Mr. Verdross's amendment seemed a reasonable one, but Mr. Padilla Nervo had convincingly pointed out its flaws. For instance, were the issue of passports, the guardianship of minors, the drawing-up of wills, or investigations on board ship to be regarded as current administrative affairs of a consulate or not? Clearly, it would be extremely difficult to make such a distinction and perhaps the Commission should not attempt to do so.

24. He was inclined to agree with the Chairman's suggestion that the provision should emphasise the provisional nature of the institution of acting head of post. In addition, it was desirable to state that members of the administrative and technical staff of a consulate could also be appointed acting heads of post in exceptional circumstances. It should also be specified who was responsible for notifying the receiving State of the appointment of an acting head of post.

25. If the provisional character of the institution were clearly stressed, the interests of the receiving State should not be endangered, since in cases where an acting

head remained too long in that position it would still be open to that State to indicate that the person concerned was no longer acceptable in that capacity.

26. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Amado that the title "acting head of post" occurred in a number of consular conventions and was no innovation. Article 16 dealt with a situation that did occur in practice.

27. Mr. AMADO said that he remained to be convinced that there was a real need to introduce such a title in the draft.

28. Mr. VERDROSS said that he would not press his amendment in the face of strong opposition, but was bound to point out that temporary appointments sometimes lasted far too long. The Commission had decided that an *exequatur* was unnecessary for the consular officials of a consulate and it would be wholly at variance with that decision to allow a consular employee, even in a temporary capacity, to exercise consular functions and, for example, to intervene on behalf of nationals of the sending State in the courts of the receiving State.

29. Mr. BARTOŠ said he was quite unable to subscribe to the general view which seemed to be emerging from the discussion. Mindful of his duty as a member of the Commission to the public and to legal experts conversant with the actual state of affairs in the modern world, he felt bound to state what was present practice.

30. Some States provided in the consular commission itself for a consular official to take charge of a post should the head of post, for one reason or another, be unable to discharge his functions. An *exequatur* was obtained for the official in question. Other States appointed an acting head of post in a specific instance to conduct the affairs of a consulate prior to the titular head entering into his functions.

31. In the United States of America a consul whose commission had been communicated to the appropriate authority but who had not yet received his *exequatur* was termed an "acting" consul. Indeed, there had been a case of a consul in New York who had waited for his *exequatur* for six years, and during that whole period had been deemed to be an acting consul. The term "acting" in United States usage would seem to be more or less equivalent to the *gérant* in European legal parlance. Both designations were to be found in consular lists.

32. There was also the practice, which the Commission had already discussed, of appointing provisionally a consular official to act in place of the head of post during his absence.

33. Finally, there was the practice which he had described (591st meeting, para. 65) (though he would not insist on the term "pro-consul") of appointing members of the administrative or technical staff who were not consular officials to be acting head of post.

34. As a matter of the progressive development of law, he was willing to support the thesis that a distinction should not be made between consular officials and

employees when appointed to act in a temporary capacity as head of post, but emphasised that there was an important problem of precedence that would have to be resolved. He was emphatically opposed to the idea of extending all the rights and privileges of a head of post to acting heads of post not having consular rank, but that should certainly be done in the case of officials with consular rank authorized to act as head of post in order to safeguard the interests and prestige of the sending State.

35. As far as immunities were concerned, employees who were acting heads of post should benefit from them, since it was important that they be afforded protection for the discharge even of minor functions.

36. Clearly, it was for the sending State to decide in the wide sense what should be the scope of the powers of an acting head of post, and the receiving State could object only if the normal scope of consular functions as determined by general conventions, customary law or special agreements were exceeded.

37. The CHAIRMAN observed that the Commission was not dealing with the precedence of acting heads of post, since that problem was dealt with in article 17, paragraph 5. Furthermore, article 16 related only to the temporary conduct of the consulate's affairs by an acting head of post. The possibility of the exercise of other *ad interim* functions was a matter for agreement between the two States concerned.

38. Mr. SANDSTRÖM expressed agreement with the modification suggested by the Chairman and Mr. Ago. It would be wise, however, to prescribe notification by the government of the receiving State, along the lines of the first sentence of article 15.

39. He would ask the Special Rapporteur whether an acting head of post who was an employee of the consulate would enjoy exemption from taxation and customs duties. He would doubt the wisdom of any such arrangement.

40. Mr. ŽOUREK, Special Rapporteur, replied that acting heads of posts chosen from among the employees of the consulate would enjoy the same exemptions as other acting heads of posts. The Commission's task was to unify international practice in the matter; a head of post could not be denied certain privileges and immunities merely because his functions were being exercised temporarily.

41. Mr. AMADO said that, while some of his more serious doubts had been dispelled by Mr. Bartoš's statement, he still believed that the French title *gérant intérimaire* implied that some officials acting *ad interim* did not exercise their functions on a temporary basis.

42. Mr. YASSEEN observed that there were two possible ways of resolving the question. If the person to be designated acting head of post of a consulate was a member of the technical or administrative staff, then, either his functions should be confined to the despatch of current administrative business — however difficult it might be to distinguish such functions from the normal consular functions — or else the authorization of the receiving State should be obtained if the sending State

wished him to exercise normal consular functions. For the validity of the acts performed by consular officials presupposed their competence, and that competence depended not only on the sending State, but on the receiving State as well. The members of the administrative and technical staff were admitted to the receiving State for the purpose of performing strictly administrative and technical functions. Although it might be said that consular officials, other than heads of post, were at least tacitly authorized by the receiving State to perform *ad interim* the normal functions of a consulate, it could not be claimed that the members of the administrative and technical staff were similarly authorized.

43. Sir Humphrey WALDOCK said that certain doubts might be dispelled if the title of article 16 were more specific. The title "Temporary performance of the duties of head of post in the case of the vacancy of the position or temporary inability of the head of post to act", or some similar wording, would limit the article to temporary situations only.

44. With regard to the substance of the article, he agreed with the Chairman and Mr. Ago that it would be difficult to make a valid distinction between administrative and other consular functions. If administrative functions were restricted to work within the consulate itself, the question would become an internal matter for the sending State. If, on the other hand, administrative functions included certain consular functions proper, it would be essential to allow the acting head of post to perform all the essential day-to-day work of the consulate; that was, in effect, the whole object of the article.

45. From the point of view of drafting, the provision should not be made too imperative, particularly in its application to cases where an employee of the consulate might be called upon to act as head of post. It would therefore be better to follow the wording of a number of bilateral conventions, and to state that the direction of the consulate "may" be temporarily assumed by an acting head of post. Moreover, that wording would be more in conformity with the fact that the sending State alone was in a position to decide on the appointment.

46. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Yasseen that an employee of the consulate was a person who had already been admitted to the sending State, but that the exequatur was normally required only for the head of post. Moreover, article 21 clearly stated, that, subject to the provisions of articles 11, 22 and 23, the sending State could freely appoint the members of the consular staff. With regard to the capacity of the persons concerned to act, he had been told on a number of occasions by consular officials that administrative employees with many years in the consular service often had wider knowledge and experience of the work of the consulate than a career officer who had recently received his first posting to a consulate. Responsibility in the matter in any case lay with the sending State, which might, in certain cases, limit the functions of the acting head of post; the decision must, however, be left to that State.

47. Mr. ERIM said it had been suggested that the name of an acting head of post might be notified before the position fell vacant or before the head of post became unable to carry out his functions. In view of the urgent circumstances in which an acting head of post might be called upon to assume his position, it seemed advisable to insert a provision concerning such prior notification in paragraph 1.

48. The debate had shown a certain discrepancy between existing international practice in the matter and the solution dictated by logic. An exequatur in due form or on a temporary basis was required for a head of the consular post. That meant that the consent of the receiving State was sought for such an appointment, but not in the case of an acting head of post, although he would exercise the same functions. Logically, the receiving State should be given an opportunity to reject or accept the acting head of post; but the more liberal system was that consecrated by international practice, and it seemed advisable for the Commission to codify that system.

49. The CHAIRMAN observed that the prevailing opinion in the Commission seemed to be to treat the situation of acting heads of post as exceptional and temporary, and to accept the more liberal formulation. It would also be useful to amend the title of the article along the lines suggested by Sir Humphrey Waldock in order to stress the temporary nature of the situation. The Drafting Committee might be instructed to find suitable wording. It also seemed to be the consensus of the Commission that paragraph 2 should be adopted as it stood and paragraph 1 with a few modifications. It should be indicated that consular officials and employees of the consulate might be designated to act temporarily as heads of post, and the exceptional nature of the appointment of employees of the consulate should be stressed. With regard to notification, the Drafting Committee might be asked to take article 19, paragraph 1 of the Vienna Convention into account and to incorporate Mr. Erim's suggestion that, wherever possible, such notification should be given in advance.

50. He suggested that the Drafting Committee be instructed to recast the article along those lines.

It was so agreed.

ARTICLE 17 (Precedence)

51. Mr. ŽOUREK, Special Rapporteur, said that article 17 had been generally accepted by most governments. Only the United States Government (A/CN.4/136/Add.3) had stated that it would be agreeable either to inclusion of an article along those lines, or to its deletion, thereby leaving the precedence of consular officers to be determined in accordance with local custom. The Netherlands Government (A/CN.4/136/Add.4) had proposed that the word "consuls" should be replaced by "consular officials"; his view was that it would be more in conformity with the structure of the draft to replace the word "consuls" by "heads of post". Finally, the Belgian Government (A/CN.4/136/Add.6) had made a few observations relating to detail,

and had proposed that the end of paragraph 3 should be amended, in order to take into account the position of consuls who were not heads of post. That government had also considered that the rule laid down in paragraph 4 should be applicable even where there was a difference of class.

52. The two questions to be settled by the Commission were whether or not the article should be limited to heads of post and, in the event of an affirmative decision, how the position of consular officials who were not heads of post should be dealt with.

53. Mr. BARTOŠ said that he approved of the existing text of the article. The United States Government's observation had obviously been prompted by the different rules which governed precedence in different towns in that country; in some of them, foreign consuls-general held a meeting to choose the dean of the consular corps. The Commission's best course, however, would be to lay down a universal procedure based on seniority, even though it might be less democratic than the election of a dean.

54. Mr. AGO agreed with the Special Rapporteur that paragraphs 1, 2 and 3 should refer to the head of post, and proposed that paragraph 4 should be deleted. In paragraph 5, it might be wiser to refer to "acting heads of post" instead of "consular officials in charge of a consulate *ad interim*", in order to avoid reopening the debate on article 16.

55. Mr. FRANÇOIS suggested that, if Mr. Ago's suggestions were adopted, it might be useful to substitute for paragraph 4 a provision along the lines of article 17 of the Vienna Convention in order to ensure that the names of subordinate officials were known to the competent authorities of the receiving State.

56. Mr. YASSEEN observed that paragraph 4 might be useful especially with the addition of the Belgian Government's suggestion that the rule laid down in that paragraph should be applicable even where there was a difference of class.

57. Mr. ERIM remarked, in connexion with paragraph 5, that the employees of the consulate might act as temporary heads of post. In that case, if a wireless operator became acting head of post, he might take precedence over career consuls — and in Turkish practice, career consuls had diplomatic status — i.e., over diplomats. Several other countries were in the same situation. The Commission should consider that matter very carefully.

58. Mr. AGO said that what mattered was not the antecedents of the acting head of post, but the fact that he had been appointed to perform certain functions on a temporary basis. It would be stressed in article 16 that the cases concerned were exceptional, extraordinary and temporary; but once the person concerned had been appointed acting head of post, precedence would be linked to the functions he was performing.

59. He endorsed Mr. François's suggestion that a provision relating to precedence within the consulate should be added, but preferably in a separate article,

in order that a distinction should be made between external and internal precedence.

60. The CHAIRMAN, speaking as a member of the Commission, said that he, too, had at first been inclined to favour the deletion of paragraph 4, but he had since felt some doubts on that point. For practical reasons, it was perhaps advisable to maintain the provisions of that paragraph in order to cover a situation which arose in the case of consulates, but not in that of diplomatic missions. Where the head of post was a vice-consul, he would have precedence not only over other vice-consuls, but also over a consul who was a subordinate officer in the consulate-general of another country in the same city.

61. Sir Humphrey WALDOCK, while agreeing with Mr. Yasseen that paragraph 4 contained a useful provision, proposed, however, that it should be placed after paragraph 5 since, unlike the other four paragraphs, it did not deal with the precedence of heads of post *inter se*, but with the precedence of a head of post over other consular officials.

62. Mr. ŽOUREK, Special Rapporteur, said that he could accept the amendment proposed by Belgium which would make paragraph 4 read: "Heads of post, whatever their class, have precedence over consular officials not holding such rank." The question arose, however, whether that clarification did not go too far and whether on the contrary in consular law it would not be better to apply the rule that heads of post had precedence only over officials of the same class.

63. He also supported Mr. François's proposal for including a provision along the lines of article 17 of the Vienna Convention.

64. Mr. BARTOŠ said that there was a certain ambiguity in the language of article 17 of the draft because it had been influenced by two different systems: first, the system under which all consuls, and not only heads of post, required an exequatur and ranked according to the date of the grant of the exequatur, and, second, that under which only heads of post needed an exequatur.

65. He agreed with the proposal that the article should deal only with the precedence of heads of post, for that approach would eliminate the ambiguity to which he had referred. Also, he supported the proposal by Mr. François for including a separate provision dealing with the precedence of subordinate consuls, regardless of whether they required an exequatur or not.

66. Lastly, he would mention a separate question, which the Commission would be well advised to examine in due course. It was not uncommon for a member of a diplomatic mission to act as consul in his capacity as head of the consular section of that mission. His embassy would then sometimes ask that he should remain in the diplomatic list, while at the same time being recognized as a consular officer. That had been the case, for example, with the embassies of the United States of America and the United Kingdom at Belgrade. The question arose in such cases whether

the head of the consular section of an embassy ranked as a head of consular post and in what class.

67. The CHAIRMAN, summing up the position in regard to article 17, said that there appeared to be agreement on the following points:

(i) In paragraphs 1, 2 and 3, the references to consuls should be replaced by references to heads of post;

(ii) The Drafting Committee should take into account, in drafting paragraph 5, the changes adopted by the Commission in article 16;

(iii) The provision in paragraph 5 should precede that in paragraph 4;

(iv) The Belgian redraft of the former paragraph 4 (now para. 5 of the draft) should be adopted; and

(v) The Drafting Committee should prepare a new provision — to become either a new paragraph of the article or else a separate article — modelled on article 17 of the Vienna Convention, as proposed by Mr. François.

68. If there were no objection, he would take it that the Commission agreed to all the foregoing.

It was so agreed.

ARTICLE 18 (Occasional performance of diplomatic acts)

69. Mr. ŽOUREK, Special Rapporteur, said that, during the discussion of the Commission's report in the Sixth Committee of the General Assembly (659th meeting, para. 42), the delegation of Venezuela had pointed out that, under Venezuelan law, it was forbidden to combine diplomatic and consular functions.

70. In its comments, the Netherlands Government had proposed that the term "consul" be replaced by "head of post". The Norwegian Government (A/CN.4/136) had found article 18 wholly unnecessary and that view was shared by the United States Government. The Yugoslav Government (A/CN.4/136) had also considered that the article should be omitted, on the grounds that the occasional performance of diplomatic acts by a consul should be governed by the articles on diplomatic relations and not those on consular intercourse.

71. As indicated in commentary (1), the Commission had included article 18 in order to reflect an existing practice. He stressed that the article was concerned only with the occasional performance of diplomatic acts. Article 19 dealt with the case where a consul was entrusted with diplomatic functions on a continuing basis. He would propose the retention of article 18.

72. Mr. JIMÉNEZ de ARÉCHAGA expressed the view that article 18 did not express a rule of international law that was capable of codification. The occasional performance of diplomatic acts by a consul might or might not be permitted by the law of the sending State and might or might not be authorized by the law or practice of the receiving State. It was the *ad hoc* agreement between those two States which made such performance possible.

73. However, there did not appear to be any rule of general or customary international law, taking preced-

ence over internal law, to the effect that consuls were occasionally authorized to perform diplomatic acts. From the point of view of legal theory, it was therefore unsound to include in a convention which purported to codify existing international law a provision along the lines of article 18.

74. From the practical point of view, the provisions of article 18 were also open to objection. They would have the effect of creating a border zone between diplomatic and consular functions which could give rise to serious difficulties, especially when a policy of non-recognition or rupture of diplomatic relations had been adopted as a form of international sanction. For example, in the case of the State of Manchukuo, a Committee of the Assembly of the League of Nations⁵ had advised that the continuance or maintenance of consular relations (as distinct from the grant or request of an exequatur for new consuls) did not constitute a departure from a policy of non-recognition or interruption of diplomatic relations.

75. A provision such as that contained in article 18 could affect that well-established principle. There might be a strong temptation for a government to which a policy such as that referred to had been applied to induce foreign consular officers to perform diplomatic functions and then claim that there had been an act of implied recognition, or that diplomatic relations had been restored.

76. For those reasons, the provision should be omitted.

77. Mr. VERDROSS said that article 18, although it might not embody a universal practice, nevertheless reflected an existing trend. The provision was therefore acceptable as a matter of progressive development of international law.

78. However, as it stood, article 18 was not complete. It should expressly contemplate the case where the sending State neither had a diplomatic mission of its own in the receiving State nor was represented in that State by the diplomatic mission of a third State. He would like to know the opinion of the Special Rapporteur on that point.

79. Mr. AMADO observed that, notwithstanding the qualifying words "on an occasional basis", the provision contained in article 18 went beyond the existing practice. A consul was an official who performed certain specific functions within the limits of his consular district; he usually resided in a seaport. To his mind, it would be going too far to suggest that a consul could perform diplomatic acts, in other words could represent the sending State throughout the territory of the receiving State.

80. Mr. ERIM said that he shared the views of Mr. Verdross. It was a well-known practice for two

⁵ Advisory Committee set up by the Assembly of the League of Nations on 24 February 1933 in connexion with the non-recognition of Manchukuo (League of Nations, *Official Journal*, *Special Supplement No. 113*, p. 3); on this point, see also L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans Green & Co., 1955), vol. I, sections 75 d footnote 3) and 428.

States, particularly when renewing relations after a conflict, to begin by re-establishing consular relations. In those cases, the consular officers concerned would take the first steps in the direction of the re-establishment of diplomatic relations. Of course, such cases were few in number because, fortunately, countries did not often break off relations. Notwithstanding that fact, the practice in the matter was quite consistent; in any event, no instance of a contrary practice could be cited. Lastly, it should be remembered that the provision had been submitted to governments and had not met with any real opposition. Only a few governments had suggested the deletion of the article, not because they objected to its substance, but because they felt the provision was unnecessary.

81. As a matter of form, the Commission might consider whether articles 18 and 19 should not be combined.

82. The CHAIRMAN said that that question could be left to the Drafting Committee. His own view was that the two articles dealt with two different situations. Unlike the case mentioned in article 18, that covered by article 19 implied the granting of diplomatic status to the consul.

The meeting rose at 1 p.m.

593rd MEETING

Friday, 19 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 18 (Occasional performance of diplomatic acts)
(continued) and ARTICLE 19 (Grant of diplomatic status to consuls) *

1. The CHAIRMAN invited the Commission to continue its discussion of article 18 of the draft on consular intercourse and immunities (A/4425). In view of the close connexion between the provisions of articles 18 and 19, it would be convenient to consider both articles at the same time.

2. Mr. BARTOŠ, with regard to taking both articles together, recalled the Yugoslav Government's comment (A/CN.4/136) that the occasional performance of diplomatic acts by consuls should be dealt with in the

articles concerning diplomatic relations rather than in those concerning consular relations.

3. He would oppose the inclusion of both articles, but felt stronger objections to article 19. It was true that a consul might, occasionally, be asked to perform diplomatic acts with the concurrence of the receiving State, but it would be inaccurate to suggest that there was any State practice or rule of customary international law authorizing a consul to perform such occasional diplomatic acts.

4. As to article 19, which created a new class of diplomatic officer, he had not in his experience heard of any existing cases of a consul being entrusted with diplomatic functions and granted diplomatic status. Under the capitulations system consuls in certain countries had possessed diplomatic status, but as far as he knew that had never been the case in a fully sovereign State. In modern state practice, cases were of course known of a diplomatic representative being entrusted with consular functions, but the reverse did not occur.

5. For those reasons, he urged the Commission to reject both article 18 and article 19.

6. Mr. AGO pointed out, in connexion with article 18, that, if the receiving State consented, the sending State could ask any person to perform a diplomatic act on an occasional basis. The situation was not peculiar to a consul and there was therefore no real reason to specify the possibility of such occasional performance of diplomatic acts by non-diplomats in a consular convention.

7. The position was even more evident with regard to article 19. Whether a person was a consul or not, upon his being entrusted with diplomatic functions, he was appointed a diplomatic officer.

8. For that reason, he did not consider it advisable to include, at least in the form of separate articles, provisions of the type of article 18 and, in particular, article 19.

9. The CHAIRMAN, speaking as a member of the Commission, emphasized that both articles dealt with career consuls only. The Commission would consider, at a later stage, whether the articles, if adopted, applied to honorary consuls.

10. From the strictly legal point of view, it was perhaps true to say that article 18 added nothing to the draft. By mutual agreement, States could always provide for any specific acts being performed by a consul. The provisions of the article, however, were useful in practice because they indicated the possibility of a consulate performing occasional diplomatic functions. Such provisions would open the way to mutual agreement on the subject. In that connexion, there was the example of the USSR Consulate-General in the Union of South Africa, which, with the tacit consent of the Government of the Union, had often been called upon to perform diplomatic acts as no diplomatic mission of the Soviet Union at Pretoria had existed.

11. With regard to article 19, he did not agree with Mr. Ago that it would be simpler to meet the case

* For debate concerning more specifically article 19, see paras. 70 *et seq.* of this record.

contemplated by appointing the person concerned as a diplomatic representative. In practice, there could be delay in reaching an agreement on the exchange of diplomatic missions and, in the meantime, it was useful to entrust a consul-general with diplomatic functions.

12. However, he agreed with the Belgian comment (A/CN.4/136/Add.6) that the reference to the title of consul-general-*chargé d'affaires* should be omitted. A receiving State might not be prepared to agree to that particular title, and it was therefore better to leave the States concerned free on that point.

13. Mr. YASSEEN said that he would speak only on article 18. The powers contemplated in article 19 were so much wider in scope than those envisaged in article 18 that the two provisions could be regarded as different in nature.

14. Article 18 referred to the performance of diplomatic acts and it would have been preferable for the question to have been settled by the Vienna Convention on Diplomatic Relations (A/CONF.20/13). The emphasis should always be placed on the functions rather than on the person performing them. However, the question had not been settled at the Vienna Conference and that argument of form should not therefore prevent the Commission from dealing with it at the present stage.

15. He agreed with those members who considered that article 18 served a practical purpose. It stipulated that the consent of the receiving State was necessary and was therefore consistent with the general principles of international law applicable in the matter.

16. Mr. ŽOUREK, Special Rapporteur, said that he could accept the suggestion made by Mr. Verdross (592nd meeting, para. 78) that article 18 should specify that it covered the case where the sending State had neither a diplomatic mission of its own in the receiving State nor was represented therein by the diplomatic mission of a third State.

17. In his first report (A/CN.4/108) he had mentioned the State practice in the matter in connexion with the corresponding article 14 of his first draft. In particular, he had drawn attention to the reply of 11 January 1928 of the Government of the Commonwealth of Australia to the questionnaire of the Committee of Experts for the Progressive Development of International Law which showed that foreign consuls in Australia had often been instructed to perform diplomatic acts at that time.

18. The provisions of article 18 filled a practical need and contained the necessary safeguards for the receiving State. He therefore urged the Commission to retain the article in the draft.

19. With regard to article 19, it was universally admitted that diplomatic and consular functions could be performed by the same official. It was true that nearly always it was a diplomatic officer who was entrusted with consular functions, but there was no reason why the reverse should not be permitted. There were cases where two States maintained only consular relations between them and where, for financial or even political

reasons, the establishment of diplomatic relations was delayed.

20. Mr. MATINE-DAFTARY said that the contents of article 18 were not sufficiently important to justify their inclusion in a separate article. States were free, of course, to agree that the performance of diplomatic acts would be entrusted to a consul, but there seemed no reason for singling out that particular case for mention in a separate article.

21. In reality, both article 18 and article 19 dealt with the functions performed by a consul, and their contents should be included in article 4. Accordingly, he proposed that both articles be omitted and that the function referred to therein be mentioned in article 4 as being of an exceptional nature.

22. Mr. VERDROSS thanked Mr. Zourek for accepting his proposal concerning article 18.

23. He recalled that the Vienna Convention specified in its article 4, paragraph 1, that the sending State must make certain that the *agrément* of the receiving State had been given for the person it proposed to accredit as head of its diplomatic mission to that State. In addition, article 10, paragraph 1 (a) of the same Convention required the notification of the appointment of a diplomatic officer so as to enable the receiving State to reach an early decision on whether the person concerned was acceptable. If, therefore, a consul were to perform diplomatic functions, the consent of the receiving State to his acting in a diplomatic capacity would have to be obtained. For that reason, he could not understand why article 18 did not contain the phrase "with the consent of the receiving State" which appeared in article 19. He therefore proposed that those words should also be included in article 18.

24. Lastly, he agreed with those members who considered that articles 18 and 19 should be maintained, since they corresponded to an existing practice and therefore filled a genuine need.

25. Mr. AGO explained that it had not been his intention to suggest that in the case mentioned in article 19 it was simpler to appoint the person concerned as a diplomatic agent. He had merely meant to stress that, in the case under reference, the consul was transformed into a diplomatic agent. It was precisely for that reason that the Special Rapporteur had specified the title which a consul-general would bear in such a case. Article 19 should therefore be deleted.

26. Article 18 stated a self-evident fact and was therefore perhaps not harmful, but it was unnecessary. Besides, it could be interpreted — wrongly — as meaning that a person other than a consul could not be entrusted with the task of performing diplomatic acts on an occasional basis.

27. The proposal of Mr. Matine-Daftary that the provisions of articles 18 and 19 should be incorporated into article 4 had, *prima facie*, some logic. Articles 18 and 19 did in fact deal with functions to be performed by the consul. Unfortunately, a provision of that kind added to article 4 might convey the mistaken impression that the performance of diplomatic acts by a consul,

either on an occasional or on a continuing basis, was a normal instead of an exceptional occurrence.

28. Mr. ERIM mentioned the case of the Greek and Turkish consuls in Cyprus, who had conducted lengthy negotiations with the Governor of the island and with a British Minister of State. If the strict diplomatic procedure had been followed, the Greek and Turkish embassies in London should have negotiated with the British Foreign Office. The countries concerned had, however, found it useful to carry on the negotiations on the spot through the Greek and Turkish consuls. That example showed how varied were the possibilities envisaged in articles 18 and 19.

29. It was true that, even in the absence of provisions such as articles 18 and 19, the sending State and the receiving State could agree to authorize the consul to perform diplomatic acts, either on an occasional or on a continuing basis. There were, however, many provisions in the draft which referred specifically to the consent of the States concerned, and it had not been suggested that all those provisions should be omitted from the draft.

30. For those reasons, since articles 18 and 19 were not open to any serious objection, but offered the prospect of useful facilities, they should be retained. He agreed with Mr. Ago that the provisions of the two articles should not be transferred to article 4, for that might give the impression that the cases envisaged were normal rather than exceptional occurrences.

31. Mr. GROS said that the case where, at the instruction of his government, the consul should engage in trade negotiations with the receiving State was already amply covered by the provisions of article 4, paragraph 1 (e), which specified that the functions exercised by consuls included that of furthering trade and the development of commercial relations between the sending and the receiving State. Such an activity constituted a consular function, and there was no need to provide for the occasional performance of diplomatic acts in order to cover that point, the receiving State's consent being of course required for such, as for any other negotiations.

32. There was one important diplomatic function which a consul could not fulfil: that of representing the sending State in the receiving State. With the consent of the receiving State, however, any person, and not only a consul, could be entrusted with an occasional function of diplomatic representation. While, therefore, he would have no objection to a provision to the effect that a consul could be entrusted with diplomatic functions with the consent of the receiving State, he proposed that the provision should be modelled on the terms of article 3, paragraph 2, of the Vienna Convention, on the following lines: "Nothing in the present Convention shall be construed as preventing the performance, on an occasional basis, of diplomatic functions by a consul."

33. Such a formulation would indicate that, in exceptional cases, such a course was possible, but it would not encourage the mingling of diplomatic and consular functions.

34. As to article 19, it provided for the combination of diplomatic with consular status and therefore in its last part encroached upon the Vienna Convention on Diplomatic Relations.

35. Mr. SANDSTRÖM said that he agreed with Mr. Ago that, in the absence of diplomatic relations, any person could, by agreement between the two States concerned, be entrusted with the occasional performance of diplomatic functions.

36. As he had understood it, the purpose of having two separate provisions in the form of articles 18 and 19 had been to make it clear that the occasional performance of diplomatic acts did not involve the creation of the title of consul-general-*chargé d'affaires*. Since it seemed that the reference to that title would be deleted in article 19, there seemed to be no reason for two separate provisions such as articles 18 and 19.

37. A single provision along the lines suggested by Mr. Gros would satisfactorily cover both situations envisaged in articles 18 and 19.

38. Sir Humphrey WALDOCK said that, while he had no great enthusiasm for either article, his objection to article 19, was however, much stronger. Its provisions involved a genuine risk of confusion with the Vienna Convention.

39. Commentary (3) on article 19 specified that the consul-general-*chargé d'affaires* must, in addition to having the *exequatur*, at the same time be accredited by means of letters of credence. The Vienna Convention, however, specified the need for *agrément*. Was it intended that the *agrément* was necessary in the case envisaged in article 19?

40. Admittedly article 18 might have a certain usefulness and he would have no objection to the adoption of a provision such as that proposed by Mr. Gros, which could, however, be couched either in a negative or in a positive form.

41. Mr. AMADO agreed with the argument advanced by Mr. Jiménez de Aréchaga (592nd meeting, paras. 72-74) that article 18 was not justified since it was not in keeping with general practice. The article, in his opinion, was an innovation that struck a discordant note in the draft. He certainly was unable to subscribe to the somewhat inconvincing arguments of the Chairman and had found even the Special Rapporteur's defence of the article half-hearted.

42. If the article should be adopted, what immunities, if any, would be enjoyed by a consul during the performance of diplomatic acts?

43. Mr. ŽOUREK, Special Rapporteur, answering Mr. Amado's question, referred to paragraph (2) of the commentary, which also showed that there was good reason for distinguishing between the consul's occasional performance of diplomatic acts and the grant of diplomatic status to consuls. In the former case a consul would not enjoy diplomatic immunities, whereas in the latter he would. That point could be clarified by an additional sentence in article 18.

44. As to the doubts expressed about the utility of the article, Mr. Ago was quite right in pointing out that

a sending State could request any private person to perform some particular diplomatic act, but such a person would be sent in a purely unofficial capacity and the case was very different from that where a consul holding an official position and known to the government of the receiving State was instructed to perform some diplomatic act, which would commit the sending State.

45. In reply to Mr. Gros's criticism that preliminary negotiations concerning trade for example were in any case part of the consul's normal functions, he drew attention to the limitations imposed in article 37 on communication by the consul with the authorities of the receiving State. Many States did not allow consuls to communicate directly with the Ministry of Foreign Affairs, and consequently the exception provided for in article 18 was necessary.

46. Nor did he agree that article 19 might involve some contradiction with the provisions of the Vienna Convention, because if article 19 came into effect, the provisions of the Vienna Convention would apply fully and the *agrément* or the consent in some other form of the receiving State would have to be obtained if a head of consular post were to be entrusted with diplomatic functions.

47. Because many States did not have diplomatic missions in every country, article 19 filled a real practical need and, in answer to Mr. Amado's affirmation that it was uncalled for, he would point out that the Commission had the dual task not only of codifying, but also of promoting the progressive development of international law. In any event a conference of plenipotentiaries could always delete article 19 if in the view of the majority it was unnecessary.

48. Mr. PAL said that he had little personal knowledge of practice in respect to the matters under consideration, but would refer the Commission to article 8 in the Consular Convention between the United Kingdom and Sweden¹ which indicated that States recognized the exercise of dual functions. That article seemed to provide the answer to the question raised concerning privileges, and the provision being only in relation to a temporary situation, its appropriate place in the draft Convention was also indicated clearly by the above-mentioned Convention. Establishment of diplomatic relations, as of a diplomatic mission being both mere matters of agreement, there was nothing inherently wrong or objectionable in the provisions as drafted, with the safeguarding requirement of the receiving State's consent.

49. His view was that article 18 should be retained in its place.

50. Mr. JIMÉNEZ de ARÉCHAGA said that if the majority view was in favour of retaining article 18 he would not press his objection, but urged that the Drafting Committee give careful thought to the fact that the Havana Convention of 1928², on which the Special Rapporteur had claimed to have based the provision,

only dealt in article 12 with the case where the head of a diplomatic mission was absent; in other words the existence of diplomatic relations was presupposed. The Special Rapporteur's text, however, also covered the case where there were no diplomatic relations between the two States in question. In addition, the Special Rapporteur's text left it to the receiving State to specify which diplomatic functions could be performed by a consul on an occasional basis. In certain instances a receiving State might like a consul to perform a number of functions in the hope that that would lead to its recognition and to the establishment of diplomatic relations. In his opinion, the article should expressly state that a consul could perform only such occasional diplomatic acts as were authorized by the sending State.

51. Mr. PADILLA NERVO said that the Commission had always sought to take account of existing practice. The theory of the exercise of dual functions was no innovation and had been recognized in practice, for example, by the Foreign Office and the State Department. It was quite common for diplomatic officials to exercise consular functions. Examples of current practice were found in article 8 of the Consular Convention of 1954 between the United Kingdom and Mexico,³ and in article 1, paragraph 5 of the Consular Convention of 1942 between the United States of America and Mexico,⁴ which was even more explicit.

52. Clearly, the practice filled a genuine need and should therefore be reflected in the draft under consideration. The precise wording could be left to the Drafting Committee.

53. Mr. MATINE-DAFTARY said that he found the attitude of members who criticized an article but had no objection to its retention quite inexplicable. It was not the role of jurists to accommodate all points of view.

54. In reply to Mr. Ago's criticism of his proposal, he explained that he had not meant to state a general rule concerning the exercise of diplomatic functions by a consul, but to propose a provision in the form of an exception which, as such, should be placed immediately after the general rules concerning consular functions. He would also draw the attention of Mr. Gros to the fact that article 3, paragraph 2 of the Vienna Convention, which he proposed as a model in place of articles 18 and 19, was drafted in very much the same form as the amendment that he had in mind; paragraph 2 constituted an exception to the general rule enunciated in paragraph 1 of article 3. He was at a loss to understand Mr. Gros's objection to his proposal. If the Commission decided to take paragraph 2 as a model, express mention must be made of the fact that the consent of the receiving State was required for the exercise of diplomatic functions by a consul.

55. In view of the fact that a consul-general-*chargé d'affaires* automatically had diplomatic status, the last part of article 19 was surely unnecessary.

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58, v. 3), p. 470.

² *Ibid.*, p. 423.

³ United Nations Treaty Series, vol. 331 (1959), No. 4750, p. 30.

⁴ *Ibid.*, vol. 125 (1952), No. 431, p. 302.

56. Sir Humphrey WALDOCK observed that, although the provisions mentioned by Mr. Pal and Mr. Padilla Nervo in the Consular Conventions between the United Kingdom and Sweden and the United Kingdom and Mexico provided evidence that the exercise of dual functions was to be found in practice, they would do little to assist the Commission in its discussion, since the articles in question dealt with the reverse situation when diplomatic relations existed and diplomatic staff were assigned to perform consular functions.

57. His own view was that article 18 could be retained and that its position in the draft was a matter that could be left to the Drafting Committee. On the other hand, there seemed to be no useful purpose in including article 19.

58. Mr. BARTOŠ agreed with Mr. Ago and Mr. Gros that the performance of diplomatic functions on an occasional basis was not part of a consul's normal functions and hence had no place in article 4. Article 18 dealt with a special case and its proper place was at the end of the general section in the draft.

59. In his opinion, article 19 was concerned with *ad hoc* diplomacy, which had not been dealt with at the Vienna Conference. The trend since the First World War had not been towards adding diplomatic to consular functions, but the reverse. A formula based on the wording of article 3, paragraph 2 of the Vienna Convention would not be adequate and the provision would have to be stated in affirmative form.

60. It should be borne in mind that diplomatic acts performed by a consul on an occasional basis were usually of such a nature that he was little more than a channel for the transmission of instructions from the sending State, but some States did not even allow a consul to make direct contact with the Ministry of Foreign Affairs, whether he had the status of *chargé d'affaires* or not. Even persons performing *ad hoc* diplomatic functions were not able to communicate direct with the Ministry of Foreign Affairs unless that had been specifically agreed to by the receiving State.

61. He was prepared to tolerate the inclusion of article 18, but doubted very much whether it served any useful purpose. Even in the absence of such an article, a consul or any other individual designated by the sending State could perform occasional diplomatic acts if the receiving State so permitted.

62. The references to article 19 made during the debate had confirmed his conviction that the article as it stood should not be inserted in the draft convention. Formerly, States having no diplomatic mission in the receiving State had used their consuls-general as diplomatic agents; but the case of the Commonwealth of Australia, to which the Special Rapporteur had referred, was no longer relevant, since it related to the use of the Foreign Office of the United Kingdom as an intermediary at a time when the Commonwealth of Australia had not yet had full and independent capacity in foreign policy and international law. It was quite natural for the Australian Government to have changed

its opinion since the time of the League of Nations inquiry. After the Imperial Conference, when the Dominions had been recognized as possessing the full right of legation, Australia had modified its attitude and no longer regarded the consuls-general of other States resident in Australia as being authorized to perform diplomatic acts.

63. It had been argued that governments had not opposed article 19 in their comments; but had any governments expressed support for article 19 and, if so, for what reasons? The absence of objections could not be construed as an expression of support for any provision of the draft; such an assumption would be tantamount to ignoring the laws of numerical statistics. Governments' comments were certainly valuable, but in fact relatively few States had commented on the draft. Some had shown genuine interest in the draft; others had commented on it more cursorily, and yet others had sent in replies prepared by interested individuals; most governments, however, considered themselves overburdened with questionnaires from international bodies.

64. As to the substance of article 19, the real purpose of the sending State concerned was to establish diplomatic relations where there were none. A consul-general-*chargé d'affaires*, a title devised by the Special Rapporteur, was a diplomatic agent, and a person endowed with both diplomatic and consular capacity and with both diplomatic and consular competence in fact had diplomatic capacity and competence. If a State was prepared to establish a diplomatic mission, that mission should be headed by a standing *chargé d'affaires*, rather than by a person having semi-consular and semi-diplomatic status, enjoying diplomatic privileges and immunities. Accordingly, article 19 was unacceptable because it involved a kind of a degeneration of the diplomatic status.

65. With regard to the privileges and immunities of consuls who occasionally performed diplomatic acts under article 18, under modern international law privileges and immunities attached to the functions performed. Under the rules of *ad hoc* diplomacy, therefore, the consular officials concerned should enjoy diplomatic privileges and immunities for so long as they performed diplomatic functions.

66. Mr. AMADO pointed out that the countries which had concluded the bilateral conventions to which Mr. Padilla Nervo had referred had full consular and diplomatic relations with each other. Accordingly, the need for the occasional performance of diplomatic acts or for the grant of diplomatic status to consuls did not arise. The modern tendency in international law was to allow diplomatic agents to perform consular functions, but to regard cases where consuls performed diplomatic functions as abnormal and exceptional.

67. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Bartoš, said that it was unusual for governments to refer in their comments to articles with which they were in agreement. On the contrary, they confined their comments to articles to which they had objections. He had therefore assumed — in the case of

article 18, at any rate — that, since there had been few negative observations, the majority of governments wished the article to be included. The second reading of the draft must be based on the comments of governments, although they had no final value and although the plenipotentiary conference might reveal quite a different body of opinion. In the circumstances, however, since article 18 had been opposed by three governments only, he had been led to the logical conclusion that there were no serious objections on the part of others.

68. The CHAIRMAN, summing up the debate on article 18, said that a number of amendments had been suggested. Mr. Verdross had proposed (592nd meeting, para. 78) introducing the idea that the article would be applicable only in cases where the sending State was not represented in the receiving State either by a diplomatic mission of its own or by that of a third state. There had, however, been very little support for the amendment and the majority seemed to be in favour of the wording as it stood. Mr. Verdross had further proposed including the provision that a consul might perform diplomatic acts with the consent of the receiving State; while he (the Chairman) doubted the need for such a provision, the Drafting Committee might be instructed to decide on its inclusion. Mr. Matine-Daftary's proposal that the provision should be inserted in article 4 had not been supported and would not therefore be referred to the Drafting Committee. With regard to Mr. Padilla Nervo's suggestion that the article should be modelled on analogous provisions in bilateral conventions, since the problem related purely to the question of dual functions, it would be taken up in connexion with other articles of the draft. Finally, Mr. Bartos's suggestion concerning the privileges and immunities should be considered by the Drafting Committee.

69. He suggested that article 18 be referred to the Drafting Committee for revision in the light of the debate.

It was so agreed.

70. The CHAIRMAN invited debate more particularly on article 19 of the draft.

71. Mr. ŽOUREK, Special Rapporteur, drew attention to the proposal of the Netherlands Government (A/CN.4/136/Add.4) that the words "a consul" should be replaced by "the head of a consular post". He did not think that the Commission would object to that amendment. The Governments of Norway (A/CN.4/136) and Belgium (A/CN.4/136/Add.6) had both opposed the inclusion of the article. The Government of the United States (A/CN.4/136/Add.3) had observed that a consular officer performing functions of a diplomatic character owing to the non-existence of diplomatic relations between his government and the government of the receiving State remained a consular officer, was not entitled to enjoy diplomatic privileges and immunities and needed no special title. The latter observation proved the value of article 19: at least one government had taken the view that a consul entrusted with diplomatic functions was not entitled to diplomatic privileges and immunities. He had concluded, however,

that the other governments which had commented had no objections of principle to the article.

72. Some speakers earlier in the meeting, particularly Mr. Padilla Nervo and Mr. Pal, had expressed the view that cumulative functions were being increasingly admitted in modern international practice; strictly speaking, when a member of the diplomatic staff performed consular functions in the context of a diplomatic mission, he was not a consul, because he was exercising the normal functions of a diplomatic mission, there was all the more reason to recognize the dual function in cases where the sending State had no diplomatic mission in the receiving State. A head of consular post exercising diplomatic functions should therefore be endowed with diplomatic status, particularly since the national law of some States compelled the Commission to provide for such cases in its draft. Although the clause might not operate very often, it would prove useful in special cases; in a multilateral convention such as the Commission was drafting, provision should be made for such situations in order to avoid lengthy negotiations when practical cases arose.

73. Mr. YASSEEN expressed the view that article 19 was quite unnecessary, because the situation it contemplated was perfectly normal and was in keeping with the requirements of the Vienna Convention. The case was that of a State which had no diplomatic mission in another State and directed a person to perform diplomatic functions in that other State. That was in fact the manner of establishing a diplomatic mission. If the receiving State accepted such a *chargé d'affaires*, the fact that he was already a consul in no way changed the situation.

74. There was a contradiction in the wording of the article. In the opening phrase, reference was made to "a consul", but the title he was to assume was "consul-general-*chargé d'affaires*"; it was very questionable whether a consul could become a consul-general by virtue of performing diplomatic functions.

75. Although he was still in favour of retaining article 18, for practical reasons, that position did not commit him to acceptance of article 19.

76. Mr. AGO suggested that article 19 might refer to two distinct hypothetical cases. In the first, the consul remained a consul, although he carried out diplomatic acts on a less occasional basis than that contemplated by article 18; that hypothesis was already covered by article 18, which might, however, be slightly recast to meet that situation more completely. In the second hypothesis, however, a consul was invested with diplomatic status and became a diplomatic agent; in that case, the provision no longer fell within the scope of the draft on consular intercourse, but was covered by the Vienna Convention. He therefore proposed that the Drafting Committee be asked to reword article 18 to cover the special cases concerned and that article 19 should be deleted.

77. Mr. ERIM agreed that articles 18 and 19 should be merged and suggested that the Drafting Committee should not confine the provision to States where the sending State had no diplomatic mission. The main

point was that the government of the receiving State should permit the performance of the diplomatic acts concerned.

78. The CHAIRMAN, speaking as a member of the Commission, said that he knew of no cases where consuls had been elevated to diplomatic rank in the manner suggested in article 19. He endorsed Mr. Ago's proposal and suggested that the merger of the two articles might be effected simply by deleting the words "on an occasional basis" from article 18.

79. Speaking as Chairman, he suggested that the Drafting Committee be instructed to merge articles 18 and 19 in the light of the remarks made during the debate.

It was so agreed.

80. Mr. BARTOŠ stressed that his approval of the inclusion of article 18 depended on the way in which it would be drafted by the Drafting Committee.

The meeting rose at 1 p.m.

594th MEETING

Tuesday, 23 May 1961, at 3 p.m.

Chairman : Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Mr. Tsuruoka, whose very great experience of diplomacy and international law would, he was sure, make a valuable contribution to the Commission's work.

2. Mr. TSURUOKA thanked the Chairman for his generous words. It was a great honour and responsibility for him to succeed Mr. Yokota, who had asked him to convey to the Chairman and members his appreciation for all that they had done for him while he was a member of the Commission.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add. 1-10, A/CN.4/137)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 20 (Withdrawal of exequatur)*

3. The CHAIRMAN called for comments on article 20 of the draft on consular intercourse and immunities (A/4425).

4. Mr. ŽOUREK, Special Rapporteur, said that the provisions of article 20 applied only to persons holding an exequatur. Consequently it concerned heads of

consular posts and also other consular officials in countries which required an exequatur for those officials as well. In view, however, of the decisions taken by the Commission in regard to earlier articles of the draft, it was perhaps desirable to limit the scope of article 20 to heads of post only.

5. The Netherlands Government (A/CN.4/136/Add.4) had proposed a new text for article 20. That text differed from the Commission's text on four points:

- (1) It replaced the reference to the case where "the conduct of a consul gives serious grounds for complaint" by the condition "if for grave reasons a consular official ceases to be an acceptable person", thereby involving a drafting change which could be referred to the Drafting Committee;
- (2) it covered not only persons holding an exequatur, but other consular officials in addition;
- (3) it implied that in the case of members of the consular staff other than consular officials the receiving State's acceptance was necessary;
- (4) it omitted paragraph 3, which set forth the effects of the withdrawal of the exequatur.

6. The Spanish Government (A/CN.4/136/Add.8) had suggested that article 20 might include a reference to article 51, which guaranteed that the consul's rights and privileges would be respected until he left the country, a question which, so far as article 20 was concerned, was dealt with only in the commentary.

7. The United States Government (A/CN.4/136/Add.3) had expressed the opinion that the withdrawal of an exequatur should be effective immediately and that a request for recall was not necessarily effective immediately. He recalled that the Commission had discussed that point at its eleventh session (516th meeting, paras. 25-52) where discussed as article 17) and had decided that the withdrawal of an exequatur was a grave act, not to be resorted to until the receiving State had first requested the consul's recall and that request had not been complied with (commentary (2) on the article).

8. Finland (A/CN.4/136) had suggested that the provision concerning the circumstances in which the receiving State could request the consul's recall should be broadened so as to give wider discretion to that State.

9. The other governments which had commented appeared to be satisfied with the Commission's text and, except for questions of drafting and the point mentioned by the Spanish Government, the text as it stood might well be retained. The discussion could profitably centre on whether there were any good reasons for making changes in the existing draft.

10. Mr. SANDSTRÖM said that the remark of the Government of Finland suggested that the passage referring to "serious grounds for complaint" could be interpreted to mean that the sending State might enter into a discussion with the receiving State on the consul's conduct. Such a discussion was as undesirable in the case of consuls as it was in the case of diplomats. He recalled,

* In the course of this debate the Commission also considered article 23 (Persons deemed unacceptable) (paras. 15 *et seq.* below).

in that connexion, the terms of article 9 of the Vienna Convention on Diplomatic Relations (A/CON. 20/13), which stated that the receiving State could "at any time and without having to explain its decision" notify the sending State that the person concerned was *persona non grata* or not acceptable.

11. Mr. AGO, concurring, said that the words "where the conduct ... complaint" should be deleted.

12. Paragraph 1 of the article was applicable not only to heads of post, but also to other consular officials. It was therefore not appropriate to refer, in paragraphs 2 and 3, only to the case of the withdrawal of the exequatur. In many countries, consular officials who were not heads of post did not receive an exequatur and there could be no question of its being withdrawn.

13. For those reasons, he preferred a text along the lines of article 9 of the Vienna Convention.

14. The CHAIRMAN, speaking as a member of the Commission, proposed that, by analogy with article 9 of the Vienna Convention a single provision should be drafted covering all members of the consular staff.

15. Mr. YASSEEN expressed agreement, but pointed out that article 23 dealt with the case where a member of the consular staff was declared not acceptable. Perhaps, therefore, articles 20 and 23 should be merged into a single article.

16. The CHAIRMAN, speaking as a member of the Commission, said that had been precisely his intention.

17. Mr. ŽOUREK, Special Rapporteur, said that there were important reasons for establishing a difference of treatment between diplomatic and consular officials.

18. In the case of the head of a consular post, he could be declared not acceptable only after the withdrawal of his exequatur. The procedure was therefore different from that of the declaration of a diplomatic officer as *persona non grata*.

19. The staff of a consulate was often very small and the work highly specialized. It was not easy to replace a consular official who was recalled. Assurances must therefore be given that the day-to-day work of a consulate would not be interrupted without serious reasons.

20. Moreover, diplomatic officers enjoyed full immunity from jurisdiction in respect not only of acts performed in the exercise of their functions, but also of their private acts. It was therefore natural to give the receiving State a wide discretion regarding the circumstances in which that State could request the recall of a diplomat. The unrestricted right to declare a member of a mission *persona non grata* or unacceptable constituted for the receiving State an indispensable safeguard and a counter-balance to the very considerable inviolability and immunities enjoyed by members of diplomatic missions.

21. On the other hand, the position of members of a consulate was very different. Their inviolability was extremely restricted and their immunity from jurisdiction covered only acts performed in the exercise of their functions. Thus there were not the same reasons for giving the receiving State extensive rights to declare unacceptable a member of a consulate.

22. For those reasons, he thought that the reference to "serious grounds for complaint" should stand. That expression could, of course, be replaced by the one suggested by the Netherlands Government. In that connexion, however, in the French text, the sentence proposed by the Netherlands Government spoke of a consular officer ceasing to be *persona grata*; if the Netherlands text were to be used, the words "*persona grata*" would have to be replaced by "*personne acceptable*".

23. The proposal for merging articles 20 and 23 should be considered after the Commission had dealt with the two articles separately, since in the formulation which the Commission had adopted, they dealt separately with two categories of person.

24. Mr. VERDROSS drew attention to a lack of balance between the provisions of articles 20 and 23. For the head of post or other consular official holding an exequatur, article 20, paragraph 1, specified that his recall could be requested only where his conduct gave serious grounds for complaint. For the subordinate staff, on the other hand, article 23, paragraph 1, stated that the receiving State could "at any time notify the sending State that a member of the consular staff is not acceptable".

25. He saw no valid reason for such a discrepancy. Since he also supported the merger of articles 20 and 23, he therefore proposed that, in drafting a single article, the position of all members of the consular staff should be made uniform, in so far as the grounds for recall were concerned.

26. The CHAIRMAN said that the Commission had before it a proposal for merging articles 20 and 23, and in that connexion it had to decide whether there should be a reference to "serious grounds for complaint". It was probably advisable to follow the example of the Vienna Convention and not to specify the need for such grounds.

27. Mr. ERIM expressed doubts on that point. Diplomats enjoyed the full measure of immunity and it was therefore logical that the receiving State should have full latitude to request their recall. Consuls enjoyed no personal immunities and only an immunity in respect of their official acts. It was mainly because of that difference between the two categories of foreign service officer that the Commission had included in the draft a reference to "serious grounds for complaint".

28. Most of the governments seemed to favour the inclusion of the passage in question. Few had commented on article 20 and those which had done so had generally not opposed the passage. The Netherlands Government, for example, had proposed in effect the merging of articles 20 and 23, but had included a reference to "grave reasons" in connexion both with the withdrawal of an exequatur and with the revoking of the acceptance of members of the consular staff other than consular officials.

29. Mr. MATINE-DAFTARY said that the most important question at issue was whether the receiving State should be required to explain its reasons for requesting the recall. Clearly, it was for the receiving State to

decide whether it had serious reasons or not. The position was, therefore, that the receiving State could at any time inform the sending State that the person concerned no longer enjoyed its confidence. It would be logical for the Commission to adopt purely and simply a provision which, like the corresponding provision of the Vienna Convention, merely expressed that position.

30. The CHAIRMAN recalled that there had been considerable discussion at the Vienna Conference on the proposal, which had ultimately been carried, to include in article 9 the words "without having to explain its decision". It would be better to omit from the draft all reference to reasons. A provision omitting such a reference would make it clear that the receiving State was not under an obligation to give explanations.

31. Mr. GROS said that the request for the recall of an ambassador was a serious step. The Vienna Conference had decided that the Convention should not require in law an explanation in connexion with such a request, because an unofficial explanation was always given in those cases. In practice, a request for the recall of an ambassador did contain explanatory comments.

32. If, therefore, in the draft the Commission were to drop the words "where the conduct of a consul gives serious ground for complaint", it could be thought that the recall of a consul might be requested without any explanation. Such a recall could lead, as examples had shown, to complete severance of consular relations. It was therefore appropriate to provide that serious reasons should be given for the request.

33. Lastly, he supported the merger of articles 20 and 23. It would be logical to include in a single article the provisions of both articles.

34. Sir Humphrey WALDOCK said that he had at first been inclined to favour a provision along the lines of article 9 of the Vienna Convention. However, he had since felt some hesitation on that point because consular conventions very uniformly contained a provision similar in its effects to articles 20 and 23 of the Commission's draft. An examination of a typical clause in one of those conventions showed: (1) that for the purpose under discussion the head of the consular post and the subordinate staff of the consulate were treated in the same manner; (2) that there had to be serious reasons for the withdrawal of an exequatur or for the request for the recall of a subordinate member of the consular staff; and (3) that the receiving State could be required to furnish reasons through the diplomatic channel.

35. He did not think that the argument based on the immunity enjoyed by diplomatic officers carried much weight, but he had been impressed by the point mentioned by Mr. Gros.

36. Mr. AMADO said that he could not support an expression such as "serious grounds", which was open to subjective interpretation. A receiving State could have many reasons for requesting the recall of a consul and it would serve no useful purpose to specify that those grounds should be "serious".

37. There was an important difference between article 9

of the Vienna Convention and article 20 of the draft. The first dealt both with diplomatic officers, who could be declared *persona non grata*, and with other members of the staff of a diplomatic mission, who could be declared "not acceptable". He stressed that the term "*persona non grata*" could apply only to a diplomatic officer, in other words to a representative of the sending State. With regard to consuls and their staff, the appropriate expression was "not acceptable". A consul was not a representative of the sending State, but merely an official of that State entrusted with the performance of specific functions in his consular district.

38. Lastly, he supported the proposal for merging articles 20 and 23.

39. Mr. VERDROSS supported the retention of the reference to "serious grounds for complaint". A diplomatic officer performed functions of a political character and, in his case, a small incident could render him *persona non grata*. A consul's functions were chiefly of an administrative character and he should be declared not acceptable for grave reasons only. As the late Mr. Scelle had said, consuls were necessary to the everyday life of States and hence their work should not be interrupted except for serious reasons. The fact that bilateral conventions specified that there had to be serious reasons for the withdrawal of the exequatur or for the request for recall was an additional argument for retaining the passage under discussion.

40. Mr. AGO pointed out that if the Commission, having before it the text of article 9 of the Vienna Convention, nevertheless decided to retain for consuls the passage under discussion, it might even be inferred that it was of opinion that the recall of an ambassador could be requested on grounds that were not serious.

41. An important point was who was to be the judge of the seriousness of the grounds for complaint. But an even more important question was whether it was really in the interest of good relations between the two States concerned, and indeed in the interests of the consul himself, that the grounds for the request for his recall should always be indicated and discussed. In his opinion the passage in question could be not only unnecessary, but in some cases even dangerous. Although, therefore, the passage should be omitted and the article should be modelled on article 9 of the Vienna Convention, it was not desirable to include the words "and without having to explain its decision" which appeared in article 9, paragraph 1, of that Convention. The absence of any reference to the grounds for the request for recall or for the withdrawal of the exequatur would suffice to make the position clear.

42. Mr. MATINE-DAFTARY said that the passage under discussion was little more than an empty formula. Even if the sending State were to dispute the seriousness of the grounds on which the recall had been requested, it could not possibly impose its consul upon the receiving State. Of course, the receiving State should not request such a recall for trivial reasons; but in the last resort the decision could only be left to that State.

43. Mr. SANDSTRÖM observed that the passage

under discussion constituted a rule of conduct for the receiving State. That State should not request the consul's recall without serious grounds for complaint, but it was not bound to disclose the reasons.

44. Mr. ŽOUREK, Special Rapporteur, stressed that the passage had been introduced in order to emphasize that the request for a consul's recall should be based on the conduct of the consul himself. The recall of a consul should occur only in exceptional cases, because the interruption of consular relations was prejudicial to both the States concerned.

45. The CHAIRMAN put to the vote the question whether the words "Where the conduct of a consul gives serious grounds for complaint" should be retained.

It was decided, by 11 votes to 5, with 2 abstentions, to retain those words.

46. The CHAIRMAN said that the Commission appeared to be in agreement to merge articles 20 and 23 into a single provision modelled on article 9 of the Vienna Convention, but retaining the passage, "where the conduct . . .". Also, the intention of the Commission was to omit the words in article 9, paragraph 1, of the Vienna Convention "and without having to explain its decision".

47. Mr. ERIM asked whether, for the then purposes, the distinction established between persons holding an exequatur (article 20) and members of the consular staff (article 23) would disappear.

48. The CHAIRMAN recalled that Mr. Verdross had proposed that, in merging articles 20 and 23, all difference of treatment between the two categories should disappear for the purposes in question. If there was no objection, he would take it that the Commission agreed to instruct the Drafting Committee to prepare a single article along the lines he had described, bearing in mind the proposal by Mr. Verdross.

It was so agreed.

ARTICLE 21 (Appointment of the consular staff)

49. Mr. ŽOUREK, Special Rapporteur, pointed out that the expression "consular staff" excluded the head of post. He recalled that in connexion with article 13 (the exequatur), the Commission had decided (590th meeting, para. 79), to consider the possibility of taking into account the practice of States which for internal reasons required an exequatur for consular officials other than heads of post. The Drafting Committee had been instructed to find an appropriate wording for that provision, and the Commission might decide that the solution eventually found should be reflected in article 21.

50. He drew attention to the United States Government's comment that consular officers had some form of consular recognition and that consular employees had no such recognition and to the Belgian Government's suggestion (A/CN.4/136/Add.6) that the second phrase of the article should read "the sending State may freely appoint consuls who are not heads of post and employees of the consulate, who, on notification of their appointment, are authorized to exercise their functions". That amendment was not acceptable in the

light of the basic philosophy of the draft, for it tended to make the appointment of the employees of the consulate dependent on the authorization of the receiving State. Accordingly, he suggested that the present wording of article 21 should be retained, subject to redrafting in the light of the Drafting Committee's text for article 13; he was sure that an adequate solution could be found without abandoning the Commission's basic position.

51. Mr. ERIM drew the Special Rapporteur's attention to the discrepancy between the phrase "the necessary number of consular officials and employees of the consulate" in paragraph (1) of the commentary to article 21 and the phrase "what is reasonable and normal" in article 22 (size of the staff). There was a difference in meaning between "necessary" and "reasonable" or "normal". The same word should be used in both texts.

52. The CHAIRMAN proposed that article 21 should be referred to the Drafting Committee, which would decide upon the articles of the draft to be mentioned in the first phrase.

It was so agreed.

ARTICLE 22 (Size of the staff)

53. Mr. ŽOUREK, Special Rapporteur, drew attention to five comments from governments. The Yugoslav Government (A/CN.4/136) considered that the receiving State should decide on the number of consular staff it was willing to receive in its territory and that any dispute in the matter should be referred to arbitration. The Government of Poland (A/CN.4/136/Add.5) had criticized the article on the grounds that it would enable the authorities of the receiving State to interfere with the work of the consulate and to narrow it down at will. The Governments of the United States and Belgium had considered that the article should be deleted, the latter Government adding that the question was governed exclusively by internal law and should be settled by bilateral agreement between the two States concerned. Finally, the Netherlands Government had proposed the deletion of the words "and normal" in order to avoid an element of comparison with other posts or with the size of the same post in the past, and had suggested that the substance of paragraph (3) of the commentary should be incorporated in the article itself. The latter point seemed to be covered by the opening phrase of the article.

54. In his original draft he had not proposed such an article, which he had regarded as unnecessary in the draft on consular intercourse, but the majority of the Commission had been in favour of its inclusion (A/4425, article 22, commentary (2)). He maintained his view that the position of diplomatic missions differed materially from that of consulates in that respect, and it was pertinent that many of the governments which had commented on the article had raised objections to it.

55. Mr. MATINE-DAFTARY observed that, although it might be difficult to estimate the size of the staff needed for a diplomatic mission, there was no such difficulty in the case of consulates. The main function of the consul was to protect the nationals and the trade of the sending

State; the number of nationals in the receiving State and the volume of trade with that State could be estimated quite easily. His fear was that the omission of the article might enable the sending State to take undue advantage of the receiving State, and that the existence of article 11 of the Vienna Convention and the absence from the Commission's draft of any mention of the size of the consular staff would amount to locking the front door and leaving the back door open. Moreover, the phrase "what is reasonable and normal" implied agreement between the two States concerned, whereas under article 11 of the Vienna Convention the size of a mission was to be kept within limits considered by the receiving State to be reasonable and normal.

56. Mr. BARTOŠ observed that the Government of Yugoslavia had not merely expressed the view that, in case of dispute, the matter should be referred to arbitration, but had added that that should be done on the understanding that the decision of the receiving State should remain in force until the award. He was convinced that peaceful and friendly international relations would best be served by leaving the matter to the receiving State to decide.

57. Mr. PAL pointed out that, in accordance with paragraphs (2) and (3) of the commentary to article 22, the receiving State was in fact the final arbiter of the question. The matter seemed to be one of drafting only.

58. Mr. YASSEEN said that, preferring its objective criterion, he was in favour of retaining the article, which had considerable practical merit.

59. Mr. AMADO considered that it was impossible to lay down a criterion of what was reasonable and normal; there was no place for such an expression in a legal draft.

60. Mr. SANDSTRÖM observed that the difference between article 22 of the draft and the original draft of the provision that had become article 11 of the Vienna Convention was that the latter had provided for arbitration or recourse to the International Court of Justice in the event of disputes. Article 22 as drafted in fact left the size of the staff to the judgment of the receiving State.

61. The CHAIRMAN pointed out that by decision of the Vienna Conference the article on jurisdiction and arbitration had been deleted from the draft on diplomatic intercourse and had been made the subject of a separate protocol.

62. He suggested that article 22 should be referred to the Drafting Committee without any specific instructions.

It was so agreed.

ARTICLE 24 (Notification of the arrival and departure of members of the consulate, members of their families and members of the private staff)

63. Mr. ŽOUREK, Special Rapporteur, said that the comments on the article received from the governments of the Netherlands, the United States, and Chile (A/CN.4/136/Add.7) related mainly to drafting points. The Government of Spain had (A/CN.4/136/Add.8) con-

sidered that the term "family" should be clearly defined to avoid ambiguities of interpretation and had made a suggestion concerning the definition of that word. The Commission should try to define the term "family" in the article on definitions and in draft article 1 he would propose the inclusion of a definition of a member of the family of a member of the consulate. Article 10 of the Vienna Convention had been based on the corresponding article of the consular draft and article 24 might be referred to the Drafting Committee with instructions to redraft it along the lines of article 10 of the Vienna Convention.

64. Mr. VERDROSS, pointed out that paragraph 1 (a) of article 10 of the Vienna Convention contained the additional idea that the appointment of members of the mission should be notified to the receiving State. It would be useful to include the same idea in paragraph 1 (a) of article 24 of the draft in order to avoid the inconvenience which would arise if a person declared unacceptable by the receiving State arrived in that State or at its frontiers.

65. Mr. BARTOŠ, fully agreed with Mr. Verdross's remarks.

66. With regard to the question of defining the term "family", he would point out that all previous attempts at a satisfactory definition had failed. He appealed to the Special Rapporteur to endeavour to find wording which could be approved by the majority of the Commission and by the plenipotentiary conference.

67. Mr. AGO also endorsed Mr. Verdross's views.

68. Mr. ERIM expressed doubts whether the problems to which Mr. Verdross had referred could be solved by merely referring to notification of the appointment of members of the consulate. The persons concerned might well set out for the receiving State immediately upon their appointment and notification to the receiving State. An embarrassing situation could arise if the receiving State considered them to be unacceptable.

69. The CHAIRMAN observed that it was impossible to provide in the draft for all the eventualities of everyday life.

70. He suggested that the Drafting Committee be instructed to redraft article 24 along the lines of article 10 of the Vienna Convention.

It was so agreed.

ARTICLE 25 (Modes of termination)

71. Mr. ŽOUREK, Special Rapporteur, said that the only critical comment had been received from the Government of Norway (A/CN.4/136), which regarded the use of the expression "severance of consular relations" in paragraph 1 (c) as unfortunate, and stated that the wording of the article failed to take into account the fact that in consular relations between two States one or more consulates were often abolished while others were maintained. In his third report (A/CN.4/137) he had taken that objection into account and had redrafted the article with a new paragraph 1 (c) concerning the closure of its consulate by the sending State. The Chilean

Government (A/CN.4/136/Add.7) had suggested that the words "or discharge" in paragraph 1 (a) should be deleted, on the ground that "recall" was sufficient for international purposes, since discharge was an administrative penalty, the effects of which were governed by the internal law of each State, and there was no point in giving it international effects. The case contemplated by the Chilean Government was the rare one where the sending State severed all connexion with a consular official. However, the argument that the effects of discharge were governed by the internal law of each State might be applicable to recall also, since it marked the termination of a consul's functions at a given consulate. Finally, the Belgian Government (A/CN.4/136/Add.6) had suggested that the cause of the resignation or death of the consul should be included, although the Commission had decided against stating such obvious causes.

72. He thought that the Drafting Committee should be instructed to redraft article 25 in the light of those observations.

73. Mr. AGO considered that, by analogy with the Vienna Convention, the article should not include a separate reference to the severance of consular relations, which was a much wider topic than the termination of the functions of a specific consul.

74. Article 43 of the Vienna Convention might provide a model for a more flexible formulation than that given in the rather cumbersome language of article 25 of the draft. Once again, the Drafting Committee should give some thought to grouping together provisions dealing with heads of post and those dealing with members of the consulate. As it stood, paragraph 2 of the article was not very clear.

75. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had decided (547th meeting, paras. 45-54) not to devote a separate article to the severance of consular relations which occurred very infrequently and which was very undesirable from the point of view of international relations, but had decided to mention it as one of the possible modes of termination of consular functions. As the enumeration contained in article 25 was not exhaustive, the retention or omission of subparagraph (c) would not affect the substance.

76. Mr. AGO remarked that in the event of the severance of consular relations the system proposed in article 28 was closely analogous to that envisaged in article 45 in the Vienna Convention for the case of the severance of diplomatic relations.

77. Mr. ŽOUREK, Special Rapporteur, referring to paragraph 2 of article 25, said that there must be a difference in the treatment of consular officials holding an exequatur and those without.

78. The CHAIRMAN suggested that the Drafting Committee be instructed to review article 25 in the light of article 43 of the Vienna Convention, with discretion to decide how far the latter provision could be followed.

It was so agreed.

ARTICLE 26 (Maintenance of consular relations in the event of the severance of diplomatic relations)

79. Mr. ŽOUREK, Special Rapporteur, said that the Governments of Norway and the United States of America had considered article 26 unnecessary. The Commission would have to decide whether to follow the Yugoslav Government's view that the article should state explicitly that upon the severance of diplomatic relations there would be no interruption of consular relations and that the consular sections of diplomatic missions would continue to function as consulates. The Yugoslav Government had added that in such cases it was necessary to make contact possible between consulates and the representatives of the protecting Power. In his opinion that was a case in which the Commission could take a step in the direction of the progressive development of international law so as to ensure that when the diplomatic mission of the sending State exercised consular functions, in the territory of the receiving State and the receiving State maintained a consulate in the territory of the sending State, the former did not find itself at a disadvantage. If the principle were accepted it would not be difficult for the Drafting Committee to devise suitable wording and in that connexion he would refer to his redraft of the article in his third report.

80. Mr. BARTOŠ said that the Yugoslav Government's comment was not based upon a general practice, but had been put forward in the light of a procedure followed when the Federal Republic of Germany had broken off diplomatic relations with Yugoslavia. On that occasion the Federal Government had proposed that there should be no interruption in consular relations and in order to avoid having to modify existing consular districts it had been agreed between the two governments that consular sections of the diplomatic missions should continue to function. That eminently practical solution had continued for several years and was in no way contrary to the existing rules of international law: it deserved consideration by the Commission.

81. Mr. MATINE-DAFTARY said that the Yugoslav Government had drawn attention to an interesting innovation, but he doubted whether the Commission could generalize from a specific case that was unlikely to recur. The Federal Republic of Germany had decided to sever relations with Yugoslavia because that country had entered into diplomatic relations with the German Democratic Republic. That was a case of symbolic severance, for while applying its principle, the Federal Republic of Germany had wished to maintain relations with Yugoslavia in the form of consular relations. In practice, the severance of diplomatic relations was almost always accompanied by the severance of consular relations.

82. The CHAIRMAN suggested that the point raised by the Yugoslav Government was in fact covered by the wording of article 26. The example mentioned by Mr. Bartoš, however, certainly proved that the article was a useful one.

83. Mr. VERDROSS, agreeing with the Chairman, pointed out that in the event of the severance of diplo-

matic relations there was nothing to prevent the two States concerned from agreeing that consular sections of diplomatic missions should continue to function. The point made by the Yugoslav Government could be mentioned in the commentary.

84. Mr. BARTOŠ endorsed the Chairman's view that the specific case mentioned by the Yugoslav Government was implicitly covered in article 26; it could be dealt with by agreement on a bilateral basis.

85. Mr. AGO expressed the view that article 26 was necessary and as drafted was adequate. It was a necessary corollary to the principle discussed by the Commission (582nd meeting, para. 33 to 583rd meeting, para. 8) in connexion with article 2 that the establishment of diplomatic relations in the absence of opposition involved the establishment of consular relations.

86. Mr. PADILLA NERVO agreed with Mr. Ago but considered that the rule stated in article 26 properly belonged to article 2. It was a rule recognized in a number of consular conventions.

87. The CHAIRMAN proposed that article 26 be referred to the Drafting Committee with instructions to decide whether it should form a separate article or should be incorporated in article 2.

It was so agreed.

ARTICLE 27 (Right to leave the territory of the receiving State and facilitation of departure)

88. Mr. ŽOUREK, Special Rapporteur, drew attention to the comments of the Governments of Norway, the Netherlands, Poland, Chile and Spain.

89. The question of the Governments of Norway and the Netherlands concerning the meaning of the expression "discharged locally" in paragraph 3 could be answered in the commentary. The reference was to dismissal of a consular official, who thereupon became a private individual in the territory of the receiving State. The suggestion of the Government of Poland that article 27 should expressly stipulate that the provisions relating to the right to leave the territory of the receiving State did not apply to employees of the consulate who were nationals of that State should be borne in mind. The Commission might add that condition to the article or broaden the scope of article 50. The Spanish Government had made a comment much to the same effect. Perhaps a proviso might be added in article 1, which was in the nature of an introductory provision making it clear that the provisions of the articles concerning consular privileges and immunities did not apply to every member of a consular staff and that persons having consular privileges and immunities, if they were nationals of the receiving State, enjoy only such privileges and immunities as were provided in article 50. That was the more desirable since a reader who consulted just one individual article would not necessarily be aware of the structure and philosophy of the entire draft.

90. The Chilean Government suggested that paragraph 3 should be deleted, on the ground that the consular official concerned should not suffer an "international" penalty,

which might, in addition, affect members of his family. That suggestion was not acceptable.

91. The other comments submitted by governments were mainly concerned with drafting.

92. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur to what extent the article could be modelled on article 44 in the Vienna Convention.

93. Mr. ŽOUREK, Special Rapporteur, said that the Commission would probably agree that article 27 could more or less follow article 44 in the Vienna Convention, provided that proper emphasis were placed on the right of consular staff to leave the territory of the receiving State.

94. Mr. VERDROSS supported the Polish Government's suggestion that it should be expressly stipulated that article 27 did not apply to nationals of the receiving State. He accordingly proposed that the words "other than nationals of the receiving State" be inserted after the words "members of the consulate" in paragraph 1. That amendment would be in line with article 44 of the Vienna Convention. The point could not be dealt with in article 50, which was concerned with immunities, an entirely different subject.

95. Mr. ERIM, with regard to the Special Rapporteur's observation, said that the reason for the dismissal of a member of the consular staff was not necessarily that he had committed an offence. There might be internal reasons for the dismissal.

The meeting rose at 6 pm.

595th MEETING

Wednesday, 24 May 1961, at 9.30 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137) (*continued*)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (*continued*)

ARTICLE 27* (Right to leave the territory of the receiving State and facilitation of departure) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 27 of the draft on consular intercourse and immunities (A/4425).

2. Sir Humphrey WALDOCK said that article 27 was open to criticism as to form. The body of the article placed an obligation on the receiving State, whereas the title spoke of a right enjoyed by members of a consulate of the sending State.

* In the second sentence of the article, for "amount" read "moment."

3. Mr. PAL urged that it should be clearly stated in the article that its provisions did not apply to nationals of the receiving State. A reference to article 50, which was concerned with immunities, would not suffice.

4. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Pal: paragraph (4) of the commentary did not solve the problem, for article 50 did not cover the situation envisaged in article 27.

5. In view of the doubts expressed by the Belgian Government (A/CN.4/136/Add. 6) concerning the phrase "as soon as they are ready to leave" in paragraph 2, the Drafting Committee might revise the provisions, perhaps on the lines of that contained in article 44 of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13) which used the words "to leave at the earliest possible moment". Such wording allowed for a reasonable lapse of time to enable the person or persons concerned to make the necessary preparations for departure.

6. Mr. FRANÇOIS recalled that paragraph 2 had been discussed at considerable length at the twelfth session,¹ when some members had been at pains to caution the Commission against wording that might encourage governments to delay the departure until the other parties' attitude had been made clear. Clearly it was important not to condone the practice of delaying such departure, and he would urge the Drafting Committee to bear that very important consideration in mind.

7. Mr. AGO also found the wording used in paragraph 2 unsatisfactory. He pointed out that there was a discrepancy between the English and French texts of article 44 of the Vienna Convention ("at the earliest possible moment" and *dans les meilleurs délais*). He preferred the French expression which, though vague, took account both of the interests of the receiving State and of those of the individual concerned, whereas the English version seemed to be concerned only with the prompt departure of the individual in the interests of the receiving State.

8. Sir Humphrey WALDOCK agreed with the Chairman that the phrase "as soon as they are ready to leave" was an unhappy one. If the Drafting Committee were to find a formula based on either the English or the French text of article 44 in the Vienna Convention, it should specify that the receiving State must grant the necessary time and facilities for departure.

9. Mr. SANDSTRÖM pointed out that there was a significant difference between paragraph 3 in article 27, which denied the benefit of paragraph 2 to members of a consulate discharged locally, and article 44 of the Vienna Convention, which was expressly declared not to be applicable to nationals of the receiving State.

10. He asked for the reason for that difference and also for a further explanation of the meaning of the phrase "discharged locally".

11. Mr. ŽOUREK, Special Rapporteur, said in reply that the Commission had certainly agreed that article 27 was not applicable to nationals of the receiving State (commentary (4)); as that point had evidently not been

brought out sufficiently clearly, an additional clause to that effect could be added to the article.

12. A member of the consulate who was "discharged locally" might be a national of a third State or an individual appointed from the sending State. Dismissal on the spot did occur in practice in both cases and, if necessary, some more explicit wording could be found or a detailed explanation might be inserted in the commentary.²

13. The CHAIRMAN, speaking as a member of the Commission, agreed that there was some ambiguity in the phrase "discharged locally", especially since article 27 did not apply to nationals of the receiving State. Did the phrase then refer to nationals of the sending State who were resident in the receiving State?

14. Speaking as Chairman, he suggested that article 27 should be referred to the Drafting Committee with instructions to add an explicit proviso stating that it did not apply to nationals of the receiving State and to consider the drafting points raised by governments and by members in the course of the discussion, particularly in connexion with the words "their departure as soon as they are ready to leave" in paragraph 2 and the words "discharged locally" in paragraph 3.

It was so agreed.

ARTICLE 28 (Protection of consular premises and archives and of the interests of the sending State)

15. Mr. ŽOUREK, Special Rapporteur, said that he would comment only on one government's comment, that of Spain (A/CN.4/136/Add.8). He could not agree with that government that the terms of article 28 were excessively broad and that the obligation of the receiving State should be confined to respect for the consular archives. The Commission could not overlook the general practice of arranging for the protection of the interests of the sending State in the event of the severance of consular relations.

16. It was his view that the two situations mentioned in paragraph 2 of the article must be provided for.

17. As no objection of principle had been raised to article 28, he believed it could be adopted and referred to the Drafting Committee.

18. Mr. SANDSTRÖM suggested that the scope of the article would be too wide if it referred in general terms to the "interests of the sending State". It should surely be restricted specifically to such interests as came within the province of consular protection.

19. The CHAIRMAN, speaking as a member of the Commission, pointed out that in the parallel provision of the Vienna Convention (article 45 (c)) the words "and those of its nationals" had been added on the ground that the phrase "interests of the sending State" might not necessarily cover the interests of that State's nationals. The Drafting Committee should be asked to consider whether a similar addition was needed in article 28.

20. Speaking as Chairman, he suggested that the article

¹ 547th meeting, para. 59, to 548th meeting, para. 23, where discussed as article 51; cf. also 573rd meeting, paras. 76-78.

² A/CN.4/137, Special Rapporteur's observations *ad* article 27.

be referred to the Drafting Committee together with the foregoing observations.

It was so agreed.

CHAPTER II. CONSULAR PRIVILEGES AND IMMUNITIES

ARTICLE 29 (Use of the national flag and of the state coat of arms)

21. Mr. ŽOUREK, Special Rapporteur, said that the only point raised in government comments was whether there should be special mention of the consular flag in the text of the article as proposed by the Government of Norway (A/CONF.4/136). He had no precise information about the number of States which made use of the consular flag, but the right to fly the consular flag was provided in several recent consular conventions, particularly some concluded by the United Kingdom; there was therefore some justification for making an express reference to the practice in the text of the article itself rather than in the commentary. That change should satisfy the Norwegian Government. He had accordingly made the change in the redraft of article 29 proposed in his third report (A/CN.4/137).

22. He had replied to the comment of the Yugoslav Government (A/CN.4/136) with regard to the right of the acting head of post to fly the national flag on his means of transport in his report and suggested that the explanation might be embodied in paragraph (4) of the commentary.

23. The comment of the Belgian Government related purely to drafting.

24. Mr. VERDROSS said that the phrase *ses moyens de transport personnels* was vague. It should be made clear that the intention was to refer to the means of transport reserved exclusively for the use of the consulate.

25. Sir Humphrey WALDOCK agreed that some more precise wording should be found which would specify beyond all doubt that the reference was to means of transport employed strictly in the personal use of the head of post and in the discharge of the functions of the consulate.

26. Mr. MATINE-DAFTARY said that for the purpose of the clause in question the decisive test was the use, not the ownership, of the vehicle. After all, the head of post might not possess a car or he might possess one that failed to match the dignity of his position and would have to hire one for official occasions. It was not clear from the wording of paragraph 2 as it stood whether the national flag could be flown on a hired car.

27. Mr. SANDSTRÖM expressed doubts whether the national flag could be flown on a taxi. Another question was whether it could be flown on a consular car used by a member of the consulate who was not the head of post.

28. Mr. MATINE-DAFTARY said he had not spoken of taxis, but of hired cars, which he considered could certainly fly a national flag when used by a head of post on official business.

29. The CHAIRMAN, speaking as a member of the Commission, observed that the article should not be too

specific. There was a close parallel between article 29 of the draft and article 20 in the Vienna Convention, and it might well be referred to the Drafting Committee for reconsideration in the light of the latter text.

It was so agreed.

ARTICLE 30 (Accommodation)

30. Mr. ŽOUREK, Special Rapporteur, said that he had replied to the Norwegian Government's comment in his third report.

31. It remained for the Commission to decide whether to add a provision on the lines of that contained in article 21, paragraph 2, of the Vienna Convention. Previously, as explained in the commentary, the Commission had not done so on the grounds that such an additional obligation might be unduly onerous for the receiving State, particularly if the number of consulates in its territory was large. If the Commission currently took the view that such an additional clause was desirable, it might wish to consider the wording suggested in his third report.

32. Mr. VERDROSS pointed out that article 30 imposed two obligations on the receiving State, viz. to permit the acquisition of premises and to assist the sending State to obtain such premises, whereas article 21 in the Vienna Convention imposed upon the receiving State an alternative obligation, either to facilitate the acquisition of premises or to assist the sending State to obtain accommodation in some other way. Article 30 should be redrafted on similar lines and an additional clause based on article 21, paragraph 2, of the Vienna Convention should be inserted.

33. Mr. AGO agreed with Mr. Verdross and found the wording of article 21 in the Vienna Convention far superior. As drafted, article 30, which seemed to be concerned with certain internal rights and obligations of States, was wholly out of place in a draft concerned with international rights and obligations.

34. The obligation placed on receiving States in paragraph 2 of article 21 in the Vienna Convention was not unduly onerous and could certainly find a place in a draft on consular relations.

35. Mr. ŽOUREK, Special Rapporteur, said that he had no objection to article 30 being redrafted on the lines of the corresponding provision in the Vienna Convention, which in effect stated the same thing though in different form.

36. The CHAIRMAN suggested that article 30 should be referred to the Drafting Committee for revision on the lines of article 21 of the Vienna Convention.

It was so agreed.

ARTICLE 31 (Inviolability of the consular premises)

37. Mr. ŽOUREK, Special Rapporteur, said that some governments, particularly those of the United States and Japan (A/CN.4/136/Add.3 and Add.9), Norway, Spain and Yugoslavia had considered the rule formulated in paragraph 1 of article 31 too categorical and had suggested various exceptions to it. Proposals of a similar character had been made at the Vienna Conference in respect of the

inviolability of the premises of a diplomatic mission, but had not been incorporated in article 22 of the Vienna Convention. His own opinion was that article 31, which was one of the cornerstones of the draft, should not be modified because any weakening of that important rule would lead to friction and dispute between States and would lead to abuses.

38. The Belgian Government's proposal for the inclusion of a provision relating to expropriation raised a problem whose solution would be more appropriate to a multi-lateral convention.

39. The second point raised by the Belgian Government concerning the possibility of inviolability being claimed for purposes unconnected with the exercise of consular conventions would be taken up at a later stage, in connexion with article 53 (Respect for the laws and regulations of the receiving State).

40. The proposal of the United States Government that the principle of inviolability should be held to extend to premises and archives even if located in local business premises and if the consulate was in the charge of a local business man was more pertinent to the articles concerning honorary consuls. At the twelfth session the Commission had reserved judgment on the point (article 54, commentary (5)) and it would appear from the comments of governments that for the most part they did not think that the inviolability accorded by article 31 should extend to honorary consuls.

41. Mr. GARCÍA AMADOR considered that, in the form in which the clause was worded, there was some danger of the "special duty" mentioned in paragraph 2 being misunderstood. In fact, the obligations placed on the receiving State in paragraph 1 and paragraph 2 were of the same nature. It would be preferable to use more general terms; perhaps the wording of article 22 of the Vienna Convention might provide some guidance.

42. Mr. MATINE-DAFTARY expressed the view that the meaning of the expression "consular premises" in article 31 should be clarified. As things were, the expression was defined in article 1(b) as any building or part of a building used for the purposes of a consulate; but a consul, who dealt with commercial and cultural matters, among others, might use a hall for the purpose of showing a film about his country or exhibiting his country's products. In that case, would the premises in question be regarded as "consular premises" and as inviolable, in the same way as those of a diplomatic mission? That would be going too far.

43. Mr. FRANÇOIS said that, although he had no proposal for amending article 31, he could only regard the result of the Commission's lengthy debates on the subject and the article that had emerged from the Vienna Conference as highly unsatisfactory. The provisions concerning the inviolability of the premises of a diplomatic mission in the Vienna Convention and those concerning the inviolability of consular premises in the draft were virtually identical. Yet, in the past, a distinction had always been drawn between the extraterritoriality of diplomatic missions and the immunity of consulates. The removal of that distinction was an innovation in international law. In cases of *force majeure* it was

dangerous enough to require the consent of the head of diplomatic mission before the local authorities could enter the premises, but in the case of a consulate it would obviously be still more unwise. It would be difficult to find someone qualified to give the necessary consent; moreover, consulates were often situated in one apartment of a large building. The assimilation of diplomatic missions and consulates, with the result that the whole building was endangered, had yielded impossible results. Although he would not propose an amendment, he had serious reservations with regard to the article.

44. Sir Humphrey WALDOCK said that, although the rule that the Commission had formulated might be desirable from the point of view of the progressive development of international law, it went well beyond the municipal law of many countries, including that of the United Kingdom. He agreed with Mr. Matine-DAftary that a more accurate definition of "consular premises" was essential for the purposes of the article.

45. The bilateral consular conventions concluded by the United Kingdom took a much narrower view of the inviolability of consular premises than that adopted by the Commission. The provisions of some of those conventions were reflected in a number of government observations; although most of those conventions referred generally to the principle of inviolability, they qualified it by the very serious proviso that, if the consent of the head of post could not be obtained, entry to the consulate might be gained by the ordinary processes of law, subject to an order from the Ministry of Foreign Affairs. Desirable as the general principle of inviolability might be, the article as it stood went far beyond the general concept of that principle currently held by most States. He shared Mr. François's misgivings in the matter.

46. In addition to making provision for cases of fire and other disasters mentioned by earlier speakers, many bilateral conventions provided that asylum could not be offered in a consulate to protect a fugitive from justice. The Vienna Convention contained no such provision, the matter being left to the general understandings of international law. While he had no specific proposal to make in that respect, he thought the question worth raising in order to put the Commission on guard against a possible danger.

47. Mr. SANDSTRÖM, replying to Mr. García Amador, recalled that the question of the "special" duty of States had been discussed at length in connexion with the draft on diplomatic relations (A/3859, article 20, commentary (3)) when it had been explained that, while the receiving State had a general duty to take all appropriate steps to facilitate the exercise of diplomatic functions, it had a special duty to protect the premises against intrusion or damage; naturally, in a country which was at peace the obligations concerned would not be as broad as in a country which was, for example, under martial law.

48. With regard to the general question of the inviolability of diplomatic premises, he had originally taken the view that in some cases the authorities of the receiving State should be allowed entrance. He had, however, been convinced by the argument that it would be dangerous

to give the authorities of the receiving State the pretext for entering the premises of a diplomatic mission, particularly since a way of doing so could always be found in really urgent cases. He therefore thought it best, in the case of article 31 of the present draft, to adhere as far as possible to the wording of article 22 of the Vienna Convention.

49. Mr. ŽOUREK, Special Rapporteur, drew Mr. Matine-Daftary's attention to article 53, paragraph 2, which seemed to meet his difficulty. Moreover, the Commission would have an opportunity of revising the definition of the expression "consular premises" when it dealt with article 1.

50. In reply to Mr. François, he would point out that the Commission had deliberately modelled the provisions concerning the inviolability of consular premises on the corresponding provisions in the draft on diplomatic intercourse. The text which he had originally submitted (A/CN.4/108) had contained certain restrictions but, as was pointed out in paragraph (7) of the commentary, the Commission had decided that article 31 should follow *mutatis mutandis* the terms of what had become article 22 of the Vienna Convention. Moreover, the text of that article had been accepted almost unanimously at the Vienna Conference. Both the substance and form of the article should therefore be retained.

51. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that the Commission should follow the example of the Vienna Conference, particularly in view of the decision reflected in paragraph (7) of the commentary to article 31. Proposals along the lines of Mr. François's and Sir Humphrey Waldock's remarks had been made at Vienna, but had been rejected by the Conference; thus, the principle of complete inviolability, already approved by the majority of the Commission, had been accepted in respect of diplomatic premises and should be adopted in respect of consular premises.

52. He drew attention to the phrase "and other property thereon and the means of transport of the mission," which had been added during the conference to article 22, paragraph 3, of the Vienna Convention, and suggested that similar wording should also be incorporated in article 31, paragraph 3 of the draft under discussion.

53. Mr. BARTOŠ said that, although personally considering that consular premises should enjoy the greatest possible immunity, he had been led by a close study of the draft and consultations with other jurists to the conclusion that there was an inadmissible contradiction between article 31 as it stood and article 40 (Personal inviolability), which provided for cases of arrest or detention, pending trial, of a member of the consular staff and, consequently, for the execution of orders of arrest or detention. The provisions of article 31, paragraph 3, made it impossible to execute such orders in the consular premises. A study of the most recent bilateral consular conventions further showed that many exceptional cases were provided for, and that consular officials were subject to certain rules relating to the jurisdiction of the receiving State even in cases of imputed offences, provided that the proceedings had begun. For example,

if a murder were committed on the consular premises and for some reason, the head of post refused to consent to an investigation (even if the suspect was not a member of his staff), the receiving State would be placed in a very difficult position. The relatively minor restrictions which were to be found in bilateral conventions struck the correct balance between the principle of inviolability and the principle of respect for the criminal jurisdiction of the receiving State.

54. The Commission must, of course, take the responsibility for the shortcomings of the text, since it had decided to delete the exceptions proposed by the Special Rapporteur. The intention of the majority of the Commission had been to lay down an absolutely general principle; it had now become apparent, however, that that principle did not correspond to reality. In article 22 of the Vienna Convention, the absolute personal immunity of diplomatic agents, including administrative and technical staff, was presumed, but no such personal guarantee existed in the draft on consular intercourse. Since career consuls were not assimilated to diplomatic agents, a reservation should certainly be made in respect of the inviolability of the premises.

55. The CHAIRMAN pointed out to Mr. Bartoš that the analogy with the Vienna Convention was in fact closer than it would seem from his (Mr. Bartoš's) arguments. The same problem might arise in the case of the staff of a diplomatic mission, since under article 37 of the Vienna Convention not all the members of the diplomatic staff enjoyed personal inviolability.

56. With regard to the question of asylum raised by Sir Humphrey Waldock, he observed that it was for the Commission to decide whether it wished to discuss the problem. Members should, however, remember that it had decided not to discuss the subject in connexion with the draft on diplomatic relations.

57. Mr. AGO said that he was in favour of leaving article 31 as it stood, but making the addition suggested by the Chairman and bringing it closer into conformity with article 22 of the Vienna Convention. With regard to Mr. Matine-Daftary's comments, the Commission should consider a more accurate definition of the expression "consular premises" when it reviewed article 1. As to the remarks of Mr. François, it might be mentioned in the commentary that in cases of *force majeure*, when the head of post was absent, his consent to entry of the consular premises might be presumed; in his opinion, however, it would be very dangerous to go so far as to state that limitation in the article itself. Of the two dangers of abuse of inviolability by the consul and of the breach of inviolability by the receiving State, the latter was the more serious, for the receiving State had many more possibilities of pressure at its disposal.

58. He drew Sir Humphrey Waldock's attention to paragraph (3) of the commentary to article 53, where the Commission's views on the use of consular premises as an asylum for persons prosecuted or convicted by the local authorities were clearly stated. Accordingly, there was no need to introduce in the article a limitation in connexion with the right of asylum.

59. It might be wise to indicate clearly in the commentary to article 31 that the practice in the matter of the inviolability of consular premises was usually in bilateral instruments laid down in more limited terms than it was in the article, but that it would be in the interests of the progressive development of international law to extend the application of the principle.

60. The case mentioned by Mr. Bartoš could arise even in the case of a diplomatic mission. If a consul were to be arrested for a very serious crime, the receiving State undoubtedly had means of pressure which could achieve the desired end without resorting to entrance into the consular premises; the competent authorities might make representations to the diplomatic mission of the sending State or to its Ministry of Foreign Affairs, the consul's exequatur might be withdrawn, or he might be declared *persona non grata*; but in that case also, it would be wrong to guard more against abuse by the sending State than against abuse by the authorities of the receiving State.

61. Mr. VERDROSS endorsed Mr. Ago's remarks. Moreover, he intended to propose that the final draft convention should be preceded by a preamble similar to that of the Vienna Convention, providing that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the Convention.

62. Mr. ERIM said that the Commission was repeating the debates on the article it had held at the twelfth session (530th, 545th and 571st meetings, where discussed as article 25). Moreover, at least six governments regarded the article as unduly categorical and had suggested that it should be modified. Article 53 admittedly answered many of the objections that had been made, but the outstanding question was that of entry into consular premises in cases of *force majeure* where no offence had been committed. So far as the commentary was concerned, since the draft would probably be amended, it would lose much of its importance. As it stood the article was so categorical that in the practical case of fire breaking out in a block of flats of which one floor was occupied by the consulate, it virtually debarred entry into the premises in the absence of the head of post. Such cases should be expressly provided for, particularly since governments which had not sent in their comments would probably raise objections in the General Assembly or at the plenipotentiary conference if the article did not contain such a provision.

63. Mr. BARTOŠ said that he did not consider that the Chairman's analogy with the position of the staff of diplomatic missions was accurate. Article 31 referred to the consent of the head of post himself, who, even though in charge of the consulate, did not enjoy immunity from criminal jurisdiction, and might, by withholding consent, take advantage of the situation to the detriment of the competent court. By contrast, in the case of diplomatic missions, some members of which did not enjoy immunity from criminal jurisdiction, consent to enter consular premises lay with the head of mission, who was the senior officer of the persons concerned and enjoyed immunity in respect of his person. Moreover, the sending State might have no diplomatic mission in the receiving

State, in which case the head of consular post would be the senior official of the sending State in the country.

64. Nor could he agree with Mr. Verdross that the insertion of a preamble along the lines of that of the Vienna Convention — if the Commission were to accept the proposed text — would provide a solution: the inviolability of the consular premises would be governed not by customary law, but by the express and categorical provisions of article 31, since the preamble of the Vienna Convention established the principle that only those situations not regulated by the Convention would be governed by customary law. Where there was a provision in the Convention, then, according to the preamble of the said Convention, customary law would not apply.

65. In reply to Mr. Ago, he would point out that, although other articles of the draft contained provisions limiting the use of consular premises, no sanctions were provided for in the case of breach of those provisions. The breach would constitute an offence under international law, which could be dealt with through the diplomatic channel or through international judicial bodies; it would in any case be incorrect for the authorities of the receiving State to take direct action. He saw some merit of principle in Mr. Ago's argument that the dangers of abuse by the sending State were less than those of abuse by the receiving State, but in the specific case and in the conditions provided by the Convention itself the sending State would run no risk provided that the receiving State acted in accordance with the provisions of the Convention. He would therefore suggest that a phrase along the following lines might be added at the end of paragraph 3 of the article: "except in cases of violation of the rules of this convention".

66. Mr. ŽOUREK, Special Rapporteur, stressed that the aim of article 31 of the draft was identical with that of article 22 of the Vienna Convention.

67. It would not be desirable to weaken the rule by providing exceptions for certain exceptional cases (fire, committing of a crime on the mission's premises and the like) covering all possible situations. Such emergencies could happen to a diplomatic mission, for it was quite common for such missions to occupy one floor or one apartment in a large building. And yet article 22 of the Vienna Convention had been adopted and he suggested that the similar wording used in article 31 of the consular draft should be approved.

68. Cases comparable to those provided for in article 31 (where the consular premises may not be entered for the purpose of an arrest) could likewise arise in respect of a diplomatic mission, for some of the persons working in such missions did not enjoy diplomatic immunity. In practice, all cases of that kind which had arisen in the past had been settled without much difficulty; the receiving State had in fact at its disposal powerful means of bringing pressure to bear on the foreign mission or consulate concerned in order to obtain the surrender of the person to be arrested.

69. He concurred with the view expressed by Mr. Ago that the greater danger of abuse lay in the action of the local authorities, which had the physical means of entering

the consular premises. That was true with regard to both diplomatic and consular premises. Since the aim pursued in article 31 was identical with that of the corresponding provision of the Vienna Convention, he suggested that the Commission adopt article 31.

70. Mr. PADILLA NERVO said that the Commission was faced with a clear choice between two courses. Either it could accept the principle of inviolability in the terms expressed in article 31 or it could draw up an exhaustive list of all the exceptions and limitations to the rule of inviolability. Bilateral consular conventions showed that such exceptions and limitations existed in State practice.

71. The opinion of the majority would probably be similar to that which had emerged both in the Commission itself and in the Vienna Conference in regard to the diplomatic bag. Both in the Commission and in the Conference, attempts to allow exceptions to the rule of inviolability had been rejected, the opinion of the majority being that any exception might lead to abuses and would substantially weaken the rule. He shared Mr. Ago's view that the main danger to be guarded against was that of abuse by the receiving, rather than by the sending State.

72. Commentary (8) to article 31 stated that the principle of the inviolability of the consular premises was recognized in numerous consular conventions and gave a list of such conventions, with references to the relevant provisions thereof. Those conventions generally stated that consular premises could not be entered by the local authorities except with the consent of the head of post. However, it was usually added that such consent could be tacit and that it would be assumed in the event of fire or other disaster or if the local authorities had reasonable cause to believe that a crime of violence had been, was being, or was about to be committed in the consular premises. Also, it was usually stated that if the consent of the head of post could not be obtained, the premises could be entered pursuant to an order of the competent judicial authorities and with the consent of the Ministry of Foreign Affairs of the sending State. Consuls were forbidden to afford asylum to fugitives from justice; if the head of post refused to surrender such a fugitive on the lawful demand of the local authorities, those authorities could, pursuant to an order of the judicial authorities and with the consent of the Ministry of Foreign Affairs of the sending State, enter the consular premises to apprehend the fugitive.

73. Lastly, such provisions usually stated that any entry or search of consular premises must not infringe the inviolability of the consular archives.

74. The case of the arrest or detention, pending trial, of the head of a consular post was dealt with in the last sentence of article 40, paragraph 4, which specified that, in that case, the receiving State had a duty to notify the diplomatic representative of the sending State.

75. Of the two courses open to the Commission he preferred the first: the principle of inviolability should be laid down in the terms set forth in article 31, subject to the amendment of paragraph 3 to bring it into line with the terms of the corresponding paragraph of article 22 of the Vienna Convention.

76. Mr. SANDSTRÖM recalled that Sir Humphrey Waldock had pointed out that certain bilateral conventions did not go so far as article 31 in stating the principle of inviolability. It was therefore useful to examine the appropriate provision of a typical bilateral consular convention, that of 1952 between the United Kingdom and Sweden.³

77. The relevant passages of article 10 of that Convention showed that it was possible to draft provisions of the type of article 31 in more flexible terms. However, he was inclined to agree with those members who thought that it might be dangerous to allow exceptions to the rule of the inviolability of consular premises and he therefore supported the text as drafted.

78. Sir Humphrey WALDOCK emphasized that he had mentioned the provisions of bilateral conventions for the purpose of demonstrating that article 31 did not constitute a codification of existing law. He would be satisfied if a reference to the provisions of existing conventions were added in the commentary. He was impressed by the arguments advanced in favour of a liberal solution, but it should be recognized that difficulties could arise if some freedom were not allowed to the authorities of the receiving State to enter the consulate premises in case of serious need, such as the fear of a burglary, where prompt action was desirable.

79. Article 53, paragraph 3, was of assistance in making it clear that the consular premises must not be used in any manner incompatible with the consular functions and that, if other activities were carried on there, the consular part must be kept separate from the part where the other activities took place. That language could usefully be incorporated into the definition of consular premises to be given in article 1. If that were done, the scope of the provisions of article 31 would become clearer and less open to objection.

80. The case where a consul committed a serious offence so that his arrest became necessary was essentially a question to be dealt with through the diplomatic channel. The receiving State had the means to bring pressure to bear on the sending State and its consulate in such cases. But what would be the position if the receiving State decided that the only appropriate action was to withdraw the exequatur of the consul and to close down the consulate? Would such action terminate the existence of the consular premises as such? For his part, he was not sure what was the answer to that question given by the texts of the relevant articles of the Commission.

81. Mr. AMADO said that all the statements made, both in support of the rule and in favour of stating exceptions, were sound. The absolute terms in which article 31 had been drafted could undoubtedly give rise to difficulties, but he agreed with Mr. Padilla Nervo that it would be dangerous to enumerate exceptions to the rule of the inviolability of consular premises.

³ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58. V.3, pp. 467 et seq.

82. He had not been very much impressed by some of the arguments put forward by governments which criticized article 31 as too categorical. The Government of Norway (A/CN.4/136), for example, had suggested that the second sentence of paragraph 1 might preclude even a courtesy call to the consulate. Clearly, the terms of article 31, however categorical, must be construed reasonably. For example, the tacit consent of the head of post to enter the premises could be assumed in the event of such emergencies as fire.

83. For those reasons, he supported the text of article 31, which seemed to contain only a very small element of innovation or progressive development of international law. The rule set forth in the article was fully consistent with the basic purpose of consular relations, which were established by States in order to provide services of mutual benefit to both the receiving State and the sending State.

84. With regard to Mr. García Amador's remarks concerning the phrase "special duty", the adjective "special" was useful in the context in order to stress that the receiving State was required to take special steps to protect consular premises from mob violence; those steps would go beyond those normally taken in the discharge of its general duty to maintain public order.

85. Mr. GARCÍA AMADOR explained that he had not disputed that a special obligation existed in the particular case, but the main provision of article 31, i.e., paragraph 1, also placed a special obligation upon the receiving State. His intention had been to point out that the expression "special duty", which appeared in paragraph 2, was not usual, although it had been included in article 22 of the Vienna Convention. What was really meant was that the receiving State was under an obligation to extend a special protection to the consulate premises. He therefore suggested that language to that effect should be used instead of the opening words of paragraph 2.

86. Sir Humphrey WALDOCK said that, in principle, he would accept the text of article 31, provided that the commentary was expanded so as to indicate the more restrictive nature of the relevant articles of the bilateral conventions to which he had referred. In that manner, the commentary would avoid giving the impression to students of the draft that the Commission had not appreciated that its proposed text went beyond some existing practice. The Drafting Committee should take into account the discussion on article 53, paragraph 3.

87. Mr. ŽOUREK, Special Rapporteur, said that Sir Humphrey Waldo's wishes would be taken into account: the final text of the commentary would be expanded so as to describe the relevant provisions of bilateral conventions. Of course, the commentary would refer not only to those conventions which stipulated exceptions to the rule of inviolability, but also to those which set forth the principle in broader terms than did article 31. For example, certain bilateral conventions extended the principle of inviolability to the private residence of the consul.⁴

88. The CHAIRMAN, summing up the debate on article 31, said that:

(i) the majority appeared to think that article 31 should stand as drafted, subject to changes to bring the article into line with the provisions of article 22 of the Vienna Convention;

(ii) the Commission was agreed that the Special Rapporteur should be asked to expand the commentary so as to indicate the existing practice: it would thus be made clear that article 31 contained some element of progressive development and was probably not yet a generally accepted rule of international law;

(iii) the point raised by Mr. Matine-Daftary with regard to the definition of consular premises would be dealt with in connexion with article 1 (Definitions);

(iv) the point raised by Mr. Bartoš could be usefully discussed in connexion with article 53.

89. Mr. BARTOŠ asked the Chairman to request the Special Rapporteur to mention in the commentary, as was customary in such cases, the fact that there had been an expression of opinion against the provisions of article 31 as proposed.

90. The CHAIRMAN said that the point would be taken into account. If there were no objection, he would take it the Commission agreed to instruct the Drafting Committee and the Special Rapporteur as he had suggested.

It was so agreed.

ARTICLE 32 (Exemption from taxation in respect of the consular premises)

91. Mr. ŽOUREK, Special Rapporteur, recalled that, in deference to objections of governments to a similar article in the draft on diplomatic intercourse, he had prepared at the previous session a text specifying that the exemption to which the article related was an exemption *in rem* affecting the actual building acquired or leased by the sending State. However, after a discussion in the Drafting Committee, it had been agreed to retain a text similar to that of the corresponding clause in the draft on diplomatic intercourse, but to stress in paragraph (2) of the commentary that the exemption was intended to be an exemption *in rem*, with the additional comments:

"In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated".⁵

92. The Governments of Norway, Denmark (A/CN.4/136/Add.1) and the United States of America (A/CN.4/136/Add.3) had expressed objections or reservations to

⁴ Cf. commentary (9) to the article.

⁵ Cf. also Special Rapporteur's observations in his third report (A/CN.4/137) *ad art. 32*.

that interpretation. The United States Government had pointed out that the article, by eliminating any differentiation in treatment as between property leased by the sending State and property owned by it, established a new concept in the administration of property taxes: generally no distinction was drawn in the application of such taxes on the basis of who the lessee might be.

93. The Chilean Government (A/CN.4/136/Add.7) had proposed that, in order to bring the text of article 32 into line with commentary (2), it should be amended to read: "Consular premises owned or leased by the sending State or by the head of post shall be exempt . . ."

94. He had reserved his final opinion on the article until the results of the Vienna Conference were known, in the expectation that it would then be seen how far governments were prepared to go in granting exemption from taxation. In fact, that Conference had adopted, as article 23, paragraph 1, of the Vienna Convention a provision similar in terms to article 32 of the draft, but had added a paragraph 2 which greatly limited the scope of paragraph 1.⁶ In point of fact, the operation of paragraph 2 would mean that in the great majority of cases paragraph 1 would not apply to leased premises because, in most countries, certain taxes were in fact payable by the lessor of the premises.

95. In conclusion, the Commission hardly adopt any other course than to incorporate into article 32 of the draft a second paragraph similar to article 23, paragraph 2, of the Vienna Convention. It was extremely unlikely that States would be prepared to grant a more liberal measure of tax exemption to consulates than to diplomatic missions, particularly since consulates were much more numerous than embassies. Nevertheless the Commission should endeavour in the commentary to article 32 to determine the scope of paragraph 2 of the article.

96. Mr. MATINE-DAFTARY said that, as he had pointed out during the discussion in the Vienna Conference, the insertion of paragraph 2 added nothing to the provisions of article 23 of the Vienna Convention. The owner of leased premises was subject to the local laws and was, of course, not exempt from any taxes which might be payable on the rent which he received. The fact that he rented his property to a diplomatic mission or to a diplomatic officer made no difference to his position in regard to local taxation.

97. The CHAIRMAN, speaking as a member of the Commission, admitted that, when he had taken part in the discussions at Vienna, he had been somewhat puzzled by the terms of article 23, paragraph 2.

98. The intention of those who had proposed that paragraph had been to make those taxes payable even if, under the terms of the lease, the mission had agreed to bear them. Cases had apparently occurred where a

mission had subscribed to such an agreement and had subsequently sent a note to the Ministry of Foreign Affairs of the receiving State to the effect that, since diplomatic missions were exempted from taxation, it should not pay the tax in question. By stating that exemption did not apply to those taxes, paragraph 2 would have the effect of compelling a diplomatic mission to pay them if it had agreed to do so in the lease.

99. Mr. VERDROSS said that article 31 could not go further than article 23 of the Vienna Convention. He therefore proposed the addition of a paragraph 2, similar to paragraph 2 of article 23 of that Convention.

100. He pointed out that, in States where a land registry existed, certain dues were payable in respect of the registration of transactions relating to land. Those dues could be quite high and it was desirable to state in the commentary whether they constituted a tax from which the consular premises were exempt or whether they represented payment for the specific service of registering the transaction.

The meeting rose at 1 p.m.

596th MEETING

Thursday, 25 May 1961, at 9.30 a.m.

Chairman : Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add. 1-10, A/CN.4/137)

[Agenda item 2]

(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 32 (Exemption from taxation
in respect of the consular premises) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of article 32 of the draft on consular intercourse and immunities (A/4425).

2. Mr. JIMÉNEZ DE ARÉCHAGA agreed with Mr. Verdross (595th meeting, para. 99) that article 32 should be redrafted so as to conform with the terms of article 23 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), since the Commission could not propose to give a greater measure of tax exemption to consular posts than that given to diplomatic missions.

3. As he understood it, paragraph 2 of article 23 of the Vienna Convention was designed to incorporate into the text of that Convention the idea expressed in commentary (2) to the corresponding article of the Commission's draft on diplomatic intercourse (A/3859, article 21). The commentary stated that the exemption did not apply to the case where the owner of leased premises specified in the lease that the taxes referred to in the

⁶ Article 23, paragraph 2, of the Vienna Convention provides: "The exemption referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."

article were to be defrayed by the diplomatic mission, because that liability did not represent the payment of a tax as such but an increase in rent.

4. Therefore, under paragraph 2 of article 23 of the Vienna Convention a diplomatic mission could not claim tax exemption if it had contracted to pay a tax which, according to the law of the receiving State, was normally payable by the person contracting with the sending State or with the head of the mission. That clarification was important and should be given in the commentary to article 32, if the Commission incorporated into that article the proposed paragraph 2. That commentary, which should be along the lines of commentary (2) to article 21 of the draft on diplomatic intercourse, would replace the existing commentary (2) to article 32 which, as rightly pointed out by the Governments of Norway and the United States (A/CN.4/136, and Add.3), was not consistent with the text of article 32.

5. Mr. ŽOUREK, Special Rapporteur, replying to a question raised by Mr. Verdross (595th meeting, para. 100), said that fees payable for the registration of a land transaction in the land registry should be regarded as a tax. In most countries, the amount charged was much too high for it to be considered merely as payment for the specific service of registering the transaction.

6. He proposed to expand paragraph (4) of the commentary by adding a few more examples to those given and he would take the opportunity to clarify the point in question.

7. Mr. VERDROSS said that certain bilateral conventions, such as that between the United Kingdom and Austria,¹ specified that taxes on transactions or instruments affecting transactions, such as taxes or dues on the sale or transfer of property, were also covered by the exemption. The Commission should take an express decision on the question whether such duties as registration fees for land transactions were covered by the exemption.

8. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 2 of article 23 of the Vienna Convention was not sufficiently clear. According to its sponsors, it covered the case where a diplomatic mission had agreed, under the terms of the lease, to pay at a tax which was normally payable by the other party.

9. He agreed that it was not possible to give consulates a greater measure of tax exemption than diplomatic missions, but an effort might be made to improve the wording of paragraph 2.

10. Mr. EDMONDS pointed out that in many countries, including the United States of America, taxes were levied primarily against the property and not upon individuals. Commentary (2) stated that the purpose of article 32 was to exempt the property itself, but that idea was not expressed in the text of the article, which exempted not the property but "the sending State and the head of post".

11. In addition, article 32 did not make sufficiently clear the extent of the property covered by the exemption. In the frequent case where a consulate occupied only

part of a building, only that part should be covered by the exemption.

12. Mr. AGO said that paragraph 2 had been included in article 23 of the Vienna Convention because certain delegations had been anxious to meet the wishes of the Treasury departments in their own countries, perhaps not fully grasping all the implications of the provision.

13. Both in connexion with a sale and with a lease of a property there existed in most countries taxes payable by both parties to the transaction. Where a diplomatic mission was the purchaser or lessee, it was, of course, exempted from any taxes payable by a purchaser or lessee. If, however, the mission undertook to reimburse to the vendor or lessor a tax normally payable by such vendor or lessor, the effect of paragraph 2 would be to preclude the mission from claiming exemption in order to avoid payment.

14. The only prudent course for the Commission was to adopt the same system in respect of consuls, since it was unthinkable that it should propose to give to consuls greater privileges than to diplomats. An explanation of the purpose of paragraph 2 should, however, be included in the commentary.

15. Mr. MATINE-DAFTARY said that he had voted for article 23, paragraph 2, at Vienna on the understanding expressed by Mr. Ago. The question of determining the taxpayer in respect of a particular tax was one for the legislation of the country concerned; that determination could not be affected by a clause in a private contract. If, therefore, a tax was payable by the owner of a building under the laws of the receiving State, and the property was leased to an embassy, and the ambassador agreed to pay the amount of the tax, that agreement remained a matter between the parties to the lease. It did not alter the fact that the taxpayer was the private owner and not the ambassador. Exemption could therefore not be claimed, and the ambassador had to carry out his agreement to refund to the owner the amount of the tax which he had undertaken to pay.

16. Mr. BARTOŠ agreed with Mr. Matine-Daftary that a private contract such as a lease could affect the financial position of the contracting parties but could not affect the application of the legislative provisions which specified who was to be the taxpayer.

17. The purpose of paragraph 2 of article 23 of the Vienna Convention was to prevent the owner of a property from obtaining an indirect benefit as a result of his having leased his property to a diplomatic mission.

18. The purchase or lease of property for the use of a diplomatic mission or consulate could give rise to a great many problems which varied from country to country, as he had learned from his experience in advising the Ministry of Foreign Affairs of his country in matters of that kind. Some of those problems were connected with the distinction between taxes which were of an objective character and those which were of a subjective character. Others arose out of the distinction between taxes charged on property as such and taxes charged on the utilization of property. A consulate was exempted from all taxes applicable in respect of the occupation or utilization of the consular premises.

¹ Cmd. 1300.

In that connexion, he cited the problem of the development charge in respect of the garden of a consulate. Opinions were divided: it was held by many that the charge should not apply to a garden which was used by the mission as an amenity.

19. He urged the Commission not to enter into details in article 32, but to adopt a provision along the lines of article 23 of the Vienna Convention, leaving practical difficulties to be settled by the interested countries, usually on the basis of reciprocity, as was the existing practice.

20. Mr. YASSEEN said that he had understood article 23 of the Vienna Convention as dealing with the question of determining who should, in the final analysis, bear the burden of the tax. In that connexion, he did not think that the English "payable by" reflected the exact meaning of the French "à la charge de".

21. At the Vienna Conference, he had taken the position that the statement contained in paragraph 2 was true, but that the provision was unnecessary because it merely expressed the self-evident fact that a private individual who was a taxpayer under the laws of the receiving State could not benefit from a tax exemption which applied only to diplomatic officials. The position was no different so far as consuls were concerned, and for that reason he doubted the advisability of including in article 32 of the draft a provision along the lines of article 23, paragraph 2, of the Vienna Convention.

22. Sir Humphrey WALDOCK, agreeing with the position taken by Mr. Ago, said that it would be wise to follow the example of the Vienna Conference and include paragraph 2. He agreed with Mr. Bartoš that there could be many complicated small problems arising from the provisions of local legislation and that those problems could best be settled by agreement between the two States concerned. In article 32, the Commission could deal only with general principles.

23. Mr. LIANG, Secretary to the Commission, said that what mattered was the nature of the tax. Certain taxes related to the property itself, others related to the use of the property.

24. As to the statement contained in the commentary (2) that the exemption to which article 32 related was "an exemption *in rem*", he found it so ambiguous as to be incomprehensible. The taxes referred to in article 32 appeared to relate to the use of property and, in that connexion, he could give an example from his own experience. For several years, he had been a diplomatic official accredited to the United Kingdom and had rented an apartment in London. Since the rent payable for his apartment included a tax, he used to obtain remission of that tax by making the appropriate application through the Foreign Office. He saw nothing wrong in a diplomatic official's claiming such a remission, or in a receiving State's granting it, where the tax related to the use of the property. Unless such remission were granted, the absurd situation would arise of a diplomatic official's having to bear, in effect, twice the amount payable by an ordinary lessee, as had been pointed out by the Chairman.

25. In the light of those considerations, paragraph 2

of article 23 of the Vienna Convention could not be regarded as the codification of a generally accepted rule of international law. It constituted perhaps what the Commission's Statute called "progressive development of international law".

26. Lastly, he drew attention to the relevant provisions of Section 8 of the Convention on Privileges and Immunities of the United Nations adopted by General Assembly resolution 6 (I) of 13 February 1946. Those provisions stated that, while the United Nations would not, as a general rule, claim exemption from taxes on the sale of moveable and immoveable property which formed part of the price to be paid, nevertheless, when the United Nations was making important purchases for official use of property on which such [duties and] taxes had been charged or were chargeable, Member States "will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax". Those provisions were based on the premiss that the taxes were related to the use of the property and were not taxes on the property as such.

27. Mr. SANDSTRÖM said that it would be unwise in that context to give an interpretation of article 23, paragraph 2, of the Vienna Convention, although the Commission could not omit from article 32 a provision along the lines of that paragraph 2. While it would perhaps be undesirable to try to give an official interpretation in a commentary, he was personally inclined to accept the interpretation placed on the provision by Mr. Ago.

28. Mr. AGO said that the position had been clarified by the examples given by the Secretary and members of the Commission. It was necessary to include a provision along the lines of paragraph 2 of article 23 of the Vienna Convention so as to prevent persons who contracted with a consul from evading the provisions of the law.

29. Mr. GROS agreed with Mr. Ago.

30. Mr. MATINE-DAFTARY said that, while he was in agreement with the proposal to include paragraph 2, he could not agree with Mr. Sandström's suggestion that no interpretation should be given. The Commission should explain in the commentary the purpose of the provision.

31. Mr. ŽOUREK, Special Rapporteur, said that article 32 covered not only the lease of property, but also the sale of property to a consulate. Land transfers were usually subject to a duty and the article, even with the addition of paragraph 2, would not cover all the cases that might arise. For example, the law in certain countries made both purchaser and vendor liable jointly and severally for the payment of transfer dues and the vendor would try to pass on the whole of the burden to the purchaser. It was not clear how the provisions of the article would operate in such a case.

32. In conclusion, he said that the discussion had to some extent clarified the meaning of article 32 and the proposed additional paragraph 2, but that the implications were still not all completely clear. He would, of course, endeavour to give as full an explanation as possible in the commentary.

33. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to instruct the Drafting Committee to draft article 32 along the lines of article 23 of the Vienna Convention.

It was so agreed.

ARTICLE 33 (Inviolability of the consular archives and documents and official correspondence of the consulate)

34. Mr. ŽOUREK, Special Rapporteur, drew attention to a difference in terminology between article 33 and the corresponding article 24 of the Vienna Convention. The former referred to "consular archives, the documents and official correspondence of the consulate" while the latter mentioned only "the archives and documents of the mission". A number of government comments also dealt with that question of terminology; the Union of Soviet Socialist Republics (A/CN.4/136/Add.2) had suggested that in article 1 (e) the expression "consular archives" should be defined as meaning "all documents, official correspondence and the consulate library, as well as any article of furniture intended for their protection or safe-keeping". The Netherlands Government (A/CN.4/136/Add.4) had expressed the view that the words "the documents" were superfluous, since documents were covered by "archives", and suggested that the appropriate change be made in both article 33 and article 1 (e).

35. With regard to the substance of article 33, there had been no objections from governments. The Yugoslav Government (A/CN.4/136) had suggested that the article would be more complete if the definitions of inviolable articles were incorporated in the body of the article. The United States Government (A/CN.4/136/Add.3) had pointed out that in the United States domestic mail service only firstclass mail was not subject to inspection and had urged that consideration should be given to the relevant provisions of postal conventions.

36. Accordingly, he proposed that questions of terminology should be left aside for the time being and that the Commission should adopt article 33 as it stood, on the understanding that the language would be later adjusted in order to reflect the decision which the Commission would take in regard to the definition of the expression "consular archives" in article 1.

37. Mr. VERDROSS suggested the insertion in the article of a second paragraph stating that the consular archives and documents and official correspondence of the consulate should be kept separate from the private correspondence of the consul and from other papers not connected with the consulate.

38. Mr. MATINE-DAFTARY remarked that it was not possible to give to consulates the same broad measure of inviolability as to diplomatic missions in regard to archives, documents and papers.

39. In the first place, unlike a diplomatic officer, a consul could be tried for an offence by local courts and, in that case, the local judicial authorities should be able to search for evidence wherever it could be found.

40. In the second place, a consul acted as notary public and registrar of births, marriages and deaths. Therefore, the consular archives or records could be cited in the courts of the receiving State in order to prove, for example, that a person had been married at the consulate; the consul might favour the other spouse by withholding the register of marriages. In such cases, the registrar was safeguarding private interests and not State secrets. A formula should therefore be sought which would make the consular archives accessible to the local judicial authorities in those cases.

41. Sir Humphrey WALDOCK supported the suggestion of Mr. Verdross and drew attention to the provisions of article 53, paragraph 3, which required the offices used by the consulate to be kept separate from those of other institutions or agencies installed in the consular premises.

42. Mr. AGO said he could not agree with Mr. Verdross and Sir Humphrey Waldo. The question only arose in regard to honorary consuls, who could have activities other than those connected with their consular duties. And so far as they were concerned, article 55 in any case specified that the inviolability of consular archives, documents and official correspondence was conditional on their being kept separate from the private correspondence of the honorary consul and from the books and documents relating to any private activity which he carried on.

43. There was no need for a similar provision for career consuls, who did not carry on private gainful activities. The only non-official papers which a career consul might have would be his private correspondence, the privacy of which should in any case be protected.

44. The fact that a consul acted as notary rendered it all the more necessary to guarantee the inviolability of the consular archives because of the rule of professional secrecy which applied to documents recorded by a notary.

45. He strongly opposed any suggestion that exceptions should be allowed to the rule of inviolability, for it would be easy for the receiving State to use such exceptions to render the rule inoperative in practice. He would go even farther and suggest that the language used in article 24 of the Vienna Convention should be introduced into article 33, so as to state that the archives, documents and correspondence "shall be inviolable at any time and wherever they may be". It might be necessary to keep consular archives and documents in a place other than the consulate, and it was desirable to state that inviolability continued to apply.

46. Mr. FRANÇOIS agreed with Mr. Ago that the provision on the separation of the archives and official documents from non-consular papers was necessary only in the case of honorary consuls, who were already covered by article 55; also that it would be not only undesirable, but dangerous, to introduce any exception into article 33.

47. He noted with surprise that article 24 of the Vienna Convention referred only to "the archives and documents

of the mission". He could not understand why the article made no reference to correspondence. Article 33 of the consular draft should contain such a reference, because it was intended to cover correspondence addressed but not yet delivered to the consulate. Such correspondence would certainly not be covered by the term "archives".

48. The CHAIRMAN explained that, in the Vienna Convention, the inviolability of the official correspondence was set forth, not in article 24 but in article 27, paragraph 2, which explained that the term meant all correspondence relating to the mission and its functions. That explained the absence of a reference to official correspondence in article 24.

49. Mr. ŽOUREK, Special Rapporteur, said that, although it was true that some consular conventions required consular papers to be kept separate from the private correspondence of a career consul, that requirement was a relic of the past when the majority of career consuls had engaged in private gainful occupations. It was as unnecessary to prescribe such a requirement for career consuls as in the case of diplomats. A clause of the kind suggested by Mr. Verdross might lend itself to malpractices. No exception should be made that might weaken the principle of inviolability. As to honorary consuls, the great majority of whom engaged in private gainful occupations, article 55 of the draft fully met Mr. Verdross's point.

50. In reply to Mr. Matine-Daftary, he said that a consul was hardly likely to refuse to produce on request a copy of a marriage certificate, for example. If such a case should occur, however, the person requesting the production of the document would be free to apply to the authorities of the sending State. He would be hardly likely to bring proceedings in the receiving State.

51. Mr. PAL recalled that at the twelfth session (531st meeting, paras. 9 and 12) Mr. Scelle had suggested the insertion of a provision on the lines of Mr. Verdross's proposal, but the Special Rapporteur had indicated that such a provision would be uncalled for in the case of career consuls, for the practice of their engaging in gainful private occupation had become almost obsolete.

52. Article 33 should be retained and there should be no objection to adding the words "wherever they may be" used in article 24 of the Vienna Convention, as that change would be fully consonant with the Commission's intention as revealed in its commentary on the 1960 draft article.

53. Sir Humphrey WALDOCK said that if the question of the separation of consular from other papers was in fact settled by article 55, on the grounds that the question could not arise except in connexion with honorary consuls, he would be satisfied. However, after reading paragraph (4) of the commentary to article 53, which did not relate to honorary consuls, and which stated explicitly cases where the offices of institutions or agencies were installed in the buildings of a consulate occurred with some frequency, he had some doubts.

54. Mr. ŽOUREK, Special Rapporteur, explained that at the twelfth session (A/4425, article 54, commentary

(5)) the Commission had decided that the question of the applicability of certain provisions to honorary consuls would be held over pending the receipt of the comments of governments.

55. Mr. VERDROSS pointed out that, so far from excluding the possibility that career consuls might carry on a gainful private occupation, the draft expressly recognized that possibility in article 40, paragraph 1. Accordingly, if his suggestion were not accepted, a proviso should be inserted in article 33 stipulating that in the case of a career consul who carried on a gainful occupation the provisions of the article would not apply unless the consular archives, documents and official correspondence were kept separate from non-consular papers.

56. Mr. BARTOŠ observed that one of the problems was how to determine which documents formed part of the consular archives, a matter on which it was not easy to frame precise rules, as the discussions at the Vienna Conference had shown. Though he had voted in favour of article 24 of the Vienna Convention, he had not found it altogether satisfactory.

57. It was true that the commentary to article 33 provided some explanation of what was meant by consular archives, documents and official correspondence, but those definitions would not appear in the text of the article itself and their absence might create difficulties of interpretation. Though a multilateral convention should not be overburdened with excessive detail, the Drafting Committee should be instructed to devise rather more precise wording.

58. Any paper addressed to a consulate should become part of its archives, since freedom to communicate with a consul was a vital element of consular protection; any attempt to restrict the application of the article by reference to the origin of a document should be withstood.

59. In general, the private correspondence of consular officials should, for the purposes of the article, be placed on a par with official correspondence because of the difficulty of differentiating between private, semi-official and official letters. Some might be private in character but contain material of an official nature. On the other hand, he was fully aware of the possibilities of abuse; in one case, for example, a foreign consul in Yugoslavia had received correspondence concerning forged Yugoslav bank notes. In a provision stating the rule of the inviolability of consular archives, it was desirable to provide definitions where possible, and the possibility of abuse for criminal purposes had to be weighed against the need to maintain an essential rule.

60. Mr. PADILLA NERVO said that, as the commentary emphasized, the rule stated in article 33 was of fundamental importance; if any exception to the rule were allowed the principle of the inviolability of consular archives would be seriously weakened and possibly frustrated. It was usual in consular conventions to stipulate that correspondence bearing an official stamp was inviolable and not liable to seizure by authorities of the receiving State. In practice, career consuls were seldom allowed by their own country's regulations to

engage in gainful private activities, and accordingly the safeguard provided for honorary consuls in article 55 should suffice.

61. Article 33 should stand, possibly with the addition of a phrase such as that used at the end of article 24 of the Vienna Convention. Later, after the terms of article 55 had been settled, the Commission might consider whether it was advisable to draft a specific clause providing that career consuls who carried on a private occupation should segregate the consular from the non-consular papers.

62. Mr. AGO said that Mr. Verdross had drawn attention to what was in fact an exceptional case. If by implication the provision in article 40, paragraph 1, cited by Mr. Verdross admitted the possibility that career consuls might engage in a gainful private activity, the reason might be that the Commission had not at the twelfth session taken a final decision on the question of preventing career consuls from engaging in gainful private activities. In the light of article 42 of the Vienna Convention, however, it seemed desirable to insert a corresponding prohibition in the provisions of the draft concerning career consuls. If it was expressly laid down that career consuls were not allowed to engage in a gainful private activity, Mr. Verdross's suggested amendment would become unnecessary. Perhaps the suggestion could be taken up after that more general issue had been settled and in the meantime article 33 might be approved in its existing absolute form.

63. Mr. MATINE-DAFTARY said that he sympathized with Mr. Verdross's suggestion, but considered that the discussion it had provoked was somewhat academic because even if very strict obligation were imposed upon a consul to keep official documents separate, there was no sanction that could be applied for failure to comply with it.

64. Sir Humphrey WALDOCK said that Mr. Verdross's suggestion could perhaps be discussed in conjunction with article 53. It would certainly be inconsistent not to stipulate that documents should be kept separate if the requirement laid down in article 53, paragraph 3, concerning premises were retained.

65. All that had been suggested was that the duty to keep consular papers separate should be stated and there was no question of prescribing sanctions against failure to do so. The question was not of major importance but could arise, for example, in the case where an investigation became necessary into the papers belonging to a shipping agency run from an extension of a consulate.

66. Mr. ŽOUŘEK, Special Rapporteur, said that Mr. Verdross had drawn attention to a real, though infrequent problem. The Commission had decided not to include a provision of the kind contained in article 35, paragraph 2, of his original draft (A/CN.4/108), in recognition of the fact that under the law of certain States career consuls were allowed to engage in gainful private activity. That was the practice, for instance, of the United States as indicated in the United States Government's comment on articles 54-63 (A/CN.4/136/Add.3).

67. There were two possible ways of dealing with Mr. Verdross's suggestion: either to insert a provision prohibiting career consuls from engaging in a gainful private occupation, or to insert in the draft a new article assimilating career consuls engaged in private gainful occupations to honorary consuls. Under such an article, the requirement contained in article 55 (concerning the segregation of consular from other papers) would be extended to that category of consular officials. A decision on the latter question would ultimately have to be taken, but he suggested that for the time being the most convenient procedure might be to refer article 33 to the Drafting Committee as it stood.

It was so agreed.

ARTICLE 34 (Facilitation of the work of the consulate)

68. Mr. ŽOUŘEK, Special Rapporteur, said that the only government to comment on article 34 was that of the United States of America, which considered that the article might be deleted. His opinion was that the article, which stated a general rule, should be retained.

69. The CHAIRMAN suggested that article 34 be referred to the Drafting Committee for consideration in the light of the terms of the corresponding article (article 25) of the Vienna Convention, where slightly different wording was used.

It was so agreed.

ARTICLE 35 (Freedom of movement)

70. Mr. ŽOUŘEK, Special Rapporteur, said that he had commented on the observation made by the Yugoslav Government in his third report (A/CN.4/137).

71. In reply to the comment of the United States Government, which was in principle opposed to travel restrictions, he recalled that the article was modelled on the corresponding article in the draft on diplomatic intercourse and immunities adopted by the Commission after lengthy discussion and accepted by the Vienna Conference (article 26 of the Vienna Convention). There was no need to reopen discussion on the matter and the article could be referred to the Drafting Committee.

72. The CHAIRMAN, speaking as a member of the Commission, explained that the Vienna Conference had not made any change in the relevant provision submitted by the Commission and which now appeared as article 26 in the Vienna Convention. The text had been the result of a determined effort to achieve a compromise.

73. Mr. BARTOŠ considered that the Commission should not seek to go beyond the compromise accepted by the Vienna Conference so as not to jeopardize the liberty of the freedom of movement which should be observed to the greatest extent possible, except when the requirements of national security made that impossible. He therefore agreed with the purpose of the amendment suggested by China (A/CN.4/136/Add.1).

Article 35 was adopted.

ARTICLE 36 (Freedom of communication)

74. Mr. ŽOUREK, Special Rapporteur, said that the representative of Ghana, speaking in the Sixth Committee (659th meeting) at the fifteenth session of the General Assembly, had suggested that it should be specified whether article 36, as well as other articles of the draft, were to be regarded as conferring rights or privileges.² That view seemed to derive from the belief that consular privileges were not based on law. In that connexion, he would point out that the word "privileges" was used to designate certain rights, belonging to the sending State, which were accorded to consular officials as distinct from other foreign residents. On the other hand, immunities represented the prerogatives whereby consular officials were exempted from the jurisdiction of the receiving State. But both categories of benefit were based on international law.

75. A number of governments had commented on the article, some tending to limit the consulate's communication. The Government of Denmark (A/CN.4/136/Add.1), considered that freedom of communication should be restricted so that, besides maintaining contact with the government of the sending State and that State's diplomatic mission accredited to the receiving State, consulates should be free to communicate only with the consulates of the sending State situated in the same receiving State. The Government of Spain (A/CN.4/136/Add.8) had suggested that the scope of the article should be restricted along the same lines, pointing out that the extension of freedom of communication to other consulates of the sending State, wherever situated, was at variance with the principle of treaties to which Spain was a party.

76. The second set of comments related to the much-discussed point whether, in certain special cases, permission should be given to open the consular bag. The Danish Government had proposed a provision, to be added to paragraph 3, stating that in such cases the authorities of the receiving State might request that a sealed courier bag should be opened by a consular official in their presence, and the Spanish Government had suggested a similar addition. The Government of Japan (A/CN.4/136/Add.9) had suggested that paragraph 2 should be amended to state that the bags, if certified by the responsible officer of the sending State as containing official correspondence only, should not be opened or detained; that government also proposed a drafting amendment to the text. Finally, the United States Government considered that the diplomatic bag might in certain circumstances be refused by the receiving State, that the right to operate a radio transmitter (admissible in the case of diplomatic missions) did not necessarily exist in the case of consulates, and that the article did not exempt consular officials from payment of postage.

77. The main question for the Commission to decide seemed to be whether or not to restrict the principle of free communication stated in paragraph 1. His view was that the article should be retained as it stood, since

the restrictions proposed by the Danish and Spanish Governments would entail considerable delay in the despatch of consular business by diverting communication to diplomatic and other channels. With regard to the proposal that the authorities of the receiving State should in special cases be allowed to open the consular bag, the essential principle which the Commission had adopted in the cases of the inviolability of the consular premises and the consular archives should be retained, particularly since the question had been discussed at length during the Commission's twelfth session (531st, 532nd and 572nd meetings, where discussed as articles 27 and 29), and since the draft article was in conformity with the corresponding article of the Vienna Convention.

78. Furthermore, article 27 of the Vienna Convention contained an additional provision on diplomatic couriers *ad hoc*. The Commission's draft provided a similar clause relating to the designation of special couriers in cases where the sending State used diplomatic couriers, but needed to find a means of communication between consulates and the diplomatic mission or where the sending State had no diplomatic mission in the receiving State. Finally, article 27, paragraph 7, of the Vienna Convention provided that a diplomatic bag might be entrusted to the captain of a commercial aircraft; the Commission might wish to insert a similar provision in article 36 of the present draft.

79. Mr. VERDROSS said that, in principle, he agreed with the Special Rapporteur that the present wording of article 36 should be retained. The qualifying phrase, however, concerning the installation and use of wireless transmitters, which had been added to article 27, paragraph 1, by the Vienna Conference should apply *a fortiori* to consulates and a similar phrase should be added at the end of article 36, paragraph 1.

80. Mr. YASSEEN observed that international practice in the matter did not quite conform with the provisions of article 36. Nevertheless, he was in favour of retaining the article as drafted, if only as a step towards the progressive development of international law. Moreover, article 36 represented a corollary to article 33 dealing with inviolability of the consular archives, and documents and official correspondence of the consulate, and it would therefore be illogical not to apply the principle of absolute inviolability to the means of communicating consular documents. For that reason also, the article should be supplemented by the paragraphs that had been added to the corresponding article of the draft on diplomatic relations.

81. Mr. SANDSTRÖM observed that, in the case of the draft under discussion, it might be unnecessary to include a paragraph on special couriers, since paragraph 1 already referred to "all appropriate means, including diplomatic or other special couriers".

82. The CHAIRMAN observed that the Commission seemed to be agreed on adopting article 36 as it stood. The outstanding question was whether certain additional provisions of article 27 of the Vienna Convention should be incorporated in the text.

83. Mr. BARTOŠ pointed out that the decision of

² See also Special Rapporteur's third report (A/CN.4/137), *ad* article 36.

the Vienna Conference to provide absolute inviolability for the diplomatic bag had by no means been unanimous. Nearly one-third of the participants had wished to include a provision under which the bag could be either opened or denied admission by the authorities of the receiving State in certain special cases. In view of that difference of opinion even in the case of the diplomatic bag, it would be advisable for the Commission to take a specific decision on the corresponding clause of article 36.

84. The CHAIRMAN observed that the matter had been discussed thoroughly in the Commission at previous sessions. Moreover, proposals to the effect described by Mr. Bartoš had been rejected by the Vienna Conference, and there seemed to be no need to reopen the question in the Commission. If the Commission proceeded from the assumption that the consular bag should be given a different status from that of the diplomatic bag — an incomplete inviolability or incomplete freedom of movement — that channel of communication might in practice be closed. Accordingly, reference to certain opinions voiced at the Vienna Conference would be pertinent only if the Commission decided to reopen its debate on the subject, and he had seen no indication of such a wish. Neither the decision of the Vienna Conference nor the comments received from governments seemed to justify a reversal of the Commission's decision.

85. Mr. ERIM said that the decisions of the Vienna Conference could not serve as an argument for providing the same freedoms and immunities to consulates and to diplomatic missions. He agreed with Mr. Bartoš that many governments were unlikely to agree to such assimilation; moreover, a number of governments had suggested amendments to article 36 under which the authorities of the receiving State would be able to open the consular bag in special cases. Lastly, in view of the lengthy discussions and divergent opinions at the twelfth session on the idea contained in paragraph 2, it could not be said with any accuracy that the Commission had unanimously accepted the principle of assimilation.

86. Sir Humphrey WALDOCK said that the essential question was whether or not the Commission believed that, in the case of communication, consulates should be treated on the same footing as diplomatic missions. If that question were answered in the affirmative, it would be logical to draft article 36 along the lines of article 27 of the Vienna Convention, since the latter applied to communications from diplomatic missions to consulates, while the former dealt with communications from consulates to diplomatic missions.

87. Mr. SANDSTRÖM, referring to the point he had made earlier in the meeting, considered that the reference to the protection of the special courier in paragraph (4) of the commentary to article 36 might be incorporated in the article itself.

88. Mr. FRANÇOIS, recalling the lengthy debates during the twelfth session on the possibility of opening the consular bag in special cases, observed that some of the members who had accepted the present text had done so on the understanding that paragraph 2 did not completely exclude the opening of the bag.

That paragraph was, in his opinion, closely related to paragraph 3, which stated that the bags should contain only documents or articles intended for official use. Accordingly, if it were suspected that the bags contained other documents or articles, the authorities of the receiving State might open them, on the full responsibility of that State if the suspicions proved to be unfounded. Article 27 of the Vienna Convention also implied that possibility, and he therefore had no serious objection to article 36 being drafted along the lines of that text.

89. The CHAIRMAN, speaking as a member of the Commission, said that he could not agree with Mr. François's interpretation of article 27 of the Vienna Convention. It had never been the intention of the Commission or of the Vienna Conference to make the inviolability of the diplomatic bag conditional. The provision of article 27, paragraph 3, of the Vienna Convention imposed an obligation on the receiving State, whereas paragraph 4 of that article imposed an obligation on the sending State. If the receiving State had any doubts concerning the contents of the diplomatic bag, it was nevertheless not justified in opening or detaining the bag; it might use any other means at its disposal and it had many possibilities in that connexion, but Mr. François's interpretation was a dangerous one, and had in fact been rejected by the Commission. He fully endorsed Sir Humphrey Waldock's remarks and considered that, if the principle of assimilating the inviolability of the diplomatic bag to that of the consular bag were adopted, it would be logical to draft article 36 along the lines of article 27 of the Vienna Convention.

90. Mr. BARTOŠ observed that, despite the divergences of view revealed during the discussion, at the voting the majority of the participants in the Vienna Conference had declared themselves in favour of an absolute guarantee. Accordingly, Mr. François's interpretation of article 27, although logical, did not correspond to the formally expressed will of the Conference.

91. Mr. MATINE-DAFTARY recalled that he had defended the text of article 27 of the Vienna Convention and had spoken against the amendments to it. It had always been his attitude, however, to differentiate between the privileges and immunities of diplomatic missions and those of consulates; his natural inclination, therefore, would be to support Mr. Erim's views. On the other hand, since the majority of the Commission had already decided in favour of absolute inviolability of the consular archives and documents and official correspondence of the consulate, it would be illogical not to maintain the same inviolability in respect of freedom of communication.

92. Mr. ŽOUREK, Special Rapporteur, said that he also was unable to accept Mr. François's interpretation of article 27 of the Vienna Convention. Three proposals made at the Vienna Conference authorizing the opening of the diplomatic bag in certain cases had all been rejected and the principle of inviolability of the diplomatic bag had thus been firmly confirmed. Moreover, paragraph (1) of the commentary on article 36 stated that the article predicated a freedom essential for the discharge

of consular functions and, together with the inviolability of consular premises and that of the consulate's official archives, documents and correspondence, formed the foundation of all consular law. In the light of that statement, there seemed to be no reason to reverse the Commission's earlier decision.

93. Mr. FRANÇOIS asked whether, in the case of a consular bag being opened and being found to contain nothing but diamonds or drugs, the State which had opened the bag should apologize to the sending State.

94. Mr. ERIM thought that, since the Commission was debating the comments of governments it should give conclusive replies to some objections raised. For example, the Belgian Government (A/CN.4/136/Add.6) did not consider that the principle expressed in paragraph 2 was absolute and had stated that, according to usage, the authorities of the receiving State could open the consular bags if they had serious reasons for their action, but must do so in the presence of an authorized representative of the sending State. That serious objection, and others like it, deserved the Commission's full consideration. The Belgian Government's observation made it obvious that a statement of the principle as an absolute rule was an innovation in international law and a step towards identifying diplomatic with consular law.

95. Mr. ŽOUREK, Special Rapporteur, queried whether the "usage" referred to by the Belgian Government could be identified with customary law. Nor could he agree that it was the general usage to allow the authorities of the receiving State to open the consular bags. The Commission had, in the case of a number of articles, proposed the unification and development of international law; in the case of article 36, the proposed rule, was perfectly justifiable.

96. Mr. AGO suggested that, in the case cited by Mr. François, the sending State and the receiving State should apologize to each other, since each would be guilty of violating a rule of international law.

97. Since the Commission had admitted the principle that the correspondence of the consulate might be carried in either the diplomatic or the consular bag, and since the principle of absolute inviolability for the diplomatic bag had been accepted in article 27 of the Vienna Convention, it would be illogical to differentiate between the two means of communication.

98. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of according the consular bag the same inviolability and freedom of movement as those accorded to the diplomatic bag. He suggested that article 36 should be referred to the Drafting Committee with instructions to recast it along the lines of article 27 of the Vienna Convention.

It was so agreed.

99. Mr. BARTOŠ stressed that the decision on article 36 had not been unanimous.

The meeting rose at 1 p.m.

597th MEETING

Friday, 26 May 1961, at 10.15 a.m.

Chairman: Mr. Grigory I. TUNKIN

Date and place of the next session

[Agenda item 7]

1. Mr. LIANG, Secretary to the Commission, observed that it had been the Commission's practice to meet towards the end of April for ten weeks until the beginning of the summer session of the Economic and Social Council, early in July. That practice was governed by operative paragraph 2 (d) of General Assembly resolution 1202 (XII), which provided that the annual session of the Commission should be held in Geneva without overlapping with the summer session of the Council. That session would begin on Tuesday, 3 July 1962; the Secretariat therefore suggested that the Commission's next session should begin on Tuesday, 24 April, and continue until Friday, 29 June 1962.

2. The CHAIRMAN suggested that the Commission should adopt the dates proposed by the Secretariat.

It was so agreed.

Co-operation with other bodies (continued)

[Agenda item 5]

3. Mr. LIANG, Secretary to the Commission, said that the Secretariat had been in touch with the legal bodies of the Organization of American States and the Asian-African Legal Consultative Committee. The previous meeting of the Inter-American Council of Jurists had been held at Santiago, Chile, in September 1959 when he had acted as observer and had reported to the Commission at its twelfth session (A/CN.4/124). At Santiago, the Council had decided to hold its next meeting at San Salvador, El Salvador, but had not decided on the date. The Secretariat had since been in correspondence with the Pan American Union and with the delegation of El Salvador to the United Nations; Mr. Urquía, the head of that delegation, had informed the Secretariat that the fifth meeting of the Inter-American Council would be held at the beginning or in the middle of 1962. An earlier date had been suggested; but, since the work of the Council was closely linked with the Conference of American States to be held at Quito, Ecuador, no definite decision could be made until after that conference. The Commission had been invited to send an observer to the fifth meeting of the Council, but the decision on that could be deferred.

4. The Asian-African Legal Consultative Committee's session at Tokyo in February-March 1961 had been attended by Mr. García Amador, as the Commission's observer, pursuant to the decision at the twelfth session (A/4425, chap. IV, para. 43). Mr. García Amador's written report would be circulated as a document of

the Commission.¹ The Asian-African Legal Consultative Committee had sent the Secretariat a letter, dated 13 May 1961, expressing the Committee's appreciation of Mr. García Amador's attendance and stating that Mr. Hafiz Sabek, the head of the delegation of the United Arab Republic, would attend meetings of the Commission as an observer from 7 June 1961 to the end of the session. The letter further stated that the next session of the Committee would be held at Rangoon, Burma, for two weeks between 15 January and 15 February 1962. Although the exact dates and the agenda had not been settled, it was believed that the agenda would include such subjects as the problem of the legality of nuclear tests, the diplomatic protection of citizens abroad, the question of the maltreatment of aliens, avoidance of double taxation and arbitral procedure. The Commission had been invited to send an observer to that session.

5. The CHAIRMAN, speaking as a member of the Commission, observed that arrangements had been made for the Asian-African Legal Consultative Committee and the Inter-American Council of Jurists to provide the Commission with documents, a matter of great interest. With regard to the question of sending observers to sessions of those bodies, the Committee could hardly establish the principle of regular representation, in view of the considerable expense involved, which was, moreover, all the less justified in view of the extensive exchange of material. Every case should therefore be decided on its own merits and in the light of such possibilities as sending members who happened to be near the locality of the session. With regard to the question of designating an observer to attend the session of the Asian-African Legal Consultative Committee, the Commission as in a rather awkward situation, since 1961 was the last year of its existing composition.

6 Mr. GARCÍA AMADOR suggested that the question relating to the co-operation with other bodies, so far as the Asian-African Committee was concerned, should be deferred until the Committee's observer arrived at Geneva.

7. Mr. GROS said he doubted the advisability of settling such a delicate internal question in the presence of that Committee's observer. Furthermore, it seemed to be very difficult to take a decision on the matter at that session.

8. Mr. GARCÍA AMADOR said that he had made the suggestion as a matter of elementary courtesy to the Committee's observer. He agreed that the appointment of the Commission's observer to the fifth session of the Committee could be decided separately.

9. Mr. EDMONDS suggested that, since the Chairman's term of office would continue until the end of the year, the Commission might authorize him to designate an observer after the elections had been held.

10. Mr. SANDSTRÖM proposed that the Secretariat should inform the Asian-African Legal Consultative Committee that it was not in a position to send an observer for the reasons stated by several speakers.

It was so agreed.

11. The CHAIRMAN invited the observer for the Inter-American Juridical Committee to make a statement.

12. Mr. CAICEDO CASTILLA (Observer for the Inter-American Juridical Committee) paid a tribute to the work of the Commission and emphasized the usefulness of strengthening the co-operation between the legal organs of the United Nations and the Organization of American States.

13. The Inter-American Council of Jurists and its permanent Committee, the Inter-American Juridical Committee of Rio de Janeiro, were entrusted with the codification of international law in America. Their task in the American region was thus similar to that performed on a world basis by the International Law Commission. It was therefore extremely important to ensure the smooth exchange of information and material between them. Administrative arrangements should be made to ensure that the most important documents of the Commission should be sent directly to the members of the inter-American organs and vice versa.

14. For example, members of the Commission would find it useful to have the report prepared by the Committee at the end of each of its sessions containing a brief description of the topics examined and the decisions reached, together with precise references to the relevant documents.

15. It was worth noting that, whenever the Committee had found that a topic referred to it had been the subject of an earlier codification in the form of a convention — universal or European — it had not hesitated to recommend that the American States should refrain from preparing a regional instrument and should instead accede to the existing convention. For example, when the Committee had been asked to prepare a convention or a uniform law on the rules concerning the immunity of State ships, it had recommended that the American States accede to the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned ships, signed at Brussels on 10 April 1926 and its additional Protocol of 24 March 1934. Those States had endorsed the recommendation unanimously. A similar approach had been adopted by the Committee to the question of collision, on which it had found that there was no need for a regional instrument in view of the existence of the Convention for the Unification of Certain Rules of Law respecting Collisions between Vessels signed at Brussels on 23 September 1910.²

¹ Subsequently circulated as A/CN.4/139.

² Inter-American Juridical Committee, *Report on Rules concerning the Immunity of State Ships* (CIJ-36), Pan American Union, Washington, D.C., January 1958 and *ibid*, *Collision* (CIJ-45), Pan American Union, Washington, D.C., November 1960.

16. A world body and a regional body could be called upon to deal with the same questions. Thus, the General Assembly of the United Nations had decided, by its resolution 1505 (XV) of 12 December 1960, to consider, at its sixteenth session, the question of the future work in the field of the codification and progressive development of international law. That same problem had been examined by the Inter-American Juridical Committee, which had prepared a plan enumerating the topics susceptible of inclusion in an American codification. Those topics included the following: subjects of international law; sources of international law; juridical principles on which the Inter-American System is based; fundamental rights and duties of States; recognition of new governments; territorial waters; international rivers; non-recognition of acquisitions of territory by force; non-intervention; diplomatic and territorial asylum; treaties; diplomatic officers; consular officers; pacific settlement of disputes; rules applicable in case of war, whether civil or international; rules of neutrality.³

17. The Committee had also decided, in pursuance of the provisions of the Charter of Bogotá, to continue to deal with the codification of private international law, which was the subject of two general international instruments in America: the Code of Private International Law adopted by the Sixth International Conference of American States held at Havana in 1928,⁴ known as the "Bustamante Code" and ratified by fifteen countries (five of which had made reservations) and the Montevideo Treaties signed in 1889,⁵ and 1940⁶ and ratified by six countries.

18. It was therefore all the more important that there should be a steady exchange of information and documents, particularly concerning those subjects which had special features either in American international law, such as the legal effects of reservations to multilateral treaties, or in Latin American law, such as diplomatic asylum and the international responsibility of States.

19. Latin America was represented on the International Law Commission by four eminent jurists, well able to convey the views held in that region. However, it was also important that the reports and drafts which expressed the official view of a group of countries, or of a whole continent, should be made known to the members of the Commission even in the intervals between sessions.

20. On the subject of reservations to multilateral treaties, a draft had been approved at Santiago, Chile, by the Inter-American Council of Jurists (A/CN.4/124, para. 94); the draft was to be submitted to the Eleventh Inter-American Conference scheduled to meet at Quito. The draft reaffirmed the Pan American doctrine of partial acceptance of reservations, according to which

such reservations would be in force as between States which accepted them; that doctrine differed from the system which required the unanimous consent of the ratifying parties for the acceptance of a reservation.

21. On the subject of State responsibility, the Inter-American Juridical Committee, at its 1960 session, had discussed an extensive preliminary draft, consisting of seventeen chapters and dealing with the contribution which the American Continent had made to the development and the codification of the principles of international law on the subject. Chapter III set forth thirteen principles which, in the Committee's view, expressed the American doctrine in the matter. The other chapters contained comments on the various principles in question, and indicated the sources (provisions of inter-American treaties, declarations of inter-American conferences, court decisions, relevant rules of municipal law, messages issued by heads of State, Foreign Ministries' circulars and teachings of authoritative writers). Five chapters of the preliminary draft had been approved by the Committee, with the negative vote or the abstention of the representative of the United States of America in respect of some sections. The remaining chapters would be discussed by the Committee at its session to be held from July to September 1961.

22. He would stress that the Committee's work was limited to the consideration of the rules accepted by the countries of America, rules which were adjusted to their special needs, and conformed with the realities of their social conditions and national and international circumstances. The preliminary draft to which he had referred therefore differed in structure from the reports submitted to the International Law Commission by the Special Rapporteur on the topic of State responsibility, Mr. García Amador, which dealt with the question on a world basis and which constituted remarkable treatises of great original value. A statement of the American position in the matter was, in his opinion, necessary in order to arrive in the not too distant future at a solution on a world basis. The twenty Latin American countries, with over 200 million inhabitants, had reached a high level of civilization; they hoped that the new rules advocated by them on the international responsibility of States deserved, because of their inherent justice, to become part of universal international law. The Latin American countries, and the jurists of those countries, were grateful for the special study of the American contribution in regard to the international law on State responsibility; he recalled that it was Mr. García Amador himself who had proposed at the Tenth Inter-American Conference, held at Caracas in 1954, that the study in question should be undertaken.

23. In conclusion, he stressed that co-operation among jurists, men of peace dedicated to the rule of law, would undoubtedly tend to strengthen international institutions and uphold the highest principles of justice. That co-operation was particularly useful in those difficult times and it was for that reason that the Organization of American States and its organs had been particularly gratified to see the International Law Commission so ably represented by its Secretary, Dr. Liang, at the

³ *Ibid.*, Report on the Plan for the Development and Codification of Public and Private International Law, reproduced in *Handbook, First Meeting of the Inter-American Council of Jurists*, Pan American Union, Washington, D.C., 1950, p. 116.

⁴ League of Nations, *Treaty Series*, vol. LXXXVI, p. 111.

⁵ De Martens, N.R.G. (2nd series), p. 443.

⁶ *International Legislation*, Edit. Manley O. Hudson and Louis B. Sohn, vol. VIII (1938-1941), Washington 1949, No. 583, p. 498 and No. 584, p. 513.

fourth meeting of the Inter-American Council of Jurists (1959). He expressed the hope that the Commission would be represented at future meetings of the Council and, if possible, at meetings of the Inter-American Juridical Committee. The Committee, which was a permanent organ, meeting for three months of every year, was in a position to study problems in detail and to scrutinize thoroughly the drafts which were to embody the binding rules of law of the future. Lastly, he would thank the Chairman for the opportunity which had been given to him to address the Commission.

24. The CHAIRMAN thanked the representative of the Inter-American Juridical Committee for his statement and expressed the Commission's appreciation of the Committee's interest in its work. All the members, he was sure, would welcome the steady and mutually beneficial relationship that had been established between the two bodies.

**Representation of the Commission
at the sixteenth session of the General Assembly**

25. Mr. EDMONDS proposed that the Chairman should be asked to represent the Commission at the sixteenth session of the General Assembly.

26. Mr. PAL and Mr. BARTOŠ seconded the proposal.

That proposal was adopted.

**Planning of future work of the Commission
(A/CN.4/138)**

[Agenda item 6]

27. The CHAIRMAN invited the Commission to consider the subjects which should be discussed at its fourteenth session and pointed out that the decision would be closely connected with any item that might be discussed during the current session in addition to the draft articles on consular intercourse and immunities.

28. Mr. VERDROSS observed that, since the term of office of the present members of the Commission would end in 1961, there would be no certainty of the attendance of any members except those nominated by States permanent members of the Security Council. Accordingly, the only specific proposal that could be made was that Sir Humphrey Waldock should be asked to continue Sir Gerald Fitzmaurice's work on the law of treaties.

29. Mr. AGO said that the Commission was in the delicate position of being unable to predict its membership in 1962 and yet of being obliged to provide a topic for discussion at the fourteenth session. The law of treaties had been discussed at a number of earlier sessions, and detailed debates had been held on a considerable part of Sir Gerald Fitzmaurice's report. It would be extremely desirable to conclude consideration of that highly important topic. He therefore supported Mr. Verdross's proposal, and suggested that the new Special Rapporteur on the subject should be given specific directives as to the form of the project. The Commission at its fourteenth session would thus be given an alternative

topic to that of State responsibility, and with those two subjects its work would be well assured.

30. Mr. ERIM supported the views expressed by Mr. Verdross and Mr. Ago.

31. The CHAIRMAN, speaking as a member of the Commission, said that the Commission was not in a position to propose a new subject for discussion, because it could not anticipate its composition in 1962. He therefore agreed with previous speakers that it would be advisable to take up the question of the law of treaties and that certain instructions concerning the presentation of the subject should be given to the new Special Rapporteur.

32. Sir Humphrey WALDOCK said he was greatly honoured by the proposal that he should succeed his learned predecessors in acting as Special Rapporteur for the law of treaties. In view of his lack of experience of the Commission's work, it might have been desirable for a member of longer standing to undertake the work; in the particular circumstances, however, it seemed to be the wish of the whole Commission that he should assume the task. He hoped that the Commission would make allowance for his inexperience and give him the most precise directives possible.

33. The CHAIRMAN observed that, since the consensus of the Commission seemed to be to appoint Sir Humphrey Waldock as Special Rapporteur for the law of treaties, he would suggest that a general debate on the subject be held, with a view to giving Sir Humphrey the necessary instructions, as soon as the discussion on consular intercourse and immunities was completed.

It was so agreed.

34. The CHAIRMAN drew attention to General Assembly resolution 1505 (XV) and the Secretariat note (A/CN.4/138) concerning future work in the field of the codification and progressive development of international law. Governments were asked to submit their views on the subject in time for the General Assembly's sixteenth session. Some members of the Commission had intimated that it might be useful to hold an exchange of views on the matter at the current session.

35. He suggested that, since such a discussion required considerable preparation, it should be postponed until the subject of consular intercourse and immunities had been completed.

It was so agreed.

The meeting rose at 11.15 a.m.

598th MEETING

Monday, 29 May 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

(resumed from the 596th meeting)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

**ARTICLE 37 (Communication with the authorities
of the receiving State)**

1. The CHAIRMAN invited debate on article 37 of the draft on consular intercourse and immunities (A/4425).
2. Mr. ŽOUREK, Special Rapporteur, recalled that at the twelfth session (533rd meeting, when discussed as article 30) opinion had been divided on the question which were the authorities that consuls could address in the exercise of their functions. The text of article 37 as it stood was a compromise: it defined the authorities as those competent under the law of the receiving State (*cf.* article 37, commentary (1) to (4)).
3. The Yugoslav Government (A/CN.4/136) had suggested that a new passage should be added at the end of paragraph 2. The addition in question would have a restrictive effect in that it would preclude consuls from addressing central authorities except in cases where those authorities ruled in first instance. Although, as he explained in his third report (A/CN.4/137), he sympathized with the purpose of the amendment, it could not be easily fitted into the structure of article 37.
4. Logically the Chilean Government (A/CN.4/136/Add.7) was right in saying that paragraph 2 was unnecessary, but if that provision were deleted the Commission would have failed to take account of the practice of those States which did not allow their consuls to address the Ministry of Foreign Affairs of the receiving State. Of course, an exception to the rule stated in paragraph 2 might be laid down in bilateral conventions, which, if the second version of article 65 was approved, would remain in force automatically. In the interests of the sending State, paragraph 2 should be retained.
5. The Netherlands Government's amendment (A/CN.4/136/Add. 4), the substitution of "consular officials" for "consuls" was acceptable.
6. The Belgian Government (A/CN.4/136/Add.6) had provided a definition of "local authorities" in its comment and had also stated that under Belgian consular law consuls were never entitled to approach either the central authorities or local authorities outside their consular district, except in the case envisaged in paragraph 2 of article 37. That government considered that paragraph 3 should be deleted on the grounds that the procedure referred to was within the exclusive jurisdiction of the receiving State and was not a matter of international law. He did not agree. Paragraph 3, though of a declaratory nature, certainly had some practical value, for it stated that it was the receiving State that determined, for instance, whether and under what conditions consulates could address central authorities. However, there was room for improvement in the wording.
7. The United States Government (A/CN.4/136/Add.3) had given a somewhat different definition of local authorities from that of the Belgian Government.
8. Mr. BARTOŠ explained that the Yugoslav Government's intention was no doubt to draw attention to the case where certain matters, such as those pertaining to patents, maritime law or social insurance, came in certain countries within the competence of central authorities. Though such matters could be dealt with through the diplomatic channel, in general it was in the interest of both the sending and the receiving State that consuls should be able to address central authorities. Otherwise, in the absence of bilateral agreement or of a rule of the municipal law of the receiving State on the subject, a consul might be hampered in the exercise of his normal consular function of protecting a national of the sending State.
9. A provision in the draft to deal with that exceptional situation would not derogate from the principle that consuls normally communicated with local authorities.
10. Mr. AGO said that the compromise text of article 37, evolved after lengthy discussion, successfully reconciled differing points of views. Allowance was made in paragraph 1 for the possibility that matters coming within the scope of consular functions might be handled by different authorities in the receiving State, since the reference was not to central or local authorities but to those which were competent. While appreciating the reason for the addition suggested by the Yugoslav Government, which incidentally seemed to relate to paragraph 1 rather than to paragraph 2, he thought it unnecessary.
11. Though paragraph 3 might not be indispensable, it did spell out a generally accepted idea and there was no valid reason for dropping it.
12. He supported the Netherlands Government's amendment.
13. Mr. ERIM endorsed Mr. Ago's views about paragraph 3, but suggested that the order of the wording should be inverted so as to emphasize that it was the laws and usages of the receiving State which determined the procedure to be observed by consuls in communicating with that State's authorities: that change should give satisfaction to the Belgian Government.
14. Mr. MATINE-DAFTARY expressed the view that paragraph 1 in its flexible form as drafted covered all eventualities. If the words "and usage" were inserted after the words "under the law", the provision would be complete and would cover the case where municipal law was silent on the point. If paragraph 1 were approved

as so amended, then paragraph 3, which as it stood was ambiguous, would become unnecessary.

15. Mr. BARTOŠ said that were it not for the second sentence in paragraph (4) of the commentary, which had aroused some doubts in his mind since it did not seem to tally exactly with the compromise reached on the text of the article, he would have had no difficulty in accepting paragraph 1 of the article.

16. Mr. YASSEEN considered that in the French text the words *le droit* should be substituted for the words *la législation* in paragraphs 1 and 3 so as to cover all internal regulations of the receiving State.

17. The CHAIRMAN, speaking as a member of the Commission, said that the Netherlands' amendment was acceptable, but he hoped that the Drafting Committee would also consider an alternative whereby the word "consulates" would be substituted for the word "consuls". He also drew the Drafting Committee's attention to the desirability of using the mandatory form in paragraph 1 with the substitution of "shall" for "may".

18. He was not altogether satisfied with the phrase "laws and usages" in paragraph 3; it might be preferable to use the phrase "laws and regulations" which occurred in article 36 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) and would cover all mandatory rules established by the receiving State and usage.

19. It was doubtful whether it would be desirable to revise paragraph (4) of the commentary in the light of Mr. Bartoš's criticism. The paragraph accurately reflected the compromise reached at the twelfth session. The provision leaving it to the receiving State to determine which were the competent authorities that might be addressed by consuls in the exercise of their functions was flexible and more likely to command acceptance by States. The Commission had recognized in its commentary that practice varied.

20. Mr. BARTOŠ said that, although Mr. Yasseen's amendments did not fully resolve the problem, he could accept them. Any relevant legislative provision, customary law and case law might serve to determine which authorities could be addressed by consuls. In fact, what was really meant by the expression "the law of the receiving State" was that State's internal legal system.

21. Mr. AGO said there would be no objection to using the expression "laws and regulations" in paragraph 3, for the procedure for communicating with the authorities of the receiving State was in fact probably governed by regulations or even specific ministerial instructions. But he doubted whether the same expression would be appropriate in paragraph 1 which dealt with the entirely different question of the demarcation of competence between the different authorities of the receiving State. In the French text the word *droit*, though entirely acceptable, was probably less apt than the expression *système juridique* ("legal system"). Surely reference to usage would be quite out of place in paragraph 1.

22. There was some justification for Mr. Bartoš's criticism of paragraph (4) of the commentary. In paragraph 1 of the article the Commission had sought to indicate that the authorities which might be addressed

by consuls were determined *ratione materiae* by the general legal system of the receiving State, for some matters were within the competence of central and others within that of local authorities. That idea had not been precisely conveyed in paragraph (4) of the commentary, which should be reviewed by the Drafting Committee.

23. Mr. VERDROSS said that there was a serious objection to using the word *droit* in the French text since the English equivalent was "law". He believed that the expression *ordre juridique* would be comprehensive.

24. Mr. YASSEEN, explaining his amendment, said that the word *législation* did not cover all law. First, it did not embrace unwritten law—customary law and principles of jurisprudence. Further, it did not cover all written law. Strictly speaking, it could not indicate the rules made by authorities having regulatory power. On the other hand, the word *droit* embraced all legal rules, whatever their origin.

25. The expression "legal system" was too broad; as used, for instance, in Article 9 of the Statute of the International Court of Justice it did not mean the system of law of a particular country. However, he could accept the narrower expression "internal legal order".

26. Mr. AMADO expressed strong opposition to the expression "legal order", which was quite inappropriate. The expression "laws and regulations" would suffice, perhaps with a reference to practice as well.

27. It was paradoxical that under paragraph 2 consuls of a State which had no diplomatic mission in the receiving State would be able to approach the Ministry of Foreign Affairs, whereas consuls of a State which had more extensive relations with the receiving State would not.

28. The CHAIRMAN, speaking as a member of the Commission, said that the phrase "legal order" was not appropriate since it conveyed a certain concept of law. He preferred the expression "municipal law".

29. Mr. ŽOUREK, Special Rapporteur, opined that the second sentence in paragraph (4) of the commentary could only be interpreted to mean that the competent authorities were determined *ratione materiae* and were designated by the receiving State.

30. The CHAIRMAN suggested that article 37 be referred to the Drafting Committee in the light of the discussion and of the drafting points raised.

It was so agreed.

ARTICLE 38 (Levying of consular fees and charges, and exemption of such fees and charges from taxes and dues)

31. Mr. ŽOUREK, Special Rapporteur, said that the article, which stated a rule of customary law, had not met with any objections on the part of governments. When discussing the provision at its twelfth session (537th meeting, paras. 26-37, where discussed as article 31) the Commission had not settled the question of the extent to which contracts concluded at a consulate between private persons were exempt from the taxes and dues

levied by the law of the receiving State, though it proposed a solution in paragraph (4) of the commentary which also asked for information. Some of the governments which had sent comments had taken a position on that matter, most of them being in favour of the proposed solution. For example, the Government of Finland (A/CN.4/136) had observed that such taxes or dues were only chargeable in Finland if documents drawn up at consulates were presented to Finnish authorities for the purpose of producing legal effects in Finland, but not if they were to be employed outside Finland. The Government of Norway (A/CN.4/136) also had stated that it was natural to grant exemption from taxes and dues in the case of documents between private persons which were not intended to produce legal effects within the receiving State. Finally, the Belgian Government had stated that only instruments executed at the consulate between private persons and intended to produce effects in the receiving State were liable to the taxes and dues provided for by the legislation of that State.

32. On the basis of those observations, he suggested in his third report that a new paragraph should be added to the article itself, stating the exception concerned. The new paragraph added that the documents not exempt were those which were to produce "direct" legal effects in the receiving State, for it was possible that certain deeds, particularly those relating to family law and certain obligations, would produce indirect effects in the territory of the receiving State. In any case, the Commission had to decide whether it wished to include a provision along the lines he proposed; the final wording might be left to the Drafting Committee.

33. Mr. VERDROSS, referring to paragraph 1, observed that the exact meaning of the verb "to levy" was not entirely clear. If a consul had already drawn up the instrument in question, he had no means of compelling the person concerned to pay the fee or charge. Accordingly, some such phrase as "without, however, being able to resort to coercive measures" should be added at the end of the paragraph.

34. Mr. BARTOŠ said that two absolutely distinct ideas were involved. The first was contained in article 38, paragraphs 1 and 2, as drafted; the second was dealt with in the comments of the Finnish Government. The first idea was, as the Special Rapporteur had said, the generally-accepted one that the receiving State could not impose taxes and dues on consular fees and charges. The question raised in the Finnish Government's comments, however, was that of the tax treatment, in the light of their further use, of documents on which consular fees and charges had already been levied. That question had nothing to do with consular privileges and immunities, but related, rather, to the question of avoidance of double taxation. It was inadvisable to go into the question in detail in the draft on consular intercourse; it was enough to provide that the sending State was exempted in the receiving State from all taxes and dues on consular fees and charges.

35. Mr. YASSEEN asked whether, if the Commission accepted the inclusion of a new paragraph 3, the provision would be limited to bilateral and multilateral deeds, as

its wording — "documents executed at the consulate between private persons" — seemed to imply. In his opinion, the provision should be general and should apply to all juridical acts, even unilateral ones.

36. The CHAIRMAN, speaking as a member of the Commission, said that, a comparison between article 38 of the draft and article 28 of the Vienna Convention showed that the wording of the former was unduly elaborate for the relatively minor matter dealt with. Article 28 of the Vienna Convention did not mention that the diplomatic mission was entitled to levy fees and charges and so avoided the difficulty referred to by Mr. Verdross. It would be wiser to redraft article 38 along the simple and comprehensive lines of article 28 of the Vienna Convention.

37. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Bartoš, said that the question raised in connexion with paragraph (4) of the commentary to the article did not relate exclusively to the utilization of the documents in question in the territory of any State. The main question was that of the circumstances in which the document was drawn up. If a contract were concluded at the consulate between two persons, was it exempt from dues and taxes levied in the receiving State on such contracts? The inclusion of a provision making the position clear seemed to be desirable in view of the comments of three governments.

38. The point made by Mr. Verdross was somewhat academic, since the consul had no means of using coercive measures in the receiving State. The matter was governed by the general rule that if a document were drawn up within the territory of the receiving State, certain fees were charged for it.

39. With regard to the Chairman's reference to the difference between article 38 of the draft and article 28 of the Vienna Convention, the discrepancy was more apparent than real. The text of article 38, although more explicit than that of the corresponding provision of the Vienna Convention, in fact set forth a similar provision. Moreover, article 28 of the Vienna Convention implied that a diplomatic mission was entitled to levy fees and charges for official acts. He could accept either formulation, but much preferred the text of article 38 as drafted because it clearly set forth the right of the sending State to levy fees and charges in the territory of the receiving State.

40. In reply to Mr. Yasseen, he observed that the documents in question would always be between private individuals and hence could be either bilateral or multilateral. Finally, he stressed the practical interest of including a new third paragraph in the article.

41. Mr. BARTOŠ reiterated the distinction he had drawn between the two separate questions involved. The first related to the validity of documents drawn up at a consulate, whereas the second concerned the possibility of using such documents for purposes of further taxation. A number of States were conducting a vigorous campaign against double taxation, under the auspices of the International Chamber of Commerce, but it was a fact that certain States imposed double taxation on documents drawn up at consulates and extended no

reciprocal exemption in respect of the taxation of consular fees and charges. He was opposed to introducing the second concept into the article, since it was not incompatible with consular privileges and immunities, but related rather to questions of legal assistance. The "unless" clause in the proposed new third paragraph might give rise to abuse under the pretext that the documents would produce effects in another country; a person requesting assistance from the consul was obliged to pay the fees and charges provided by the law of the sending State, and the new paragraph might open the way to avoidance of such payment.

42. With regard to the point raised by Mr. Verdross, in practice the consuls could and did use an indirect kind of coercion to obtain payment. In the event of the person's failure to pay the consular fees the consulate had a lien on the document. Accordingly, while he agreed with Mr. Verdross that direct coercion could not be used without the consent of the receiving State, the consul had means of bringing pressure to bear. While he would not oppose an addition along the lines suggested by Mr. Verdross, he thought that the possibility of indirect sanctions was self-evident.

43. Mr. MATINE-DAFTARY supported in principle the suggestion that article 28 of the Vienna Convention should serve as a model for article 38 of the draft. However, the language of that article 28 should be adjusted so as to cover dues and taxes imposed not only by the receiving State itself, but also by its territorial and local authorities, as specified in article 38, paragraph 2.

47. Paragraph 1 of article 38 could mean any one of three things. It could mean that a consulate was entitled to levy fees and charges, or that it could only levy fees and charges in accordance with the law of the sending State or even both things at the same time. In practice, a consul could only execute instruments in accordance with the law of the sending State, but if a party wished to rely on such an instrument vis-à-vis the authorities of the receiving State, the law of that State would apply. That law could contain, in addition to any requirements regarding the validity of the transaction itself, taxation provisions specifying, for example, that the instrument was liable to stamp duty. In that event, it was clear that the consul would not be called upon to collect the tax due to the receiving State as well as the consular fee.

45. In conclusion, the points intended to be covered by paragraph 1 seemed to be largely academic; a provision along the lines of article 28 of the Vienna Convention, adjusted so as to cover territorial and local taxes as well as national taxes, would suffice for article 38.

46. Mr. JIMÉNEZ de ARÉCHAGA supported the Special Rapporteur's view that article 38 should not be altered so as to bring it into line with article 28 of the Vienna Convention.

47. He recalled that the Vienna Conference had merely adopted as article 28 the substance of the text proposed by the International Law Commission itself in its 1958 report as article 26 (A/3859).

48. With respect to consuls, however, the Commission had adopted the more extensive formulation in the two

paragraphs of article 38 because consulates, and not diplomatic missions, were the authorities chiefly concerned with instruments of the type under discussion. Also, the Commission had intended to cover certain points raised by some governments and mentioned by Mr. Bartoš. For those reasons, he urged the Commission to be consistent with its own decision and not to alter the article adopted in 1960.

49. As to the proposed additional paragraph, he agreed with Mr. Bartoš in opposing it. In so far as it meant to say only that the receiving State could not tax a consular act as such, the proposed paragraph 3 was unnecessary. For that purpose, the provisions of paragraph 2 were quite sufficient. If, on the other hand, it was intended to deal with the question of taxation of contracts, the provision should not be entertained by the Commission. That question could only be dealt with by a convention on double taxation. If the Commission were to touch upon that delicate matter in such an incidental and limited manner, its decision might be interpreted *a contrario* in support of the contention that private contracts, if not executed before a consul, were taxable under the local legislation, even if they were only intended to produce their effects in a foreign country.

50. Mr. ERIM said that the terms of article 28 of the Vienna Convention implied the right of a diplomatic mission to charge certain fees. That language was perhaps suited to diplomatic missions, which did not have frequent occasion to levy fees and charges. However, in the case of consulates, which charged fees in the course of daily business, a more explicit provision was desirable in order to lay down the accepted rule of customary international law in the matter.

51. The question of coercion, which had been referred to by Mr. Verdross, could arise only in theory: a consul might, for example, ask the support of the local authorities in collecting certain dues from one of his nationals. In practice, however, the consul would make sure that his fees were paid before performing the service requested of him. If in a rare case, he sustained a loss as a result of the failure of one of his nationals to pay the fees, the consul was responsible towards the sending State and had to make good the deficiency. In fact, the terms of paragraph 1 did not imply the right of coercion. By analogy, in internal legislation, it was customary to set forth in separate and distinct provisions the right to levy a tax and the right to impose measures of coercion for its collection. The language used in paragraph 1 in no way suggested that a consul might be entitled to ask for the support of the local authorities to collect consular dues.

52. With regard to the proposed additional paragraph, he agreed with those who opposed its inclusion. The question dealt with in that proposed additional paragraph was outside the scope of consular relations proper.

53. Mr. VERDROSS said that paragraph 1 was not only superfluous but dangerous. If the language used in article 28 of the Vienna Convention were adopted, paragraph 1 would be unnecessary because the consulate's right to levy dues and charges would be implicit in the

language in question. Paragraph 1 was, in addition, dangerous in that it specified that the fees and charges were those "provided by the law of the sending State". Would the receiving State be entitled to enquire whether the fees charged conformed with the law of the sending State or were purely arbitrary? If the receiving State did not have that right, the provisions of paragraph 1 had no international effect and should therefore be omitted. For those reasons, he agreed with Mr. Bartoš and proposed the deletion of paragraph 1 and the redrafting of article 38 along the lines of article 28 of the Vienna Convention.

54. Mr. AMADO said that he was impressed by the arguments put forward by Mr. Verdross and was inclined to favour the deletion of paragraph 1. Clearly, if the consular functions set forth in article 4 included that of levying certain fees and charges and a consulate was established in the receiving State, that consulate was entitled to levy those fees and charges in the territory of the receiving State. He saw no reason to restate that fact in article 38.

55. As to paragraph 2, he proposed the deletion of the reference to the territorial or local authorities of the receiving State. It was sufficient to specify that the receiving State should not levy any tax or due on the consular fees and charges, for it was that State which owed the obligation, under international law, not to tax consular fees.

56. Mr. ŽOUREK, Special Rapporteur, said that he would withdraw the proposed paragraph 3. The matter would be referred to in the commentary, so that the attention of governments would be drawn to the question.

57. With regard to article 38 as adopted in 1960, he pointed out that none of the governments had submitted any objections to the text of either paragraph 1 or paragraph 2. Unlike Mr. Verdross, he did not think that paragraph 1 was superfluous. Article 28 of the Vienna Convention sufficed in the case of diplomatic officers, who were not amenable to the jurisdiction of the receiving State. Consuls, however, were subject to the jurisdiction and to the laws of the receiving State, save in respect of acts performed in the exercise of their functions, and it was therefore desirable to state in explicit terms that they were entitled to levy consular fees and charges. Nor could he see any danger in the statement that the fees and charges were those provided by the law of the sending State. That statement did not mean that the receiving State was empowered to check whether the consular fees conformed with the law of the sending State. All that it meant was that the fees applicable for consular acts were those laid down in the scale established by the sending State. That statement reflected the universal practice in the matter and served to indicate that neither the receiving State nor the private individuals affected could question the scale of fees laid down by the sending State for its consulates.

58. The CHAIRMAN, summing up the position, said that the majority of the Commission seemed to favour the retention of paragraph 1 as drafted in 1960.

59. With regard to paragraph 2, there appeared to be general agreement to instruct the Drafting Committee to consider to what extent its terms could be simplified by drawing upon the language of article 28 of the Vienna Convention.

60. Lastly, the Commission did not appear to favour the proposed additional paragraph which the Special Rapporteur had withdrawn.

61. If there were no objection, he would take it that the Commission agreed to refer article 38 to the Drafting Committee with instructions to re-examine the wording of paragraph 2 in the light of article 28 of the Vienna Convention.

It was so agreed.

ARTICLE 39 (Special protection and respect due to consuls)

62. Mr. ŽOUREK, Special Rapporteur, said that only two governments had submitted comments on article 39. The Netherlands Government (A/CN.4/136/Add.4) had proposed a drafting amendment replacing "consuls" by "consular officials" and suggested that the last sentence of commentary (3) be deleted. Those changes could be accepted.

63. The comment of the United States Government (A/CN.4/136/Add. 3) dealt with substance: it was to the effect that the United States Federal Government was without authority to protect a foreign consular officer from what he or his government might consider a slanderous press campaign; freedom of the press was guaranteed by the United States Constitution.

64. That objection, which related to the constitutional relationship between a federal government and the governments of the constituent States, had been raised also in connexion with other provisions of the draft. It formed part of the general problem of the observance of international law. It was precisely the purpose of a codification convention on consular relations to unify, as far as possible, the provisions of consular law. When the draft articles came to be adopted as a multilateral convention by an international conference, with any amendments that might be made, that convention would make it incumbent upon each of its signatories to adjust or complete its national legislation so as to conform with the rules of international law embodied in the convention. No State would adduce its own laws to justify failure to comply with its international obligations. If the receiving State were obliged to grant consular officials special protection, it should include steps to protect them against abusive press campaigns.

65. For those reasons, he proposed that the Commission should adopt article 39 as it stood, subject only to the drafting changes proposed by the Netherlands Government.

66. Mr. JIMÉNEZ de ARÉCHAGA suggested that the Drafting Committee should be asked to redraft article 39 in the light of the language of article 29 of the Vienna Convention, and in particular, to replace the expression

"all reasonable steps" by "all appropriate steps". He recalled the criticism of the term "reasonable" in another context by Mr. Amado at a previous meeting.

67. While he had no objection to the text of article 39, he would urge the deletion of the last sentence of commentary (3), which stated that the receiving State must protect the consul against abusive press campaigns. That sentence, taken in conjunction with the last sentence of article 39, which placed on that State the duty to take all reasonable steps "to prevent any attack" on the person, freedom or dignity of the consul, would create an obligation under international law which, in his opinion, was unacceptable as unconstitutional for the States belonging to most of the legal systems represented in the Commission. Those legal systems did not allow a preventive control of the press; they only provided for sanctions or liability *ex post facto* in the event of a wrongful exercise of the freedom of the press. Preventive measures could not be taken even to protect a foreign head of State or for that matter the head of State of the country concerned.

68. For those reasons, he urged the deletion of the last sentence of commentary (3), to which objection had been made by certain governments, including that of the Netherlands, and proposed that in the second sentence of commentary (6), after the words "having regard to", the words "its constitutional law" should be inserted.

69. The CHAIRMAN, speaking as a member of the Commission, said that he agreed, for practical reasons, to the deletion of the last sentence of commentary (3). No such sentence had appeared in the commentary to the corresponding article of the draft on diplomatic intercourse and the Commission could not, of course, go further in the case of consuls than in that of diplomats. However, as a matter of principle, he could not agree with the statement made by Mr. Jiménez de Aréchaga. The legislation of all countries punished such acts as libel and slander, and legislative provisions of that type constituted precisely the measures contemplated in article 39.

70. Speaking as Chairman, he said that, if there were no objection he would take it that the Commission agreed to refer to the Drafting Committee article 39 as it stood, with instructions to take into account the Netherlands proposal and also to substitute the word "appropriate" for the word "reasonable" before the word "steps" in the second sentence, so as to conform with the language used in article 29 of the Vienna Convention.

It was so agreed.

The meeting rose at 6 p.m.

599th MEETING

Tuesday, 30 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/L. 137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 40 (Personal inviolability)

1. The CHAIRMAN invited consideration of article 40 of the draft on consular intercourse and immunities (A/4425).
2. Mr. ŽOUREK, Special Rapporteur, recalled that the drafting of article 40 at the twelfth session (538th, 539th and 540th meetings, where discussed as article 33) had been rendered difficult by the diversity of state practice in the matter. Nevertheless, the article had been on the whole well received by governments.
3. The provisions of the article were essentially based on the principle that consular officials were subject to the jurisdiction of the receiving State in both civil and criminal matters, except in respect of acts performed in the course of their duties. The article did not grant any personal immunity from jurisdiction, but merely exempted consular officials from imprisonment in certain limited cases.
4. In paragraph 1, in view of the diversity of state practice as reflected in the consular conventions in force, the Commission had offered two alternative texts. One would allow arrest or detention pending trial only in the case of an offence punishable by a maximum sentence of not less than five years' imprisonment. The other would have allowed such arrest or detention only in the case of a "grave crime". Faced with those two alternatives, some governments, including those of Yugoslavia (A/CN.4/136) and Belgium and Chile (A/CN.4/136/Add.6 and Add.7), had expressed a preference for the first alternative; others, including those of Finland and Czechoslovakia (A/CN.4/136) and the Netherlands (A/CN.4/136/Add.4) had supported the second alternative. The Commission was therefore called upon to choose between the two. For his part, bearing in mind the comments of governments, he preferred the more general formulation in spite of its defects, because it was more likely to attract general support at an international conference.
5. Some governments, such as those of the United States (A/CN.4/136/Add.3) and Japan (A/CN.4/136/Add.9) wished to go further than the Commission; they had suggested that consular officials should be exempted not only from arrest or detention, but also from actual prosecution, except in the case of a crime punishable with a maximum penalty of imprisonment for one year.

Those proposals would give consular officials not merely personal inviolability, but also a measure of immunity from jurisdiction and, if supported by the majority of States, would be acceptable to him.

6. Lastly, the Netherlands Government had proposed drafting changes which affected the substance of paragraph 1, inasmuch as they would restrict the scope of personal inviolability.

7. Paragraph 2, which specified that consular officials must not be committed to prison save in execution of a final sentence of at least two years' imprisonment, had attracted considerable comment from governments. The Governments of Norway (A/CN.4/136) and Denmark (A/CN.4/136/Add.1) wished the provision to be deleted altogether. The Government of Finland had criticized the paragraph as granting too wide a measure of inviolability and suggested that its provisions should be narrowed down substantially. The Netherlands Government also found paragraph 2 unsatisfactory and had suggested that it be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official. The Swedish Government (A/CN.4/136/Add.1), while expressing no objection against paragraph 2 itself, had questioned the reasons given in the commentary for maintaining the paragraph.

8. The Belgian Government had suggested that the two-year limit be deleted; in his opinion, however, the reason given — that the limit in question was unknown in Belgian law — was not convincing. When the draft articles came to be adopted as an international convention, many States wishing to sign the instrument would be faced with the necessity of adjusting their legislation to its provisions. The Commission could not take into account the argument that a draft article was not consistent with the legislation of a particular State.

9. The Belgian Government had also pointed out that the wording used in paragraph 2 might be construed as ruling out custody and protection in cases of insanity. The Drafting Committee might consider that point.

10. The Yugoslav Government had suggested that article 40 should state that it was possible for the sending State to waive the immunity referred to in that article, and also that it must waive it in the case of an offence committed by a consular official if the sending State had no justifiable interest in preventing the institution of legal proceedings. Provision should also be made, in the opinion of the Yugoslav Government, to cover the obligation of the sending State to try any official who could not, because of his immunity, be tried or punished in the receiving State. In connexion with those comments, he emphasized that the article did not provide for immunity from jurisdiction, but for exemption from arrest or detention pending trial, in certain cases, and from committal to prison for short terms.

11. With regard to paragraph 3, the Norwegian Government, in addition to criticizing the text of the provision itself, had expressed the view that the provision did not support the interpretation placed on it in commentary (17). There appeared to be no reason why a consul should

have the choice of being represented by his attorney in criminal proceedings; such a privilege would be at variance with the rule contained in article 42, paragraph 2, of the draft.

12. With regard to paragraph 4, a drafting change had been suggested by the delegation of Indonesia speaking in the Sixth Committee of the General Assembly (Special Rapporteur's third report, A/CN.4/137 *ad* article 40); that suggestion might be referred to the Drafting Committee.

13. Also of interest in regard to paragraph 4 was the proposal made by the Netherlands Government that paragraph 2 should be replaced by a rule providing for consultation between the receiving State and the sending State in respect of the execution of any prison sentence pronounced against a consular official.

14. In the light of those comments, he proposed in his third report a redraft of article 40. In paragraph 1 of the redraft, the formula "unless they commit a serious offence" was used, which was less precise and more general than the reference to a specific term of imprisonment. In spite of its defects, that formula would have the great advantage of avoiding the difficulties which would arise from differences in national legislation on the punishment of offences. He recalled that earlier, in his second report (A/CN.4/131), he had proposed a more precise formula, but the government comments had convinced him that only a more general formulation was likely to be widely acceptable.

15. If the Commission accepted his redraft of paragraph 1, it would also have to adopt the more general formula of "serious offence" in paragraph 2.

16. The Commission would also have to decide the important question of principle: should consular officials enjoy any immunity from jurisdiction in criminal matters? Some bilateral consular conventions granted such an immunity, but he did not think it advisable to include it in the draft articles.

17. He would certainly take into consideration all the remarks made in connexion with the commentary when preparing the final text of the commentary to the article.

18. In conclusion, he urged the Commission to concentrate on the government comments and not to reopen the discussion on the substance of the article, which had been thoroughly debated at the twelfth session. He emphasized that no government had suggested the deletion of the article.

19. Mr. VERDROSS supported the Special Rapporteur's proposed redraft of paragraph 1. It was consistent with the existing practice in the matter, which exempted consuls from arrest or detention pending trial unless they were charged with a serious offence. He also agreed with the Special Rapporteur's proposal that reference should be made to "a serious offence" and not to an offence punishable by a specified term of imprisonment, for it would be almost impossible to secure general acceptance for any particular term of sentence for the purposes of a multilateral convention.

20. He could accept one amendment to paragraph 1, so as to specify that inviolability would not apply in

the case of an act considered as a "serious offence" by the laws of both the sending State and the receiving State (*cf.* comment of United States Government).

21. He had some doubts with regard to paragraph 2. It was illogical to state that a consul could be prosecuted, but that, if he were sentenced to a term of imprisonment, the sentence could not be carried out. Some States applied a system under which it was possible to suspend, or even to expunge, a sentence if the offender did not commit a second offence within a specified period; that system, however, did not deprive the sentence of all legal effect. The purpose of paragraph 2, by contrast, was to create an absurd situation: a sentence would be passed by a criminal court but would not have any legal effect whatsoever.

22. The desired result could only be achieved logically by stating that consular officials were immune from prosecution in respect of offences punishable with a penalty of less than two years' imprisonment.

23. Lastly, he fully agreed with the Yugoslav Government that provision should be made for the possibility of the sending State waiving the benefit of the privilege set forth in the article.

24. Mr. EDMONDS said that, when adopting article 40 at its twelfth session, the Commission had recognized that the provisions of that article did not reflect an existing rule of international law, but represented a step forward in the direction of the development of that law. That fact was indicated in the commentary. He supported the action thus taken by the Commission, because he saw no reason for drawing any distinction between consuls and diplomats in regard to personal inviolability.

25. In paragraph 1, the method of defining an offence by means of an adjective like "serious" or "grave" was unsatisfactory; what seemed serious to one person or court might not seem so to another. For that reason, both paragraphs 1 and 2 should be couched in more specific terms.

26. A further question affecting paragraph 2 was whether an offence should be defined in terms of the duration of imprisonment. In many countries, including the United States, the term of imprisonment was not fixed until after conviction. The same offence might be punished in one case by one year's imprisonment and in another by ten years' imprisonment. It was therefore preferable to speak of inviolability in terms of the sentence actually imposed and not in terms of the sentence which might be imposed.

27. In conclusion, he urged that the article should be retained as it stood, with the first alternative text for paragraph 1; if governments had any objection to that text, they could amend it at the international conference to which the draft articles would be submitted.

28. Mr. MATINE-DAFTARY said that the comments of governments confirmed him in the views which he had expressed on the article at the twelfth session (538th meeting, para. 6 and 540th meeting, paras. 40-45). A provision of that type was workable only in a bilateral convention between two countries whose legislation was very similar, but it was totally impracticable in a

multilateral instrument. From his experience as a former member of the judiciary, he could also state that the proposed system would represent an unwarranted interference with the operation of the courts on the part of the Ministry of Foreign Affairs of the receiving State, since that Ministry would have to inquire — before giving its fiat to the institution of proceedings — whether the offence with which a consul was charged was punishable by a particular term of imprisonment.

29. Another unsatisfactory feature of the provisions of the article was that they might interfere with the proper investigation of a case in which a consul was only one of the accused; in that event, it might be in the interests of the investigation to prevent the accused consul from communicating with other persons.

30. He could not support a provision the meaning of which depended on the interpretation of so vague an expression as "serious offence". It was not clear whether it was intended that the offence should be a serious one for the consul, for the receiving State or in the eyes of public opinion. The clear issue before the Commission was whether consuls should have immunity from jurisdiction in criminal matters or not. Any attempt at half measures would create an anomalous position and would not function properly in practice.

31. The CHAIRMAN, speaking as a member of the Commission, said that the question of principle raised by Mr. Matine-Daftary was a very real one, especially if the relevant provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) were borne in mind. By virtue of article 31, paragraph 1, and article 37, paragraph 2, of that Convention, members of the administrative and technical staff of a diplomatic mission enjoyed full immunity from the criminal jurisdiction of the receiving State. The draft, on the other hand, did not propose to grant immunity from criminal jurisdiction even to the head of a consular post, thus placing him in a much less privileged position than a subordinate member of the staff of a diplomatic mission. That inconsistency was totally unjustified in view of the functions performed by the two groups of persons concerned. However, he would refrain from drawing the logical conclusion and proposing that consuls should be given immunity from criminal jurisdiction, because he did not believe that States would accept such a proposal.

32. With regard to paragraph 1, he agreed with Mr. Verdross in supporting the Special Rapporteur's proposal that the general expression "serious offence" should be used, possibly with the addition of the words "and when apprehended *in flagrante delicto*", in preference to a clause defining those offences in terms of the penalty applicable. However, since consuls, unlike diplomatic officers, were subject to the jurisdiction of the receiving State, it would be natural to give priority to the local law for the purpose of defining what constituted a serious offence.

33. He did not think that any major difficulty would arise from the use of an expression such as "serious offence". In the legislation of practically all countries, criminal offences were divided into a number of categories: the method of classification varied from country

to country, but it could be left to the receiving State to say whether an offence belonged to the more serious class of crimes. It was hard to believe that the receiving State would take an arbitrary decision in that regard; its authorities could be expected to apply objectively the classification in force in that State.

34. Another argument in favour of that course was that the provisions of bilateral conventions which dealt with the situation envisaged in the article were invariably couched in more or less general terms, leaving the details to the legislation of the receiving State.

35. Lastly, as pointed out by Mr. Verdross, in view of the diversity of national law, it was very improbable that States would agree on a more precise and specific definition of the offences referred to in paragraph 1.

36. With regard to paragraph 2, he agreed in substance with Mr. Verdross that its provisions were logically inconsistent with the system adopted by the Commission. It was contradictory to state that a sentence could be passed on a person but that in some certain cases it could not be executed. In addition, the provisions of paragraph 2 were at variance with the practice of many States and would give rise to objections. Logically, the Commission should either accept the principle of the complete immunity of consular officials from jurisdiction for certain offences, or admit, without qualification, the committal to prison of a consular official who was sentenced to imprisonment.

37. The Commission could hardly suggest the granting of immunity from criminal jurisdiction to consuls because that proposal would not be acceptable to States. It should therefore face the fact that, in the absence of such immunity, the provisions of paragraph 2 were bound to attract objections as they stood. Probably the best course would be to delete the words "of at least two years' imprisonment"; paragraph 2 would then state that a consular official could only be committed to prison "in execution of a final sentence".

38. There was a gap in paragraph 3, since its provisions did not state whether it was possible to use measures of compulsion in order to oblige a consular official to appear before the competent authority. He believed it had been the intention of the Commission to preclude the use of such measures and it was therefore desirable to state that intention explicitly.

39. Mr. FRANÇOIS expressed a preference for the second alternative text for paragraph 1, *in fine*. He admitted that there was much substance in the objections put forward by Mr. Matine-Daftary, but the text in question, although uncertain, represented the lesser of two evils.

40. With regard to paragraph 2, the objections put forward by Mr. Verdross and the Chairman were logically correct. Nevertheless, the anomalous situation of a person being liable to sentence but not to the execution of the sentence occurred also in the case of diplomats. There were cases in which a member of the diplomatic staff could be sentenced by a court, but the majority of writers were of the opinion that even in those cases a sentence against a diplomat could not be carried out.

41. The argument in favour of exempting a consul from serving a sentence of short-term imprisonment was that the imprisonment would detract unnecessarily from the dignity of the consular office. It would be quite unacceptable for a consul to be sent to prison for a term of one week, for example, for a minor breach of the law.

42. The system, however, was open to one grave objection. Offences against traffic regulations almost invariably involved comparatively mild penalties. In recent years, members of the consular staff in the Netherlands and elsewhere had been showing an alarming disregard for traffic regulations, confident that no action could be taken against them. Matters had reached such a point that the enforcement of all sentences of imprisonment in respect of traffic violations committed by consular officials should be seriously considered.

43. It was precisely for that reason connected with traffic offences that he objected to the provisions of paragraph 2.

44. Mr. AGO said that the more article 40, a key article, was examined, the more its imperfections stood revealed. He agreed to a large extent with the views expressed by Mr. Verdross. Personally, he had opposed the extraordinarily liberal extension of immunity to the administrative and technical staff of a diplomatic mission finally decided upon by the Vienna Conference. But in his opinion after that Conference, it was wrong that members of technical or administrative staff or minor officials of a consular section in a diplomatic mission should enjoy a greater immunity than that accorded, for example, to a consul-general. Though the Chairman was right in thinking that States would probably not agree to the equation of consular with diplomatic immunities, perhaps the Commission should take it upon itself to point out what should be the logical consequence of the criteria adopted at the Vienna Conference.

45. As to paragraph 2, he agreed with Mr. Verdross that either complete immunity from jurisdiction should be granted or execution of a final sentence must be allowed against a consular official. He therefore supported the Chairman's suggestion that the words "of at least two years 'imprisonment'" be deleted. Moreover, it was undesirable to maintain a provision which was apt to encourage courts to impose sentences of over two years so as to be able to commit a consular official to prison. With that amendment, a consular official could be imprisoned in execution of a final sentence, which might be for more or less than two years. However, under the criminal law of most countries it was usual to award suspended sentence against persons without a criminal record who were convicted of a minor offence.

46. As to paragraph 1, consular officials should certainly not be liable to arrest or detention pending trial, particularly as they were not likely to evade appearance in court. In any case, the risk of such a possibility would be less serious than the danger that the receiving State might detain a consular official before any trial, on the mere basis of an accusation which subsequently might prove to be entirely unfounded.

47. With reference to Mr. Verdross's suggestion concerning the definition of "serious offence" as meaning an act regarded as such by the law of both States — as was done in extradition treaties — although preferable, such a definition would also not work satisfactorily. For so long as the court had not ruled on the particular case, it would be impossible to say that the offence in question was in fact a "serious" one within the meaning of the law.

48. If the Commission decided to maintain the system it had envisaged at the previous session, to render it consistent with the terms of the Vienna Convention and suitable for practical application, article 41 would have to be recast on more liberal lines.

49. Mr. JIMÉNEZ de ARÉCHAGA expressed a preference for the alternative text proposed for paragraph 1. He doubted whether States would accept a provision exempting consuls from detention pending trial, since in the case of serious crimes such exemption might provoke a popular outcry.

50. As to the suggestion of the United States Government that consular officials should be subject to the criminal jurisdiction of the receiving State in the case of serious crimes in those cases only where the act was a crime under the law both of that and of the sending State, an analogous rule occurred in numerous extradition treaties, but that rule should not apply in the case in point since consuls were subject to the local jurisdiction.

51. He saw no particular objection to the deletion of paragraph 2, which indeed would become redundant if the words "of at least two years' imprisonment" were deleted since it would then cover the same ground as paragraph 1.

52. With regard to paragraph 3, consular officials against whom criminal proceedings had been instituted should certainly appear before the competent authorities and he agreed with the Norwegian Government that there was no reason for allowing them the privilege of being represented by an attorney.

53. He supported the Special Rapporteur's redraft of paragraph 4. Furthermore, as suggested by the Norwegian and United States Governments, a provision concerning waiver of immunity was certainly necessary and should be inserted after article 41. Such a provision was unnecessary in article 40 if paragraph 2 were deleted.

54. Mr. ŽOUREK, Special Rapporteur, observed that the final form of article 40 would depend on whether or not the Commission wished to strengthen the position of consuls. He agreed with the Chairman and Mr. Ago that adoption of the present text would create some inconsistency with the system embodied in the Vienna Convention, which conferred extensive immunity on members of the staff of a diplomatic commission.

55. He would be prepared to advocate a greater degree of personal inviolability than envisaged in the article, but was not convinced that such a liberalization would be acceptable to governments, a consideration which the Commission as an organ of the General Assembly could not fail to bear in mind.

56. With regard to Mr. Verdross's argument that it was

illogical not to allow the execution of a final sentence if complete immunity from jurisdiction were not given, the same lack of logic would be found in article 31 of the Vienna Convention. The application of article 32, paragraph 4, of that Convention would lead to a similar element of inconsistency. Analogous provisions concerning the personal immunity of consuls had been included in many conventions ever since the Convention of Pardo of 1769. The element of inconsistency could be removed either by conferring complete immunity from jurisdiction — save in cases of crime — or by deleting paragraph 2 in article 40.

57. As to Mr. Matine-Daftary's criticism of the expression "serious offence", he could only reply that, though it was admittedly imprecise, it did appear in many conventions. Its interpretation must be left to the States concerned and he doubted whether a more satisfactory alternative could be found for insertion in a multilateral convention.

58. He agreed with Mr. Jiménez de Aréchaga that States were unlikely to accept the suggestion made by Mr. Ago that consuls should be exempt in every case from detention pending trial. His general conclusion was that the Commission should retain the rule as laid down in paragraph 1 with the alternative wording proposed for the end of that paragraph.

59. Mr. VERDROSS said that Mr. François seemed to be under some misapprehension. There were no exceptions to the rule that diplomatic agents enjoyed absolute immunity from criminal jurisdiction. The only exceptions were in respect of civil or administrative jurisdiction. There was, of course, a fundamental difference between a sentence in criminal proceedings and a judicial decision in civil proceedings. For a decision in civil proceedings, even though not executed, always created an obligation on the party to take some action, whereas a criminal sentence was meaningless if it could not be executed. That was why article 32, paragraph 4, of the Vienna Convention provided that "Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment"; but it did not so provide for waiver of immunity from jurisdiction in respect of penal proceedings.

60. It was essential to include in the draft a provision concerning the waiver of immunity from jurisdiction.

61. Mr. GROS said that he would have hesitated to speak on an article which had been discussed in such detail at the twelfth session when he had not been present, but the importance of the subject prompted him to express his opinion.

62. He had the gravest doubts about applying the criterion of "a serious offence" in a multilateral convention. As Mr. Verdross had rightly pointed out, such a criterion could only have meaning in a bilateral convention between two States which either had similar legal systems defining the same types of crime as "serious", or which agreed to define such crimes in the convention itself. As an example of the kind of difficulty such a criterion might create in a multilateral convention,

one State had introduced the death penalty in connexion with motor accidents. If therefore the criterion of "a serious offence" were to be kept, a list of such offences would have to be included in the draft text.

63. Mr. AGO had pointed out the contradiction between the rules concerning the immunity of the subordinate staff of diplomatic missions, under the Vienna Convention, and the rules contemplated in the draft for heads of consulates. While admitting the force of that observation, he did not reach the same conclusion as Mr. Ago, who appeared to be thinking of the equation of consular officials with embassy staff. If they were really equated in that way, the distinction between diplomats and consuls would virtually vanish so far as their immunity from jurisdiction was concerned.

64. If, without going to such extreme lengths, the Commission decided to extend a greater degree of immunity from jurisdiction to consuls than the draft accorded, a provision should be included to allow for waivers of immunity. Given the scope and nature of diplomatic functions, a sending State could have grounds for declining to accede to the receiving State's request for a waiver in the case of a diplomat, but in the case, for example, of a consular official involved in a serious motor accident the sending State would be more or less obliged to make the waiver. Such a provision was essential if article 40 could not be maintained as drafted.

65. If Mr. Ago's thesis were accepted, the Commission would have to model the article on the relevant provisions of the Vienna Convention, and that would undermine the very concept of the consular institution, which was defined in terms of functions and immunities. He feared that to blur the distinction between the role of the diplomat and the role of the consul in such a manner might bring to naught the work of the Special Rapporteur.

66. Mr. BARTOŠ observed that the Commission was concerned with a fundamental question of principle — namely, whether or not career consuls should enjoy absolute personal immunity. Such complete immunity was mentioned in certain bilateral conventions, but as yet the trend was very cautious; for example, in a number of consular conventions concluded by the United Kingdom, the United States and France, personal immunity on the same footing as that of diplomatic agents was extended to career consuls-general only. Mr. Gros had rightly pointed out that the paramount consideration was that of the functions performed; but in cases where both diplomatic and consular functions were performed by the same mission, in what way would the immunities of minor officials of the consular sections of diplomatic missions be differentiated from those of career consuls?

67. The Vienna Conference's decision to extend immunity from criminal jurisdiction to the administrative and technical staff of diplomatic missions did not reflect the general opinion of the participants, but had been adopted in order to break a deadlock which had threatened the Conference with utter failure; and yet, the States which would attend the plenipotentiary conference on consular relations were to be asked to extend to consular officials a provision which had been accepted as a last

resort — although, of course, it constituted a rule of positive international law.

68. He would be prepared in the draft under discussion to accept the rule of the complete immunity from criminal jurisdiction, even for employees of the consulate, but he could not agree to a provision which, while in effect maintaining the criminal jurisdiction of the receiving State over consular officials, would prevent that State from exercising the right to arrest or detain consular officials pending trial. Under the article as it stood, a consul who committed an offence under the ordinary law could not be remanded in custody provisionally; he remained at liberty, with full enjoyment of his consular rights, was free to communicate with his government and could even leave the territory of the receiving State without hindrance. Accordingly, it would be absolutely illogical to state on the one hand that the jurisdiction of the receiving State remained, but on the other to deprive that State of all possibility of enforcement except with the consul's goodwill. Moreover, if a person holding consular rank was immune from criminal jurisdiction, the courts of the receiving State could not institute proceedings against him and he would be placed on exactly the same footing as a diplomatic agent.

69. He would be prepared to defy official opinion in his own country and, in the interests of the progressive development of international law, to agree to extend the full immunity from criminal jurisdiction to career consuls, thus placing them on a par with diplomatic agents in that respect. Alternatively, the Commission might prepare two variants of the article, the first containing both the rule of absolute immunity and a provision concerning its waiver, and the second providing for the immunity of consular officials in respect of official acts performed in the exercise of their functions only. In the latter case, consular officials would be subject to the jurisdiction of the receiving State in other respects, and the cases in which provisional arrest or detention might be resorted to should be enumerated.

70. It was also extremely difficult to specify, in terms of a maximum sentence, in what cases a consular official would be liable to arrest or detention pending trial; penalties for acts *eiusdem generis* varied greatly from country to country, ideas concerning the treatment of offenders were evolving, and political and military offences posed a special problem. He therefore preferred the alternative wording of "except in the case of a grave crime" in paragraph 1, which was more elastic. Besides, whereas article 40 as it stood spoke of a maximum sentence of not less than five years' imprisonment [first alternative of paragraph 1], the corresponding provisions of most European codes dealing with penal procedure usually did not provide for compulsory arrest or detention pending trial except in the case of an offence punishable by a maximum sentence of not less than ten years' imprisonment. The draft provision was in that way more severe towards consuls than was the ordinary law of many countries towards ordinary citizens. Lastly, under many European codes examining magistrates were obliged to inform aliens arrested or detained pending trial of the reasons for such action, a provision which had not been included in the article. Accordingly, the draft convention,

which set out to provide consuls with more favourable conditions than those applicable to other aliens, in fact placed them in an inferior position in that regard.

71. Mr. AMADO said he could not agree with Mr. Ago's conclusions. The fact that there was a certain tendency to fuse diplomatic and consular functions could have no effect on the immunities of diplomatic agents and consular officials. For example, if a minister agreed to act as consul-general, he consented to perform certain specific functions which entailed equally specific immunities.

72. Further, the expression "personal inviolability" as applied to consuls might be regarded as a creation of the Commission. The Secretary to the Commission had said during the twelfth session (539th meeting, para. 26) that he shared the doubts which had been voiced regarding the expression. The Commission's decision to use the expression could not alter the fact that a consul was a relatively minor official of the sending State who performed certain functions.

73. Finally, he drew attention to paragraph (2) of the commentary, which made it clear that the inclusion of personal immunity clauses in consular conventions represented a reaction against the practice of refusing to recognize the personal inviolability of consular officials. It was obvious that the whole subject was in the process of evolution, and the Commission should therefore exercise the utmost caution in the matter.

74. Mr. PADILLA NERVO said that he had some hesitation in expressing an opinion on the draft text of article 40 and agreed with nearly all the views expressed by other speakers in the debate. He would nevertheless point out that the historical origins of the institution of the personal immunity and inviolability of diplomatic agents and the whole idea of their representative character were governed by two principal concepts. The first was that of safeguarding the dignity of the sending State and its representatives, and the consequent need to grant certain immunities without which their functions could not be exercised; the second was that of precluding impunity for offences. In considering the system of consular immunities as opposed to diplomatic immunities, the Commission should take account of the trend to regard the position of consuls as increasingly important. In consequence of developments in means of communication and of the growing importance of economic and commercial interdependence, diplomatic and consular functions were tending to be placed on a footing of equality in municipal law. In addition, certain functions could be entrusted to both diplomatic agents and consular officials. Accordingly, for the purpose of the applicability of the criminal law, it would be difficult to differentiate clearly between diplomatic agents and consular officials. He therefore agreed with Mr. Ago that it was illogical to grant to junior officials of a diplomatic mission immunities which were not enjoyed by high ranking consular officials; thus, the hybrid provisions of the article were hardly consistent either with logic or with practice.

75. The difficulty of accepting the principle of absolute immunity from jurisdiction for all consular officials — or assimilating them to diplomatic agents in that regard — lay in the fact that the dignity of the State must be safe-

guarded and, at the same time, officials must be enabled to discharge their functions with immunity from provisional detention for civil offences. If the system of the Vienna Convention were extended to consular officials — in view of the evolution of the two types of representation — the Commission's object might be achieved by providing for the possibility of a waiver of immunity by the sending State if a consular official was accused of a criminal offence; that State would naturally take the findings of the examining magistrate into account in deciding whether or not to waive immunity. Another difficulty might arise in cases where the sending State empowered a consul to carry out diplomatic acts; if that official were fully subject to the criminal jurisdiction of the receiving State, the dignity of the sending State would be prejudiced; conversely, however, the sending State might empower the consul to perform diplomatic acts with the express intention of preventing proceedings from being taken against him. Neither contingency would promote friendly relations between the two States concerned.

76. With the object of reconciling the two different points of view and of working out language acceptable to the majority at the plenipotentiary conference, it might be advisable to use wording less specific than that of article 40 as it stood. Moreover, the Commission would have to make up its mind whether it meant to codify existing rules of international law on the subject, as the Special Rapporteur implied, or intended to develop the law in the light of current trends towards the assimilation of the diplomatic and consular functions. The latter course entailed considerable risks; if it were found impossible to agree on a general formula stressing that the main objective of inviolability was to safeguard the dignity of the sending State and its representatives, it might be best to leave the article as it stood.

The meeting rose at 1.5 p.m.

600th MEETING

Wednesday, 31 May 1961, at 10.5 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 40 (Personal inviolability) *(continued)*

1. The CHAIRMAN invited the Commission to continue its discussion of article 40 of the draft on consular intercourse and immunities (A/4425).

2. Mr. PAL, referring to paragraph 1 of the article as proposed by the Special Rapporteur in his third report (A/CN.4/137), observed that it would be more accurate if the phrase "unless they commit a serious offence" were amended to read "unless they are accused of committing a serious offence", for the question whether or not a serious offence had been committed would be determined at the trial.

3. Turning to the substance of the question, he agreed with Mr. Gros that the use of the expression "a grave crime", without indicating any criterion for determining when a crime was to be regarded as grave for the purpose, as proposed in the Commission's alternative version of paragraph 1 of the article, would open the door to controversy. The Netherlands Government (A/CONF.4/136/Add.4) had preferred that alternative expecting that there might be consultations between the States concerned and, if necessary, an appeal to a third party for the purpose of determining the gravity of the crime. In practice, it would be the trying magistrate who would decide whether the crime in question was or was not grave, when in any case before him immunity would be claimed, and if the consular official claiming immunity was not satisfied by that decision, the official concerned would have to apply to the sending State, which would enter into correspondence with the receiving State. In the meantime, the consular officer would have to submit to detention. That difficulty would be obviated if some kind of criterion were laid down. In a number of national legal systems, such as India's, offences were differentiated according as they were compoundable or non-compoundable, bailable or non-bailable, cognizable or non-cognizable or triable by different classes of magistrate, or according to the different courts of first instance dealing with them or according to the form of instituting proceedings. Some such criterion might be used in the case of article 40.

4. He was inclined to accept Mr. Ago's suggestion (599th meeting, paras. 45 and 46) that consuls should not be arrested or detained pending trial at all but should be liable to imprisonment if sentenced. The acceptance of that thesis would mean that consular officials would have only an interim immunity, and not complete immunity from criminal jurisdiction. It would equally serve the fundamental purpose of immunity cited by Mr. Padilla Nervo (*ibid.*, para. 75) namely, to maintain the dignity of the sending State and its representatives and to ensure the smooth performance of consular functions. The rule of exempting consular officials from liability to arrest and detention pending trial for all classes of crime would be to some extent a progressive development without going the whole length of absolute inviolability accorded to diplomatic agents by the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

5. Finally, he was in favour of deleting paragraph 2. If consular officials were subject to the jurisdiction of the receiving State, it would be improper to grant them immunity from punishment even when found guilty under the law of that State.

6. Mr. AGO observed that the Commission's debate on article 40 had also embraced the substance of article 41

(Immunity from jurisdiction). Mr. Amado (*ibid.*, para. 71), had criticized his suggestion at the same meeting as being too sweeping and had stressed the distinction between the functions of diplomatic agents and consular officials. He would assure Mr. Amado that he was fully aware of that distinction and had argued at the Vienna Conference in favour of granting immunities only to persons performing genuine diplomatic functions. The decisions of the Vienna Conference had, however, blurred the distinction and as a consequence immunities had been granted to persons whose functions could not be regarded as strictly diplomatic. Since under article 37 of the Vienna Convention the technical and administrative staff of diplomatic missions, including those employed in the consular section of a mission, had been granted complete personal inviolability, it would be contradictory in logic not to extend a like immunity to career consuls.

7. On the other hand, he agreed with Mr. Amado that in practice it was perhaps advisable that those immunities be restrictive. He also endorsed Mr. Verdross's view that, since all penalties should be executed in respect of consular officials, there was no need to specify in paragraph 2 the length of the sentence concerned. But, it would have been logical to provide for complete immunity of members of the consulate from liability to arrest or detention pending trial.

8. Mr. PAL had rightly pointed out that the use of the loose term "serious offence" or "serious crime" would lead to considerable difficulties. Who was to determine whether an offence was serious or not, or what maximum sentence should carry liability to arrest or detention? If the receiving State were left completely free to determine the gravity of the crime of which the consular official was accused, immunity would be practically abolished, since the courts of that State might arrest a consular official for an allegedly serious offence and prevent him from performing his functions for an indefinite period. The just and logical principle to be adopted, therefore, seemed to be that of presuming the consular official to be innocent so long as he was merely accused, but to provide that he was not protected by immunity after sentence had been passed. The risk of leaving the consular official entirely at the mercy of the courts of the receiving State would thus be avoided.

9. Mr. TSURUOKA said he was inclined to favour the idea of submitting two variants of the article to the plenipotentiary conference. The first variant should recognise immunity for consular officials on the same footing as diplomatic agents, but should provide for the possibility of waiver of the immunity by the sending State. That system had long been followed in diplomatic relations without serious inconvenience to either sending or receiving States, and its extension to consular officials might be justified by the growing trend towards recruiting diplomatic and consular staff under similar conditions and making the two categories of functions increasingly interchangeable. It would be advisable, however, to limit the scope of the first variant to consular officials and their families, and also to recommend in the commentary that the sending State should waive the immunity whenever possible, provided that the performance of

consular functions was not seriously hampered by such waiver and that it entailed no serious prejudice to the prestige of the sending State. The success of the system in the history of diplomatic relations was due to the delicate balance that had been established between the respect of the receiving State for the status of diplomatic agents and the sending State's respect for the legal system of the receiving State. It should be pointed out, however, that such a variant of article 40 would represent an innovation in existing international practice in the matter, and might be strongly resisted by certain States. The fact that a liberal trend had prevailed in respect of diplomatic immunities at the Vienna Conference did not guarantee similar success at the conference on consular intercourse, owing to the difference between the two functions. The Commission therefore would be wise to adopt a more conservative text; on the other hand, if it submitted a single draft, the conference might be led to adopt a hasty solution.

10. The second variant might be agreed upon by improving the text proposed by the Special Rapporteur. He was inclined to accept the phrase "unless they commit a serious offence" despite the arguments that had been advanced against it. With regard to paragraph 2, he agreed that the last phrase ("of imprisonment for a serious offence") should be deleted.

11. Mr. MATINE-DAFTARY said he would confine his remarks to paragraphs 1 and 2 of article 40, since paragraphs 3 and 4 were essential to ensure that the exercise of the consular function would be hampered as little as possible. With regard to the Special Rapporteur's text of paragraph 1, under the codes of criminal procedure of all civilized States arrest or detention pending trial were stipulated in two cases. The first was that of "serious" offences — a term which was used in most codes — and it was for the examining magistrate to rule on the gravity of the offence. The second case was that where the examining magistrate ordered the accused person's provisional detention in order to prevent him from taking any action which might hamper the investigation, such as concerting with witnesses or persons accused with him as accomplices to give false evidence. The Special Rapporteur's text covered the first case, but not the second; it was, however, essential to include such a provision to enable the examining magistrate to conduct his investigation properly.

12. With regard to paragraph 2, he agreed with Mr. Verdross that all sentences must be executed. He could not, however, support Mr. Ago's suggestion, which would have the effect of preventing all provisional arrest or detention; if a consul were accused of murder in *flagrante delicto*, for example, it would be most inadvisable to leave him at large pending trial. He could not, therefore, agree to a provision under which a consular official could be imprisoned only in pursuance of a final sentence. Moreover, in no civilized country did the law provide for the execution of a penalty without final sentence. A distinction must be drawn between detention pending trial and imprisonment and a sentence passed by the court. He reiterated the need to provide for a consular official's detention pending trial in the case of

a serious offence and to prevent interference with an investigation.

13. The CHAIRMAN, speaking as a member of the Commission, observed that it was not the Commission's practice to present alternative texts in its final drafts and it would be inadvisable to take such a course in the case of article 40. The various views that had been expressed might be mentioned in the commentary to the article, and participants in the plenipotentiary conference might use them as a basis for proposals.

14. Mr. AGO's suggestion that it should be laid down as a general rule that a consular official could not be detained or arrested except in execution of a sentence was logically very attractive and would certainly facilitate agreement. He very much doubted, however, whether the suggestion would be accepted by many States, for it went considerably further than existing practice in the matter. In virtually all States the arrest or detention of a consular official pending trial was admitted, although the conditions of imposing such arrest or detention differed widely. While he had no personal objection to the suggestion, he doubted the advisability of accepting it, exclusively on the ground that States were not ready to adopt such a principle. The text of paragraph 1 proposed by the Special Rapporteur was considerably closer to existing practice. Moreover, he believed that it covered both the situations referred to by Mr. Matine-Daftary.

15. He had originally been inclined to support the deletion of paragraph 2, but had since come to the conclusion that there was a cogent argument in favour of its retention. If a consular official could be arrested only in the execution of a final sentence, then that official would enjoy more favourable treatment than ordinary citizens. With regard to Mr. Matine-Daftary's remark, under the municipal law of many countries the courts could order provisional arrest or detention.

16. He agreed that the last phrase of paragraph 2 should be omitted, but reiterated that, if the whole paragraph were deleted, the article would in effect contain only one provision, i.e. that consular officials were not liable to arrest or detention pending trial unless they committed a serious offence.

17. Mr. VERDROSS said that, at first sight, he had been impressed by Mr. Ago's argument that there was a considerable contradiction between the granting of personal inviolability to the technical and administrative staff of diplomatic missions, under article 37 of the Vienna Convention, and refusal to grant similar immunity to career consuls, although the latter might perform much more important functions. Further consideration of the matter, however, had led him to the conclusion that the contradiction did not in fact exist. Members of the technical and administrative staff were assistants of the head of the diplomatic missions and might even, under article 19 of the Vienna Convention, conduct current administrative affairs of a diplomatic mission; the same applied to members of the consular sections of diplomatic missions who, in a small mission, might quite conceivably act as heads of post and, hence, as *chargés d'affaires* of the sending State. It was therefore

only proper to allow those staff members to enjoy diplomatic immunities, although their normal functions might be less important than those of career consuls.

18. He agreed with the Chairman that the text of paragraph 1 proposed by the Special Rapporteur corresponded to existing practice in the matter. Most bilateral conventions provided that consular officials should not be liable to arrest or detention pending trial unless they committed a serious offence. He further agreed with the Chairman that paragraph 2 should be retained, subject to the omission of the last phrase. The resulting wording would provide the most just and precise solution. It should further be borne in mind that, if the relations between the sending and the receiving States made it necessary, the head of the receiving State, acting on the advice of the Minister for Foreign Affairs, could always pardon a foreign consul who had been sentenced by final judgement.

19. Mr. JIMÉNEZ de ARÉCHAGA said that he had two objections to Mr. Ago's suggestion concerning paragraph 1, the first based on expediency and the second on considerations of substance. With regard to the expediency of adopting Mr. Ago's solution, he pointed out that the Commission at its twelfth session had proposed two variants of paragraph 1. All the governments which had commented on article 40 had expressed the view that some qualifying reference — either to a serious crime or to a specific maximum sentence — should be made in the text. A totally new approach, at variance with the attitude reflected in their comments, would therefore come as a considerable surprise to those governments.

20. So far as substance was concerned, consular officials were subject to the municipal law of the receiving State in respect of their private acts; it was explained in paragraph (2) of the commentary that the provision for arrest pending trial in the case of serious crime was established in a number of bilateral agreements, some of them dating back to the eighteenth century. It was essential for consular officials to be treated on the same footing as ordinary citizens in respect of serious crimes committed when they were not exercising their consular functions. Furthermore, the Commission should bear in mind the possibility that the sending State might recall the consular official before the final sentence was passed. He agreed with Mr. Gros that the question of determining the gravity of a crime might raise some difficulty, but that difficulty would arise if a term of sentence were established. He had been impressed by Mr. Ago's argument that, if article 40 provided for the consul's immunity except in cases where the offence was punishable by a specified maximum sentence, the judge might go out of his way to declare a severe penalty applicable for the purpose of bringing the case within the scope of the exception. Moreover, the Commission should have confidence in national legal systems, which tended to impose provisional arrest and detention in increasingly fewer cases, reserving such measures for serious offences only, and to apply them only where they were indispensable for the prosecution or for the protection of the person of the accused.

21. With regard to paragraph 2, the vital passage was "save in execution of a final sentence of at least two years' imprisonment". If the words "of at least two years' imprisonment" were deleted, there would be no reason to retain the paragraph, for without those words, the paragraph would mean in effect that a consul — as indeed any other person — could not be committed to prison except in execution of a final sentence — a provision similar to that adopted by the United Nations Commission on Human Rights in article 9 of the draft international covenant on civil and political rights (E/2573). It might be argued that the question of a consul's detention pending trial would remain; but that form of custody was covered by paragraph 1. Accordingly, paragraph 2 (without its last few words) would be redundant and could be omitted.

22. Mr. ŽOUREK, Special Rapporteur, said that, taking into account the opinion expressed by the Governments of Norway and Yugoslavia (A/CN.4/136), he had proposed in his third report (A/CN.4/137), a new article 50a dealing with the waiver by the sending State of the immunities specified in articles 40 and 41. The Commission would examine that proposal when it came to consider section III of his report concerning the additional articles suggested by governments for inclusion in the draft.

23. He could not agree to the suggestion by Mr. Tsu-ruoka that the Commission should submit two alternative texts. As indicated by the Chairman, it was not customary for the Commission to adopt that procedure in its final drafts. To do so in that instance would give a regrettable impression of indecision.

24. In connexion with Mr. Amado's remark on terminology (599th meeting, para. 72), admittedly the expression "personal immunity" was used in a number of consular conventions, some of them rather old. That expression, however, had given rise to considerable difficulties. For example, as pointed out in his second report (A/CN.4/131), two different interpretations had been given by the French courts. In certain cases, those courts had interpreted the term as equivalent to full immunity from jurisdiction; in other cases, they had held that personal immunity conferred only exemption from imprisonment, but not immunity from jurisdiction. It was therefore desirable to use the expression "personal inviolability", which was not open to such difficulties of interpretation.

25. Mr. Ago's suggestion that paragraph 1 be redrafted so as to protect consular officials from arrest or detention pending trial in all cases would constitute a desirable development of international law. It did not, however, correspond to the existing practice as shown by the consular conventions in force; those conventions, even in the rare cases where they granted consular officials immunity from jurisdiction, always stipulated an exception in respect of serious crimes.

26. Mr. Matine-Daftary had suggested that it would be an unwarrantable interference with the course of justice to prevent an examining judge from arresting a consul in the interests of the investigation of a case. In fact, many consular conventions stipulated that a

consul could be arrested only if charged with a crime of a serious character. In the circumstances, the Commission could not take the view that a consul could be arrested on a minor charge simply because the examining judge considered it useful in order, for example, to prevent contact with other accused persons. The purpose of the provisions of article 40 was to reconcile the respect due to the laws of the receiving State with the need to prevent any interference with the smooth working of consular relations. For that purpose, a criterion based on the seriousness of the offence was necessary. In any case, the municipal law of a State would be unlikely to admit of the arrest pending trial of a person charged with a minor offence; he had himself served with the judiciary for four years and could state that, in his country at least, custody pending trial was ordered only where an accused was charged with a serious crime.

27. He agreed with Mr. Jiménez de Aréchaga that paragraph 1, which gave expression to a well-established international practice, could not be materially altered without giving governments cause for considerable surprise, since none of them had suggested that consular officials should be exempted from arrest or detention pending trial in all cases, regardless of the nature of the charge.

28. As to paragraph 2, the deletion of the qualifying proviso "of at least two years' imprisonment" would not make the paragraph superfluous, as had been suggested. Without the words in question, its provisions would serve to state that a consular official's personal freedom could not be subjected to any restriction save in execution of a final sentence. That formulation would make it clear:

(i) That a consular official could only be committed to prison in execution of a "final sentence", an expression which excluded a decision that was still subject to appeal;

(ii) That a consular official could not be committed to prison by virtue of a mere order from a judge in connexion, for example, with a statement made by him as a witness;

(iii) That a consular official could not be deprived of his personal freedom by virtue of a mere administrative decision or a police warrant;

(iv) That a consular official could not be subjected to any restriction upon his personal freedom other than committal to prison, i.e. to measures of compulsion constituting imprisonment.

29. Mr. YASSEEN said that the Commission should not depart from the existing practice of granting immunity from jurisdiction to consular officials only in respect of acts performed in the course of their official duties. That practice was evidenced by numerous consular conventions.

30. The Commission should not be unduly impressed by the broad measure of immunity from jurisdiction granted by the Vienna Convention to members of the administrative and technical staff of diplomatic missions. The provisions of article 36, paragraph 1, of the draft articles on diplomatic intercourse and immunities (A/3859) submitted to the Vienna Conference would have given members of the administrative and technical staff who

were not nationals of the receiving State the same immunity as diplomatic agents. That proposal of the Commission had been the subject of much criticism and the Conference had, in the first place, rejected immunity from jurisdiction in civil matters. An attempt had then been made to reject or limit immunity from criminal jurisdiction and the provision on the subject had, as a result, failed to obtain the necessary majority. But subsequently the original paragraph itself of the article providing immunity for members of the administrative and technical staff had failed to obtain the necessary majority. Many delegations, however, had taken the view that the important question of the position of such staff in criminal law could not be ignored in a convention on diplomatic relations. Accordingly, the discussion had been reopened and, somewhat reluctantly, many delegations had contributed with their votes to the adoption of the text which appeared as article 37, paragraph 2, of the Vienna Convention. In the circumstances, the text in question could not be cited in support of the suggestion that there existed some trend in favour of broadening the scope of immunity from jurisdiction. The Vienna Conference had in fact shown more reserve in respect of that point than had the Commission in its draft on diplomatic intercourse.

31. For those reasons, he considered that, on the whole, the Commission would do well to adopt the text proposed by the Special Rapporteur. In paragraph 1, he preferred the expression "a serious offence" to the reference to a specified term of imprisonment. The latter criterion lacked precision because penalties varied in nature and the length of the sentence was not always a criterion of its severity. Indeed, in the penalty scale, even a short sentence of hard labour was regarded as more severe than a longer term of imprisonment.

32. As to Mr. Ago's suggestion that consular officials should be protected from arrest or detention pending trial in all cases, he said he would be prepared to accept the suggestion because of the position and functions of the officials concerned. Such a provision would not be altogether inconsistent with the municipal law of many countries, which admitted the possibility of the release on bail of an accused, regardless of the nature of the crime with which he was charged, particularly on the grounds of his personal standing.

33. In paragraph 2, he thought that the final proviso "of at least two years' imprisonment" should be deleted. The introduction of that proviso was an innovation which was not compatible with the general principles applicable in the matter. As a matter of drafting, the initial provision "Except in the case . . ." should also be dropped, so that paragraph 2 would read: "The officials referred to in paragraph 1 shall not be committed to prison or subjected . . . save in execution of a final sentence".

34. Mr. GROS said that he was sceptical of the argument advanced in support of using the criterion "a serious offence" and based on the use of expressions of that type in bilateral consular conventions. Every one of such conventions had been discussed and negotiated by the two States concerned and invariably included a

definition of the term "serious crime" or "serious offence" used in the text of the convention. In the absence of a definition, it would be practically meaningless to use an expression of that kind in a multilateral treaty.

35. It was, therefore, not possible to draw a general rule of international law from the terms used — but also defined with precision — in bilateral consular conventions. The purpose of the codification attempted by the Commission was to reduce the possibilities of dispute. The use without further definition of an expression such as "a serious offence" would invite difficulties of interpretation and would thereby create problems instead of solving them. If such an expression were used, it would be necessary to give, at least in the commentary, an enumeration of the crimes deemed to be "serious" for the purposes of the draft. The list in question would be drawn from existing bilateral consular conventions. In the absence of such a list, however, he would maintain his objection to the proposed expression.

36. With reference to the remarks by Mr. Matine-Daftary, in practice it was rare that a consul was charged with a crime of violence. Traffic accidents, debts and, occasionally, alleged activities foreign to the consular function, were the source of the problems which arose.

37. There were two further comments of detail he would make in connexion with Mr. Matine-Daftary's remarks. One was that in French law, as in the law of other countries, it was possible for the Court to order the arrest of a person in court; a witness could, for example, be arrested as a result of a statement made by him. Also, a person could be committed to prison in pursuance of a sentence that was not final: for instance a person sentenced to a term of imprisonment might on occasion have to serve his sentence even if an application for judicial review had been lodged with the *Cour de Cassation*, the highest judicial authority. Pending that Court's decision, the prisoner might have to spend many months in prison. It was necessary to bear those facts in mind in the drafting of paragraph 1. The other point was that the examining judge was usually empowered to keep an accused in custody for as long as was considered necessary to ascertain the truth in the case; the judge's powers were thus very broad. For that reason the article under discussion should specify in which cases consular officials could be arrested. Since those officials did not enjoy immunity from jurisdiction in such cases, there were cases in which they could be arrested, but a restrictive definition would, in such cases, be required.

38. Mr. MATINE-DAFTARY, replying to the Special Rapporteur, said that he had never suggested that a person could be held in custody pending trial on a trivial charge. He had merely pointed out that, in addition to his powers of arrest in respect of grave crimes, an examining judge had also the power to order any accused to be held in custody provisionally for the purpose of preventing contact with other accused.

39. If, as the Special Rapporteur had suggested, one of the purposes of article 40, paragraph 1, was to ensure that a consular official would not be liable to arrest by administrative order, the paragraph would have to

specify that the arrest or detention envisaged must be ordered by the "judicial authorities".

40. As to paragraph 2, he was not opposed to its retention if the proviso "of at least two years' imprisonment" were deleted. With that deletion, the paragraph would state, as was indeed the case in most countries, that a person could not be committed to prison otherwise than in execution of a final sentence. For his part, he did not know of any system of criminal law which made it possible to execute a penalty so long as an appeal against the decision was still possible. There was a difference between conviction and a warrant for arrest, which was merely part of the process of investigation. However, it might be worth while providing *expressis verbis* that a final sentence was indispensable for a consul's imprisonment, for such a provision would constitute a safeguard against the execution of the penalty pending appeal (if that should be possible under any system of municipal law).

41. Mr. AGO stressed the need to avoid all confusion between immunity from jurisdiction and personal inviolability. All members of the Commission agreed that consular officials were immune from jurisdiction only in respect of acts performed in the course of their official duties. So far as their personal inviolability was concerned, it would not be unduly liberal to exempt consular officials from arrest or detention pending trial in all cases. Under the law of numerous countries, including the United States, it was possible for any accused, regardless of the seriousness of the charges against him, to obtain his release on bail.

42. He fully agreed with Mr. Gros that it was unsound to try to derive a general rule of international law from the use of expressions like "serious offence" in bilateral conventions. In all such conventions, a precise definition of the term was given on the basis of the municipal law of the two countries concerned.

43. If, therefore, the Commission were to retain some criterion in paragraph 1 he would make three suggestions. First, the use of the term "offence" should be avoided for it was much too broad and could include even breaches of administrative regulations. He urged the use of an expression such as "serious crime". Second, the commentary should contain examples of such crimes, to show that, for example, breaches of the law by negligence were not included. Third, the commentary should indicate that the Commission had contemplated the possibility of admitting the exemption of arrest or detention pending trial in all cases, but had reached the conclusion that far the time being it could not go beyond the existing practice. A commentary of that type would serve the purpose indicated by Mr. Tsuruoka of suggesting to governments the possibility of an alternative course of action without submitting the two alternative texts, a procedure which the Commission did not follow in its final drafts.

44. Lastly, he agreed with Mr. Matine-Daftary that paragraph 1 should specify that the arrest or detention envisaged must be effected by order of the competent judicial authority; in other words, the detention of consuls by order of an administrative or political autho-

ity would not be admissible. A provision on those lines would provide a valuable safeguard against interference with a consul's official duties.

45. Mr. SANDSTRÖM opined that the second alternative offered in paragraph 1 was too vague. The first alternative was also not precise enough, for the duration of a sentence depended upon the criminal law of the State concerned. Moreover, such a proviso would not be workable in practice except in truly reciprocal stipulations in bilateral conventions, as e.g. in the Consular Convention of 1952 between the United Kingdom and Sweden.¹ Article 14 of that Convention stipulated that a consular officer could not be subject to detention in custody pending trial unless accused of a grave offence as defined in article 2 (9), and the latter article laid down that a "grave offence" meant one for which a sentence of imprisonment for five years or over might be awarded in the United Kingdom and one for which a sentence of imprisonment of four years or over might be awarded in Sweden. A provision of that nature could not of course be devised for a multilateral convention.

46. He was not opposed to the idea of exempting consuls altogether from detention pending trial in view of the special position they occupied and since the likelihood of their committing serious offences was extremely small.

47. On the other hand, paragraph 2, which did not serve any very useful purpose, could be deleted.

48. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary's remark that detention pending trial could be ordered in the case of serious crimes or, if necessary, for the purposes of the investigation, pointed out that those two contingencies were provided for in the text of article 40 as it stood. But in view of the practice of States and following the precedents contained in bilateral conventions, the Commission had decided to exempt consuls from such forms of custody if charged with offences that were not serious.

49. He had only mentioned the rule according to which consuls could not be detained for breach of administrative orders in connexion with paragraph 2, which in its existing negative form clearly excluded the possibility of such detention.

50. The CHAIRMAN said that after lengthy discussion the Commission should be in a position to take a decision on article 40. The consensus of opinion seemed to be in favour of the adoption of the Special Rapporteur's proposed new text for paragraph 1 as reproduced in his third report, with the addition of the proviso suggested by Mr. Matine-Daftary and supported by Mr. Ago that such arrest or detention pending trial could only be ordered by the competent judicial authority. The exact wording of the proviso could be left to the Drafting Committee.

51. Mr. BARTOŠ said he would be prepared to vote for such an addition if it were clearly understood that

detention for quarantine purposes, for instance, was an entirely different matter. There had been a case where the departure of certain Yugoslav consular officials from Beirut had been held up by the quarantine authorities.

52. Mr. ŽOUREK, Special Rapporteur, confirmed that article 40 as drafted referred only to detention ordered by judicial authorities.

53. The CHAIRMAN put to the vote the addition proposed by Mr. Matine-Daftary to paragraph 1 in article 40.

The proposal was adopted by 12 votes to 1, with 4 abstentions.

54. Mr. GROS asked whether the Commission had decided whether the word "offence" or the word "crime" should be used in paragraph 1.

55. The CHAIRMAN suggested that that point could be left to the Drafting Committee.

56. Mr. PADILLA NERVO emphasized that the point was one of substance, since the practical effect of using the one or the other term would be quite different.

57. Mr. ŽOUREK, Special Rapporteur, said that in some countries the classification of criminal acts corresponded to that used in France — namely, *crime*, *délit* and *contravention*. In other countries the expression "serious offence" was used, not the term "crime". If the Commission so wished, he could by way of example indicate in the commentary the kind of offences which were defined as serious in consular conventions.

58. He was strongly opposed to the use of the word "crime" and since there was no disagreement on the meaning of the exception laid down in paragraph 1 he could see no reason why the Commission should not adopt the term "serious offence". He had chosen the word "offence", which by reason of its generality should be acceptable to all States.

59. The CHAIRMAN considered that as there was no disagreement over the meaning of "serious offence" the choice of wording most likely to be acceptable to States could be left to the Drafting Committee, which would probably have to study the language used in bilateral conventions and national laws.

60. Mr. BARTOŠ said that since during the past twenty years the tripartite classification mentioned by the Special Rapporteur had been abandoned in new penal codes, he would be prepared to vote only for some generic term.

61. Mr. YASSEEN emphatically agreed with Mr. Padilla Nervo that the Commission was not discussing a drafting point; in countries where the tripartite classification was used, all crimes were by definition serious.

62. The CHAIRMAN observed that the Commission would have to use a general term rather than one borrowed from the law of a particular group of States.

63. Mr. MATINE-DAFTARY observed that the expression "serious offence" should give general satisfaction, whereas the use of the word "crime" might cause difficulties for certain countries.

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 467 et seq.

64. Mr. AGO pointed out that the Commission could hardly hope to find a term that would be consistent with the legal parlance of every country in the world. He was categorically opposed to the use of the word "offence" which could, in some countries such as France and Italy, include a breach of administrative regulations. The word "crime" had a general connotation familiar everywhere and comprised classes of offences which in some countries were defined as "serious".

65. Mr. AMADO said that the expression "serious offence" was not known in the penal code of a number of countries, including his own. He was therefore opposed to its use, but if the Commission decided otherwise, at least it should be qualified by the words "under the criminal law". He would have supported the suggestion of Mr. Gros that the type of offence envisaged in paragraph 1 might be enumerated.

66. The importance of the principle of "inviolability" would be seriously diminished if its application could be restricted by reason of an "offence".

67. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Amado that in the language of criminal lawyers the term "offence" was a generic one meaning any violation of the criminal law. If qualified by the adjective "serious", the term would be equivalent to the term "crime" as used by certain countries.

68. Mr. YASSEEN pointed out the very great difference between a "serious offence" and a "serious crime".

69. Mr. FRANÇOIS proposed that the matter be referred to the Drafting Committee in the light of the discussion.

70. Mr. PADILLA NERVO said that the question should be settled by the Commission itself to forestall possible difficulties later. Since the consensus appeared to be that the exception stated in paragraph 1 referred to a crime and not to a simple violation of the law, some acceptable definition in terms of the duration of the sentence was necessary.

71. In reply to a question by the chairman, Mr. EDMONDS said that in United States legal terminology, an offence which could be a breach of administrative rules was different from a crime, which was much more serious. The discussion had served to confirm his view that far greater precision was required in paragraph 1. His original objection to the expressions "grave crime" or "serious offence" had been that they were open to very different interpretations. He therefore proposed that the Commission should vote on the first alternative in the text approved at the previous session. The phrase "an offence punishable by a maximum sentence of not less than five years' imprisonment" had at least some meaning for all States.

72. Mr. AMADO said that if the clause used the expression "serious offence", it would fail to convey the Commission's intention that consuls could only be detained in the case of what were designated in some countries as crimes of an atrocious character.

73. Mr. PADILLO NERVO considered that Mr. Edmond's proposal should be put to the vote first since it concerned the text originally submitted to govern-

ments for comment. The decision on that proposal would give better guidance to the Drafting Committee.

74. The CHAIRMAN, observing that as the Commission had already started the voting on article 40 it could not take up Mr. Edmonds's proposal until the vote had been concluded, put to the vote Mr. François' proposal that paragraph 1 should be referred to the Drafting Committee in the light of the discussion.

The proposal was adopted by 7 votes to 5, with 5 abstentions.

Article 40, paragraph 1, as proposed by the Special Rapporteur (A/CN.4/137), as amended, was adopted, subject to drafting changes.

75. The CHAIRMAN said that the Commission appeared to be in favour of his suggestion that the words "of imprisonment for a serious offence" in paragraph 2 of the Special Rapporteur's redraft of article 40 should be omitted.

76. Mr. JIMÉNEZ DE ARÉCHAGA said that he would be unable to support paragraph 2 as amended by the Chairman if it could in any way be construed to imply that consuls were granted any special privileges since the right granted by that paragraph was enjoyed by any individual, as was proved, for instance, by article 5, paragraph 1(a), of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950).²

77. The CHAIRMAN said that paragraphs 3 and 4 in the Special Rapporteur's redraft were, presumably acceptable for they had not given rise to amendments.

78. The Commission would recall that the Special Rapporteur had prepared a separate article concerning the waiver of immunity (A/CN.4/137, article 50 a) which would be discussed later.

79. He suggested that article 40, as amended, should be referred to the Drafting Committee.

It was so agreed.

80. Mr. AMADO said that the statement made in paragraph (20) of the commentary was highly questionable and he hoped that it might be reconsidered by the Special Rapporteur.

81. The CHAIRMAN suggested that the Special Rapporteur might be asked to summarize in the commentary the views expressed about the relationship between article 40 and the parallel provisions of the Vienna Convention as well as those put forward concerning the desirability of giving consular officials absolute immunity from arrest and detention.

It was so agreed.

The meeting rose at 1.5 p.m.

² United Nations, *Treaty Series*, vol. 213, pp. 221 *et seq.*

601st MEETING*Thursday, 1 June 1961, at 10 a.m.*

Chairman : Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

1. The CHAIRMAN, referring to the decisions taken concerning article 40 (559th meeting, paras. 53 and 75) explained that, since the Special Rapporteur's new text had been approved with certain changes, he had not put Mr. Edmond's proposal to the vote. However, there was nothing to prevent Mr. Edmonds or any other member of the Commission from re-introducing the text of article 40 as adopted at the twelfth session at the time when the Commission came to discuss the Drafting Committee's report.

2. He invited the Commission to take up article 41 of the draft on consular intercourse and immunities (A/4425).

ARTICLE 41 (Immunity from jurisdiction)

3. Mr. ŽOUREK, Special Rapporteur, drew attention to his summary of government comments in his third report (A/CN.4/137, *ad* article 41). In addition, in a comment received subsequently the Spanish Government (A/CN.4/136/Add.8) had stated that it had no objection to article 41 provided that the narrower definitions of "employee of the consulate" and "private staff" suggested in the same Government's comment on article 1 were accepted.

4. In deference to the objections of two governments to the phrase "acts performed in the exercise of their functions", he had prepared a redraft of the article before knowing the terms of the final corresponding provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13). As the Commission would see, article 37, paragraph 3, of that Convention contained the phrase in question and so did article 38, paragraph 1, of the Convention with the additional adjective "official", as in article 50 of the draft on consular intercourse.

5. Since the Commission wished wherever possible to follow the wording of the Vienna Convention, he would withdraw his redraft and recommend that the Commission revert to the text of article 41 as adopted at the twelfth session, particularly since the two criticisms which had caused him to redraft the article did not concern a major issue.

6. He doubted whether the Danish Government's suggestion (A/CN.4/136/Add.1) concerning liability for damage caused by motor vehicles would be acceptable in a multilateral instrument and, as explained in his

observations on that suggestion, he thought the matter would best be regulated by bilateral agreement. A number of recent consular conventions contained a clause on such liability. If the Commission so desired, he would draft an appropriate text which would probably require a separate article.

7. In his third report he had replied to the question of Indonesia and the Philippines concerning the general criterion for determining whether an act had been performed in the exercise of official functions.

8. As the Commission had indicated in paragraph (3) of the commentary, it would be extremely difficult to frame a general rule defining what acts fell within the scope of the exercise of consular functions and had pointed to the danger of in any way qualifying the immunity laid down in article 41, for such a qualification might lead to consuls being hampered in the exercise of their functions, particularly in view of the existing limitations on consular immunity.

9. Article 41 and those following of course raised very interesting theoretical issues, but he appealed to members to confine their remarks to the points raised by governments since the Commission still had numerous articles, including some new articles, to consider.

10. Mr. VERDROSS said that he regretted the Special Rapporteur's withdrawal of his redraft, for the redraft was far superior to that adopted at the previous session. As an example of the kind of difficulty to which the 1960 text of article 41 might give rise, it could be construed to mean that a consul who, provoked by some remarks made in the course of an official conversation, killed the speaker, had committed an act performed in the exercise of his functions.

11. For the purposes of article 41 there could be only one possible method of distinguishing between official and private acts: the former were attributable to the sending State and the latter to an individual. If on the grounds that similar wording had been approved by the Vienna Convention, the Commission maintained the 1960 text of article 41, he urged that it should be clearly explained in the commentary that the last phrase meant acts attributable to the sending State because performed in the exercise of consular functions.

12. Mr. MATINE-DAFTARY preferred the text of article 41 as adopted at the twelfth session, which would be perfectly intelligible to jurists since the expression "acts performed in the exercise of their functions" occurred in numerous codes and had been discussed in great detail in cases dealt with by the courts (reports of cases, e.g., in the *Recueil de Jurisprudence* by Dalloz). Of course, if there were any dispute whether a particular act came within that definition, the matter would be settled by the courts. He was not in favour of excessively detailed explanations in the commentary.

13. The Special Rapporteur's redraft of the article did not make the meaning any clearer, could cause difficulties of interpretation and might provoke questions about the Commission's reasons for departing from the 1960 version and also from the language used in the Vienna Convention.

14. Since in most countries third party liability insurance was compulsory, perhaps the point of the Danish Government should be referred to in the commentary.

15. The CHAIRMAN pointed out that the redraft of article 41 as given in the Special Rapporteur's third report was no longer before the Commission. He hoped that article 41, which was a simple one, could be disposed of quickly.

16. Mr. EDMONDS said that article 41 presented some very real difficulties. As adopted at the twelfth session, it was extremely vague and, moreover, would be unworkable in practice. He was uncertain what was meant by the words "shall not be amenable to the jurisdiction of the judicial or administrative authorities". It might be read to mean that a consul could not be subjected to judicial or administrative proceedings, except for an act performed outside of the exercise of his functions. Only for such an act could he be brought before a court of law or before an administrative tribunal. Alternatively those words might be construed to mean that no member of a consulate could be held liable in respect of a judgment in civil or criminal proceedings for an act performed in pursuance of his functions.

17. Mr. YASSEEN supported the Special Rapporteur's arguments in favour of the text adopted at the previous session.

18. A provision on the lines suggested by the Danish Government would be appropriate with respect to members of a diplomatic mission who enjoyed immunity from civil jurisdiction, but was unnecessary in the present draft since consular officials were bound to respect the laws and regulations of the receiving State concerning the compulsory insurance of motor vehicles.

19. As to the Swedish Government's comment (A/CN.4/136/Add.1), there was a real difference in scope between the expression used in article 41 and that used in article 50, paragraph 1. The latter provision, which was necessary in the interests of the exercise of consular functions, went far enough.

20. The CHAIRMAN, speaking as a member of the Commission, agreed that Mr. Edmonds had drawn attention to a real problem, but it was one of wording rather than substance. Any dispute about whether an act was one performed in the exercise of consular functions would be adjudicated by a court.

21. He, too, preferred the text of article 41 as adopted at the twelfth session and suggested that Mr. Edmonds' criticism would be met by some such wording as "Members of the consulate shall enjoy immunity from the judicial and administrative jurisdiction of the receiving State in respect of acts performed in the exercise of their functions". He put that wording forward for consideration by the Drafting Committee.

22. Mr. GROS said that the purport of the French text of article 41 was perfectly clear and accorded with the wording suggested by the Chairman. The provision conferred immunity from jurisdiction in respect of any act relating to the exercise of consular functions. That was no innovation, but an established rule of law. For example, an action could not be brought against

a consul in the courts of the receiving State for refusal to issue a visa or for the dismissal of a national of the receiving State who was a member of the consular staff. Again, in the Dillon case between France and the United States in 1854, the refusal of a French consul at San Francisco to appear as a witness in a matter concerning the exercise of his functions had been allowed.

23. Mr. Matine-Daftary had rightly observed that the meaning of the expression "acts performed in the exercise of official functions" was well known both in municipal law and international practice, and French administrative case-law used a good criterion: an act that was separable from official acts. The matter had been ably expounded in paragraph (2) of the commentary to article 41, from which it was clear that the act committed in the example described by Mr. Verdross would not be classed as an official act. In case of any doubt whether an act was performed in the exercise of consular functions, the courts would decide. It must not be overlooked, however, that such a question might be raised by the States concerned through the diplomatic channel, thus providing a fresh safeguard of a reasonable interpretation of the phrase "acts performed in the exercise of their functions".

24. The text of article 41 and the commentary were acceptable.

25. He was not altogether convinced by Mr. Yasseen's contention that an express provision on the lines of that suggested by the Government of Denmark was unnecessary. A member of a consulate in a State where third party insurance was compulsory might conceivably plead article 41 in order to claim that he was not required to be insured against liability for accidents which occurred during his journeys to and from the office or to and from official ceremonies; in that connexion he recalled that it had been in such circumstances that the driver of the car of the Secretary-General of the United Nations had committed a traffic offence. It seemed desirable to stipulate either in the text or very clearly in the commentary that, notwithstanding the provisions of article 41, consular officials must comply with the laws and regulations of the receiving State in respect of compulsory insurance against motor accidents, even on the occasion of official journeys.

26. Mr. SANDSTRÖM said that it was not necessary to introduce in the article itself a provision on the lines suggested by the Danish Government, for vehicles belonging to members of a consulate were obviously also used for private purposes and would therefore be automatically subject to the legislation of the receiving State, which under article 53 the member of the consulate was bound to respect.

27. Mr. YASSEEN opined that regulations concerning compulsory insurance were bound to be applicable to consular officials since nothing precluded such applicability. With regard to Mr. Gros's point, it was hardly likely that a consul would assert that his motor vehicle was used exclusively in the exercise of his consular functions.

28. Mr. LIANG, Secretary to the Commission, referring to the case involving the former Secretary-General of

the United Nations, explained that in fact it had been his chauffeur who had been summoned for exceeding the speed-limit in New York and the question had arisen whether the act had been in the performance of the Secretary-General's functions. The former Secretary-General had ordered the chauffeur to submit himself to the jurisdiction of the court without prejudice to the question whether immunity could have been claimed by virtue of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations, signed on 26 June, 1947.¹

29. As far as a compulsory insurance was concerned, under the terms of article 53 there could be no doubt that a member of a consulate was under the same obligation as a national of the receiving State to comply with its regulations.

30. Mr. GROS said that the case cited raised, as did many others, the question under discussion whether the act of proceeding to an official ceremony was within the exercise of official functions. The point was not a theoretical one; it had happened that a diplomatic agent involved in an accident had declined to disclose the number of his insurance policy pleading the immunity of an official journey. It was extremely important to ensure that article 41 was not involved against the laws and regulations of the receiving State concerning compulsory insurance.

31. Mr. AMADO urged the Commission to consider the insertion of a provision on the lines of the Danish Government's suggestion because of the ever-increasing number of motor accidents. If no such express provision were inserted in the article itself, a statement in the strongest possible terms was needed in the commentary.

32. Mr. ŽOUREK, Special Rapporteur, assured Mr. Amado that he would insert a very explicit statement in the commentary to cover the important point raised by Mr. Gros. In view of the terms of article 53, he doubted whether the Commission could go any further.

33. In order to give satisfaction to Mr. Verdross, he would also prepare a more detailed explanation for the commentary of the meaning of "acts performed in the exercise of their functions".

34. Mr. BARTOŠ said that in the interests of the progressive development of international law the Commission should insert in the article itself a provision on the lines of that suggested by the Danish Government. He would point out that even diplomatic officials could not import a motor vehicle or obtain licence plates in the receiving State without producing evidence of full third-party insurance. If, however, the opinion that the matter should be dealt with in the commentary prevailed, he would strongly support Mr. Amado's plea for a categorical statement on the subject.

35. Mr. PADILLA NERVO strongly supported the views expressed by Mr. Amado and Mr. Bartoš and pointed out that in New York diplomats were not given

special number plates until they had taken out an insurance for their cars.

36. As to the wording of article 41, in view of the statement contained in the first sentence of paragraph (2) of the commentary, perhaps the word "official" should be inserted before the word "acts" in the text of the article itself.

37. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of the text of article 41 as adopted at the twelfth session. He suggested that it be referred to the Drafting Committee in the light of the observations made by Mr. Edmonds and Mr. Padilla Nervo, as well as his own suggestion as to wording.

38. The point raised by Mr. Gros concerning compulsory motor car insurance might be dealt with in the commentary.

It was so agreed.

ARTICLE 42 (Liability to give evidence)

39. Mr. ŽOUREK, Special Rapporteur, introducing the article, said that a number of general observations had been received from governments. Thus, the Government of Spain considered that the privilege of giving evidence at his own residence should be granted to career consuls only. The Commission had already considered similar objections and had pointed out that chapter II of the draft referred to career consuls only, while chapter III related to the privileges and immunities of honorary consuls. The Government of the Philippines (A/CN.4/136) had criticized the drafting of paragraph 1, specifying that the word "liable" was negated by the phrase "no coercive measure may be applied". The Norwegian Government (*ibid.*) had also criticized paragraph 1, but on more substantive grounds, stating that the first sentence seemed to follow *a contrario* from other articles of the section and that the rule set forth in the second sentence was not warranted by generally accepted principles of international law or by reasonable considerations relating to the progressive development of international law. He could not agree with that government that the paragraph should be deleted, since there seemed to be a need to set forth clearly the two rules incorporated in the article at the twelfth session. The first sentence, moreover, incontestably corresponded to general practice in the matter, and the second sentence, as members of the Commission had explained at length, definitely met the needs of the smooth operation of consular relations, as well as those of the progressive development of international law.

40. The Danish Government did not consider that there was sufficient ground for including in the draft the rule formulated in the second sentence of paragraph 1. The Chilean Government (A/CN.4/136/Add.7) considered that paragraphs 1 and 2 should be deleted, since they conflicted with the principle that, except in respect of acts forming part of their functions, consular officials should be subject to the ordinary jurisdiction of the receiving State. The Yugoslav Government (A/CN.4/136) had made three suggestions: first, that a provision

¹ United Nations, *Treaty Series*, vol. II (1947), No. 147, p. 11.

should be included to the effect that the consul could submit a written declaration instead of giving evidence at his official residence; secondly, that a rule should be added stipulating that, in cases of refusal to give evidence on grounds that such evidence was connected with the exercise of consular functions, the receiving State might request the sending State to authorize the consul to give evidence; and, thirdly, that the article should provide that the consul was not obliged to testify under oath. He had slightly amended the text of paragraphs 1 and 2 to take into account the observations of the Philippine and Yugoslav Governments. In paragraph 1, he had replaced the words "are liable" by "may be called upon", to meet the Philippine objection, and had added the words "or accept a written statement from him" at the end of paragraph 2 in order to comply with the first suggestion of the Yugoslav Government.

41. With regard to comments on paragraph 3, there was the proposal of the Netherlands Government (A/CN.4/136/Add.4) that the rule formulated in the last sentence of paragraph (3) of the commentary should be added to paragraph 3 of the article. The Commission might well adopt that suggestion particularly since the idea had received support at the twelfth session (573rd meeting, paras. 36 and 38). The Chilean Government considered that the last sentence of paragraph 3 should be deleted, on the grounds that, since the official exercised a right in declining to give evidence, he could not be penalized or subjected to coercive action by reason of his decision. Although he agreed that the comment was strictly speaking logical, it was important to include the provision in the article, particularly in view of the United States Government's comment (A/CN.4/136/Add.3) that the test of whether a function was official was whether the sending State assumed responsibility for it and that further consideration should be given to the matter of requiring a consular official to give evidence or permitting him to decline to do so; it seemed particularly important, moreover, to provide expressly that of a consular official's refusal to give evidence should not be regarded as contempt of court.

42. Certain drafting changes suggested by the delegation of Ghana in the Sixth Committee at the fifteenth session of the General Assembly, referred to in his third report, by the Philippine Government and the United States Government should be referred to the Drafting Committee. The Belgian Government (A/CN.4/136/Add.6) had suggested that the word "office" at the end of paragraph 2 should be replaced by "the consulate"; that would be an undoubted improvement, being in conformity with the terminology accepted by the Commission.

43. Apart from the amendments he had suggested, the Commission should retain the text that it had adopted after exhaustive discussion at the twelfth session, particularly since few governments had proposed any drastic changes.

44. Mr. BARTOŠ said that, in his personal capacity, he had been unable to agree with the drafting of the Yugoslav Government's suggestion that the consul

might always be entitled to submit a written declaration instead of giving evidence at his office or residence, because that would be contrary to the principles of the *procédure contradictoire*. Nevertheless, the wording that the Special Rapporteur had found to comply with the Yugoslav Government's suggestion had dispelled his doubts and provided a happy solution.

45. A more important point, however, was that of the settlement of disputes between the consul and the courts of the receiving State. If a consul refused to give evidence, no coercive measure could be applied to him. The consul might, however, agree to give evidence, but withhold certain testimony on the grounds that it was connected with an official secret or with the exercise of his functions and, if the court disputed those grounds, the question could be settled only by the sending State. It was essential to insert a provision to that effect in the article itself or in the commentary, for there was a widespread notion that, having agreed to testify, the consul was subject to the procedures of the court where the evidence was taken. In actual fact, if that court assumed competence to settle such a dispute, it would be interfering in the public acts of the sending State; the question should be settled by that State in keeping with its own municipal law. According to information at his disposal, nearly two-thirds of all States did not allow their consular officials to give evidence in foreign courts concerning matters which came to their notice in the course of their public functions without the express permission of the home State. While that was an administrative guarantee, and not an absolute prohibition, the permission was issued at the ministerial level. A consul might decline to give evidence without pleading official secrecy, but in view of the possibility of disciplinary or judicial sanctions being imposed by the authorities of his own State if he had agreed to give evidence, he might decline to testify by pleading official secrecy or that the evidence was connected with the performance of his official functions. Accordingly, it was essential to state at least in the commentary that in such cases the receiving State might ask the sending State either to authorize the consul to give evidence or to settle the question whether or not official secrecy was involved.

46. Mr. VERDROSS said he had two questions to ask the Special Rapporteur. In the first place, could the court of the receiving State call upon members of the consulate to attend as witnesses directly? Under Austrian law, for example, such a request had to be made through the Ministry of Justice; that point might be mentioned in the commentary.

47. Secondly, if the member of the consulate concerned was a national of the receiving State, and no official functions whatsoever were involved, could no coercive measures be applied to compel him to give evidence? The Commission would surely be going too far in extending immunity to such persons.

48. Mr. AGO said he would be extremely interested to hear the Special Rapporteur's reply to Mr. Verdross's second question.

49. He observed that the passage "no coercive measure may be applied with respect to them" was open to

either a narrow or a broad interpretation. He could agree with the narrow interpretation that the consul could not be compelled to attend as a witness in judicial or administrative proceedings; where acts unconnected with official functions were concerned, however, could proceedings be instituted against the consul for failure to attend, and could he, for example, be fined for non-appearance?

50. The CHAIRMAN, speaking as a member of the Commission, said he had some doubts concerning the relationship between paragraphs 1 and 3. The Commission's intention at its twelfth session had been to indicate a consul's obligation to give evidence; he was not sure that the article as a whole conveyed that obligation. The first sentence of paragraph 1 was sufficiently categorical to be interpreted as covering all the eventualities which might arise, but the provision of the first sentence of paragraph 3 did not make it clear enough that the first sentence of paragraph 1 referred only to matters not connected with the performance of official functions. It might therefore be advisable to add at the end of the first sentence of paragraph 1 a phrase along the lines of "except in matters connected with the exercise of their functions". The obligation to give evidence in all other cases would thus be made clear.

51. Mr. SANDSTRÖM fully endorsed the Chairman's suggestion.

52. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Verdross's first question, said that under the law of several countries transmission of the summons to the consuls in the circumstances contemplated was conducted exclusively through the Ministry of Justice, or Ministry of Foreign Affairs, a rule applicable both to diplomatic agents and to consular officials. Under many consular conventions, however, the courts could communicate with such officials direct, and would merely prohibit any threat of a penalty for non-appearance. In such cases his view was that the courts could communicate direct with consular officials, but without threatening any penalty should they not comply with the summons. The first sentence of paragraph 1 might therefore be left as it stood.

53. With regard to Mr. Verdross's second question, a consul who was a national of the receiving State should not enjoy the privilege conferred by article 42 in respect of acts which were not connected with the performance of official functions. That might be stated more clearly in the final commentary to the article. Moreover, the point seemed to be covered by article 50, paragraph 1.

54. He pointed out to Mr. Ago that the passage "no coercive measure may be applied" clearly excluded any measure that the judicial or administrative authorities might be entitled to take against a consular official in order to compel him to give evidence. Even a fine imposed for non-appearance would be a "coercive measure". If the authorities of the receiving State questioned the grounds of the consular official's refusal, they could of course seek redress by applying to the sending State; the result of such a step would depend on whether the matters concerning which evidence was to

be taken were connected with the consular official's functions.

55. He would accept the Chairman's suggested amendment, which would clarify the relationship between paragraphs 1 and 3.

56. Mr. VERDROSS said he could not agree with the Special Rapporteur's explanation that his second question was answered by article 50, paragraph 1, for that clause referred only to official acts already performed. It should be made quite clear in article 42 that exemption from coercive measures in the event of refusal to give evidence did not apply to nationals of the receiving State in respect of acts having nothing to do with official functions.

57. Mr. PAL, referring to the Chairman's suggestion with regard to paragraph 1, said that the Commission's original idea had been to follow the guidance of certain consular conventions, and especially that of article 13 (3) and article 12 (5) of the Consular Convention of 1952 between the United Kingdom and Sweden.² The meaning of paragraph 1 — which corresponded to article 13 (3) of the said Convention — was that, in general, members of the consulate were liable to attend as witnesses, but that, if they declined, no coercive measures should be taken to compel them to attend. Paragraph 3, on the other hand, set forth their right to claim the privilege of declining to attend. Thus, under paragraph 1, members of the consulate could decline to attend in all cases, whether or not they were entitled to claim the privilege; if they did so decline, all other consequences of such refusal would follow, except that no coercive measures could be taken against them. Under paragraph 3, however, no consequences could attach to refusal to give evidence as it would be in claim of privilege.

58. Mr. AGO fully supported the Chairman's amendment to paragraph 1. Without that amendment, the article might be interpreted as allowing the consul to avoid the general obligation to give evidence.

59. With regard to the Netherlands Government's proposal concerning the sentence to be added to paragraph 3, he said he was not sure that it would be wise to include too many detailed provisions in the article itself. A consul would not without weighty reasons decline to give evidence concerning events coming to his notice in his capacity as registrar. By laying undue stress on such details, the Commission would run the risk of weakening the immunity which article 42 was to confer. In the event of abuse, the sending State could always recall or discharge the official concerned. A multilateral convention should set forth clear general principles; the details could be left to international practice and to bilateral treaties.

60. Mr. FRANÇOIS said that he fully understood the reasons given by Mr. Ago for his hesitation in regard to the Netherlands proposal to insert a provision to the effect that a consular official should be prepared to

² *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3.), pp. 472 and 473.

testify to the authenticity of deeds executed by him. However, it was highly desirable to stipulate, for that case, an exception to the rule specified in article 42, paragraph 3 because in some countries a person who wished to plead a document drawn up at a consulate would need the consular official's testimony to the authenticity of that document.

61. It had been suggested that a consul would normally not refuse to give the evidence in question, but he had some doubts on that point. If, under the provisions of article 42, a consul were to have the right to decline to give evidence in all matters connected with the performance of his official duties, he might be inclined to think that the prestige of his office would suffer if he were to give such evidence. The only method of ensuring that the desired evidence was forthcoming was to supplement article 42 in the manner proposed by the Netherlands Government, making it clear, of course, that the proposed provision did not imply that the consular official was liable to give details of the background of the instruments or to divulge information which had come to his knowledge in the course of executing them.

62. Mr. AMADO drew attention to the somewhat unsatisfactory drafting of paragraph 2. In other contexts he had criticized the use of vague words like "reasonable", which were open to subjective interpretation. In addition to using that term, paragraph 2 had the defect of adopting the cumbersome expression "shall take all reasonable steps to avoid interference with the performance of his official duties" which could be improved by using an expression such as "shall avoid interfering with...". Also, the expression "arrange for the taking of such testimony" could be replaced with advantage by "take such testimony".

63. Furthermore, the use of the conjunction "and" to link the first clause of the sentence with the second, which related to the taking of testimony at the consular official's residence or office, did not give a precise indication of the procedure applicable. The position, as he understood it, was that the consular official could choose between attending as a witness in the judicial proceedings and asking for his testimony to be taken at his residence or office, where such a method was possible and permissible. In both cases, the authority requiring the evidence should avoid interfering with the performance of his official duties. The language of paragraph 2 should be improved so as to make that position clear.

64. Mr. AGO fully concurred with Mr. Amado's remarks on the drafting of paragraph 2, which would be taken into account by the Drafting Committee.

65. With regard to the point raised by Mr. Verdross concerning members of the consulate who were nationals of the receiving State, it would be better to clarify the terms of article 50, dealing with those nationals of the receiving State, rather than to specify the exception in article 42. The same problem arose in connexion with other articles, such as article 40, and it was better to cover in a single article (article 50) the question of the inapplicability of a number of privileges to persons who were nationals of the receiving State. If the exception were to be specified in connexion with one privilege and not another,

that apparent contradiction could give rise to difficulties of interpretation.

66. Mr. ŽOUREK, Special Rapporteur, said that the Commission had to choose between drafting article 42 in very general terms and laying down precise rules therein. In his view, the rules in the article should be as specific as possible in order to avoid divergencies of interpretation.

67. He agreed with Mr. Ago that the proviso debarring nationals of the receiving State from the benefit of specific privileges should not appear in each of the articles concerned. Article 50, which limited the privileges and immunities enjoyed by such consular officials nationals of the receiving State to immunity from jurisdiction in respect of official acts performed in the exercise of their functions and excluded all other privileges not specifically granted to them by the receiving State, seemed sufficiently clear not to need improvement.

68. Nevertheless, there was some merit in the suggestion put forward by some governments to refer to article 50 in certain articles of the draft. A person not familiar with the whole draft would understand much better the scope of each of its provisions if, in the case where a privilege did not apply to nationals of the receiving State, that fact were clearly stated. In deference to the wishes of those governments, he suggested that a passage should be included in article 1 (Definitions) — which would have to be consulted by any reader — to the effect that members of the consulate who were nationals of the receiving State had a special status.

69. Mr. PADILLA NERVO pointed out that paragraph 1 made all members of the consulate — an expression defined as meaning both consular officials and employees of the consulate — liable to attend as witnesses, while specifying that no coercive methods could be applied to them. Paragraph 2, on the other hand, protected only consular officials from interference in the performance of their duties and seemed to exclude employees of the consulate.

70. Consular conventions appeared to adopt a somewhat different approach. Thus, article 13(3) of the Anglo-Swedish Convention cited by Mr. Pal, which was similar to the corresponding clause in the consular conventions signed by the United Kingdom with Mexico and with a large number of other countries, stated that the authority or court requiring the testimony of a "consular officer or employee" had "to take all reasonable steps to avoid interference with the performance of his official duties". Only the privilege of giving testimony at his office or residence (wherever permissible and possible) was restricted to "a consular officer who is not a national of the receiving State".

71. He asked the Special Rapporteur whether he could explain the position.

72. Mr. ŽOUREK, Special Rapporteur, replied that the difference in scope as between paragraph 1 and paragraph 2 was intentional. Consular employees were not normally entrusted with the exercise of consular functions proper, and since some governments had raised objections to the text adopted at the twelfth session, the Commis-

sion's intention was to make it clear that such employees did not enjoy the privileged treatment provided under paragraph 2 of article 42.

73. It was true that certain consular conventions appeared to give to employees the privilege specified in paragraph 2, but those conventions usually gave a narrower meaning to the term "consular employee". For example, article 2 (7) of the Anglo-Swedish Convention defined a consular employee as "any person, not being a consular officer, employed at a consulate for the performance of consular duties" and expressly excluded "drivers or any person employed solely on domestic duties at or in the upkeep of the consular premises". By contrast, article 1 (j) of the Commission's draft defined the expression "employee of the consulate" as meaning "any person who performs administrative or technical work in a consulate or belongs to the service staff". The expression used in the bilateral convention thus did not cover most of the persons considered as employees of the consulate by the Commission. In addition, it included persons entrusted with consular functions, who, under the Commission's draft, were "consular officials".

74. Another reason for the difference between the terms of article 42 and the corresponding provisions of bilateral conventions was that it was easier for those conventions to grant broader privileges for reasons connected with the special relations between the two countries concerned. The draft articles drawn up by the Commission, however, in order to be acceptable to the majority of governments must necessarily be more conservative in respect of the privileges recognized.

75. The CHAIRMAN said that most of the objections put forward to article 42 concerned questions of drafting. The only question of substance, which the Commission should decide by means of a vote, was that of the Netherlands' suggestion for the addition of a provision along the lines of the last sentence of commentary (3).

76. Mr. AGO said that the Netherlands suggestion raised an important question of principle. The consul was an official of the sending State. When he performed his duties as registrar of births, marriages and deaths, the acts performed by him constituted acts of the sending State. If he produced a document relating to his official duties as registrar or gave evidence thereon, he would be acting on behalf of the sending State. Should article 42 be amended so as to impose upon him the duty to give evidence relating to such a document, the effect would be to impose an obligation upon the sending State itself. If, therefore, the law of the sending State did not permit the consul to give such evidence, a difficult position would arise. The courts of the receiving State would be in effect issuing an order to the sending State; if that order were disregarded, they might impose a fine on the consul for contempt of court when he was in fact simply obeying the laws of the sending State in a matter relating to his official duties as an official of that State.

77. Mr. BARTOŠ agreed with Mr. Ago. In the event of a controversy between the authorities of the receiving State and the consul on the question whether the testimony requested related to a matter covered by his duty of

secrecy towards the sending State, the courts of the sending State were alone competent to settle the dispute.

78. Mr. MATINE-DAFTARY pointed out that, where a consul acted as registrar of a marriage, for example, he was the depository not of a State secret, but of private interests. A private person could well require the consul's evidence on the subject of a marriage solemnized by him.

79. Mr. BARTOŠ said that a clear distinction should be drawn between, on the one hand, the contents of a document drawn up by the consul in his capacity as notary or registrar and, on the other hand, any information which might have come to his knowledge in connexion with the drawing up of the document in question. The contents of the document were public, but the information was confidential.

80. For example, in the case of a declaration recognizing a child born out of wedlock, the officer or official recording the declaration might, under the legislation of some countries, have to advise those concerned on the possible legal consequences of the declaration, which frequently would give rise to a confidential discussion between the consul and the persons concerned. Even though the consul drew up a document accessible to the public, he would necessarily become the depository of confidential information. So far as that information was concerned, he was bound by professional secrecy. The actual contents of the declaration recorded by him were, of course, part of a public record and available to those concerned.

81. Mr. ŽOUREK, Special Rapporteur, pointed out that the last sentence in commentary (3) stated that the consul "should not decline" to give the evidence in question. There was therefore no intention to create an obligation; the passage merely indicated that the sending State might be asked to consider allowing the consul to give evidence in such circumstances.

82. The CHAIRMAN said that the question before the Commission was whether an actual obligation would be embodied in article 42. On that understanding, he put the Netherlands proposal to the vote.

The proposal was rejected by 10 votes to 3, with 3 abstentions.

83. Mr. AMADO, explaining his vote, said that he had voted against the Netherlands proposal because article 42, paragraph 3, stated clearly that members of the consulate could decline to give evidence concerning matters connected with the discharge of their duties. The last sentence of commentary (3) was intended merely as a recommendation to the sending State to facilitate the giving of evidence where possible.

84. Mr. BARTOŠ, explaining his vote, said that he had voted against the proposal because the last sentence of commentary (3) was much too broad in that it implied that a consul might be called upon to give evidence "concerning events which came to his notice in his capacity as registrar" and disregarded the fundamental distinction which he had mentioned between the contents of a public document and confidential information that might be given to the registrar.

85. Mr. SANDSTRÖM, explaining his vote, said that he had voted against the proposal for the same reason. He, too, found the terms of the last sentence of commentary (3) much too broad.

86. Mr. YASSEEN, explaining his adverse vote, said that he regarded the consul as acting as a notary and registrar of the sending State. In that capacity, he was not amenable to the jurisdiction of the receiving State. Any evidence that might be required in respect of acts performed by him in the course of his official duties could be obtained only through the competent authorities of the sending State.

87. The CHAIRMAN said that there remained no question of substance to be decided by the Commission so far as article 42 was concerned. He therefore suggested that the Commission should:

(1) refer article 42 to the Drafting Committee with instructions to revise paragraphs 1 and 3 in clearer terms;

(2) instruct the Drafting Committee to take into account, in paragraph 2, the drafting proposals made by Mr. Amado and by some governments; and

(3) ask the Special Rapporteur to consider the advisability of including in the commentary a reference to the distinction drawn by Mr. Bartoš.

It was so agreed.

The meeting rose at 1 p.m.

602nd MEETING

Friday, 2 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 43 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

1. The CHAIRMAN invited debate on article 43 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that the comments received had shown that not all governments had understood the Commission's intention regarding work permits, notwithstanding the explanation given in commentary (4).

3. The Government of Finland (A/CN.4/136) had suggested that the exemption from work permits should be limited to work performed in the consulate. A similar suggestion had been made by the Netherlands Govern-

ment (A/CN.4/136/Add.4), and the Norwegian Government (A/CN.4/136) had stated that the exemption should not apply to members of the consulate and their families who carried on a gainful private activity outside the consulate. The Governments of Belgium (A/CN.4/136/Add.6) and Spain (A/CN.4/136/Add.8) had expressed similar views.

4. With the object of removing all doubt regarding the Commission's intention, he had in his third report (A/CN.4/137) proposed a redraft containing the qualifying proviso "other than those who carry on a gainful private activity outside the consulate". On reflection, however, he thought it would be preferable to revert to the 1960 text (A/4425), for he proposed to prepare a general provision dealing with the status of members of the consulate who carried on a gainful private activity outside the consulate. The problem of that status arose in connexion with a number of articles, and it was desirable that it should be settled for all purposes in a single provision.

5. The Polish Government (A/CN.4/136/Add.5) had suggested that article 43 should contain a reference to the practice of issuing special cards to members of the consulate, mentioned in commentary (2). The Drafting Committee might be asked to consider the suggestion, which was consistent with the view expressed in the Commission's own commentary.

6. The only question of substance to be decided by the Commission arose from proposals restricting the scope of application of article 43. In particular, the Governments of Norway, Belgium and Japan (A/CN.4/136/Add.9) took the view that the private staff of members of the consulate should be debarred from the benefits of article 43.

7. He urged the Commission to maintain the provision as it stood; the extension of the exemption laid down in article 43 to private staff was justified on practical grounds, as explained in commentary (3).

8. Mr. YASSEEN said that the exemption from the obligations in the matter of work permits should apply only to work performed in the consulate. The drafting of article 43 should be improved so as to show clearly that it was not intended to grant exemption in respect of a gainful private activity carried on outside the consulate.

9. According to the definitions article, the expression "members of the consulate" included the head of post. However, the head of post was granted an exequatur authorizing him to carry out his official duties. It would only be necessary to specify the exemption from work permits in the case of other members of the consulate and in respect of work done in the consulate.

10. Mr. ŽOUREK, Special Rapporteur, agreed that it was necessary to revise the text of article 43, which was so concise that it had obviously been misunderstood by governments.

11. It was clearly the Commission's intention that no work permit should be needed for work performed by a member of the private staff employed by a member of the consulate. It was equally clear that, in those countries where a work permit was needed, the members of the consulate or their families who carried on a gainful

activity outside the consulate would require such a permit.

12. In fact, the exemption from work permits covered a narrower ground than the exemption from aliens' registration and residence permits. The best course would be to draft a separate paragraph concerning work permits, stating that the exemption applied to the case where a member of the consulate brought a member of his private staff with him from abroad: he would, in that case, not be required to obtain a work permit for that person.

13. Mr. LIANG, Secretary to the Commission, said that he had been struck by Mr. Yasseen's remark that article 43 referred to work done in the consulate itself. The Special Rapporteur had explained the position in that respect. However, there still remained some doubt on the interpretation of the text. A member of the consulate could bring with him from abroad a person belonging to the technical staff, such as a typist. According to the interpretation given by both Mr. Yasseen and the Special Rapporteur, it would seem that such a person was not covered by the exemption, since a typist was not a member of the private staff of the member of the consulate. The intention of the Commission, however, did not, as was evidenced by paragraph (4) of the commentary, seem to have been to confine the exemption only to private staff.

14. He had received many inquiries regarding the meaning of the provisions of article 43 on work permits. The difficulty arose from the fact that the text referred in the same sentence to the registration of aliens, residence permits and work permits, which could not be placed on the same footing. In the circumstances, it would be preferable to make the provision on work permits the subject of a separate paragraph.

15. Mr. YASSEEN suggested that article 43 should contain a separate paragraph stating that the members of the consulate were exempted from work permits in respect of their work in the consulate.

16. Mr. SANDSTRÖM said that, in practice, the requirement of a work permit could refer only to work performed outside the consulate. He thought the best course was to explain the matter in the commentary.

17. The CHAIRMAN thought that the text of article 43 as it stood sufficed, and concurred with Mr. Sandström's suggestion.

18. Mr. YASSEEN did not press for the inclusion of the proposed separate paragraph, provided that the situation was explained in the commentary.

19. Mr. JIMÉNEZ de ARÉCHAGA said that it was important to clarify the text itself, for the article as drafted left the matter in doubt. He suggested that a proviso, along the following lines, be added in article 43 after the words "work permits": "except those which may be required for a gainful private activity outside the consulate."

20. The CHAIRMAN suggested that article 43 should be referred to the Drafting Committee, with instructions to take into consideration the observations of the Government of Finland, and the remarks made in debate:

the Committee would decide whether to add a new paragraph or a qualifying proviso, so as to clarify the position regarding work permits.

It was so agreed.

ARTICLE 44 (Social security exemption)

21. Mr. ŽOUREK, Special Rapporteur, said that there was one comment on article 44 by the Netherlands Government, which suggested substituting the words "social security measures" for "social security system", because some States, in particular federal States, had more than one social security system. That suggestion could be referred to the Drafting Committee.

22. Article 44 was much more elaborate than the corresponding provision adopted by the Commission at its tenth session as article 31 of the draft articles on diplomatic intercourse and immunities (A/3859).

23. The Vienna Conference had in fact adopted, as article 33 of the Convention on Diplomatic Relations (A/CONF.20/13), a text based on article 44 of the draft on consular intercourse, subject to a number of changes, including drafting changes. In the circumstances, article 44 might be approved as it stood and the Drafting Committee should be instructed to consider whether its wording should be brought into line with that of article 33 of the Vienna Convention.

24. However, in some respects it would be inadvisable to adopt the language of article 33 of the Vienna Convention.

25. In the first place, the phrase "with respect to services rendered for the sending State", which appeared in paragraph 1 of article 33, did not seem necessary in the consular draft. By virtue of article 54 on honorary consuls, the exemption specified in article 44 did not apply to those consuls, who were the consular officers most likely to be engaged in activities other than the service of the sending State. Moreover, it was his intention to examine at a later stage whether a special article would be needed to describe the legal status of career consuls who were authorized to carry on a private gainful activity in addition to discharging their consular duties. For the time being the point might be left in abeyance until the Commission decided whether an article of that type was to be included.

26. In the second place, the expression "private servants", appearing in paragraph 2 of article 33 of the Vienna Convention, was somewhat old-fashioned and incomplete, because it did not include a private secretary, for example.

27. Lastly, paragraph 5 of the Vienna Convention, which specified that the provisions of article 33 did not affect existing or future bilateral or multilateral agreements, was not necessary in article 44 of the draft because a special article dealt with the relationship between that draft and bilateral conventions.

28. The CHAIRMAN, speaking as a member of the Commission, said that he broadly agreed with the suggestions made by the Special Rapporteur. However, he urged the Commission to follow the wording of the

Vienna Convention as closely as possible. For example, there appeared to be no reason to alter the term "private servants" as used in paragraph 2.

29. The question of the phrase "with respect to services rendered for the sending State" appearing in paragraph 1, probably involved more than drafting. Although article 42 of the Vienna Convention forbade diplomatic agents from engaging in any gainful private activity, it had been considered necessary to include that phrase in article 33, paragraph 1, because the social security exemption specified in that article applied not only to the diplomatic agent himself but also, by virtue of article 37, paragraph 1, of the Convention, to members of his family forming part of his household. If, however, a member of the diplomatic agent's family engaged in an outside private activity, that person would not be exempted from the social security provisions in force in the receiving State.

30. Since the same situation could occur in respect of members of the family of a member of the consulate, it was appropriate to include the phrase in question in article 44, paragraph 1.

31. Mr. AGO said that article 44 dealt with a delicate matter. He therefore agreed with the suggestion that the Drafting Committee should be instructed to bring the text into line with the wording of article 33 of the Vienna Convention. Any departure from that wording could be interpreted as involving a difference of substance.

32. In connexion with paragraph 1, the social security scheme referred to included accident insurance and other benefits related to a person's work. If a member of the family of a member of the consulate worked outside the consulate, that person should be covered against such risks as accident.

33. Mr. PAL said that he had some difficulty in understanding the phrase in article 33 of the Vienna Convention which referred to "services rendered for the sending State." He could not see the connexion between a national health scheme and services rendered to the sending State as stated in the article.

34. The CHAIRMAN explained that, in many countries, the benefit of health insurance, like other social security benefits, was directly related to a person's employment. The phrase in question was intended to specify that the social security exemption referred only to employment by the sending State and not to outside employment. Such outside employment was possible in the case of members of the family.

35. Mr. SANDSTRÖM said that, whereas a diplomatic agent would not of course engage in any outside activity, it was not impossible that one of his subordinates should carry on, in addition to his duties in the diplomatic mission, some outside activity. In that event, the question would arise of the application of a workmen's compensation scheme if he were injured, for example, when proceeding to his work. The same question could arise in the case of a subordinate member of the staff of a consulate.

36. Mr. ERIM pointed out that, by virtue of article 50 of the present draft, article 44 did not apply to members

of the consulate who were nationals of the receiving State. In the circumstances, there could be no objection to retaining article 44 as it stood. Members of the consulate who were not nationals of the receiving State would thus not be obliged to participate in the social security scheme of the receiving State. Their voluntary participation, however, was always possible by virtue of article 44, paragraph 4.

37. Lastly, the phrase "with respect to services rendered for the sending State" should not be included, for it would not conform to the structure of the draft as a whole.

38. The CHAIRMAN suggested that article 44, as adopted at the twelfth session, be referred to the Drafting Committee with instructions to take into consideration the wording of article 33 of the Vienna Convention and the remarks made in the course of discussion.

It was so agreed.

ARTICLE 45 (Exemption from taxation)

39. Mr. ŽOUREK, Special Rapporteur, said that article 45 had elicited a considerable number of observations from governments because it dealt with an important matter and one in which the practice of States varied considerably.

40. Some of the government observations were of a general character. The delegation of Ghana in the Sixth Committee at the fifteenth session of the General Assembly (A/CN.4/137, *ad* article 45) had requested that it should be specified whether the exceptions provided for in article 45 were to be regarded as rights or privileges. He had dealt with that question in another context (*ibid.*, *ad* article 36); in conformity with international law the article conferred rights. The United States Government (A/CN.4/136/Add.3), referring to the question of investments, had expressed the view that article 45 seemed to produce results not intended by the Commission.

41. A number of suggestions had been made with a view to restricting the scope of application of article 45. The Governments of Denmark (A/CN.4/136/Add.1) and the United States had suggested that persons permanently resident in the receiving State at the time of their engagement on the consular staff should not be exempt from taxes other than the tax on the salary received from the consulate. The Indonesian delegation to the General Assembly had proposed (as mentioned in his third report) that the exemptions set forth in article 45 should be granted only to consular officials, in other words not to employees of the consulate. A somewhat similar suggestion was made by the Government of Norway. The Governments of Spain and Japan considered that members of the families of members of the consulate should not be eligible for the benefit of article 45.

42. With regard to paragraph 1 (a), the United States Government had stated that the language of the provision was ambiguous: it was not clear whether it referred only to those taxes which were not normally stated separately, or whether it referred to taxes which could not ordinarily be separated out of the price. The Chilean Government (A/CN.4/136/Add.7) had proposed the

deletion of the concluding phrase "incorporated in the price of goods or services".

43. In view of different taxation techniques in different countries, paragraph 1 (a) had proved a difficult provision to draft. His suggestion was that the Commission should adopt the language used in sub-paragraph (a) of article 34 of the Vienna Convention, which spoke of indirect taxes "of a kind which are normally incorporated in the price of goods or services". That language would seem to avoid most of the difficulties pointed out in the government comments.

44. The Government of Norway had suggested that paragraph 1 (b) should be redrafted so as to cover all kinds of property. In the opinion of the Yugoslav Government (A/CN.4/136), it should be provided that a consul was liable to taxation on capital invested for gainful purpose or deposited in commercial banks.

45. The Belgian Government had proposed that at the end of paragraph 1 (e) the words "or as the countervalue of local public improvements" should be added. That expression, as pointed out by the Belgian Government in its remarks on article 32, was intended to cover such services as the improvement of the street or of public lighting, and the installation of water mains.

46. The Swedish Government (A/CN.4/136/Add.1) had suggested that the article should define the expression "members of their families". Since that expression was used in many articles it would be appropriate, in his opinion, to define it in article 1 under definitions.

47. There were also proposals for additional paragraphs. For example, the Belgian Government had proposed a paragraph specifying that members of the consulate, even if they carried on a gainful private activity, would be exempted from taxes and duties on their remuneration received from the sending State. It would not be appropriate to include such a provision, for the status of honorary consuls was dealt with in article 58. To cover the rare case where a career consul might be allowed to carry on a gainful private activity, he thought that, as he had suggested before, a special clause describing the consul's legal status might be inserted in the draft; that course would be preferable to the method of mentioning exceptions in each one of the relevant articles.

48. The Chilean Government's suggested addition "This provision [i.e. paragraph 2] shall not apply to persons who are nationals of the receiving State" would become unnecessary if an appropriate clause was inserted to article 1 drawing attention to the status of nationals of the receiving State in the consulate's employ.

49. The Government of Japan had proposed that paragraph 1 (a) should read "Excise taxes including sales tax;" the same Government also proposed the deletion of paragraph 2.

50. The only real question of substance to be settled by the Commission was which categories of person should enjoy the exemptions conferred by article 45. The impression he had gathered from their comments was that governments would like the scope of the article to be narrower. Since tax laws varied considerably, he felt bound to suggest, though with some reluctance,

that with a view to making article 45 more acceptable the Commission should follow the general lines of articles 34 and 37 of the Vienna Convention. Of course, States could always agree to accord more liberal treatment by bilateral arrangement.

51. The other points raised by governments concerned matters of detail which could be referred to the Drafting Committee. He referred to his redraft of paragraph 1 (a) and (d) as proposed in his third report.

52. Mr. VERDROSS observed that the first objection made by the Norwegian Government was unfounded, since paragraph 1 in article 45 related only to heads of post and members of the consular staff and did not cover employees of the consulate. In fact, the article made no provision whatever for such employees, who should perhaps be mentioned in paragraph 2.

53. The stipulation suggested by the Yugoslav Government that the consul should be liable to taxation on capital invested or deposited in commercial banks was unnecessary, for paragraph 1 (d) dealt with the taxability of private income originating in the receiving State.

54. The wording of article 45 and the Special Rapporteur's proposed amendments were acceptable: it seemed that all the points raised by governments were in fact covered.

55. Mr. MATINE-DAFTARY asked whether the Special Rapporteur would not agree that, given the whole structure of the draft, it should be explicitly stated in paragraph 1 that the exemptions laid down in article 45 did not apply to nationals of the receiving State.

56. He had strongly opposed the clause introduced in the Vienna Convention, on the initiative of the Swiss delegation, that the diplomatic agent's private capital invested in commercial or industrial undertakings in the receiving State should be liable to tax (article 34 (d) of that Convention). Such a provision might be acceptable for a prosperous country like Switzerland which did not need capital, but would be very undesirable in countries short of capital. He saw no justification for such a clause and wondered why the Special Rapporteur had taken it over in his redraft of paragraph 1 (d) in his third report.

57. Mr. BARTOŠ approved of the Special Rapporteur's decision to follow the provision of article 34 (d) of the Vienna Convention because he considered the text of article 45, paragraph 1 (d) of the present draft too general. He would point out to Mr. Matine-Daftary that members of a consulate could not, by reason of the functions, be granted greater privileges than those enjoyed by members of a diplomatic mission. A provision of the kind now included in article 34 (d) of the Vienna Convention would in any case not prevent States from granting exemption by autonomous provisions or from concluding bilateral agreements concerning the taxation of capital invested in the receiving State. Any exemptions agreed upon would form part of the municipal law of that State and depended on its good will. They could not be regarded as forming an international obligation.

58. Mr. FRANÇOIS said that article 34 (f) of the Vienna Convention granted exemption from stamp duty in respect of transactions relating to immovable property

only. In that respect the Vienna Convention was more restrictive than the present draft. He asked for an explanation, and whether paragraph 1 (f) of article 45 of the present draft should be brought into line with the Vienna Convention.

59. Mr. PAL said that article 45 should not be read in the abstract, but should be viewed in the light of the actual taxation laws of various countries. As the article stood, members of the family of a consul would not be exempt from taxes in relation to sources situated in the receiving State. The tax laws of certain countries, including the United Kingdom and certain members of the Commonwealth, based liability on the factum of legal residence. That would render a member of the consul's family liable to taxation on income in the sending State, where such a member was actually resident in the receiving State with the consul. The existing exemption would extend only to such cases.

60. He criticized the proviso in paragraph 1, the effect of which would be to withdraw the exemptions on all forms of income, whatever their source, as soon as the person began to engage in gainful private activity in the receiving State. He doubted if that could have been the Commission's intention. Presumably, the case of a member of the family engaging in gainful private activity was fully covered by the provisions of the paragraph 1 (d).

61. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Matine-Daftary, referred to paragraph 2 (b) of the commentary and explained that the Commission had decided not to insert the proviso excluding nationals of the receiving State from the application of article 45 on the grounds that article 50 fully dealt with their privileges and immunities. Admittedly to mention one condition (namely, that exemption from taxation was only given if the person concerned did not carry on a gainful private activity) without mentioning the other (viz. that he must not be a national of the receiving State) might create some problems of interpretation; on the other hand, it was hardly feasible to repeat both those conditions in every article where they applied. The difficulty might be partly overcome by an explicit statement in article 1 to the effect that consular officials or employees who were nationals of the receiving State were in a special position so far as privileges and immunities were concerned.

62. In regard to the second point raised by Mr. Matine-Daftary, since regulations concerning tax exemption on investments varied widely the best solution would be to follow article 34 (d) of the Vienna Convention. Moreover, it would be difficult to explain a deviation from that text.

63. In reply to Mr. Pal, he observed that according to the tax laws of certain countries the income of persons resident there was taxable whatever its source.

64. The CHAIRMAN, referring to the question asked by Mr. François, said that he could not recall exactly why article 34 (f) of the Vienna Convention had been approved in that form.

65. Mr. FRANÇOIS said that there was a real difference

of substance between article 34 (f) of the Vienna Convention and article 45, paragraph 1 (f), of the draft, according to which all stamp duties would have to be paid.

66. The CHAIRMAN suggested that the Drafting Committee might be instructed to examine the records of the discussions on that point at the Vienna Conference so as to discover the reason for its formulation of article 34 (f) of the Vienna Convention and whether article 45, paragraph 1 (f), of the present draft should be modelled on that clause.

It was so agreed.

67. The CHAIRMAN said that the Commission seemed generally in favour of the Special Rapporteur's redraft of paragraph 1 (a) and (d), and was agreed that article 45 should, where necessary, be brought into line with the Vienna Convention. Paragraph 1 would thus apply to consular officials and administrative and technical staff of a consulate, and paragraph 2 to service staff and private servants.

68. He would draw the Drafting Committee's attention to the desirability of substituting the more general term "emoluments" used in the Vienna Convention for the word "wages" in paragraph 2 of article 45.

69. He suggested that article 45 should be referred to the Drafting Committee with the foregoing instructions.

It was so agreed.

ARTICLE 46 (Exemption from customs duties)

70. Mr. ŽOUREK, Special Rapporteur, introducing the article, said that several governments had expressed the view that the article was too liberal and that exemption from customs duties should be restricted to consular officials. Thus, the Government of Norway had pointed out that the expression "members of the consulate" as defined in article 1 (h) included service staff, whereas service staff fell outside the term "diplomatic agents" in the corresponding provision of the draft on diplomatic intercourse (A/3859). The Government of Denmark considered that exemption from customs duties should be enjoyed only by career consuls who were not nationals of the receiving State and who did not carry on a gainful private activity in that State; he would point out that the second of those conditions was stipulated in the text of article 46 as approved by the Commission at its twelfth session. The Swedish Government had stated that the article was more liberal than the corresponding provision of the Commission's draft on diplomatic intercourse, and the United States Government that article 46 was among those which should be considered in the light of the results of the Vienna Conference. The Government of Yugoslavia considered that the words "and foreign motor vehicles" should be added at the end of sub-paragraph (b) and that it should be specified that, in connexion with the re-sale of objects imported duty free, customs duties must be paid or the sale could take place only in conformity with the customs regulations of the receiving State. He believed that the second suggestion of the Yugoslav Government was covered by the introductory phrase "in accordance with the provisions of its legislation".

71. Finally, the Government of Japan, in addition to suggesting that the words "members of the consulate" should be replaced by "consular officials" had suggested that a new paragraph be added, providing that members of the administrative or technical staff should enjoy the privileges specified in paragraph 1 in respect of articles imported at the time of first installation.

72. In his opinion, the main problem before the Commission was to decide which category of persons was entitled to the benefit of the exemption. The municipal law of many countries was less liberal than article 46; moreover, the provisions of article 36 of the Vienna Convention should be taken into account. Accordingly, he had prepared a redraft of article 46 (A/CN.4/137, *ad* article 46), limiting the exemption to consular officials only. At the time of writing his third report, however, he had not known the results of the Vienna Conference. Since article 37, paragraph 2, of the Vienna Convention granted some of the privileges specified in article 36, paragraph 1, to members of the administrative and technical staff of the diplomatic mission, he had reached the conclusion that a like exemption should be extended to the corresponding staff of the consulate. The modalities of the exemption seemed to be covered by the introductory part of his redraft; accordingly, as soon as the Commission had decided on the category of the beneficiaries, the text could probably be referred to the Drafting Committee.

73. Mr. ERIM agreed with the Special Rapporteur that the article should be modelled on the corresponding provisions of the Vienna Convention and, in any case, should not go further than that Convention. The Special Rapporteur's redraft was very close to article 36 of that Convention, except that it did not mention members of the family of the consular official. He asked whether that omission was due to the Special Rapporteur's intention to prepare a special article on privileges enjoyed by members of the families of consular officials. In the light of article 37, paragraph 1, of the Vienna Convention, which provided that members of the family of a diplomatic agent should enjoy the privileges and immunities specified in articles 29 to 36 of that Convention, the special mention of members of the family in article 36, paragraph 1 (b), seemed to be superfluous.

74. The CHAIRMAN pointed out to Mr. Erim that the purpose of the special reference to articles for the personal use of members of the family of a diplomatic agent in article 36, paragraph 1 (b), of the Vienna Convention was to indicate that the diplomatic agent could bring into the receiving State not only articles for his own personal use, but also articles for the use of his family. Article 37, paragraph 1, on the other hand, covered the case of members of that agent's family who passed through customs separately.

75. Mr. ERIM opined that article 37, paragraph 1, would have sufficed to cover both cases.

76. Mr. ŽOUREK, Special Rapporteur, said that he had admitted the reference to the families of consular officials because several governments had expressed the view that the exemption should be limited strictly to consular officials. Under the law of many States, exemp-

tion from customs duties did not extend to any person except the official concerned. In view of the diversity of customs regulations and the need to agree upon a widely acceptable text, the Commission should not give the impression of undue generosity in that respect.

76. Mr. ERIM considered that the Special Rapporteur's redraft would be unduly restrictive if it did not extend the privilege concerned to members of the families of consular officials.

77. Mr. ŽOUREK, Special Rapporteur, agreed that the Drafting Committee might be instructed to extend the scope of the article along the lines suggested by Mr. Erim.

78. The CHAIRMAN, speaking as a member of the Commission, observed that, if the Commission were to follow the corresponding provisions of the Vienna Convention, it should include a text along the lines of the last sentence of article 37, paragraph 2, of that Convention and extend the exemption to articles imported at the time of first installation by members of the administrative and technical staff of the consulate.

79. Mr. ŽOUREK, Special Rapporteur, agreed that, since the scope of article 46 was to be limited to consular officials only, it would be wise to add a second paragraph granting limited privileges to the administrative and technical staff along the lines of the Vienna Convention, although the law of a number of States did not provide for such privileges.

80. Mr. JIMÉNEZ de ARÉCHAGA thought that the Drafting Committee should be asked to set forth the provision on the exemption of administrative and technical staff in a separate paragraph, in order to enable States wishing to do so to make reservations to that provision.

81. The CHAIRMAN suggested that article 46 as redrafted by the Special Rapporteur should be referred to the Drafting Committee, with the two amendments suggested by Yugoslavia and Japan and with instructions to use the wording of the corresponding provisions of the Vienna Convention as far as possible.

It was so agreed.

ARTICLE 47 (Estate of a member of the consulate or of a member of his family)

82. Mr. ŽOUREK, Special Rapporteur, introducing the article, referred to the United States Government's opinion that the provision should be considered in the light of the corresponding clause of the Vienna Convention. The Belgian Government had pointed out that sub-paragraph (a) conflicted with a provision of Belgian law under which money and securities passing to heirs resident abroad could not be transferred before a deposit had been made to guarantee payment of the duties payable in Belgium on the estate of an inhabitant of the Kingdom. A like objection, based on the municipal law of one country, might also be raised by other States; he was not conversant with the corresponding Belgian law concerning diplomatic agents, but believed that the objection might be raised in connexion with the corresponding provision concerning diplomatic agents as well. The Netherlands Government had suggested that the words "gainful private

activity" should be replaced by "private commercial or professional activity". The Government of Japan had suggested that the provision should be restricted to consular officials and members of the administrative or technical staff who were nationals of the sending State and not of the receiving State, and also that sub-paragraph (b) should grant exemption from estate duty in respect of movable property situated in the territory of the receiving State and held by the decedent in connexion with the exercise of his function as a member of the consulate.

83. Since, apart from the observation of the Belgian Government, there seemed to be no serious objection to the text approved by the Commission at its twelfth session, the Commission might agree to follow the general lines of the corresponding provision of the Vienna Convention (article 39, paras. 3 and 4) and to adopt the article in principle, leaving the final wording to the Drafting Committee.

84. Mr. AGO said that, since the Special Rapporteur had proposed that the general lines of the Vienna Convention should be followed, two questions called for consideration. In the first place, the situation arising on death was not the subject of a separate article in the Vienna Convention, but was dealt with in the article relating to the beginning and end of diplomatic privileges and immunities; it might be wise to adopt the same system in the draft under discussion. Secondly, the last sentence of article 39, paragraph 4, of the Vienna Convention stated that estate duty should not be levied on movable property — a provision which was less liberal than that of sub-paragraph (b) of article 47 of the draft. The Drafting Committee should be instructed to recast the sub-paragraph along the lines of that provision of the Vienna Convention, which corresponded roughly to the second suggestion of the Japanese Government.

85. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Ago, recalled the discussion of the placing of the article at the Commission's twelfth session (543rd meeting, paras. 55-62). He had explained at that time that he had submitted the provision as a separate article because it dealt with exemption from estate duty, rather than with the duration of privileges and immunities. The corresponding provision of the Vienna Convention, however, related to exemption in a special case and was closely connected with the beginning and end of diplomatic privileges and immunities.

86. The CHAIRMAN suggested that the Drafting Committee should be instructed to make the necessary changes in the article in the light of article 39, paragraph 4, of the Vienna Convention and especially of the last sentence of that article, to which Mr. Ago had drawn attention. The Drafting Committee should also decide whether the provision should be kept in a separate article or incorporated in another.

It was so agreed.

The meeting rose at 1 p.m.

603rd MEETING

Monday, 5 June 1961, at 3.10 p.m.

Chairman : Mr. Grigory I. TUNKIN

Address of Welcome by the Assistant Director-General of the International Labour Office

1. Mr. JENKS, Assistant Director-General of the International Labour Office, said that the International Labour Organisation [ILO] was particularly happy to extend the hospitality of its premises to the International Law Commission for the remainder of its thirteenth session, while the International Labour Conference was meeting in the enlarged Assembly Hall of the Palais des Nations. The enlargement of that Hall might be regarded as symbolical of the transformation of the international community, which had added an element of urgency to the restatement and codification of international law and had therefore greatly increased the importance of the Commission's work.

2. Welcoming the success of the recent United Nations Conference on Diplomatic Intercourse and Immunities, he said that the ILO had been glad to make a modest contribution to the deliberations of that Conference with regard to social security. The ILO would always be glad to place its knowledge and experience at the disposal of the Commission and of future conferences, and would continue to follow with interest the Commission's work on consular intercourse and immunities, especially in so far as it might have a bearing on the functions of consuls in connexion with the application of international labour conventions concerning maritime labour, migration and foreign workers. When the Commission came to consider further the topic of relations between States and inter-governmental organizations under General Assembly resolution 1289 (XIII), the long and continuous experience of the ILO in the matter would be at its disposal. Its basic philosophy in that connexion was based on two simple propositions. In the first place, international immunities had a fundamental institutional significance as a device enabling international organizations to discharge their responsibilities with freedom, independence and impartiality. Secondly, those responsible for administering the immunities had an overriding obligation to do so in such a manner as to avoid any kind of abuse liable to discredit or prejudice their fundamental objective.

3. The ILO was also following with especial interest the Commission's work on the law of treaties, since the network of the treaty obligations for the administration of which it was responsible was growing annually. When welcoming the Commission at the time of its eleventh session (481st meeting, paras. 2-5), he had described that network as comprising 111 Conventions, 92 of them in force, which had received 1,892 ratifications and 1,382 declarations of application in respect of non-metropolitan territories, covering 76 countries and 94 territories. The figures had since risen to 115 Conventions, 98 of them in force, with 2,288 ratifications and

1,280 declarations of application, covering 94 countries and 84 territories. The law governing that body of obligations had certain distinctive features, especially with regard to reservations, which, he hoped, the Commission would take into account in its examination of the law of treaties. A noteworthy recent development was that no fewer than twenty-seven new States, or more than one-quarter of the total membership of the ILO, had on admission to the Organisation agreed to continue to be bound by International Labour Conventions accepted on their behalf by the States previously responsible for their international relations. The number of ratifications registered as a result of such decisions had reached 285 and was expected to reach 313 as a result of the forthcoming admission of two new Members.

4. Since the Commission had last met in the building, it had received the sad news of the death of two of its former Chairmen, who had made their mark on the constitutional and legal history of the ILO. Mr. Manley O. Hudson, the Commission's first Chairman, had been first legal adviser of the International Labour Conference and had influenced both the Conference procedure and the final articles included in the international labour conventions; it was to that influence that the ILO owed the probably unique practice that the legal advisors of the Conference were also members of its drafting committees, a practice which had contributed greatly to the consistency and continuity of the ILO's legislative drafting. The late Mr. Georges Scelle had thirty years previously written what was still an outstanding book on the ILO, and particularly on the novel aspects of its Constitution and procedure and on the distinctive features of international labour conventions. Mr. Scelle had taken part in a number of International Labour Conferences and had for many years been a leading member of the Committee of Experts on the Application of Conventions and Recommendations.

5. In conclusion, he paid a tribute to Mr. Tunkin, Chairman of the Commission, for his contribution to the work of the codification of international law and his eminence as a scholar in his own country and abroad.

6. The CHAIRMAN thanked the Assistant Director-General of the ILO for his instructive address and for the arrangements made for the Commission's thirteenth session.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued) *

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 48 (Exemption from personal services and contributions)

7. The CHAIRMAN invited the Commission to consider article 48 of the draft on consular intercourse and immunities (A/4425).

8. Mr. ŽOUREK, Special Rapporteur, introducing the article, said that the comments received from governments showed no opposition to the article as it stood, but that the Governments of the Netherlands (A/CN.4/136/Add.4) and Belgium (A/CN.4/136/Add.6) proposed that its scope should be restricted by the deletion of the words "and members of the private staff who are in the sole employ of the consulate". The Government of Japan (A/CN.4/136/Add.9) proposed that the words "are nationals of the sending State and" be inserted after "private staff who". The effect of the Japanese amendment would be to mention expressly what implicitly followed from article 50, paragraph 1. The Government of Poland (A/CN.4/136/Add.5) considered that the article should contain a stipulation exempting the consulate from any payments in kind levied by the receiving State. Finally, the Government of the United States (A/CN.4/136/Add.3) regarded article 48 as one which should be considered in light of the results of the Vienna Conference.

9. The question before the Commission therefore seemed to be to decide what persons qualified for the benefit of the exemption in question. Article 48 as it stood provided more extensive rights to members of the consulate than those granted to diplomatic agents under article 35 read together with article 37 of the Vienna Convention. The Commission's decision to extend exemption to members of the private staff had been taken after considerable thought and in deference to the argument that the liability of such staff to personal services and contributions might seriously impair the operation of the consulate. In some cases, for example, if a private chauffeur or secretary was called upon under the regulations of the receiving State to perform public services which would prevent him from carrying out his duties for several days, the work of the consulate might be hampered considerably. The Commission had also weighed the disadvantages that the exemption would cause to the receiving State against the hindrance caused to the consulate if the exemption was not granted, and had found the disadvantage to the former to be incomparably less than to the latter. Nevertheless, since the provisions concerning the private servants of members of the mission in article 37, paragraph 4, of the Vienna Convention did not include exemption from personal services, it would be difficult for the Commission to retain the exemption of members of the private staff of members of the consulate. He therefore suggested that the suggestion of the Netherlands and Belgian Governments should be followed, in order to avoid possible objections on the part of participants in the future plenipotentiary conference on the ground that the present draft was more generous than the Vienna Convention. With regard to the form of the article, he was inclined to prefer the structure of article 48 as approved by the Commission to the more concise text of article 35 of the Vienna Convention.

10. Mr. MATINE-DAFTARY agreed with the Special Rapporteur that members of the private staff should not be included in the exemption, but pointed out that, under article 1(h) and (k), the expression "members of the consulate" included the employees of the consulate. On the other hand, article 35 of the Vienna Convention referred to diplomatic agents only, and article 37 of

* Resumed from the previous meeting.

that Convention granted limited privileges to the administrative and technical staff of a diplomatic mission. Accordingly, since the private staff of members of diplomatic missions and consulates would in any case not enjoy the exemption in question because they were usually nationals of the receiving State, it would be wiser to follow the corresponding provisions of the Vienna Convention than to retain the form of article 48 as approved by the Commission.

11. Mr. ERIM opined that it would be difficult to adapt articles 35 and 37 of the Vienna Convention to article 48 of the draft. Article 35 laid down a general rule for diplomatic agents, whereas article 37 admitted members of the staff to the benefit of certain privileges and immunities. The draft on consular intercourse should certainly not grant privileges and immunities more extensive than those granted by the Vienna Convention, but article 48 might be modified without affecting the substance simply by specifying that the privileges and immunities recognized in the Vienna Convention should not be exceeded. Moreover, if the form of the Vienna Convention were to be followed in respect of the exemption in question, provisions other than article 48 would have to be recast, in order to specify the privileges and immunities of each category of members of the consulate.

12. The CHAIRMAN said that the consensus of the Commission seemed to be that the benefit of the article should be limited to members of the consulate and their families, to the exclusion of the private staff. In his opinion the wording should follow that of the corresponding provisions of the Vienna Convention, in view of the similarity of the substance dealt with. The composite article might read along the following lines:

“The receiving State shall exempt members of the consulate and members of their family from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.”

13. Mr. MATINE-DAFTARY agreed that the corresponding provisions of the Vienna Convention should be followed, but, referring to the position of members of the families of members of the consulate, pointed out that article 37, paragraph 1, of that Convention specified that the privileges in question applied to members of the family only if they were not nationals of the receiving State.

14. Mr. YASSEEN observed that the expression “members of the consulate” as defined in article 1 included members of the consular staff, which in turn included employees, who were defined as persons performing administrative or technical work or belonging to the service staff. Accordingly, article 49 was much broader than the corresponding provisions of the Vienna Convention.

15. The CHAIRMAN, agreeing with Mr. Yasseen, said that the Drafting Committee should be instructed to revise the article in conformity with articles 35 and 37 of the Vienna Convention.

16. Mr. ŽOUREK, Special Rapporteur, said that, as the position of consulates differed from that of diplomatic

missions, the commission should consider whether a broader provision concerning the particular exemption would not be justifiable in the draft under discussion. The staff of small consulates might well perform a great variety of functions; indeed, a consulate might consist of the head of post and one employee. Even in a larger consulate, it was conceivable that the absence (by reason of service obligations to the receiving State) of a messenger who was constantly employed in carrying documents to and from the local authorities would greatly hamper the work of the consulate. The inconvenience in the case of a diplomatic mission could hardly be said to be as great. The Commission should therefore ponder the situation carefully before deciding to follow the Vienna Convention too closely.

17. Mr. PADILLA NERVO emphasized that article 48 did not differentiate between nationals of the sending State and nationals of the receiving State. Although as pointed out by Mr. Matine-Daftary, the private staff was, in many cases, composed of nationals of the receiving State, the technical and administrative staff were often nationals of the sending State.

18. As a general rule, he agreed with the method of following in the draft, as far as possible, the terms of the corresponding articles of the Vienna Convention. In the particular instance, however, he did not know whether in discussing articles 35 and 37 the Vienna Conference had envisaged all the possibilities, including that of the employees of a mission being requested to perform military service.

19. Article 48 should be so drafted as to exempt from military service, service in the militia, or jury service — the forms of service specified in commentary (1) — all employees who were nationals of the sending State. It should be taken into account that in many countries, a national was forbidden to serve in the armed forces of another country, under penalty of loss of nationality. If, therefore, the expression “public service” were to include military service or service in the militia, the receiving State could not impose such service on nationals of the sending State, whatever their status in the service of the consulate.

20. That formulation would be consistent with the general practice of States as evidenced by numerous bilateral consular conventions, and States could hardly be expected to go beyond the terms of those conventions in the matter. In that connexion, he drew attention to the provisions of article 11 of the Consular Convention of 1952 between the United Kingdom and Sweden,¹ similar in that respect to the consular conventions concluded by the United Kingdom with a number of other countries, including Mexico.

21. Under paragraph (2) of that article 11, a consular officer or employee was exempted from all military requisitions, contributions or billeting. Under paragraph (4) a consular officer who was not a national of the

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 467 et seq.

receiving State " and also a consular employee, provided that he complies with the conditions specified in paragraph (5) of this Article, shall enjoy exemption from military, naval, air, police, administrative or jury service of every kind". The conditions in question were that the employee concerned: (a) should be a national of the sending State and not possess the nationality of the receiving State; (b) should not be engaged in any private gainful occupation; and (c) should not have been ordinarily resident in the receiving State at the time of his appointment.

22. Provided, therefore, that they fulfilled the conditions in question, employees who were nationals of the sending State were thus exempted from all forms of military and other public service under the terms of the bilateral conventions to which he had referred. In the circumstances, some exemption from military obligations should be considered for the benefit of all staff of the consulate who were nationals of the sending State, or at least the commentary should state that such persons were granted the exemption in question by many existing bilateral conventions.

23. Mr. AMADO recalled that the Commission's decision on article 48 had been influenced by convincing illustrations of the difficulties which might arise if the private and service staff of small consulates were required to perform personal services.² The Commission's opinion on the subject was very clearly stated in the second sentence of paragraph (2) of the commentary. He thought that that opinion should be taken into account.

24. Mr. YASSEEN said he had not been convinced by the Special Rapporteur's reference to small consulates. In fact, a number of small embassies or legations comprised a staff of two or three people; in such cases, the private staff was no less needed for the performance of regular diplomatic functions than was the corresponding staff of a consulate for the performance of consular functions. The Commission was therefore bound by the terms of the Vienna Convention in respect of the exemption concerned and could not exceed the scope of the provisions of that instrument.

25. Mr. SANDSTRÖM fully endorsed Mr. Yasseen's remarks. The difficulties involved could surely be solved in practice later. The participants in the Vienna Conference had been hard put to it to find a rule to cover the two fundamental considerations involved. He was therefore in favour of following the corresponding provision of the Vienna Convention.

26. Mr. BARTOŠ recalled that the paramount consideration that had led to the Commission's decision at its twelfth session had been the relatively small number of persons on a consulate's staff who would be liable to personal services and contributions. The loss of the services of two or three persons would cause no great inconvenience to the receiving State, whereas the consular work might suffer seriously by such a disruption. He had therefore at that time been in favour of granting the exemption wherever possible.

27. Since then, however, the Vienna Conference had with respect to diplomatic missions adopted more restrictive provisions concerning the exemption in question. Even in the interests of the codification and progressive development on international law, the Commission could hardly in the present draft go further than the provisions decided upon by the largest international conference yet held on such questions. For purely juridical reasons, therefore, he was in favour of conforming with the provisions of the Vienna Convention.

28. Sir Humphrey WALDOCK agreed with Mr. Yasseen and Mr. Bartoš. The relatively small privileges concerned were not yet part of existing international law, and the Commission had little hope of persuading States to accept them if they exceeded the corresponding provisions of the Vienna Convention. There was a strong disinclination to grant consuls privileges exceeding those of diplomatic agents.

29. The CHAIRMAN suggested that the Drafting Committee be instructed to revise the article in the light of article 35 of the Vienna Convention and to incorporate the relevant provisions of article 37 of that instrument.

It was so agreed.

ARTICLE 49 (Question of the acquisition of the nationality of the receiving State)

30. Mr. ŽOUREK, Special Rapporteur, introducing the article, observed that the text of the provision followed that of article 35 of the draft articles on diplomatic intercourse and immunities (A/3859) and was designed principally to prevent the automatic acquisition of the nationality of the receiving State by two categories of persons mentioned in paragraph (1) of the commentary to article 49. Only three comments on the article had been received from governments. The Government of Spain (A/CN.4/136/Add.8) had specified that the provision should apply only to career consuls and to employees of the consulate who were nationals of the sending State and did not carry on any gainful activity in the receiving State apart from their official duties. The Chilean Government (A/CN.4/136/Add.7) had observed that it would have to make a reservation to the effect that Chile would apply the article without prejudice to the provisions of article 3 of its Political Constitution. The United States Government considered that the provisions on nationality adopted at the Vienna Conference might not be suitable for incorporation in a convention on consular personnel because, for example, under United States law a consul's child, not being immune from United States jurisdiction, automatically acquired United States citizenship if born in that country, while the child of a diplomatic agent, being immune from jurisdiction, did not acquire such citizenship automatically.

31. It would be recalled that the Vienna Conference had decided to consign provisions concerning acquisition of nationality to an optional protocol (A/CONF.20/11), article 11 of which corresponded closely to the draft article 49. He would therefore suggest that the article be retained as drafted, and that the Commission might leave it to the plenipotentiary conference to decide whether

² Discussed as article 39 at the twelfth session, 543rd (paras. 1-16) and 573rd meetings (paras. 32-35).

or not the provision should be consigned to a special protocol.

32. Mr. BARTOŠ supported the retention of article 49. Aside from the question of substance, as a matter of method, the Commission should consider that the Vienna Conference had not rejected the corresponding provision (article 35) of the draft on diplomatic intercourse and immunities. The provision in question had not obtained the two-thirds majority to become part of the Convention. The proposal to delete it, on the other hand, had failed, having received even less support. In the circumstances, the Conference had fallen back on the compromise formula of adopting an optional protocol concerning acquisition of nationality.

33. The Vienna Conference had thus revealed no overwhelming body of opinion one way or the other. It had merely produced evidence of a long-standing cleavage between countries of immigration, which applied the *jus soli* principle, and countries of emigration, which applied the *jus sanguinis* system.

34. His own view was that the privilege of transmitting their nationality to their own children was essential to all officials serving their country abroad. He was therefore in favour of the provisions contained in article 49.

35. Mr. YASSEEN said that, since the Vienna Conference had adopted an optional protocol containing a provision substantially similar to article 49, that Conference could not be said to have rejected the provision.

36. The provision under discussion did not concern only the wife and children of a foreign service officer. Members of a diplomatic mission or of a consulate had the same need as their children to be exempted from the operation of the nationality laws of the receiving State. In some countries, the mere fact of prolonged residence — indeed, in some cases one year's residence — could result in the automatic imposition of the nationality of the country. It was therefore necessary to ensure that no member of a diplomatic mission or of a consulate could be deemed to be a national of the receiving State solely by the operation of that State's law. That was particularly the case with a former national of the receiving State who had lost his nationality because he had become a naturalized citizen of another country.

37. Article 49 stated in effect that persons who were in the receiving State purely by reason of their service with the sending State, and members of their families, should not acquire the nationality of the receiving State merely by the operation of its nationality laws. Even if that rule were not considered as an existing rule of customary international law so far as consuls were concerned, article 49 should be accepted as a valuable step forward in the progressive development of international law.

38. Mr. VERDROSS said that the validity of the remarks made by the United States Government could hardly be disputed. A diplomatic agent was not subject to the jurisdiction of the receiving State; a consular officer, on the other hand, was not exempt from that jurisdiction. The Commission should therefore consider whether it was possible to exempt members of the con-

sulate from the application of the nationality laws of the receiving State.

39. The case mentioned by Mr. Yasseen could hardly arise in practice. Residence for a given period was usually one of the conditions for the voluntary acquisition of a new nationality, but he did not know of any case where a nationality was imposed merely on grounds of a person's residence.

40. Mr. YASSEEN replied that the case which he had mentioned could arise in practice. A person who became a naturalized citizen of a country usually lost his original nationality by virtue of the law of his country of origin. However, in many countries, the law also specified that if such a former citizen returned, he was automatically reinstated in his original nationality. If, therefore, such a former national were to return to his country of origin as a member of the consular service of the country of his new nationality, he could find that the nationality of the receiving State was imposed upon him by virtue of his return or of a certain period of residence. It was therefore necessary to specify that members of the consulate were not subject to the application of the nationality law of the receiving State.

41. Mr. ŽOUREK, Special Rapporteur, in reply to the remarks by Mr. Verdross on the United States comments, said that according to preponderant legal opinion the exemption from the jurisdiction of the receiving State did not imply that a diplomatic agent was not subject to the laws of the receiving State, other than those which imposed obligations obviously incompatible with diplomatic privileges and immunities. Article 41, paragraph 1, of the Vienna Convention explicitly stated that, without prejudice to their privileges and immunities, it was the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State.

42. Similarly, in the case of consuls, article 53 stated that, without prejudice to their privileges and immunities, all persons enjoying consular privileges and immunities were bound to respect the laws and regulations of the receiving State. There was thus no difference between diplomatic and consular officers so far as the duty to observe the laws of the receiving State was concerned. It was therefore necessary to specify that consular officers were not subject to the automatic operation of the nationality laws of the receiving State.

43. Even if, for the sake of argument, it was admitted that exemption from jurisdiction in the case of diplomatic agents implied the exemption from the application of the law of the receiving State, as suggested in the comments of the United States Government, then *a fortiori* the draft should contain a provision along the lines of article 49. For the members of the consulate were not exempted from the jurisdiction of the receiving State and, in order to avoid cases of double nationality, it should be specified that they and their families were exempted from the automatic application of the nationality law of that State.

44. The CHAIRMAN said that there appeared to be general agreement to refer article 49 to the Drafting

Committee, with instructions to take into account the remarks by Mr. Yasseen and the text of the Vienna optional protocol concerning acquisition of nationality. If there were no objection, he would take it that the Commission agreed to that course.

It was so agreed.

ARTICLE 50 (Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State)

45. Mr. ŽOUREK, Special Rapporteur, said that article 50 was one of the key articles of the draft. Governments had attached much importance to its provisions and two of them — Norway (A/CN.4/136) and Spain — had even suggested that article 50 should be cited and referred to frequently in the other provisions of the draft (see also the Special Rapporteur's observations in his third report, A/CN.4/137).³

46. The Philippine Government's comment (A/CN.4/136) was based on a misunderstanding of the terms of article 1 (Definitions), where the expression "members of the consulate" was defined as including the head of consular post and the "members of the consular staff" (paragraph 1 (f)) and where, by virtue of paragraph 1 (k), the latter were defined as including not only consular officials, but also the employees of the consulate.

47. The Swedish Government (A/CN.4/136/Add.1, *ad* article 41) had suggested that the adjective "official" was superfluous in article 50, paragraph 1. He pointed out that that adjective was not used in article 41, although the commentary indicated that the immunity set forth in that article applied exclusively to official acts.

48. The Government of Belgium proposed that all members of the consulate should be immune from jurisdiction in respect of official acts performed in the exercise of their functions. In other words, it considered that all members of the consulate, and not only consular officials, should enjoy the immunity specified in article 50, paragraph 1. In practice, that government said, consular functions were exercised in part by subordinate employees of the consulate; in its opinion, the matter was all the more important in that the employees were often recruited locally and were therefore frequently nationals of the receiving State.

49. The Belgian and the Norwegian Governments had suggested that the immunity specified in article 50 should also exempt those concerned from giving evidence on matters connected with the exercise of their functions and from the duty to produce the relevant official correspondence and documents.

50. The suggestions of the Belgian Government for granting immunity from jurisdiction even to consular employees in the particular cases were drawn from State practice as evidenced by a number of bilateral conventions; nevertheless, he thought that States could hardly be expected to grant, in that respect, to members of the consulate privileges wider than those set forth in the

Vienna Convention for members of the staff of a diplomatic mission.

51. Article 38, paragraph 1, of the Vienna Convention granted to a diplomatic agent who was a national of, or permanently resident in, the receiving State, "only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions". Paragraph 2 of the same article stated that other members of the staff of the mission who were nationals of or permanently resident in the receiving State would enjoy privileges and immunities only to the extent admitted by the receiving State.

52. In conclusion, although the arguments put forward by the Belgian Government were plausible, it would be hardly possible to grant to employees of the consulate privileges greater than those granted to members of the non-diplomatic staff of a diplomatic mission.

53. Mr. VERDROSS said that in the commentary to article 41 the phrase "acts performed in the exercise of their functions" by the members of the consulate was interpreted as meaning official acts. That being so the adjective "official" was superfluous in article 50, paragraph 1, and should be deleted.

54. The second sentence of paragraph 1, and the whole of paragraph 2, should also be deleted. Their contents added nothing to the provisions of article 50. A privilege or immunity which could be granted or withheld by the receiving State in its option did not constitute a right in international law.

55. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should follow the pattern of the Vienna Convention. Article 38, paragraph 2 of that Convention contained a statement similar to that embodied in article 50, paragraph 2, of the draft, with the addition of the sentence: "However, the receiving State must exercise its jurisdiction over those persons in such a manner so as not to interfere with the functions of the mission."

56. The question was whether the Commission should strengthen the provisions of article 50, paragraph 2, by adding a sentence along those lines.

57. A further question was whether a permanent resident in the receiving State should not be placed on the same footing as a national of that State, as had been done for diplomatic agents in article 38, paragraph 1, of the Vienna Convention.

58. Mr. ERIM said that in practice it was very rare that a diplomatic agent had been a permanent resident of the receiving State prior to his appointment; hence the exception specified in article 38, paragraph 1, of the Vienna Convention, although important in theory, was not of much practical significance.

59. It was unlikely that the inclusion of a sentence along the lines of the second sentence of paragraph 2 of article 38 of the Vienna Convention would be effective in protecting members of a consulate from undue interference with the performance of their functions.

60. The remarks of the Belgian Government were well-founded. Consular functions were in fact exercised in

³ But *cf.* para. 70 below, where the Special Rapporteur states that his redraft of article 50 is withdrawn.

part by subordinate employees; the consular officer often merely signed the documents prepared by the employees. It was therefore appropriate to amend paragraph 1 so as to cover not only consular officials, but also employees of the consulate who were nationals of the receiving State and to exempt them from the jurisdiction of the receiving State in respect of acts performed in the exercise of their functions. He therefore supported the Belgian proposal, notwithstanding the terms of article 38 of the Vienna Convention.

61. Mr. BARTOŠ said that at the Vienna Conference two groups of countries arguing from different premises had reached the same conclusion. Spokesmen from one group which received considerable numbers of immigrants had stated that in their countries persons permanently resident for a specified number of years were placed on a footing of equality with nationals so far as rights and duties were concerned. Spokesmen for the other group of countries, mainly African and Asian, maintained that permanent residents, instead of showing a sense of loyalty towards their country of residence, pleaded their nationality when it suited them. However, the two groups had united in support of the same thesis that permanent residents, regardless of nationality, should be equated with nationals of the receiving State if they had become permanent residents before starting to exercise diplomatic functions.

62. He was definitely not of that opinion, possibly because in his country the concept of permanent residence was unfamiliar and a very clear distinction was made on the basis of nationality. But although he did not associate himself with the reasoning that had led to the insertion of the reference to permanent residents in article 38 of the Vienna Convention, he would be prepared to support such a reference in article 50 of the draft if there was an overwhelming majority in favour. On the other hand, if the majority were a small one he would abstain from voting.

63. Mr. FRANÇOIS noted that the Special Rapporteur had not mentioned the comment which the Netherlands Government had made in the same sense as that of the Belgian Government concerning the giving of evidence. Surely, it would be advisable to insert a provision of the kind proposed by the Netherlands Government, since, if a member of a consulate were liable to give evidence in respect of acts performed in the exercise of his functions, his immunity would become meaningless. The Vienna Conference when discussing the parallel article 29 in the draft on diplomatic intercourse and immunities (A/3859) had probably overlooked the fact that that text was incomplete and required amplification. The omission in the Vienna Convention was a serious one but less serious than would be the same omission in the draft, for only very rarely were members of a diplomatic staff nationals of the receiving State, whereas not uncommonly members of a consulate were.

64. Furthermore, since, according to article 54, article 50 was applicable to honorary consuls, they too would be precluded from refusing to give evidence unless there were an express saving clause.

65. Although he was very willing to follow the Vienna

Convention where appropriate, in that instance its failure to deal with the question of liability to give evidence must be remedied.

66. The CHAIRMAN, speaking as a member of the Commission who had been present at the Vienna Conference, explained that there had been a marked trend at the Vienna Conference towards restricting the privileges and immunities of members of a diplomatic mission who were nationals of the receiving State. The Commission would have noticed that article 8, paragraph 1, of the Vienna Convention stipulated that members of the diplomatic staff of a mission should in principle be of the nationality of the sending State. That view found its expression in article 38 which granted immunity from jurisdiction and inviolability to nationals or permanent residents of the receiving State in respect of official acts only. As would be seen from paragraph 2, other members of the staff of a mission and private servants who were nationals of the receiving State enjoyed privileges and immunities to the extent only to which that State was prepared to grant them.

67. Sir Humphrey WALDOCK said that he found some difficulty in discerning what was the difference of principle between article 50 and article 38 of the Vienna Convention. It was perhaps arguable that the number of people affected by the provisions contained in article 50 was greater than in the case of article 38; but, after all, a diplomatic mission employed secretaries and subordinate staff who had knowledge of official matters which could be of a highly confidential nature, with the consequence that the question of their immunity was of the greatest moment. The kind of business dealt with in a consulate was of quite a different order and generally concerned the affairs of individuals. He shared the doubts expressed by the Governments of Belgium and the Netherlands concerning the adequacy of the protection offered in article 50 in regard to the question of giving evidence about official matters, and would be interested to know how thoroughly the question had been discussed at Vienna and whether article 38 was in fact the outcome of careful deliberation. For better or for worse, however, that text had now been adopted and formed part of an international convention. Consequently, although it might be with some reluctance, the Commission would probably have to draft article 50 on similar lines. It would be difficult to put forward a more liberal provision for consular staff than had been adopted for diplomatic staff. Nevertheless, he hoped that the Commission would include in article 50 a sentence modelled on the last sentence in paragraph 2 of article 38, which, though not very forceful, might offer some measure of protection and would go a little way towards meeting the objection raised by the Belgian and Netherlands Governments.

68. If the Commission decided to follow article 38, it would certainly be justified in referring to the problem in the commentary, which perhaps might induce a conference of plenipotentiaries to effect some improvements in the new text as compared with article 38 in the Vienna Convention.

69. Mr. MATINE-DAFTARY emphasized that in the matter of giving evidence a clear distinction should be

drawn between the giving of evidence by members of a diplomatic mission, who were concerned with matters of State, and the giving of evidence by a consular official in matters relating to an individual. In the latter case, it would be inadmissible for a consular official to refuse to testify, for the withholding of the testimony might be prejudicial to the interests of the person concerned.

70. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Verdross's proposal that the word "official" in paragraph 1 of article 50 should be deleted, explained that he had prepared his third report before knowing what the outcome of the Vienna Conference would be and had suggested new wording for both article 41 and for the first sentence of article 50. Subsequently, on perusal of articles 37 and 38 in the Vienna Convention, he had decided to withdraw both those new texts. It would be explained in the commentary why in article 41 the word "acts" was not qualified by the epithet "official".

71. From a legal point of view, he agreed with Mr. Verdross's criticism of the second sentence in paragraph 1 of article 50 and of paragraph 2. Nevertheless they served a practical purpose in emphasizing that other privileges and immunities could be granted by the receiving State. It was desirable to retain those passages, for they might encourage States to extend privileges and immunities to members of the consulate where they thought it possible and desirable.

72. Mr. JIMÉNEZ de ARÉCHAGA said that in general the Vienna Convention should be followed where possible. The comments of governments on the draft had been to some extent superseded by the decisions taken by a two-thirds vote at the Vienna Conference, which might consequently be regarded as reflecting a consensus of opinion. Nevertheless, the Commission should preserve its customary independence of judgment. In that instance, he agreed that article 50 should, like article 38 of that Convention, refer to "official acts" and contain a stipulation similar to that of the last sentence in paragraph 2 of article 38. On the other hand, permanent residents should not be mentioned in article 50, for such a reference would deprive many honorary consuls of a great part of the privileges and immunities extended to them under article 54 as it stood.

73. Some provision should be added in article 50 concerning immunity from the liability to give evidence.

74. The CHAIRMAN said that the Commission did not appear to favour a significant departure from the Vienna Convention by accepting the Belgian Government's proposal to extend the application of paragraph 1 to all members of the consulate, including service staff.

75. There seemed to be no strong objection to omitting the second sentence in paragraph 1, as had been proposed by Mr. Verdross, and adding in paragraph 2 a sentence on the lines of the last sentence in paragraph 2 of article 38.

76. As he was not able to judge what was the consensus of opinion on the question whether, in keeping with the Vienna Convention, reference should be made to permanent residents and whether provision should be made for exemption from liability to give evidence in matters

relating to official functions, he would put those two issues to the vote.

It was decided by 9 votes to 3, with 3 abstentions, to include in article 51 a reference to permanent residents of the receiving State.

77. Mr. MATINE-DAFTARY urged the Commission to make a distinction, for the purpose of exemption from giving evidence, between evidence concerning official matters affecting the sending State and evidence concerning matters affecting individuals. He could support immunity only in the former case.

78. The CHAIRMAN pointed out that in connexion with article 4, the Commission had exhaustively discussed and rejected the possibility of demarcating consular functions on the lines implied in Mr. Matine-Daftary's proposal (583rd-586th meetings).

79. He put to the vote the question whether a provision should be inserted in article 50 allowing for immunity from liability to give evidence.

It was decided in the affirmative by 11 votes to 2, with 4 abstentions.

80. Mr. VERDROSS said that he would withdraw his proposal for the deletion of the word "official" in the first sentence of article 50, paragraph 1, but hoped that the Special Rapporteur would explain in the commentary why that word had not been used in article 41. He still failed to understand the distinction between the wording of the two articles.

81. The CHAIRMAN suggested that article 50 be referred to the Drafting Committee in the light of the foregoing decisions.

It was so agreed.

The meeting rose at 6 p.m.

604th MEETING

Tuesday, 6 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)

(continued)

DRAFT ARTICLES (A/4425) *(continued)*

[Agenda item 2]

ARTICLE 51 (Beginning and end
of consular privileges and immunities)

1. The CHAIRMAN invited discussion on article 51 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, summarizing the comments by governments, said that the United

States Government (A/CN.4/136/Add.3) considered that article 51 should be reviewed in the light of the corresponding provision of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

3. The Belgian Government (A/CN.4/136/Add.6) had pointed out that the provision at the end of paragraph 1 was not in keeping with the practice followed in Belgium, where the consular privileges and immunities of a member of a consulate already in the territory started not from the time when notice of his appointment was given to the Ministry of Foreign Affairs, but from the time of his recognition by the receiving State. That government argued that, logically, the receiving State should first signify its agreement since the persons concerned were often its nationals.

4. The Belgian Government had also suggested that the first sentence of paragraph 3 should be supplemented by a provision covering the case of the cessation of privileges and immunities of persons who remained in the territory of the receiving State. The text suggested by Belgium would probably not be acceptable as drafted. It was arguable that a provision should be added stipulating that in that case consular privileges and immunities ceased on the date notified to the Ministry of Foreign Affairs, or to the appropriate authority designated by it, as marking the end of the functions of the persons concerned. That was in fact the only substantive issue to be settled by the Commission in connexion with the article.

5. The Spanish Government (A/CN.4/136/Add.8), criticizing the last sentence of paragraph 3 on the ground that it conflicted with customary law, argued that if a former member of a diplomatic mission returned to the receiving State without diplomatic status he would be liable to proceedings which during his earlier stay had been barred by his immunity. That argument was untenable; the rule stated in the last sentence of paragraph 3 was universally accepted both for diplomatic and for consular officials and was expressly stated in article 39, paragraph 2, of the Vienna Convention, though naturally the immunity extended only to acts performed in the exercise of official functions.

6. The Chilean Government (A/CN.4/136/Add.7) had suggested some drafting changes affecting the Spanish text of paragraphs 1 and 2, which should be referred to the Drafting Committee. It had further suggested the deletion of the second sentence of paragraph 3 on the grounds that discharge was a purely administrative penalty which should not be internationalized. A similar objection by the same government to article 25 (Modes of termination) had not been entertained by the Commission (594th meeting) and his view was that the same course should be followed in that instance. The second sentence of paragraph 3 did not lay down a sanction in international law but simply stated one of the causes of the cessation of consular privileges and immunities.

7. With regard to the form of paragraph 51, the Commission should adhere to the text as it stood, which was more precise than article 39 of the Vienna Convention, for it distinguished clearly between members of the

consulate and members of their families forming part of the household and private staff, whereas that Convention's article 39 made no similar distinction as between diplomatic agents and their families and private staff.

8. The CHAIRMAN suggested that the expression "persons belonging to the household" used in the English text of paragraph 2 was not an exact equivalent of the French, which was correct. The Drafting Committee should be asked to bring the two texts into line.

9. Mr. YASSEEN said that, on the whole, article 51 was acceptable, but the second sentence in paragraph 3 might well be deleted, since it was unnecessary to single out for special mention one of the ways in which the functions of a member of the consulate came to an end.

10. The CHAIRMAN said that he thought that the word "discharged" meant specifically discharged locally; he asked whether the French word *révocation* had a broader connotation.

11. Mr. MATINE-DAFTARY said that in French the word *révoquer* implied a sanction, whereas the first sentence of paragraph 3 dealt with the recall of a member of the consulate.

12. Mr. GROS confirmed that in the context, as far as the French text was concerned, *révocation* meant the severest administrative sanction — dismissal from the consular corps. The question was whether the word "discharge" was the correct equivalent of *révocation*.

13. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yasseen's objection to the second sentence of paragraph 3, explained that the provision had been added, for the sake of greater precision, in the light of a suggestion made at the twelfth session (545th meeting, para. 70, and 546th meeting, para. 17).

14. Mr. JIMÉNEZ de ARÉCHAGA said that he did not favour the Belgian Government's amendment to paragraph 1, since it found no parallel in article 39 of the Vienna Convention.

15. With the appropriate drafting changes in the Spanish text, article 51, paragraph 2, would be acceptable.

16. In view of the terms of the corresponding clause of the Vienna Convention, paragraph 3 should not be amended to take account of the Spanish Government's comment. He was not clear whether the Special Rapporteur was in favour of the addition to that paragraph proposed by the Belgian Government.

17. He agreed that the second sentence in paragraph 3 should be retained since the reasons for its insertion still held good.

18. In conclusion, he asked whether the Special Rapporteur considered that a new paragraph should be added concerning the position of the family of a deceased member of the consulate on the lines of article 39, paragraph 3, of the Vienna Convention.

19. Mr. ŽOUREK, Special Rapporteur, said that there was no need to add an express provision in paragraph 3 concerning persons who remained in the territory of the receiving State, as suggested by the Belgian Government. No such provision appeared in article 39 of the Vienna Convention and the matter was unlikely to give rise to

difficulties between the two States concerned. If the functions of a national of the third State came to an end, the receiving State would in any case be notified. 20. Agreeing with Mr. Jiménez de Aréchaga, he said it would certainly be useful to add in article 51 a provision on the lines of that contained in article 39, paragraph 3, of the Vienna Convention.

21. Mr. LIANG, Secretary to the Commission, suggested that the word "discharge" in the second sentence of paragraph 3 could be interpreted as referring either to recall or to discharge as the terms were used in article 25. It was not a satisfactory equivalent for the French *révocation* and the meaning intended might be better rendered by the word "dismissal".

22. Mr. PAL observed that the second sentence in paragraph 3 referred to the same situation as that envisaged in article 27, paragraph 3. If so, the two texts would have to be brought into line.

23. Mr. SANDSTRÖM said that the situation dealt with in article 51 of the draft was exactly parallel to that dealt with in article 39 of the Vienna Convention and, although the text of the former was more explicit, it did create certain difficulties and therefore ought to be modelled on article 39.

24. Since the first sentence of paragraph 3 contained the word "normally", it adequately covered the ground, for it implied that other cases such as that mentioned by the Belgian Government should be regulated otherwise.

25. Mr. ERIM, referring to the second sentence of paragraph 3, remarked that the words "takes effect" might lead to difficulties if under the municipal law of the sending State an appeal could be lodged against dismissal, in which event the dismissal would not take effect until there had been a judicial decision on the appeal. It might therefore be preferable to stipulate that the privileges and immunities in that case came to an end at the time when the receiving State had been notified of the dismissal. Clearly, it was not for the receiving State to inquire when a dismissal became effective for the purposes of the regulations of the sending State.

26. He agreed with Mr. Sandström that the Commission might follow the Vienna Convention in mentioning only the termination of the functions of a member of the consulate.

27. Mr. MATINE-DAFTARY pointed out that article 43 of the Vienna Convention made no reference to the reasons for the cessation of functions, and rightly so, for the recall of the consul by the sending State was of no concern whatever to the receiving State. But, in case of recall, how would it know that the measure had become effective?

28. The CHAIRMAN, speaking as a member of the Commission, emphasized that he had been consistently in favour of modelling the draft on the Vienna Convention as closely as possible. However, in that instance, the Commission's own text was superior and should be maintained. There was a definite advantage in dealing separately (as did article 51, para. 2) with the privileges and immunities of members of the family, since that

avoided the imprecision of article 39, paragraph 1, of the Vienna Convention, which confused members of the diplomatic staff with members of their family, as the Special Rapporteur had pointed out.

29. If indeed there was no difference between recall and discharge, it would be difficult to justify the retention of the second sentence in paragraph 3, but whatever the wording chosen for article 25, it did seem necessary to make express provision for the problem dealt with in that sentence, of which no mention was made in the Vienna Convention.

30. Mr. YASSEEN recalled that the second sentence of paragraph 3 had its origin in a suggestion made at the previous session by Mr. Verdross (see para. 13 *supra*) who had said that, whereas the functions of the head of post were normally terminated by recall, other members of the staff might be suspended or dismissed in certain circumstances, such as their conviction of a criminal offence. That, however, was an extreme case, whereas paragraph 3 was a general provision. Discharge should be regarded as a disciplinary measure, which meant that the sending State no longer wanted the person concerned to remain at his post. It was very questionable, however, whether the Commission should provide for complementary disciplinary measures to be taken in the receiving State, thus allowing the authorities of that State to prevent the official concerned from enjoying his consular privileges and immunities for the few days during which he was preparing to leave the country. It should be remembered that even court decisions in criminal cases did not have much weight in other countries; accordingly, there seemed to be no need to include the sentence.

31. Mr. BARTOŠ observed that the date on which the discharge took effect, mentioned in the second sentence of paragraph 3, was determined by the municipal law of the sending State. For the purposes of article 51, the material date was that on which the consular function was terminated, or on which the sending State forbade the official to exercise consular functions. The provision of the second sentence of article 39, paragraph 2, of the Vienna Convention was much clearer. In international law, the dismissal became effective at the time when the person concerned was lawfully deprived of his functions and, moreover, comparative administrative law also differentiated between the time of the decision to relieve a person of his functions and the time when he was actually relieved of them.

32. He agreed with the Chairman that the Commission's intentions, especially so far as the dependents of a member of the consulate were concerned, should be made quite clear in article 51. The Drafting Committee should be instructed to revise the article accordingly.

33. Lastly, he stressed that a consul continued to enjoy consular privileges and immunities until the moment when he was in fact relieved of his functions. Article 51, however, was concerned not with the act of relieving a consul of his functions, but with the question of the termination of his immunities. That point was one of drafting, rather than of substance, and could be left to the Drafting Committee, which should, moreover, be recommended to bring the article as closely as possible

into line with article 39 of the Vienna Convention.

34. Mr. VERDROSS drew attention to a lacuna in article 39 of the Vienna Convention, in that the article did not regulate the position of a diplomatic agent who was discharged locally. Since local discharge was more likely to occur in the case of consular officials, it would be advisable to insert a provision governing the event.

35. Mr. PADILLA NERVO asked the Special Rapporteur whether the bilateral consular conventions and national consular legislations which he had studied expressly mentioned cases of the discharge of consular officials.

36. Sir Humphrey WALDOCK agreed that the provisions of the Vienna Convention should be followed as closely as possible, particularly since the Commission was dealing with the less important question of consular intercourse and immunities. If the two drafts had been considered in the reverse order, there might have been stronger reasons for seeking to improve the draft concerning consular intercourse. Nevertheless, the Commission had accepted that, in cases where it could improve on the Vienna Convention, it should do so. Article 50 had been approved on that basis, and he agreed with previous speakers that it would be useful to retain paragraph 2 of article 51.

37. He had serious doubts concerning the desirability of suggesting to participants in the plenipotentiary conference that a special provision should be inserted concerning the termination of the privileges and immunities of a member of the consulate who was discharged by the sending State. The only two cases at issue were, first, that in which a national of the receiving State was dismissed locally, which presented no problem; and, secondly, that in which a national of the sending State was concerned, when the matter was entirely in the hands of that State. If the sending State chose not to dismiss the consul until he had been recalled, his privileges and immunities would continue in effect, but if the State deliberately dismissed him on the spot, there would be a strong indication that it intended to waive all his privileges and immunities. It would be wise to leave the matter to be settled by the States concerned. Moreover, if the second sentence of paragraph 3 were omitted, the article would be much closer in substance to article 39 of the Vienna Convention.

38. Mr. ŽOUREK, Special Rapporteur, stressed that article 51 as it stood, like article 39 of the Vienna Convention, covered all the cases contemplated by article 25. Recall and discharge, however, had certain special effects distinct from normal cases where the consular official was dismissed locally. The misunderstanding which seemed to be prevailing in the Commission might be dispelled if it were borne in mind that the whole question depended on the final drafting of article 25. If that wording were general, it would cover all cases, and it would be unnecessary to mention recall and discharge in article 51; in the contrary case, however, that special contingency should be mentioned, and the Commission should also consider referring to local discharge.

39. In reply to Mr. Padilla Nervo, he said that, although termination was mentioned in some bilateral consular conventions, he could not recall any that contained provisions along the lines of the penultimate sentence of article 51. Such bilateral treaties usually concentrated on matters affecting the two States concerned. However, grounds for discharge and forms of terminating functions were enumerated in a number of national enactments.

40. Mr. PADILLA NERVO agreed that grounds for termination were enumerated in many national enactments. Accordingly, discharge was a matter between the sending State and the official concerned, and under the municipal law of that State it was always open to the official to appeal to a higher authority against such a decision. By contrast, however, a reference to discharge in article 51 would affect both the receiving and the sending States, and in his opinion it would be dangerous to include such a reference, for it would imply that the receiving State might request a waiver of immunity from jurisdiction if the discharge were due to an offence committed in its territory. As Mr. Yasseen had pointed out, the provision might have serious consequences for the official concerned; moreover, it did not constitute an improvement over the corresponding article of the Vienna Convention.

41. The CHAIRMAN recalled the Commission's decision (594th meeting, para. 77) to instruct the Drafting Committee to review article 25 in the light of article 43 of the Vienna Convention, with discretion to decide how far the latter provision could be followed. Since article 43 of the Vienna Convention contained no reference to recall or discharge, the general formulation of article 25, mentioned by the Special Rapporteur, would no doubt remain. For the sake of consistency, therefore, the second sentence of paragraph 3 of article 51 should be omitted.

42. He suggested that article 51 be referred to the Drafting Committee for revision in the light of the comments made and with instructions to bring the English and French texts into line.

It was so agreed.

ARTICLE 52 (Obligations of third States)

43. Mr. ŽOUREK, Special Rapporteur, introducing the article, drew attention to the Finnish Government's suggestion (A/CN.4/136) that the scope of paragraph 1 should be narrowed down substantially. The Yugoslav Government (*ibid.*) considered that the article did not apply to a consul's private visits to third States; he was sure that the Commission would agree with that interpretation. The Government of Norway (*ibid.*) had stated that it should be made clear that a third State was under a duty to grant a consular official free passage through its territory. The Government of the Netherlands (A/CN.4/136/Add.4) observed that the significance of the article was greatly reduced by paragraph (1) of the commentary and thought that the provision should be based on the corresponding article of the Vienna Convention. The Government of Spain (A/CN.4/136/Add.8) took the view that the article represented an

innovation rather than a codification and that the rule laid down in it might be premature. Finally, the Philippine Government (A/CN.4/136) stated that its observations on articles 41 and 50 applied to paragraphs 1 and 3 of article 52.

44. The only question of substance was whether or not the article should also apply to employees of the consulate. Since article 40 of the Vienna Convention provided for inviolability and other immunities for diplomatic agents only, article 52 as approved by the Commission at its twelfth session should be retained. The Commission might, however, wish to include in paragraph 1 the phrase "which has granted him a passport visa if such visa was necessary", which appeared in article 40 of the Vienna Convention. Although that proviso was implicit in the text of article 52, its addition might be useful.

45. Mr. VERDROSS agreed that the phrase "which has granted him a passport visa if such visa was necessary" should be added. However, that addition involved a more important point of substance than the Special Rapporteur believed.

46. The purpose of the phrase in the Vienna Convention was to settle the question whether a third State was under a duty to grant free passage, mentioned in commentary (2) to article 39 of the draft on diplomatic intercourse (A/3859). The Vienna Conference had answered that question in the negative by stating that a third State which did not grant the necessary visa was not under a duty to grant free passage.

47. The Commission should dispose of the same question in regard to members of the consulate by deciding whether to insert the same phrase in article 52 of the consular draft or not.

48. Mr. FRANÇOIS agreed with Mr. Verdross on the need to take a decision on that point. However, he wondered whether it had been the intention of the Vienna Conference to deny the duty of a third State to grant free passage.

49. The CHAIRMAN explained that the intention of the Vienna Conference had been to state that, where a visa was required, free passage would depend on whether the visa in question was granted or not by the third State concerned.

50. Mr. SANDSTRÖM said that the Vienna Conference could not have failed to consider the question in that light, since it had had before it commentary (2) to article 39 of the diplomatic draft.

51. Mr. ŽOUREK, Special Rapporteur, pointed out that, as explained in commentary (1) to article 52 — and also in commentary (2) to article 39 of the draft on diplomatic intercourse — it had not been the intention of the Commission to settle the question whether a third State should grant free passage. In both cases, the text adopted by the Commission had merely specified the obligations of third States during the actual passage through their territory. It dealt with the problems arising from the presence of certain persons on the territory of the third State, without going into the question of their admission into that territory.

52. Another important question arose from the comparison of article 52 with article 40 of the Vienna Convention. That article 40 contained a paragraph 4 specifying that the obligations of a third State also applied to persons and official communications and diplomatic bags whose presence in its territory was due to *force majeure*. Since the same problem could arise in connexion with members of the consulate and consular communications and consular bags, he suggested that a similar paragraph be included in article 52.

53. The CHAIRMAN asked the Special Rapporteur whether he envisaged the inclusion in paragraph 2 of a second sentence dealing with couriers and consular bags in transit, modelled on the second sentence of the corresponding paragraph 3 of article 40 of the Vienna Convention.

54. Mr. ŽOUREK, Special Rapporteur, said that he was inclined to retain the text of article 52, paragraph 2, as it stood; the particular point was covered in paragraph 4.

55. The CHAIRMAN said that it was not quite clear whether the case under reference would be covered by any of the provisions of the draft articles. The Commission had adopted provisions on the consular bag and on the right of a consulate to use diplomatic couriers. If it did not adopt any provision concerning their transit through third States, it would leave the status of such couriers and bags in doubt.

56. Mr. SANDSTRÖM remarked that, if paragraph 1 were brought into line with the corresponding provision of the Vienna Convention, there was no valid reason for not adopting the same course in respect of the other paragraphs.

57. Sir Humphrey WALDOCK also saw no reason for not adopting more or less entirely the text of article 40 of the Vienna Convention. If the Commission were to adopt a text different from the corresponding one in that Convention, persons comparing the two texts might infer that the Commission had intended to adopt a different approach as to substance. In the matter under reference, it was better to follow the pattern of the Vienna Convention unless there were some compelling reason for departing from its provisions.

58. There was an additional reason for bringing article 52 of the present draft into line with article 40 of the Vienna Convention. Some of the diplomatic bags covered by the Vienna Convention would be addressed to consuls and the reverse was also true; consular bags mentioned in the draft articles on consular intercourse could be addressed to diplomatic missions. There was therefore every reason why the provisions governing both types of bag should be identical.

59. Mr. AMADO deprecated the general trend to adopt the pattern of the Vienna Convention without due regard for the fundamental difference between diplomatic agents and consuls. The diplomatic bag was a centuries-old institution; it was governed by well-established and very clear rules of international law. In spite of the current tendency to combine diplomatic missions with consular offices, he could not see how

consulates could be equated with diplomatic missions.

60. The CHAIRMAN suggested that the Commission should refer article 52 to the Drafting Committee, with instructions to model its provisions on those of article 40 of the Vienna Convention. The Drafting Committee would thus:

(i) Add the phrase relating to the visa in paragraph 1;

(ii) Consider whether a clause along the lines of the second sentence of article 40, paragraph 3, of the Vienna Convention should be added in paragraph 2, bearing in mind the provisions of earlier articles which granted inviolability to consular bags and to the couriers carrying those bags, and draft a text suited to the position of consuls; and

(iii) Add a new paragraph similar to paragraph 4 of article 40 of the Vienna Convention.

It was so agreed.

ARTICLE 53 (Respect for the laws
and regulations of the receiving State)

61. Mr. ŽOUREK, Special Rapporteur, said that the Belgian Government had suggested that paragraph 2 should be amended to provide that the consular premises "shall be used exclusively for the purposes of the exercise of the consular functions. . .".

62. He recalled that the introduction of the term "exclusively" had been proposed to the same effect in another context connected with the use of the consular premises (571st meeting, para. 54). The Commission had, however, rejected that amendment (572nd meeting, para. 1) because it might open the door to abuse by enabling the receiving State to dispute the use which was made of consular premises. He therefore urged the Commission to retain the draft as it stood.

63. The Spanish Government thought paragraph 3 was at variance with the definition of "consular premises" given in article 1 (b) and suggested that the wording of the paragraph should be revised. The Netherlands Government had suggested that paragraph 3 should be revised to bring it into line with that government's suggested definition of consular premises in article 1.

64. The Government of Yugoslavia had suggested that article 53 should include a provision to the effect that consuls had no right to provide asylum. That question was dealt with already in the last sentence of commentary (3).

65. Lastly, the Government of Indonesia (A/CN.4/136/Add.10), in the light of the development of the newly independent Asian and African countries, had reserved its right in respect of the interpretation of the "other rules of international law" envisaged in paragraph 2, which had been for the greater part determined by developments in the western world.

66. Since eighteen governments had sent their comments on the draft articles and none of them had expressed any objection to article 53, which had been adopted by the Commission in 1960 after a lengthy discussion, he suggested that its substance should be left untouched. The text could be referred to the Drafting Committee,

with instructions to examine its wording in the light of article 41 of the Vienna Convention.

67. Mr. VERDROSS drew attention to a small difference between the two texts. Article 41, paragraph 3, of the Vienna Convention referred to the rules laid down "by any special agreements in force between the sending and the receiving State". The purpose of that reference was to cover the agreements existing between certain Latin American countries on diplomatic asylum, agreements which were binding between those countries.

68. It might be useful to add a similar provision in article 53, paragraph 2, to meet the case where there existed any similar agreements or usages relating to asylum in consulates.

69. It was not necessary to include in the text itself a specific provision denying any general right of asylum in consulates. The statement in paragraph 2 that the consular premises must not be used in any manner incompatible with the consular functions under international law was sufficient. General international law did not recognize any right of asylum.

70. Mr. BARTOŠ pointed out that it was not appropriate to dispose by means of a commentary of an important question such as that raised by the Yugoslav Government. The experience of both the first and second Conferences on the Law of the Sea and of the Vienna Conference had shown that the plenipotentiaries refused to accept as authoritative the commentaries prepared by the International Law Commission. It had been repeatedly pointed out that only the text of the convention formulated by the international conference was binding on the signatory States.

71. He recalled that at the Vienna Conference it had often been proposed that a statement made in a commentary be incorporated into the text of the corresponding article. Some of those proposals had been adopted and others had been rejected. Therefore, while the commentaries were certainly useful to students, no attempt should be made to settle questions of substance by means of a commentary.

72. Mr. MATINE-DAFTARY said that the Vienna Conference had adopted the passage referred to by Mr. Verdross by reason of the existence between certain Latin American countries of a convention on the right of asylum in diplomatic missions. He had voted in favour of the inclusion of that passage — although he did not favour diplomatic asylum — because of the need to reconcile the text with the special agreements binding those Latin American countries in their reciprocal relations.

73. In the draft, the inclusion of a similar passage would only be justified if there existed some convention in force between Latin American countries on the subject of asylum in consulates. Perhaps the Latin American members could tell the Commission whether a right of asylum in consulates was recognized in their region.

74. The CHAIRMAN, speaking as a member of the Commission, pointed out that the question of the relationship between the draft articles on consular inter-

course and bilateral conventions was dealt with in article 65. Because in the Vienna Convention that relationship was not the subject of a separate provision, article 41, paragraph 3, contained the passage cited by Mr. Verdross.

75. It was not likely that the addition of the passage to article 53 of the present draft would dispose of the question of asylum. Article 53, paragraph 2, dealt exclusively with the use of the consular premises in a manner compatible with the consular functions. If it were desired to deal with the question of asylum, a specific reference would have to be made to that question.

76. Mr. ERIM agreed that the question of asylum would not be settled even if the passage suggested by Mr. Verdross were inserted. Mr. Bartoš had therefore been right in suggesting that the question should be settled in the text and not in a commentary which was not binding on future signatories.

77. There was an important difference between diplomatic missions and consulates. Under general international law it could be maintained that an embassy or legation was entitled to grant asylum to a political refugee. No such contention could possibly be made in respect of consulates.

78. If the Commission wished to express the idea that no right of asylum in consulates existed, it would have to say so in article 53. The passage suggested by Mr. Verdross would not meet the case.

79. Mr. JIMÉNEZ de ARÉCHAGA recalled that the Commission had been requested by resolution 1400 (XIV) of the General Assembly dated 21 November 1959 to undertake, as soon as the Commission considered it advisable, the codification of the principles and rules of international law relating to the right of asylum. At its twelfth session, however, the Commission had decided to defer further discussion of that question to a future session (A/4425, para. 39).

80. In the circumstances, the Commission should not touch on the question of the right of diplomatic asylum, which in some cases could extend to consular premises and warships. The Commission should not adopt a provision such as that proposed by the Yugoslav Government, for if it did so it would be implicitly prejudging the question of the existence of such asylum.

81. With regard to the text of article 53, paragraph 1, he had no objection to the inclusion of a reference to special agreements in force between the sending State and the receiving State. That reference was much wider in scope than the provision contained in article 65, which only referred to bilateral conventions; the expression "agreements in force" could cover multilateral conventions, bilateral conventions and agreements which did not take the form of conventions.

82. Mr. PADILLA NERVO pointed out that the passage under discussion had been introduced into article 40 of the draft on diplomatic intercourse (which had later become article 41 of the Vienna Convention) by the Commission itself, precisely with the purpose of safeguarding diplomatic asylum, which was recognized

by treaty provisions binding certain Latin American States exclusively.

83. In general, diplomatic asylum was not held to extend to consular premises. Many bilateral conventions specifically stated that asylum should not be granted in consulates. However, in most of those conventions, such as those concluded by the United Kingdom with Sweden, Mexico and a number of other countries, it was specified that asylum should not be granted in a consulate "to fugitives from justice", with the additional stipulation that if a consular officer refused to surrender such a fugitive on lawful demand, the local authorities could, if necessary, enter the consulate to apprehend the fugitive.¹

84. Other conventions, such as that of 1912 between the United States and Mexico,² stated that a consulate must not be used as a place of asylum but did not specify that the provision referred to a "fugitive from justice", an expression which would limit the scope of the provision to ordinary criminals rather than to political asylees.

85. If the Commission should decide to include a provision denying the right of asylum in consulates, he thought that the provision should state that consular premises should not be used to give asylum to fugitives from justice who would be charged with an ordinary offence.

86. He agreed with Mr. Jiménez de Aréchaga that the passage suggested by Mr. Verdross covered a wider ground than article 65.

87. Mr. MATINE-DAFTARY noted that no reply had been given to his question whether there existed in Latin American countries any agreement or usage relating to asylum in consulates. In the absence of any such agreement or usage, a provision on the subject seemed to be superfluous in the draft.

88. Mr. ŽOUREK, Special Rapporteur, said that the position of consulates was completely different from that of diplomatic missions. There existed among certain Latin American countries agreements relating to asylum in diplomatic missions, but he knew of no such agreement in respect of consulates. The statement in article 53, paragraph 2, that the consular premises must not be used in any manner incompatible with the consular functions as specified "in the present articles or any other rules of international law" was sufficient to disallow asylum in consulates.

89. It was true, as Mr. Padilla Nervo had said, that certain bilateral conventions specifically stated that consuls were not entitled to grant asylum. Provisions of that type, however, were an inheritance of a remote past when consuls had been regarded as public ministers and as having a status similar to that of diplomatic agents. Until the end of the nineteenth century the

¹ Article 10(4) of the Consular Convention between the United Kingdom and Sweden of 14 March 1952, reproduced in *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 471.

² United Nations *Treaty Series*, vol. 125 (1952), No. 431.

exact status of consuls had still been the subject of discussion. There were no longer any doubts regarding that status—which was totally different from that of diplomats—and it would therefore be pointless to state in the present draft that no right of asylum existed in the case of consulates.

90. With regard to the suggestion by Mr. Verdross, he pointed out that the text of article 41, paragraph 3, of the Vienna Convention referred to the “other rules of general international law”. The use of the adjective “general” made it necessary to refer also to any special agreements in force between the sending State and the receiving State. Article 53, paragraph 2, however, referred to the “other rules of international law” without the adjective “general”, with the consequence that a reference to special agreements was unnecessary.

91. In conclusion, he did not consider it necessary to adopt a provision on asylum in the context, even though in his third report he offered a draft provision on the point in case the Commission should decide to add such a provision (A/CN.4/137, *ad* article 53). He could not agree with Mr. Bartoš that the Commission’s commentaries had no force at all: they undoubtedly constituted a guide to the interpretation of the relevant provisions.

92. There was another reason for not including a provision such as that proposed by the Yugoslav Government. If the right of asylum were specifically excluded, it would be necessary to state what would happen if the rule were broken by a consulate. A question of that type could be dealt with in a bilateral convention but hardly in a multilateral convention.

93. Mr. BARTOŠ requested a vote on the Yugoslav proposal.

94. The CHAIRMAN put to the vote the proposal, as formulated by the Special Rapporteur in his third report (A/CN.4/137, *ad* article 53, sentence to be added to paragraph 2).

The proposal was adopted by 8 votes to 5, with 5 abstentions.

95. Mr. JIMÉNEZ de ARÉCHAGA, explaining his vote, said that he had voted against the proposal because the provision adopted could be held to imply that a consulate should never be used as an extension of a diplomatic mission for the purposes of granting asylum. He recalled the experience of diplomatic asylum during the Spanish Civil War when the representatives of various countries had provided accommodation on consular premises for persons to whom diplomatic asylum had been granted.

96. In addition, the adoption of the proposal conflicted with the Commission’s decision at its twelfth session to defer consideration of the question of asylum to a future session.

97. Mr. GARCÍA AMADOR, explaining his vote, said that he had voted against the proposal for the same reasons as Mr. Jiménez de Aréchaga. The provision adopted was at variance with the practice of Latin American countries and even with that of some European countries in certain special situations, as evidenced

by the experience of the Spanish Civil War. He therefore deplored the hasty decision of the Commission to adopt the additional sentence in question before studying a topic which had been referred to it by a resolution of the General Assembly. When the Commission came to discuss that topic at one of its future sessions, it would find that questions such as that raised by the Yugoslav proposal could not be disposed of so lightly.

98. The CHAIRMAN said that there remained no questions of substance to be decided in connexion with article 53. The Commission appeared to be agreed that the Drafting Committee should be asked to consider whether, in the light of article 65 of the present draft, it was appropriate in article 53 to draw on the language of article 41, paragraph 3, of the Vienna Convention.

99. Sir Humphrey WALDOCK recalled that when the Commission had adopted article 33 on the inviolability of the consular archives, it had been agreed that the Drafting Committee should be asked to consider the inclusion in article 53, paragraph 3, of a reference to the question of the separation of those archives from other papers and documents (596th meeting, paras. 64 and 67).

100. The CHAIRMAN suggested that article 53, as amended by the adoption of the additional sentence, be referred to the Drafting Committee, with instructions to consider the wording of paragraph 2 in the light of article 41, paragraph 3, of the Vienna Convention and also to take into account the point mentioned by Sir Humphrey Waldock.

It was so agreed.

The meeting rose at 1.15 p.m.

605th MEETING

Wednesday, 7 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

(resumed from the 597th meeting)

[Agenda item 5]

1. The CHAIRMAN, welcoming Mr. Hafez Sabek, observer for the Asian-African Legal Consultative Committee, expressed his conviction that the existing co-operation between that Committee and the Commission would be of great benefit to the latter’s work.

2. Mr. SABEK (Observer for the Asian-African Legal Consultative Committee) thanked the Commission for inviting the Committee to be represented at that session.

3. The Committee wished to express its appreciation to the Commission for sending Mr. García Amador as observer to the fourth session of the Committee held

at Tokyo in February 1961. That participation had placed the co-operation between the two bodies on a firm footing.

4. The establishment of the Committee had been one of the consequences of the Bandung Conference of 1955, which had laid down certain basic principles concerning the conduct of Asian-African relations in a spirit of solidarity and mutual understanding. He hoped that the work of the Committee would further strengthen co-operation not only between the countries of Asia and Africa, but also among all countries of the world and that the Committee would be able to make an Asian-African contribution towards the solution of some international problems and towards the codification and development of international law.

5. One of the important functions of the Committee was to examine, from the point of view of Asia and Africa, the questions which were under consideration by the International Law Commission and to arrange for its views to be placed before the Commission.

6. Accordingly, the Committee had established formal relations with the Commission; it had taken appropriate steps to obtain all drafts adopted by the Commission and to furnish it with all important documents of the Committee, including draft articles relevant to the subjects considered by the Committee.

7. The Committee had examined at its first three sessions the subject of diplomatic privileges and immunities and its final report had been submitted to the members of the Sixth Committee of the General Assembly of the United Nations. In addition the Committee had appointed a representative to attend the Vienna Conference on Diplomatic Intercourse and Immunities.

8. The Committee had also considered the topic of arbitral procedure and had discussed at its third session the model rules adopted by the International Law Commission (A/3859, chap. II); the topic would be further discussed at the fifth session.

9. The subject of the law of the sea had been deferred to a future session in view of the Second United Nations Conference on the Law of the Sea. The Committee had also under consideration some other topics of common interest to member States, such as the immunity of States in respect of commercial transactions, extradition, enforcement of foreign judgments in matrimonial matters, legal aid, the law of treaties and consular intercourse and immunities.

10. The fifth session of the Committee would be held at Rangoon for a period of two weeks, between 15 January and 15 February 1962, and the Committee had authorized him to extend an invitation to the Commission to be represented by an observer at that session. Although the agenda for that session had not been finally settled, it was expected to include the following topics: the legality of nuclear tests; state responsibility for maltreatment of aliens; diplomatic protection of citizens abroad; dual nationality; avoidance of double taxation; and arbitral procedure.

11. He hoped that the Commission would be able to accept that invitation so that the existing co-operation

between the two scientific bodies could be strengthened in the interests of mutual understanding and the growth and development of international law.

12. Mr. GARCÍA AMADOR, welcoming Mr. Hafez Sabek, recalled that, at its twelfth session, the Commission had designated him as its observer to attend the fourth session of the Asian-African Legal Consultative Committee (A/4425, para. 43). In pursuance of that decision, he had attended the Tokyo session of the Committee and had submitted a report thereon, which he hoped the Commission would discuss at one of its next meetings.

13. The CHAIRMAN said that, when Mr. García Amador's report was circulated the Commission would, if it so desired, be in a position to discuss its contents.

14. With regard to the kind invitation extended by the Asian-African Legal Consultative Committee, he recalled that the Commission had discussed the question at the 597th meeting. The Commission, however, was rather awkwardly placed, since 1961 was the last year of its existing composition and the fifth session of the Committee would be held after the sixteenth General Assembly, which would decide the Commission's new composition.

15. In the circumstances, the Commission had arrived at the conclusion that it was unfortunately not in a position to send an observer to that session.

16. He thanked the representative of the Asian-African Legal Consultative Committee for his statement.

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)*

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

HONORARY CONSULS :

INTRODUCTORY DISCUSSION

17. The CHAIRMAN invited the Commission to resume its consideration of the draft on consular intercourse and immunities (A/4425), taking up chapter III, (Honorary consuls).

18. Mr. ŽOUREK, Special Rapporteur, said that before commencing its discussion of the individual articles 54 to 63, the Commission would do well to consider certain government comments of a general character on the subject of honorary consuls.

19. The United States Government (A/CN.4/136/Add.3) had suggested that the whole of chapter III was perhaps unnecessary. The United States did not appoint honorary consuls and, although it accorded consular recognition to honorary consuls appointed by foreign governments in the United States, it did not grant them any personal privileges and immunities. That government added that honorary consuls who were nationals of or residents in

* Resumed from the previous meeting.

the receiving State should be entitled, in the performance of their official functions and the custody of the archives of the consular post, to whatever rights and privileges other consular officers enjoyed. Except for that, their status should be the same as that of any other national or permanent resident.

20. His view was that the Commission should retain chapter III. Honorary consuls played an important part in relations between States and it was therefore necessary to include provisions governing their status and setting forth their rights and duties.

21. In addition, two governments had commented on the question of the desirability of including a definition of honorary consuls (*cf.* Special Rapporteur's third report (A/CN.4/137). In that connexion, he recalled that, at its eleventh session, the Commission had provisionally adopted definitions of the expression "career consul" and "honorary consul" (A/4425, introductory comments to chapter III, para. (2)). However, at its twelfth session, the Commission had decided, in view of the diversity of State practice in the matter and the considerable differences in national laws with regard to the definition of honorary consul, to omit any such definition (*ibid.*, para. (3)). The Commission had merely adopted the provision in article 1 (f) to the effect that consuls could be either career consuls or honorary consuls, leaving States free to define the latter category.

22. The delegation of Greece, in the Sixth Committee of the General Assembly, at the fifteenth session, had expressed its full approval of that decision by the Commission (662nd meeting). The Norwegian Government (A/CN.4/136), on the other hand, had suggested that a definition of honorary consuls should be adopted.

23. A number of countries considered that the privileges and immunities granted in chapter III to honorary consuls exceeded those granted to them by the existing State practice. That view had been expressed in the Sixth Committee by the delegations of the Ukrainian SSR and Indonesia at the fifteenth session of the General Assembly (657th and 660th meetings). He proposed that those general comments should be taken into consideration when the Commission examined the various articles of the chapter, in respect of which a number of governments had submitted comments to the effect that more restrictive provisions should be adopted.

24. Lastly, there had been comments on the structure of chapter III. The Norwegian Government had expressed the view that the system of references and cross references would inevitably lead to difficulties of interpretation, particularly in the case of article 54, paragraph 3. It considered that it would be better to spell out in chapter III all the provisions which applied to honorary consuls, even at the risk of repetition.

26. It would, of course, be possible to spell out all the provisions applicable to honorary consuls, but the work involved would not be justified. In effect, the drafting of a separate convention on the subject of honorary consuls would be involved.

26. In his third report, he proposed that the system adopted by the Commission should be retained subject

to a few changes, including the deletion of paragraph 3 from article 54.

27. Mr. VERDROSS supported the retention of chapter III. Honorary consuls continued to play an important role in State practice. If the Commission did not include provisions on the subject of honorary consuls in the present draft, a special convention would be needed for them.

28. Mr. AMADO said that the subject of honorary consuls had been discussed at great length by the Commission at its twelfth session (549th-550th and 564th meetings), when the members had gone into considerable detail. Mr. François had shown the importance of honorary consuls to a small country like the Netherlands which had far-flung trade and shipping interests. He did not believe that the Commission should devote any prolonged discussion to honorary consuls at that session.

29. He recalled his remark at the twelfth session (549th meeting, para. 47) to the effect that the wide variety of activities carried on by persons who were appointed as honorary consuls added to the difficulty of both enumeration and definition. He had suggested that the best way of avoiding those difficulties might be to retain only the article on the legal status of honorary consuls (draft article 54), which seemed to provide the indispensable minimum.

30. The CHAIRMAN noted that the only proposal before the Commission was that chapter III should be retained with the existing structure. He therefore suggested that the chapter be retained and that the Commission should follow with respect to the subject of honorary consuls the procedure which it had adopted at its previous session.

It was so agreed.

ARTICLE 54 (Legal status of honorary consuls)

31. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had decided to defer its decision whether article 31 (Inviolability of consular premises) was applicable to honorary consuls until governments had furnished their observations on the matter (article 54, commentary (5)). The Governments of Finland (A/CN.4/136), Norway and Denmark (A/CN.4/136/Add.1) were of the opinion that article 31 should not apply to honorary consuls. The Netherlands (A/CN.4/136/Add.4) and Belgium (A/CN.4/136/Add.6) had expressed the opposite view, maintaining that there should be no difference in the treatment of honorary consuls and career consuls in the matter. Lastly, the Yugoslav Government (A/CN.4/136) considered that, in the case of honorary consuls, article 31 should only apply to premises intended solely for the exercise of consular functions.

32. The Commission might perhaps consider the possibility of rendering article 31 applicable to honorary consuls on the condition specified by the Yugoslav Government. It should be noted that only in rare cases were the consular premises used by honorary consuls exclusively for the performance of consular functions. He did not believe that the majority of States would be

prepared to grant inviolability to consular premises for the benefit of honorary consuls who, in the great majority of cases, carried on a gainful private activity in addition to the exercise of their consular duties.

33. Mr. YASSEEN said that the principle of the inviolability of the premises was indispensable to the consular function, regardless of whether the consulate was in the charge of an honorary consul or of a career consul.

34. It was true that honorary consuls often carried on a private gainful occupation, but the difficulties that might arise from that fact could easily be remedied. He recalled that, at the twelfth session, he had suggested (553rd meeting, para. 6) that the inviolability of the premises of a consulate in the charge of an honorary consul should be accepted subject to the following proviso: "if those premises are assigned exclusively for the exercise of consular functions". He proposed that a provision along those lines be adopted.

35. Mr. FRANÇOIS supported Mr. Yasseen's proposal and drew attention to the Netherlands comment that, even though an honorary consul could engage in private activities, the fact did not alter the nature of his consular work: the honorary or non-honorary status should be regarded as a personal quality of a consular official, which did not affect the status of his official actions and still less that of the consulate.

36. He stressed that there were no "honorary consulates". There were consulates in the charge of honorary consuls, but those consulates did not differ in status from consulates in the charge of career consuls. The inviolability of the consular premises had always been recognized, regardless of the person in charge, subject only to the condition stated in Mr. Yasseen's proposal.

37. Mr. MATINE-DAFTARY said that when the Commission had discussed article 31, he had raised the question of the precise definition of the consular premises, and of their separation from other premises (595th meeting, para. 42). He had then been told that the question would be discussed in connexion with the definitions article.

38. He considered that the proviso proposed by Mr. Yasseen, which was intended to qualify the inviolability of consular premises in the charge of honorary consuls, should actually apply to all consular premises and not merely to those in the charge of an honorary consul.

39. Mr. BARTOŠ said that the Yugoslav proposal did no more than express an existing rule of customary international law. In the case of consulates in the charge of honorary consuls, only the consular premises and archives enjoyed inviolability; it was the duty of the honorary consul to keep those archives separate from other documents and papers.

40. Consular premises in the charge of a career consul were inviolable because those premises were invariably used exclusively for the purpose of consular functions. The position was different so far as honorary consuls were concerned. Quite commonly, for example, an honorary consul also practised as a lawyer. If the inviolability of the premises occupied by him were to be

recognized unconditionally, he would enjoy that privilege not only in respect of the exercise of the consular functions, but also in respect of his activities as a lawyer. For that reason, it was necessary, in the case of honorary consuls, to make the applicability of article 31 to honorary consuls subject to the condition proposed by Mr. Yasseen.

41. Lastly, he stressed the great difference in status between career consuls and honorary consuls. A career consul was, in principle, not allowed to engage in any outside activities. An honorary consul, on the other hand, was as a general rule engaged in a private gainful activity: he could be presumed to have an occupation outside his consular occupation. There was therefore every reason for adopting Mr. Yasseen's proviso in the context of provisions relating to honorary consuls, as distinct from those relating to career consuls. He hoped that those explanatory remarks would satisfy Mr. Matine-Daftary.

42. Mr. GROS said that in his country the situation was much the same as had been described by Mr. Bartoš. For example, Sweden had appointed a number of honorary consuls in some French ports and they conducted their consular and their private business from the same office. Only in relatively few cases were there completely separate consular premises. The inviolability of such premises could only be recognized if the consular archives were segregated from non-consular papers.

43. Mr. ŽOUREK, Special Rapporteur, in answer to Mr. François, said that honorary consulates were mentioned in lists of consulates published in several countries and that in State practice honorary consulates were distinguished from other consulates headed by career consular officials.

44. Although theoretically it would be correct to stipulate that only premises used exclusively for consular purposes were entitled to inviolability, it was by no means easy in practice to enforce and verify the observance of such a condition. For example, it was unlikely that an honorary consul would carefully move from office to office in order to conduct consular business in one room and private business in another.

45. He doubted whether there was a rule of customary law on the matter, as had been contended by Mr. Bartoš; the practice of States certainly did not yield evidence of the existence of any such rule. Since governments had adopted a somewhat non-committal attitude, he hoped that the Commission would be correspondingly cautious.

46. Mr. AMADO endorsed the view expressed by the Swiss Government (A/CN.4/136/Add.11) in the second paragraph of its general comment on chapter III of the draft. Although, as had been pointed out at the twelfth session by members from the Latin American continent, on the whole the countries of that region did not often appoint honorary consuls, they recognized the existence of the institution which was a useful one, particularly for small countries unable for financial reasons to maintain a large corps of career consuls. He agreed that the inviolability of an honorary consul's premises could only be assured if they were used for consular purposes and he would vote in that sense.

47. Mr. ERIM agreed that the proviso proposed by Mr. Yasseen should be embodied in article 54. Moreover, it certainly did happen in practice that honorary consuls conducted their consular business in a separate office or offices.

48. The CHAIRMAN, speaking as a member of the Commission, pointed out that the immunity conferred by article 31, paragraph 3, derived from the fact that the consular premises and their furnishings were usually the property of or rented by the sending State. How could that provision be applicable to honorary consuls who usually owned the premises used by them?

49. Mr. ŽOUREK, Special Rapporteur, agreed with the Chairman and said that, even if the Commission should wish the rule in article 31 to be applicable to honorary consuls, it would have to be adapted so as to take into account the special position of honorary consuls. In the light of the decisions adopted by the Vienna Conference, the Commission might find it desirable to extend the scope of the provision to the consulate's property, in particular its assets and motor vehicles.

50. The CHAIRMAN put Mr. Yasseen's proposal (see para. 34 above) to the vote.

The proposal was adopted by 13 votes to 1, with 4 abstentions.

51. The CHAIRMAN invited the Special Rapporteur to introduce the comments of governments concerning the applicability of article 32 (Exemption of taxation in respect of consular premises) to honorary consuls.

52. Mr. ŽOUREK, Special Rapporteur, said that the Norwegian Government took the view that article 32 should not be applicable to the premises of honorary consuls.

53. He recalled that at the twelfth session the Commission had decided in the opposite sense (554th meeting, para. 8, where the relevant provision was discussed as article 26).

54. Mr. YASSEEN emphasized that exemption from taxation could extend only to premises assigned exclusively to consular purposes.

55. Mr. SANDSTRÖM agreed that the proviso just adopted governing the inviolability of premises was equally applicable to their tax exemption.

56. The CHAIRMAN, speaking as a member of the Commission, considered that the Norwegian proposal was well-founded. The reason for the exemption provided for in article 32 was that consular premises either belonged to or were rented by the sending State, whereas the premises used by an honorary consul either belonged to or were rented by him personally. Accordingly, from the theoretical point of view, there was hardly any justification for extending the exemption to the honorary consul, and for practical reasons it would be difficult to exempt from taxation, say, one room that was used as a consular office by an honorary consul.

57. Mr. EDMONDS said that, although his country did not itself make use of honorary consuls, there were a great many of them in the United States and they frequently combined other occupations with their consular

functions and did not usually have a separate office in which to conduct consular business. The question of the inviolability and exemption from taxation of the premises of honorary consuls raised some extremely thorny practical problems. He was unable to see how inviolability or tax exemption could be accorded to part of an office, and it would probably be inadvisable to do so for the whole office.

58. Mr. MATINE-DAFTARY said that the problem at issue was of no great moment for his country, which did not employ honorary consuls in its own consular service, and there were only a few of them in Iran. Nevertheless, he felt bound to point out that, if article 32 were not made applicable to honorary consuls, it would become difficult to find persons to undertake such functions, since they usually did so because of the privileges and immunities that went with them.

59. He shared the Chairman's doubts concerning the applicability of article 32 to honorary consuls.

60. Mr. JIMÉNEZ de ARÉCHAGA said that the practical difficulties mentioned by the Chairman and Mr. Edmonds were not in reality very serious; moreover, they could arise also in the case of consulates in the charge of a career consul. The Commission should therefore, adhere to the decision adopted at the twelfth session, subject to the addition of the proviso proposed by Mr. Yasseen and adopted by the Commission. The effect would be that only that part of the premises which was used for strictly consular purposes would benefit from the exemption laid down in article 32. The clause to be drafted could either form a separate article or else might be inserted in the definition of consular premises in article 1.

61. The CHAIRMAN pointed out that at the twelfth session, the Commission had been pressed for time and had not always had an opportunity of discussing in sufficient detail the provisions in chapter III. In the circumstances some of its decisions might have been a little hasty.

62. Sir Humphrey WALDOCK agreed with Mr. Jiménez de Aréchaga. A provision exempting from tax buildings or parts of buildings used exclusively for consular purposes appeared in a number of bilateral conventions concluded by the United Kingdom. Such clauses had not given rise to practical difficulties.

63. Mr. ŽOUREK, Special Rapporteur, urged the Commission to bear in mind that the reason for the exemption granted by article 32 was that the premises were the property of or were leased by a foreign State. The exemptions accorded by article 45, paragraph 1(b), were based on the same consideration. By contrast, as the Chairman had pointed out, the situation in regard to premises used by an honorary consul was essentially different. He doubted whether governments would accept the proposition that article 32 should be applicable to honorary consuls and, therefore, endorsed the Norwegian Government's view.

64. The CHAIRMAN, speaking as a member of the Commission, said that references to bilateral consular conventions were unconvincing, since under article 65,

second text, those instruments would in any case remain in force and the immunities which they stipulated would be retained as between the parties thereto. The Commission, however, was drafting a multilateral convention of universal application.

65. Sir Humphrey WALDOCK explained that he had mentioned bilateral conventions, not in order to suggest that they should form the basis of a customary rule, but merely to show that the practical difficulties were not as serious as some members believed; that was the only relevance of bilateral conventions to the Commission's current debate.

66. Mr. JIMÉNEZ de ARÉCHAGA pointed out to the Special Rapporteur that, out of the nineteen governments which had commented on the draft, only one had objected to the applicability of article 32 to honorary consuls.

67. Mr. ERIM said that the reference to article 32 in paragraph 2 of article 54 should stand. Possible practical difficulties, though by no means inconceivable, should not be allowed to influence what was in effect a question of principle. If the premises used by an honorary consul were used also for purposes other than those of the consular function, the onus was on the honorary consul to prove that a certain part of the premises was used exclusively for consular functions. If the premises were rented on behalf of the sending State, the landlord should be told, for the tax position of the premises would be affected. Moreover, since the Commission had decided that the inviolability conferred by article 31 should extend to premises used by honorary consuls for exclusively consular functions, by analogy premises used by honorary consuls for exclusively consular purposes should be exempt from taxation. In practice, no great difficulty should arise, because there would normally be reciprocity between the sending and the receiving States.

68. Mr. AMADO said that a solution of the problem would be facilitated if the term "consular office" was used instead of "consular premises", as had been proposed at the twelfth session (554th meeting, paras. 4-8). Moreover, the revenue authorities of the receiving State could certainly be trusted to do their utmost to prevent abuses. He could not agree with Mr. Matine-Daftary's assumption that honorary consuls assumed their functions out of a desire to take advantage of the privilege which attached to the function; Brazil, for example, appointed many of its most highly-respected citizens as honorary consuls. Finally, the Chairman's and the Special Rapporteur's references to practical difficulties seemed greatly exaggerated.

69. The CHAIRMAN, speaking as a member of the Commission, said that he had no such strong feelings on the subject as Mr. Amado had inferred. The Soviet Union neither sent nor accepted honorary consuls, and the question was purely academic as far as he was concerned.

70. Speaking as Chairman, he observed that the opinions of members seemed to differ whether or not a reference to article 32 should be retained in article 54, paragraph 2. He would therefore put the question to the

vote, on the understanding that the article would refer to the "consular office" and not to "consular premises".

It was decided by 17 votes to 1, with 1 abstention, that a reference to article 32 should be retained in article 54, paragraph 2.

71. Mr. MATINE-DAFTARY said that he had voted in favour of the applicability of article 32 to honorary consuls because the word "office" had been substituted for "premises".

72. Mr. ŽOUREK said that he had cast a negative vote for the reasons which he had given during the debate.

73. The CHAIRMAN invited the Special Rapporteur to introduce article 54 as a whole.

74. Mr. ŽOUREK, Special Rapporteur, said that some of the comments received showed that a number of governments had misunderstood the purport of article 54, paragraph 3. Thus, the Government of Finland had proposed that the reference to article 42, paragraph 2, should be deleted and the Belgian Government had suggested that the reference to article 45 should be included in paragraph 2 and deleted from paragraph 3. In view of those misunderstandings, he had proposed in his third report (A/CN.4/137) that paragraph 3 should be deleted, a step which would considerably facilitate the Commission's work.

75. Mr. JIMÉNEZ de ARÉCHAGA supported the Special Rapporteur's proposal and suggested that paragraph 3 should be consigned to the commentary.

76. Mr. SANDSTRÖM considered that the question was mainly one of drafting and that the Special Rapporteur's proposal should be referred to the Drafting Committee for more careful study.

77. Mr. AGO observed that, while there was considerable merit in the Special Rapporteur's proposal, the deletion of paragraph 3 without any substitution would give the impression that only the articles enumerated in paragraph 2 applied to honorary consuls and that all the remaining articles were entirely inapplicable to them. On second thoughts, therefore, the Special Rapporteur's proposal might be regarded as unduly drastic.

78. Mr. ERIM agreed that the misunderstanding of paragraph 3 by certain governments was due to the drafting of that provision. The Drafting Committee might be instructed to clarify the text.

79. Mr. SANDSTRÖM thought that the institution of honorary consuls might be clearer if articles 55 to 62 were mentioned first, to be followed by those articles relating to career consuls which should also be applicable to honorary consuls. Paragraph 3 was superfluous.

80. Mr. PAL agreed with Mr. Ago that some provision along the lines of paragraph 3 should be included in article 54. Article 1(f) stated that a consul might be a career consul or an honorary consul. Accordingly, honorary consuls were *prima facie* contemplated in all the provisions of the draft wherever the term consul was used. The mere enumeration in the first article of chapter III of the provisions which were applicable to honorary consuls, might not thus suffice to exclude

the articles not enumerated therein from being applicable to honorary consuls.

81. The CHAIRMAN, speaking as a member of the Commission, thought that the Drafting Committee might be instructed to divide the draft into two parts, the first relating to career consuls and the second to honorary consuls. The second part might refer specifically to the provisions of the first part which were applicable to honorary consuls.

82. Mr. MATINE-DAFTARY did not consider that there would be much practical difficulty in adopting the Special Rapporteur's proposal. It seemed unnecessary to specify the articles which were not applicable to honorary consuls.

83. Sir Humphrey WALDOCK endorsed the Chairman's suggestion, but considered that the draft should be divided into three parts. Chapter I, containing general provisions, applied to both career and honorary consuls, whereas chapter II dealt with career consuls and chapter III with honorary consuls. If that system were adopted, the Special Rapporteur's proposal would be fully acceptable.

84. Mr. ŽOUREK, Special Rapporteur, supported Sir Humphrey Waldock's suggestion, which seemed to clarify the Commission's intention and was in keeping with the structure of the draft as conceived at the twelfth session. If that suggestion were approved, the existing paragraph 3 of article 54 might be placed in the commentary.

85. Mr. AGO also supported Sir Humphrey Waldock's suggestion, but thought, with regard to the wording of article 54, that paragraph 1 should enumerate the articles applicable to honorary consuls, whereas paragraph 2 should refer to articles 55 to 62 and also to the articles enumerated in the existing paragraph 3. He was fully aware, however, that that was a drafting point only.

86. The CHAIRMAN suggested that the Drafting Committee be instructed to revise the draft in the light of Sir Humphrey Waldock's suggestion, and to consider whether a paragraph along the lines of the existing paragraph 3 of article 54 would correspond to the general economy of the draft.

It was so agreed.

87. Mr. ŽOUREK, Special Rapporteur, said that the Spanish Government (A/CN.4/136/Add.8) had entered a reservation concerning the applicability of paragraph 2 of article 42 (Liability to give evidence) to honorary consuls. He had proposed in his third report that the reference to article 42, paragraph 2, in article 54, paragraph 2, should be replaced by a reference to article 42, paragraph 3; he agreed with the Spanish Government that the provision went too far where honorary consuls were concerned, since they were usually persons dealing mainly with professional and private business and devoted only part of their time to consular functions.

88. The same government had entered a reservation concerning the applicability of article 52 (Obligations of third States) to honorary consuls. So far as that objection was concerned, he would point out that at

the twelfth session it had been argued that honorary consuls were sometimes asked to proceed to the sending State and hence should have the same facilities as career consuls in respect of transit through the territory of a third State (574th meeting, paras. 59-70). In view of that argument alone, the Commission had mentioned article 52 among those applicable to honorary consuls.

The meeting rose at 1 p.m.

606th MEETING

Thursday, 8 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 54 (Legal status of honorary consuls)

(continued)

1. The CHAIRMAN invited the Commission to continue its consideration of article 54 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, drew attention to the proposal in his third report (A/CN.4/137, *ad* article 54) that the reference to article 42, paragraph 2, in article 54, paragraph 2, should be replaced by a reference to article 42, paragraph 3. Since the date of his report, the Government of Spain (A/CN.4/136/Add.8) had sent comments in which it expressed a reservation concerning the applicability of article 42, paragraph 2, to honorary consuls.

3. The CHAIRMAN suggested that, if there were no objections, the Special Rapporteur's proposal should be accepted.

It was so agreed.

4. Mr. ŽOUREK, Special Rapporteur, referred to the Belgian Government's amendment (A/CN.4/136/Add.6) to article 54 to the effect that a reference to article 45, paragraph 3 (presumably paragraph 2 was meant) should be added in article 54, paragraph 2, and that the reference to that provision should be omitted from article 54, paragraph 3. The Belgian amendment would have the effect of extending tax exemption to the private staff of honorary consuls, which in his opinion was inadmissible. The tax exemption of honorary consuls themselves was dealt with separately in article 58. He advised against acceptance of the Belgian amendment.

5. The CHAIRMAN suggested that the Commission should accept the Special Rapporteur's advice.

It was so agreed.

6. Mr. ŽOUREK, Special Rapporteur, said that the Spanish Government had also entered a reservation with regard to reference to article 52 (Obligations of third States) in article 54, paragraph 2. Paragraph 4 of article 52, which related to freedom and protection of correspondence and other official communications in transit, seemed to be applicable to honorary consuls so far as communications in the course of consular duties were concerned. On the other hand, it was doubtful whether the first three paragraphs were in all respects applicable to honorary consuls. He suggested that only paragraph 4 of article 52 should be declared applicable to honorary consuls, a suggestion which would probably be acceptable to most States.

7. Mr. JIMÉNEZ de ARÉCHAGA pointed out that the Commission had considered that objection when discussing article 52 (604th meeting, paras. 43 to 60), but had decided not to take it into account, particularly in view of the decision to include in paragraph 1 the phrase "which has granted him a passport visa if such visa was necessary", borrowed from article 40 of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13). The addition of that phrase had restricted the scope of the article to such an extent that there could be no harm in mentioning it among those applicable to honorary consuls. Article 52 as amended implied that the right of transit through third States was not automatic; reference to the provision should therefore be retained in article 54, paragraph 2.

8. The CHAIRMAN, speaking as a member of the Commission, said that, although he agreed in principle with Mr. Jiménez de Aréchaga, he doubted the advisability of retaining the reference to article 52. Indeed, even in diplomatic relations there was, as yet, no generally accepted rule of international law granting such immunities to diplomatic agents in transit, although it was a fairly general practice of *comitas gentium*. Article 52 might be regarded as a reasonable provision with regard to career consuls, but the plenipotentiary conference might consider that it would be excessive to extend it to honorary consuls.

9. Mr. TSURUOKA asked the Special Rapporteur whether it was the general practice to issue honorary consuls with diplomatic passports and visas.

10. Mr. FRANÇOIS pointed out that article 40, paragraphs 1 and 2, were not applicable to honorary consuls, but that article 52, paragraph 1, referred to the personal inviolability provided by article 40 as a whole. He asked the Special Rapporteur to clarify that point.

11. Mr. ŽOUREK, Special Rapporteur, observed that article 52, if taken literally and rendered applicable to honorary consuls, would mean that third States would have heavier obligations towards honorary consuls than the receiving State. It would obviously be difficult for most States to accept such disproportionate obligations. The problem could be solved easily

by referring only to article 52, paragraph 4, in article 54; if the majority of the Commission did not agree to such a course, however, a special article might be drafted, limiting the obligations of third States vis-à-vis honorary consuls to the provisions of paragraphs 3 and 4 of article 40. What mattered above all was that the draft should be generally acceptable to States, and inasmuch as several important States were not prepared to recognize the inviolability of the honorary consul's consular archives an excessively liberal provision concerning the position of honorary consuls in third States would have little chance of acceptance.

12. In reply to Mr. Tsuruoka, he said that, if an honorary consul was a national of the receiving State, he was not entitled to a diplomatic passport issued by the sending State. So far as other honorary consuls were concerned, law and practice in the matter varied widely from one country to another, but he had heard of exceptional cases where diplomatic passports had been issued to honorary consuls.

13. Mr. AGO said that the best solution would be to delete the reference to article 52 from the enumeration in article 54 and to draft a special article on the subject of the obligations of third States to honorary consuls, as the Special Rapporteur had suggested.

14. In reply to the argument that the immunities of honorary consuls should be restricted as far as possible, on the grounds that such persons exercised private activities, he pointed out that an honorary consul travelling in a third State in the exercise of his consular functions was an official of the sending State who might be travelling to the receiving State to take up his post. The third State concerned owed some obligation to allow the honorary consul to carry out his official work. The Commission's task was not to take up a position in favour of or against the institution of honorary consuls; the purpose of the draft was to facilitate the execution of the consular function, and it was for States to decide whether those functions should be performed by career consuls or by honorary consuls. While he agreed that paragraphs 1 and 2 of article 40 were not applicable to honorary consuls, it seemed essential to provide, for example, that the authorities of the sending State should be informed if an honorary consul proceeding to his post had been arrested or detained in a third State; the sending State must know that its official had been prevented from taking up his duties in the receiving State. He hoped that the special article suggested by the Special Rapporteur would be drafted with those considerations in mind.

15. Mr. GROS said that, although he had been greatly impressed by Mr. Ago's arguments, he still saw possibilities for abuse of the provisions of article 52 by honorary consuls. For example, an honorary consul who carried on business in the town where he performed his consular functions might travel to other countries on his private business, and come back to that town to "return to his post"; should the third States concerned accord him personal inviolability in every case? He therefore believed that the special article suggested by the Special Rapporteur should specify that the provisions concerned

would apply to honorary consuls only while they were proceeding to take up their post for the first time and when they were travelling in the exercise of their official functions. He was sure that the plenipotentiary conference would find the provision unacceptable without such restrictions.

16. Mr PAL pointed out that the inclusion of the reference to article 52 in article 54 was not as inconsistent as it might seem. It was specified in article 40, paragraphs 1 and 2, that the consular officials to whom personal inviolability was granted were those who were not nationals of the receiving State and did not carry on any gainful private activity; accordingly, honorary consuls were, by the very requirement of the article, excluded from the benefit of those provisions.

17. Mr. PADILLA NERVO said that he was not opposed to the solution of drafting a special article on the issue under discussion. Nevertheless, he fully endorsed Mr. Pal's remarks: by virtue of the system of cross-references employed it was clear that only the privileges and immunities covered by paragraphs 3 and 4 of article 40 were applicable to honorary consuls. Even if article 52 were left in the enumeration, therefore, its application to honorary consuls would be limited from the legal point of view.

18. Mr. BARTOŠ said that there were two fundamental considerations. First, third States should have some obligation to facilitate the performance of the consular function by honorary consuls; secondly, there had been complaints about the abuse of their position by honorary consuls. In connexion with Mr. Tsuruoka's question, he drew attention to a new and spreading practice of neither refusing nor granting diplomatic visas to certain officials, but issuing them with a courtesy diplomatic visa. That half-way measure meant that the visa was not granted automatically, by virtue of the official's status, but as a favour; it carried with it an intimation to the holder and to the authorities of the sending State that an element of caution must be exercised in the use of such a visa. He was in favour of the Special Rapporteur's proposal that a special article should be prepared concerning the obligations of third States in respect of honorary consuls, and agreed with Mr. Gros on the need to provide guarantees against abuse in such an article, in order to render it acceptable to the largest possible number of governments. The Drafting Committee should be instructed to take those two main considerations into account in preparing a new clause.

19. Mr. TSURUOKA said that he fully agreed with Mr. Bartoš. If third States were to be called upon to facilitate the performance of official functions by honorary consuls, both the sending State and the receiving State which recognized the honorary consul as such should also take measures to enable the third State to protect itself against malpractices.

20. Sir Humphrey WALDOCK agreed with Mr. Bartoš and Mr. Gros that a special article should be drafted and should contain guarantees against abuse. Article 52 as it stood obviously related to career consuls only, and provisions for honorary consuls should be more restrictive.

21. The CHAIRMAN said that the Commission seemed to be agreed that the reference to article 52 should be dropped from article 54, paragraph 2, and that a separate article on the subject should be drafted. He suggested that the Drafting Committee should be instructed to prepare that article on the basis of paragraph 4 of article 52 — to which the Special Rapporteur had raised no objection — and of the restrictive provision suggested by Mr. Gros.

It was so agreed.

22. Mr. ŽOUREK, Special Rapporteur, drew attention to the Swiss Government's comment (A/CN.4/136/Add.11) that, if article 31 and paragraphs 2 and 3 of article 53 were rendered applicable to honorary consuls, there would be no need for article 55 (Inviolability of the consular archives, the documents and the official correspondence of the consulate). The Commission had already decided (605th meeting, para. 50) that article 31 would be applicable to honorary consuls only in respect of offices used exclusively for consular functions. It was clear that article 53 would be applicable to honorary consuls only in the very rare cases where such a consul rented premises specifically for the work of the consulate. An honorary consul was not in fact obliged to exercise the consular function in an office exclusively devoted to that purpose; on the contrary, the vast majority of honorary consuls performed those functions in premises which they used for their private purposes also. It would therefore be difficult to impose the obligations of article 53, paragraph 2, on honorary consuls, save perhaps in the rare cases that he had mentioned. So far as article 53, paragraph 3, was concerned, it was extremely unlikely that an honorary consul would lease for the use of the consulate a large building which would contain offices used for other purposes.

23. The CHAIRMAN pointed out that, in dealing with the question raised by the Swiss Government, the Commission should also take into account article 61 (Respect for the laws and regulations of the receiving State), which contained a cross-reference to article 53, paragraph 1.

24. Mr. ERIM, while agreeing with the Special Rapporteur, opined that the possible, though rare, cases where honorary consuls rented special offices for consular functions should be taken into account.

25. Mr. JIMÉNEZ de ARÉCHAGA said that the Commission had decided (604th meeting, para. 94) to include in article 53 a provision to the effect that consuls had no right to provide asylum. He reserved his right to reopen the discussion on that additional provision when the final text was prepared by the Drafting Committee. It was of course true that a consul could not himself grant asylum. However, it was the practice in those countries which admitted diplomatic asylum for a diplomatic officer who had granted asylum to a person to accommodate the asylee in premises under the control of the sending State, but outside the diplomatic mission itself; consular premises had, in particular, been used in that manner.

26. If, therefore, the additional provision to be included in article 53 were to preclude, as a matter of international public policy, the use of consular premises in that manner, he would have to ask for the reconsideration of the Commission's decision. Meanwhile, however, he drew attention to the need to include in article 54 a reference to article 53, because in the absence of such a reference it might be inferred that honorary consuls, unlike career consuls, could use the consular premises in their charge for the purpose of providing asylum.

27. Mr. AGO said that paragraph 3 of article 53 was clearly inapplicable to honorary consuls. The position with regard to paragraphs 1 and 2 was more difficult. It was perhaps desirable in article 54 to refer to article 53, paragraph 1, because article 61 contained a reference to that paragraph.

28. As to article 53, paragraph 2, the decision would depend on the meaning to be attached to the term "incompatible". If it implied the prohibition of all activities other than consular functions, it would manifestly not be applicable to honorary consuls. If, however, the purpose of the term was to prevent the use of the consular premises in a manner inconsistent with the dignity of the consular office, then paragraph 2 should be made applicable to honorary consuls as well as to career consuls.

29. Mr. MATINE-DAFTARY suggested that the discussion on the inclusion of a reference to article 53 should be postponed until the Commission had taken a decision on article 61. It would be better to formulate separate provisions on honorary consuls than to attempt to make certain portions of article 53 applicable to honorary consuls merely by way of a reference in article 54. Article 53 had been drafted with career consuls in mind and its provisions were not suited to the position of honorary consuls.

30. Mr. ERIM said that much depended on the definition of consular premises. The provisions of article 53 clearly implied that the consular premises were not to be used for the purpose of carrying on a gainful private activity.

31. He drew attention to article 21, paragraph 1, of the Vienna Convention which spoke of "premises necessary" for a diplomatic mission. If the premises of a diplomatic mission, or of a consulate were defined as those necessary for the particular functions, the question would then arise who was to determine the extent of the premises needed.

32. With regard to the question raised by Mr. Jiménez de Aréchaga, he said it would seem that if any consular premises outside the diplomatic mission were used as an annex to shelter asylees, then those premises would become diplomatic premises. The provisions of the draft articles would not seem to preclude that result.

33. Mr. BARTOŠ said that the use of the term "incompatible" in paragraph 2 of article 53 was not intended to refer to any reprehensible activities. Paragraph 2 merely meant that consular premises could be used only for the exercise of consular functions. In that respect, there was a fundamental difference between career

consuls and honorary consuls. A career consul could not engage in private activities, but an honorary consul normally had another occupation. Unless, therefore, it was clearly established that the consular premises properly so-called must be kept separate from the offices used by the honorary consul for his private activities, the result would be to enable the honorary consul who engaged in business, for example, to obstruct routine inspections of his books by the Inland Revenue authorities.

34. Mr. ŽOUREK, Special Rapporteur, pointed out that an honorary consul was often a national or a resident of the receiving State. As such, he obviously had a duty to respect the laws and regulations of the receiving State. It was for that reason that a special article had been included in the draft (article 61) stating that, in addition to the duties specified in the first sentence in paragraph 1 of article 53, an honorary consul had a duty not to use his official position for purposes of internal politics or of securing a private advantage.

35. In view of the difference between the activities of honorary consuls and those of career consuls, it was not possible to make the provisions of article 53, paragraph 2, applicable to honorary consuls merely by way of a reference in article 54. The best course was to consider, at the appropriate stage, whether article 61 should be supplemented by a provision dealing with the exceptional case in which an honorary consul maintained separate premises exclusively reserved for the purpose of carrying out his consular functions.

36. The CHAIRMAN said the majority did not appear to consider it appropriate merely to refer to article 53, paragraph 2, in article 54. Most members seemed to favour the drafting of a new provision on the application of article 53 to honorary consuls. He therefore suggested that the Drafting Committee be instructed to prepare a new provision on honorary consuls, taking into account the opinions expressed by the members, the Commission's decision on article 31 and the provisions of article 53, paragraph 2.

37. The new provision could either form part of article 61 or constitute a separate article. If there were no objection, he would take it that the Commission agreed to his suggestion.

It was so agreed.

38. Sir Humphrey WALDOCK said that the discussion had shown that the term "incompatible" used in article 53, paragraph 2, was capable of more than one meaning. He drew attention to commentary (3) which explained that paragraph 2 meant simply that consular premises should be used only for the exercise of consular functions.

39. In the circumstances, he suggested that the Drafting Committee should be asked to make the text of article 53, paragraph 2, more explicit.

40. The CHAIRMAN said that the Drafting Committee would take that suggestion into consideration.

41. He asked the Special Rapporteur whether there were any other points connected with article 54.

42. Mr. ŽOUREK, Special Rapporteur, thought the Commission might adopt the Netherlands suggestion (A/CN.4/136/Add.4) that the term "honorary consul" should be replaced by "honorary consular official", unless it preferred to keep the expression "honorary consul" and explained that it meant any honorary consular official. The Drafting Committee would consider whether the same change of terminology should be made elsewhere in the draft.

It was so agreed.

43. Mr. ŽOUREK, Special Rapporteur, said that several governments had asked that an explicit reference to article 50 should be included in numerous articles, including article 54, in order to make it clear that the provisions of the articles in question did not apply to members of the consulate who were nationals of the receiving State.

44. His intention had at first been to include in article 54 a new paragraph 3, defining the status of honorary consuls who were nationals of the receiving State. That proposal was contained in his third report (A/CN.4/137). However, as he had already pointed out, he had since decided to propose the insertion in article I (Definitions) of a provision which would deal with the question of nationals of the receiving State and which would cover all the draft articles.

45. He therefore proposed that consideration of his proposed new paragraph 3 be deferred until the Commission had taken a decision on his proposal relating to article 1.

It was so agreed.

46. In reply to a question by Mr. JIMÉNEZ de ARÉCHAGA, Mr. ŽOUREK, Special Rapporteur, said that article 54, paragraph 2, should contain the reference to article 46 (except sub-paragraph (b),) which had been inadvertently omitted in his third report.

47. Mr. YASSEEN noted that article 46(a) gave exemption from customs duties to articles intended for the use of the consulate itself. In the circumstances, it was illogical to make that exemption conditional on the members of the consulate concerned not carrying on any gainful private activity, as was done by the opening sentence of article 46.

48. Mr. ŽOUREK, Special Rapporteur, said that although he agreed with the logic of Mr. Yasseen's reasoning, an unduly liberal text might not be acceptable to governments. In most cases, a consulate in the charge of an honorary consul amounted to no more than the person of the consul. Any extension of the privilege set forth in article 46(a) to an honorary consul who carried on a gainful private activity might be open to abuse because the consul, in that case, carried out his consular duties on his business or professional premises.

49. Mr. YASSEEN said that the opening sentence of article 46 had obviously been written with sub-paragraph (b) in mind. That sub-paragraph dealt with the exemption from customs duties of the articles needed for the establishment of members of the consulate. It was natural to limit that privilege to persons who were not engaged in a gainful private activity, but there was no reason for

applying that limitation when the imported articles were intended for the use of the consulate, in other words for the use of the sending State itself.

50. Mr. SANDSTRÖM said that there would be no danger involved in the unconditional exemption of articles intended for the use of a consulate. The onus would be on the consul concerned to prove that the articles were intended for the use of the consulate and not for his personal use.

51. Mr. ERIM agreed that it would be absurd to lay down the limitation in question in respect of articles imported for the use of a consulate. It was obvious that the wording of article 46 stood in need of improvement. Sub-paragraph (a) should constitute a first paragraph dealing with the exemption from customs duties of articles intended for the use of a consulate. A second paragraph, commencing with the initial sentence of the existing text of article 46, would deal with articles intended for the personal use of members of the consulate.

52. If article 46 were revised in that manner, there would be no difficulty in restricting to the first paragraph the reference to be included in article 54, paragraph 2.

53. The CHAIRMAN recalled the Commission's decision (602nd meeting, para. 81) to bring the wording of article 46 as far as possible into line with the corresponding provisions of the Vienna Convention.

54. The redrafting of article 46 in accordance with that decision would seem to cover the point raised by Mr. Yasseen. The Drafting Committee would, however, take it into account.

55. Mr. AMADO asked whether, under the provisions of the draft articles, an honorary consul would be entitled to exemption from customs duties on a motor car imported for his personal use.

56. Mr. ŽOUREK, Special Rapporteur, replied in the negative. By virtue of article 54, paragraph 2, article 46 (b), dealing with the exemption from customs duty of articles for personal use, was not applicable to honorary consuls.

ARTICLE 55 (Inviolability of the consular archives, the documents and the official correspondence of the consulate)

57. Mr. ŽOUREK, Special Rapporteur, introducing the comments of governments on article 55, said that the Netherlands Government had suggested that the article could be omitted if, in response to that government's comments on article 54, the Commission decided to mention article 33 in article 54, paragraph 2.

58. The Belgian Government considered that article 55 should also stipulate that the private correspondence of other persons working in a consulate on the same terms as an honorary consul, without salary, should be kept separate from the consular archives. In addition it had suggested an amendment under which "goods" connected with a gainful private activity should be kept separate, as should any books and papers relating to the honorary consul's commercial or other private activity.

59. The Swiss Government took the view that articles for official use should be specifically mentioned as also

being inviolable. That point might be left to the Drafting Committee.

60. On the other hand, the Commission itself would have to decide the question raised by the Belgian Government, viz. whether the text should refer to other persons working in an honorary capacity in a consulate headed by an honorary consul; but he thought that such cases were rare.

61. He recommended that article 55 should stand and that the Drafting Committee should be instructed to review the wording in the light of government comments.

62. Mr. BARTOŠ said that assistants would probably receive a salary from the honorary consul; the fact that they were not paid by the sending State could not form the basis of a claim to privileges and immunities.

63. Mr. VERDROSS observed that the Netherlands proposal would only be acceptable if article 33 were amended so as to require that private correspondence must be kept separate from consular archives and documents.

64. Mr. ŽOUREK, Special Rapporteur, in reply to Mr. Bartoš, said that the Belgian Government was clearly not suggesting that subordinate staff working in an honorary consulate without pay should be accorded the same privileges and immunities, but was simply anxious to ensure that, if any such persons did assist an honorary consul in the exercise of his consular functions, the consular archives would be kept separate from their private correspondence.

65. Mr. AGO suggested that the Commission would have to give some thought to the possible situation where the sending State, perhaps for reasons of economy, decided to appoint an honorary consul head of a consulate previously under a career consul. In that instance, the premises and their furnishings would presumably be the property of the sending State and, consequently, immune from search, requisition, attachment or execution.

66. The CHAIRMAN, speaking as a member of the Commission, said that suitable drafting changes, possibly the use of the expression "honorary consular official" as suggested by the Netherlands Government, might provide the answer to the Belgian comment concerning the correspondence of unpaid staff.

67. The point raised by Mr. Ago related to matters discussed at the 605th meeting in connexion with article 54.

68. Mr. AGO said that he had brought up the matter because certain governments had mentioned consular property other than archives in their comments on article 55.

69. Mr. ŽOUREK, Special Rapporteur, recalled that it had been agreed at the 605th meeting to draft a provision concerning the applicability of article 31 to honorary consuls so as to take into account their special position. The possibility to which he had drawn attention would be borne in mind by the Drafting Committee.

70. The CHAIRMAN suggested that article 55 should be referred to the Drafting Committee for review in the light of the comments made during the discussion and the comments by governments.

It was so agreed.

ARTICLE 56 (Special protection)

71. Mr. ŽOUREK, Special Rapporteur, said that the Netherlands Government had drawn attention to a discrepancy between the English and French texts of article 56.

72. The Japanese Government (A/CN.4/136/Add.9) had proposed an addition, taken from the commentary to article 56, which would undoubtedly make for greater precision. He saw no real need for such an amplification, but it was unobjectionable.

73. Mr. GARCÍA AMADOR proposed that the Drafting Committee be instructed to use the same term for special protection in article 31, paragraph 2, article 39 and article 56. The term "special duty" used in article 31 was not a familiar one in international law and should be avoided.

74. Mr. TSURUOKA believed that other governments shared the view expressed by Japan that the obligation imposed on the receiving State in article 56 should be stated explicitly.

75. The CHAIRMAN suggested that article 56 be referred to the Drafting Committee which should be instructed to bring the English text into line with the French.

It was so agreed.

The meeting rose at 1 p.m.

607th MEETING

Friday, 9 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 57 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

1. The CHAIRMAN invited the Commission to consider article 57 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, summarizing the comments by governments, said that he could not agree with the Belgian Government's criticism (A/CN.4/136/Add.6) of the phrase "outside the consulate"; the phrase was necessary in order to make the intentions of the article clear. The Spanish Government (A/CN.4/136/Add.8) had found the article acceptable. The Govern-

ments of Denmark and Japan (A/CN.4/136/Add.1 and Add.9) considered that the article should be deleted, and the Government of Switzerland (A/CN.4/136/Add.11), pointing out that in Switzerland honorary consuls did not enjoy the exemptions specified in article 57, considered the article unacceptable as drafted.

3. His conclusion from the comments and from the information supplied about practice was that the Commission had gone too far in proposing the exemptions provided for in article 57 and that the provision should be deleted.

4. Mr. YASSEEN observed that, as it stood, article 57 contained an inconsistency, for it could be construed to mean that an honorary consul not engaged in a gainful private activity had no need for a work permit. There seemed to be little justification for the article, particularly so far as it related to work permits, but if the Commission decided otherwise at least it should follow the wording of article 43.

5. Mr. VERDROSS said the article would be unobjectionable if redrafted in the sense intended by the Commission, namely that an honorary consul did not need a work permit for the exercise of consular functions. Of course, it was self-evident that members of his family who carried on a gainful private activity outside the consulate must comply with the regulations of the receiving State in regard to work permits.

6. Mr. MATINE-DAFTARY considered that with the deletion of the reference to work permits the article could be retained.

7. Mr. TSURUOKA said that perhaps some explanation was needed of the Japanese Government's laconic comment on article 57. It had probably been prompted by reluctance to accept such a liberal provision because in Japan foreign honorary consuls and their families were subject to the regulations concerning registration and residence in the same way as all aliens. Work permits were not required in Japan; hence the provision concerning such permits was probably not the reason for the Japanese Government's criticism.

8. Since the article was relatively unimportant, he would be prepared to associate himself with the majority view.

9. Mr. AGO said that the comments of governments clearly showed that the article was ambiguous. Mr. Verdross had correctly interpreted the Commission's intention. Obviously, members of an honorary consul's family who worked outside the consulate would be subject to the local regulations concerning work permits, but the article reflected the Commission's opinion that it was necessary to stipulate expressly that for work in the consulate such permits should not be required. Accordingly, the inconsistency mentioned by Mr. Yasseen was more apparent than real.

10. As the Commission had decided (602nd meeting, para. 20) to amend article 43, perhaps its decision on article 57 should be deferred until it had considered the redraft of article 43.

11. Mr. YASSEEN accepted the interpretation of article 57 given by Mr. Verdross and Mr. Ago, but suggested that the article should refer solely to the mem-

bers of an honorary consul's family. Clearly, the honorary consul himself should not have to obtain a work permit for his consular functions.

12. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Yasseen that an honorary consul did not need a work permit to exercise his consular functions, since the obligations imposed on the receiving State in regard to the granting of the exequatur applied also in the case of honorary consuls. On the other hand, so far as he could ascertain from his study of practice, members of the family of a foreign honorary consul were usually subject to the regulations applicable to resident aliens, and consequently States were unlikely to agree to an exemption in their case.

13. Perhaps the best course would be to limit severely the scope of the article to a provision stating that members of an honorary consul's family who worked in the consulate were exempt from the local legislation regarding work permits.

14. Mr. BARTOŠ said that article 57 posed a general problem, which also arose for members of the family of diplomatic officials. For example, there had been a long dispute between the United Kingdom and Yugoslavia as to whether members of the family of diplomatic officials who undertook domestic work in a diplomatic mission required residence and work permits, and finally it had only proved possible to settle the question on a reciprocal basis. That was indicative of the strict approach adopted by some States in the matter. If certain privileges were granted to honorary consuls there would seem to be some need for article 57, but its scope ought to be limited; otherwise, it would be better to delete the provision.

15. Mr. AGO said that if the Commission adopted the Netherlands Government's amendment (A/CN.4/136/Add.4) to substitute the words "honorary consular official" for the words "honorary consul" the Commission would have to consider whether that category could enjoy the exemptions granted in article 57. If, however, the article were to be limited to members of a consul's family, the rule was the simple one stated by the Special Rapporteur.

16. Mr. ERIM pointed out that under article 37 of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13) certain privileges and immunities were extended to members of the family of a diplomatic agent on the condition that they formed part of his household. He believed the Commission would have to adopt the same language if difficulties of interpretation were to be avoided.

17. Presumably any member of an honorary consul's family who began to engage in a gainful private activity outside the consulate would cease to be eligible for the privileges and immunities conferred under article 57 and others.

18. Mr. ŽOUREK, Special Rapporteur, referring to the Netherlands Government amendment, said that it had presumably been prompted by the fact that an honorary consul might in exceptional cases require assistance in the execution of his duties. Though exceptional, the case could occur. If the person concerned was a permanent

resident of the receiving State, was he entitled to the exemptions provided for in article 57? That question might be considered when the Commission discussed the Drafting Committee's redraft of the entire text.

19. He felt bound to emphasize that, by reason of the special position of honorary consuls, the adoption of the Netherlands amendment should not be interpreted as meaning that the sending State could appoint an unlimited number of honorary consular officials. Article 21 applied. Normally, honorary consuls would obtain such assistance as they needed from the subordinate staff they employed in their private activity.

20. The CHAIRMAN suggested that the Drafting Committee should be instructed to submit a new draft of article 57 in the light of comments made by governments and by members of the Commission and taking into account the new text of article 43 and the terms of article 37 of the Vienna Convention.

It was so agreed.

ARTICLE 58 (Exemption from taxation)

21. Mr. ŽOUREK, Special Rapporteur, introducing the discussion on article 58 said that as the Commission had rejected the Belgian Government's amendments to article 54 (606th meeting, para. 5), it was not necessary to consider that government's proposal that article 58 be omitted.

22. The Spanish Government had stated that article 58 would be acceptable provided that it did not apply to honorary consuls who were nationals of the receiving State. That condition was fulfilled by the insertion of article 50 in the draft and in any case it was laid down in the second sentence of the commentary. The Chilean Government (A/CN.4/136/Add.7) had suggested that the condition should be laid down in the body of the article. Similarly, the Swiss Government had urged that the exemption should not apply to nationals of the receiving State.

23. In addition, the Swiss Government considered that the exemption should not apply to salary paid by the sending State, since it would be difficult for the income tax authorities to segregate that salary from income derived from gainful private activity. In other words the exemption should apply only to sums paid to the honorary consul as reimbursement of expenses. That proposal would certainly have to be considered. Usually honorary consuls did not receive a salary, but were reimbursed for expenses incurred in the use of premises, for the services of subordinate staff and for other expenses. Such reimbursement might take the form of a lump sum.

24. Mr. ERIM said that the Swiss Government's argument was not convincing. Surely, it would not be difficult for the tax authorities of the receiving State to find out what salary was being paid by the sending State. He would prefer to leave the article unchanged.

25. On the other hand, he agreed with the Chilean Government that the article itself should specify that it did not apply to honorary consuls who were nationals of the receiving State.

26. Mr. VERDROSS said that article 58 should stand; he could see no force in the Swiss Government's objection. There could be no technical difficulty in ascertaining what proportion of an honorary consul's income constituted payment by the sending State.

27. Mr. BARTOŠ said that difficulties could and did arise in practice where a consul, applying for the transfer of sums collected as charges, refused to submit consular accounts to scrutiny by tax authorities on the grounds that such accounts might reveal confidential information. Indeed, if it were made obligatory for consuls to produce their accounts, a serious blow would have been struck at the principle of the inviolability of consular correspondence and documents. If the provision contained in article 58 were inserted in the draft, some reliance would have to be placed on the honesty of the persons concerned to make truthful returns.

28. Mr. JIMÉNEZ de ARÉCHAGA said that there would be no need to follow the Chilean Government's suggestion if the Drafting Committee worded the article in more explicit terms so as to make it clear that it did not apply to nationals of the receiving State.

29. With regard to the Swiss Government's proposal, any sums paid to the honorary consul by the sending State, whether as salary or otherwise, must be exempt from taxation in the receiving State. He did not think the possibility mentioned by Mr. Bartoš was a serious one, for it would be in the honorary consul's own interest to declare any sums received from the sending State, for which he could claim tax exemption, whereas all other income would be taxable.

30. Mr. FRANÇOIS remarked that the Swiss proposal would greatly complicate the situation, since it was extremely difficult to draw a sharp distinction between an allowance for expense and a salary.

31. Mr. PAL observed that the specific decision adopted at the twelfth session (558th meeting, para. 6) concerning exemption from taxation had not been clearly reflected in the text of article 58. The Commission had decided that the exemption would not extend to honorary consuls who were national of the receiving State.

32. Mr. MATINE-DAFTARY said that the Swiss Government's proposal had probably been prompted by the use of the word "emoluments" in the article. Perhaps the problem could be solved by using suitable wording to indicate that any sums paid by the sending State to an honorary consul were exempt from taxation.

33. Mr. GROS did not think there could be any problem for the tax authorities, for not only would the person concerned make a return of his total income, but in addition, the sending State might certify what was the nature and amount of the payment. In his opinion, the article was acceptable.

34. The word "emoluments" had been well chosen because the methods of remuneration varied widely. It would suffice to add some suitable explanation in the commentary.

35. The CHAIRMAN suggested that the Drafting Committee should consider what kind of clause should be

inserted to indicate which of the provisions of chapter III did not apply to nationals of the receiving State.

36. When considering the suitability of the wording used in article 37, paragraph 3, of the Vienna Convention, the Drafting Committee should bear in mind that the English text correctly referred to "emoluments", but that the French text was faulty. The Drafting Committee might consider whether it was necessary to mention "remuneration" as well as "emoluments" in the article.

37. He suggested that, with those indications, article 58 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.

ARTICLE 59 (Exemption from personal services and contributions)

38. Mr. ŽOUREK, Special Rapporteur, said that governments had commented on three main points. The first question was whether exemption from personal services should be extended to members of the families of honorary consuls and other honorary consular officers. The Belgian Government considered that only honorary consuls themselves were entitled to the exemption and pointed out that in Belgium even members of the families of career consuls did not enjoy the exemption. The Spanish Government also considered that the benefits of the article should not extend to members of the families of honorary consuls. The second point related more particularly to requisitioning, and the Belgian Government considered that the exemption should be enjoyed only by honorary consuls who were nationals of the sending State and did not carry on a gainful private activity. Thirdly, several governments wanted nationals of the receiving State to be excluded from the benefits of the article. Thus, the Government of Yugoslavia (A/CN.4/136), actually proposed that paragraph (2) of the commentary should be inserted in the article itself as paragraph (c), and the Japanese Government and the Chilean Government had made similar suggestions. The Spanish Government considered that the article should be confined to honorary consuls who were not nationals of the receiving State.

39. It emerged from those comments that the principal concern of the governments was that honorary consuls who were nationals of the receiving State should be excluded from the benefit of the exemption. As the commentary would not appear in the final convention, it might be desirable to add an express proviso to that effect in the article itself. He had pointed out, however, that the proviso stipulated in article 50 of the draft would apply to many articles of the draft and that it might therefore be preferable to mention it in article 1. That seemed to be a drafting rather than a substantive point, and might be referred to the Drafting Committee.

40. With regard to the applicability of the article to members of the families of honorary consuls, he considered that the exclusion of those persons would facilitate acceptance of the article at the plenipotentiary conference.

41. Mr. MATINE-DAFTARY said that the comments

received from governments had vindicated the attitude that he had taken on the subject of honorary consuls at the twelfth session (551st meeting, paras. 34-36). Article 59 went much too far; there seemed to be no reason to exempt honorary consuls, who were usually residents of the receiving State and enjoyed its hospitality, from all public service. To extend the exemption to members of the families of honorary consuls was quite wrong. Even if it were specified that the provision related to members of the families of honorary consuls forming part of their household — an expression used in the Vienna Convention for the families of diplomatic agents — it would in many cases cover the entire family of an honorary consul residing in the receiving State, and there seemed to be no reason to exempt distant relatives of an honorary consul from public service, especially military service. It might be justifiable to exempt vehicles used exclusively for consular business from requisitioning, but he could not agree that honorary consuls, who were often wealthy persons, should not be subject to requisitioning, military contributions, and billeting. The Drafting Committee should be instructed to restrict the scope of the article as far as possible.

42. Mr. VERDROSS observed that, so far as the distinction between an honorary consul and his family was concerned, there was a certain difference in scope between sub-paragraphs (a) and (b). Under sub-paragraph (a), he could see no reason why, for instance, the son or daughter of an honorary consul should not be called upon to perform civil defence service, but the contributions referred to in sub-paragraph (b) affected not so much persons as things, and in that connexion no distinction could be made between the honorary consul and his family, because it was impossible to distinguish between the rooms occupied by the consul and by his family if they formed one and the same household. His view was that the first exemption should be enjoyed by the honorary consul only, but that sub-paragraph (b) should also be extended to members of his family forming part of his household.

43. Mr. YASSEEN said that personal exemption of the honorary consul from all public services was justified by the interests of consular functions, which would be interrupted if he were obliged to perform such services. On the other hand, sub-paragraph (a) should not be applicable to members of the consul's family, because their absence on public service would not affect the functioning of the consulate, although he agreed with Mr. Verdross that sub-paragraph (b) would apply to the honorary consul's immediate family. The article might be revised so as to make it clear that the exemption should be accorded only to the extent to which it was essential for the regular functioning of the consulate.

44. Mr. AMADO said that he had always been in favour of according to honorary consuls a minimum degree of privileges and immunities and of not assimilating them to career consuls. In the case of article 59, it seemed excessive to grant the exemption to honorary consular officials; the purposes of the draft would be best served by limiting the provision to honorary consuls only. Moreover, he criticized the expression "honorary consular officials" as being self-contradictory and meaningless.

45. Mr. SANDSTRÖM observed that the application of the article would in any case be very limited, since the majority of honorary consuls were nationals of the receiving State. If a provision excluding nationals of the receiving State from the exemption in question were inserted in the article itself or elsewhere in the draft, he would find article 59 acceptable.

46. The CHAIRMAN, speaking as a member of the Commission, said he had some misgivings concerning the wording of the article. Even if nationals of the receiving State were excluded from the exemption, honorary consuls might be nationals of the sending State or of a third State who were domiciled in the receiving State; it was hardly justifiable to grant to such persons the same privileges as to career consuls, when they usually had their own principal occupation and devoted only a part of their time to consular functions. There seemed to be no reason why a permanent resident of the receiving State should be placed in an exceptional position as soon as he assumed the functions of an honorary consul. He therefore agreed with Mr. Matine-Daftary and Mr. Amado that the scope of the article should be substantially restricted.

47. Sir Humphrey WALDOCK said that the Chairman's point would be met if the passage "who are not nationals of or permanently resident in the receiving State", used in several articles of the Vienna Convention, were included in article 59.

48. The CHAIRMAN observed that Sir Humphrey Waldock's suggestion might be usefully applied to other articles in chapter III.

49. Mr. PADILLA NERVO drew attention to the debate on the applicability of the article on exemption from personal services to honorary consuls during the Commission's twelfth session (558th meeting, paras. 18-20, where discussed as article 39). The text provisionally adopted by the Drafting Committee had excluded nationals of the receiving State from the exemption. At that time, Sir Gerald Fitzmaurice had suggested that the article should apply to honorary consuls as it stood, pointing out that it would be most undignified if a person received in the capacity of an honorary consul could be required to furnish personal services and contributions by the receiving State. Mr. Sandström had supported that suggestion. He himself also endorsed those views, and thought that the exception in respect of nationals of the receiving State should be maintained.

50. Mr. ERIM said he could not support Sir Humphrey Waldock's suggestion. The Commission had seen fit to extend certain exemptions to honorary consuls solely in the interests of the regular functioning of the consulate. If the exemption provided for in article 59 was not granted to honorary consuls, the exercise of consular functions might be affected — though such cases would be exceptional. The interests of the receiving State would of course be the paramount consideration if the honorary consul was a national of that State; all citizens should be subject to some kind of public service. But if the honorary consul was not a national of the receiving State, the interests of the sending State must be regarded as the overriding consideration, even if the

person concerned was a permanent resident of the receiving State.

51. The exemption should not, however, be extended to members of the families of honorary consuls. He was sure that many participants in the plenipotentiary conference would agree with him that it would be inadmissible to allow, for example, the son of an honorary consul who was of military age to avoid military or other service. The purpose of according privileges and immunities to a consul's family was in fact to help the consul himself to perform his functions, by maintaining his peace of mind; in the case at issue, an extension of the privilege seemed to be unjustifiable.

52. Mr. FRANÇOIS said he shared Mr. Erim's doubts concerning Sir Humphrey Waldock's suggestion. The difficulty lay in determining the exact meaning of the expression "permanently resident". An honorary consul who was a national of the sending State would naturally establish his permanent residence in the receiving State. Would the passage suggested by Sir Humphrey Waldock relate to nationals of the sending State who took up residence in the receiving State on their appointment as honorary consuls, or would it apply to persons who had been settled in the receiving State for some time? The fact that an honorary consul had spent a long period in the receiving State should not be a reason for denying to him the benefit of the article. He was not in favour of imposing undue restrictions on honorary consuls who were nationals of a sending State because, when the receiving State accepted an honorary consul, it accepted *ipso facto* the consequences of such an appointment and had to treat the honorary consul as an official of the sending State. He would even go so far as to say that an honorary consul who was a national of the receiving State might be exempt from taxes and dues on emoluments received in his capacity as honorary consul; the Commission's opinion cited in the last sentence of the commentary to article 58 had not been unanimous. Sir Humphrey Waldock's suggestion was therefore, in his opinion, far too restrictive.

53. Mr. ŽOUREK, Special Rapporteur, said that it was particularly important for the Commission, when considering the draft on second reading, to take into consideration the treatment actually extended to honorary consuls in State practice. The United States Government had indicated (A/CN.4/136/Add.3) that, in accordance with its practice, honorary consuls who were nationals of or residents in the receiving State should be entitled to consular privileges only within the limits of the performance of their official functions and the custody of the archives of the consular post. Except for that, their status and that of their families should be the same as that of any other national or permanent resident.

54. In order to make the text more acceptable to governments, he suggested that the reference to the members of the family should be deleted, at least in sub-paragraph (a). In addition, it would be wise to treat persons permanently resident in the receiving State on a par with nationals of that State. As to the interpretation of the term "permanent resident", it

could only mean a person who had been resident in the receiving State before being appointed honorary consul. Such a resident alien would continue his previous private activities in the receiving State and it was unlikely that many States would be prepared to extend to him the same privileges as to a person who entered the country on appointment. It had been suggested that the number of persons involved would be small; that might be so, but in his opinion a principle was at stake. The application of the local law to resident aliens involved the exercise of sovereign rights which States were very reluctant to renounce.

55. Mr. PADILLA NERVO recalled that at the twelfth session the Commission had adopted the provision omitting the reference to permanent residence by a very large majority (558th meeting, para. 37). The Commission had then been greatly impressed by Sir Gerald Fitzmaurice's argument that if a receiving State accepted a person as consul of the sending State, it would be acting inconsistently with that acceptance if it were to hamper him in the exercise of the consular functions by imposing upon him, for example, the contributions specified in article 59 (*ibid.*, para. 26).

56. At the time Sir Gerald Fitzmaurice had urged that an honorary consul, even if a national of the receiving State, should be exempted from personal services and contributions which would interfere with the exercise of his duties. The argument was all the stronger when applied to persons who were not nationals of the receiving State but merely resided in that State.

57. The CHAIRMAN put to the vote the proposal that persons who were permanently resident in the receiving State should be excluded from the benefit of article 59.

The proposal was rejected by 11 votes to 3, with 2 abstentions.

58. Mr. YASSEEN, explaining his vote against the proposal, said that there were compelling reasons for not extending to a national of the receiving State the exemption specified in the article. The exemption would, if applied to a national, be a departure from the principle of the equality of all citizens in respect of public burdens. No such compelling reasons existed in the case of aliens who were permanently resident in the receiving State.

59. The CHAIRMAN suggested that article 59 be referred to the Drafting Committee on the understanding:

(1) that its provisions would not apply to nationals of the receiving State;

(2) that the exemption specified in sub-paragraph (a) would apply to honorary consuls but not to members of their families;

(3) that the exemption specified in sub-paragraph (b) would apply only to matters connected with the honorary consul's official duties and to the residence occupied by him and his family.

It was so agreed.

ARTICLE 60 (Liability to give evidence)

60. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had decided (606th meeting, para. 3) to include article 42, paragraph 3, in the list of provisions rendered applicable to honorary consuls by paragraph 2 of article 54. Since article 42, paragraph 3, dealt with the liability to give evidence, article 60 became redundant and he proposed that it should be omitted.

It was so agreed.

ARTICLE 61 (Respect for the laws and regulations of the receiving State)

61. Mr. ŽOUREK, Special Rapporteur, recalled the Commission's decision (*ibid.*, para. 37) in connexion with the inclusion in article 54 of a reference to the various paragraphs of article 53. The Commission had decided that paragraph 3 of article 53 was not applicable to honorary consuls. It had thereby disposed of the Belgian Government's comment on that point, which related to both article 54 and article 61.

62. The Commission had instructed the Drafting Committee to revise article 61 by adapting the provisions of article 53, paragraph 1, to honorary consuls; it had also decided to prepare an additional provision — which could either be a separate paragraph of article 61 or a separate article — embodying the rule set forth in article 53, paragraph 2, adapted to the needs of honorary consuls.

63. There appeared therefore to be no need to discuss the substance of article 61 but he drew attention to the Netherlands comment, which suggested that the prohibition contained in article 61 went perhaps too far.

64. Mr. FRANÇOIS said that he agreed with the Netherlands comment but thought the remedy proposed by the Netherlands Government unsatisfactory. It would not be appropriate to speak of "unreasonable advantages". The Netherlands objection could be met by means of a drafting change which would make article 61 state that the consul had the duty not to "abuse" his official position for purposes of internal politics or private advantage.

65. Mr. AGO suggested that the drafting of article 61 could be improved by replacing the reference to paragraph 1 of article 53 by the actual words of that paragraph, adapted to the position of honorary consuls.

66. Mr. ŽOUREK, Special Rapporteur, said that he would not object to article 61 being so redrafted.

67. The CHAIRMAN suggested that article 61 should be referred to the Drafting Committee with the drafting suggestions made by Mr. François and Mr. Ago.

It was so agreed.

ARTICLE 62 (Precedence)

68. Mr. ŽOUREK, Special Rapporteur, said that the Belgian comment on article 62 actually concerned article 54, paragraph 3, which had already been considered.

69. There were two government comments on the substance of article 62. Finland (A/CN.4/136), in reply to the request for information on State practice made in the commentary, had stated that the rule contained in article 62 was observed by Finland. The Swiss Government had indicated that it made no distinction in matters of precedence between career consuls and honorary consuls, but had added that the system embodied in article 62 seemed preferable to the Swiss system.

70. In the circumstances, there being no objection from governments to the article, he suggested that it be adopted as it stood.

It was so agreed.

ARTICLE 63 (Optional character
of the institution of honorary consuls)

71. Mr. ŽOUREK, Special Rapporteur, said that there had been no government comments on the substance of article 63, which could therefore be adopted as it stood. The Netherlands Government had proposed, as in the case of other articles, a change of terminology (replacement of "honorary consul" by "honorary consular official").

72. Mr. MATINE-DAFTARY expressed his complete agreement with Mr. Amado's criticism of the expression "honorary consular official" (para. 44 above). The use of the term in order to cover a few rare cases would broaden its scope.

73. Mr. AGO observed that it would be interesting to find out whether, in State practice, use was made of honorary consular officers other than honorary consuls who were heads of post.

74. Mr. BARTOŠ pointed out that it was by no means rare for a private citizen, usually a merchant or shipping agent, to be appointed honorary consul at a place where there existed a career consul or consul-general of the sending State. He could cite a number of examples of that practice in relation to his country both as sending State and as receiving State. The honorary consular officer so appointed would give the career officer the benefit of his local experience and his knowledge of trade and shipping matters.

The meeting rose at 1.5 p.m.

608th MEETING

Monday, 12 June 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 63 (Optional character of the institution
of honorary consuls) *(continued)*

1. The CHAIRMAN invited the Commission to continue the debate on article 63 of the draft on consular intercourse and immunities (A/4425).

2. Mr. YASSEEN, with reference to the Netherlands proposal (A/CN.4/136/Add.4), said that there were honorary consular officers other than the honorary consul head of post. He could cite a case where the honorary consul-general was assisted by his son, who acted in the capacity of honorary vice-consul. When the honorary consul-general was absent, his son replaced him.

3. Mr. PADILLA NERVO, in reply to the question asked by Mr. Ago (607th meeting, para. 73), said that Mexican law mentioned honorary consular officers. Article 78 of the regulations governing the Mexican consular service specified the method of compensating the services rendered by "honorary consular staff, which includes the categories of consul and vice-consul".

4. In addition, Mexican law permitted the appointment of honorary consular agents by a consul-general, on condition that the Mexican Foreign Ministry was advised of the appointment.

5. Article 1(f) of the draft under discussion defined "consul" as any person appointed to exercise consular functions "as consul-general, consul, vice-consul or consular agent". The term "honorary consul" used in article 63 therefore covered not only honorary consuls heads of post, but also the subordinate consuls serving in an honorary capacity.

6. Mr. ŽOUREK, Special Rapporteur, said that, although there existed some honorary consular officers other than heads of post, he thought it might be preferable to leave the expression "honorary consul" in article 63 and in the other articles of chapter III of the draft and to prepare a new provision stating that the expression meant any honorary consular official, whether head of post or not. Such a provision would make it possible to use the expression in question, which had been current for a very long time.

7. The CHAIRMAN suggested that the Drafting Committee be instructed to examine the terminology used in article 63 and to decide whether the term

"honorary consul" should be replaced by the wider term "honorary consular official."

It was so agreed.

ARTICLE 64 (Non-discrimination)

8. Mr. ŽOUREK, Special Rapporteur, said that two governments had commented on article 64. The Norwegian Government considered the article superfluous (A/CN.4/136). The Netherlands Government had proposed that the word "States" at the end of paragraph 1 should be replaced by "the Parties to the present Convention". He had some difficulty in formulating a rule of general international law, which applied to all States, in terms which would limit its application merely to those that became contracting parties to the multilateral convention under discussion.

9. As to the text of the article, it differed from that of article 44 of the draft on diplomatic intercourse (A/3859) in that paragraph 2 (a) of that article had been dropped. At its twelfth session the Commission had arrived at the conclusion that the passage in question was unsatisfactory (article 64, commentary (3)) although, of course, it had then been too late to change the text of the diplomatic draft. In spite of the explanation given in commentary (3), the Vienna Conference had adopted as article 47 of the Convention on Diplomatic Relations (A/CONF.20/13) a text which included the provisions of the said paragraph 2 (a). Opinions at the Conference, however, had been divided, as shown by the fact that a proposal to replace article 44 of the diplomatic draft by the text of article 64 of the consular draft had been defeated in the Committee of the Whole by the narrow margin of 30 votes to 20, with 19 abstentions.¹

10. The Vienna Conference had also inserted in paragraph 2 (b) (corresponding to paragraph 2 of article 64) the words "by custom or agreement." Those words were unduly restrictive because countries might grant broader privileges than those specified in the draft articles by some other means, such as domestic legislation.

11. The Commission was faced with the problem of the situation created by the adoption at Vienna of paragraph 2 (a). One solution would be to eliminate article 64 altogether, but a decision to that effect might be open to misinterpretation. He therefore proposed that article 64 should be adopted as it stood, for the reasons which had led the Commission to adopt that text in 1960 were still valid.

12. Mr. EDMONDS said that article 64 was a very important article, especially if read in conjunction with article 65 (second text). The provisions of articles 64 and 65 were, in fact, complementary. Article 64, paragraph 2, described the situation which would arise under bilateral agreements between States. Because of the importance of the provisions contained in article 64, he urged the Commission to retain the text which it had adopted in 1960.

13. Mr. FRANÇOIS expressed doubts regarding the Special Rapporteur's argument against the Netherlands amendment. A State which did not sign the proposed multilateral convention could not rely on article 64, paragraph 1, nor for that matter could it avail itself of any of the provisions of the convention in its relations with States which were parties to it.

14. Mr. MATINE-DAFTARY said that both the view expressed by the Special Rapporteur and that expressed by Mr. François were defensible. He was inclined to agree with the Special Rapporteur that the intention of the Commission was to draft rules for universal application and he therefore tended to favour the retention of the word "States". If that word were retained, however, it was essential to add a clause modelled on article 47, paragraph 2 (a), of the Vienna Convention, to cover the case where a State not a party to the Convention claimed the benefit of article 64, paragraph 1, in its relations with a State which was a party. In that event, the latter would be able to rely on paragraph 2 (a) for the purpose of applying restrictively the provisions of the Convention vis-à-vis the non-party State.

15. Mr. ŽOUREK, Special Rapporteur, said that the purpose of article 64 was to set forth in paragraph 1 a general rule of international law, which, as pointed out in commentary (1), was inherent in the sovereign equality of States. The article went on to provide, in paragraph 2, that where a receiving State granted privileges and immunities more extensive than those provided for in the draft articles, it was free to do so on the basis of reciprocity.

16. The draft contained articles which embodied existing rules of customary international law; hence it was appropriate to refer in paragraph 1 to "States" in general rather than to the "Parties to the Convention". Of course, where the provisions of the draft contained innovations which constituted progressive development of international law, those provisions would only apply to the contracting parties.

17. Mr. YASSEEN supported article 64 as adopted in 1960. The Commission should not be influenced by the adoption at Vienna of the paragraph 2(a) in question, which the Commission had rightly dropped from the text.

18. There was an important reason of principle for not including paragraph 2(a). As he saw it, all rules of law should be applied according to their plain meaning; one could not talk of provisions being applied "restrictively", or for that matter extensively.

19. Paragraph 2 of article 64 accurately expressed the situation. The draft articles guaranteed an irreducible minimum of privileges and immunities. Beyond that, States could, of course, grant more extensive privileges; in that event, and only in that event, would the question of reciprocity arise.

20. The discussion on the Netherlands proposal could only affect the drafting. The position with regard to substance was clear; the provision of article 64, paragraph 1, would apply to the States which became parties to the proposed multilateral convention. For States not parties to the convention those provisions would constitute *res inter alios acta*.

¹ See *United Nations Conference on Diplomatic Intercourse and Immunities*, Committee of the Whole, summary record of the 37th meeting.

21. It was true that many — although not all — articles of the draft codified existing rules of customary international law. However, even those articles would be binding — as articles of a convention — only upon the contracting parties to the convention. Non-party States were perhaps under a duty to observe the rules of customary international law expressed therein, but that did not mean that the articles as such would be binding upon those States.

22. Mr. JIMÉNEZ de ARÉCHAGA supported Mr. Matine-Daftary's suggestion that article 64 should be redrafted along the lines of article 47 of the Vienna Convention.

23. The principle of reciprocity, expressed in article 64, paragraph 2, could apply both to the extensive application of the draft articles and to their restrictive application. He realized that the Commission had decided at its twelfth session not to include paragraph 2(a), but had been overruled by the plenipotentiaries at the Vienna Conference. It was therefore appropriate to include paragraph 2(a) in the text.

24. There was an additional reason for its inclusion; any discrepancy between the Vienna Convention and the draft on consular intercourse could lead to unwarranted conclusions with regard to the scope and application of the rules contained in the latter.

25. He did not believe that the Netherlands amendment affected merely the drafting. As interpreted by the Special Rapporteur, the provisions of article 64, paragraph 1, constituted a stipulation in favour of third States. That fact involved an important technical question. If the draft articles merely codified existing international law, the Special Rapporteur would be right in advocating the retention of article 64 as it stood. But in fact many of the provisions of the draft articles (e.g. those concerning the personal inviolability of consuls and those relating to the privileges of members of their families) constituted innovations, accepted by the Commission as progressive development of international law.

26. Since the draft articles were intended to do more than simply restate existing international law, it would not be fair to give unconditionally all the rights specified therein to a State which did not accept all the duties. Paragraph 2(a) of article 47 of the Vienna Convention would then serve as a valuable safety valve and would meet the objections put forward by Mr. François and the Netherlands Government. The contracting parties to the proposed multilateral convention would in that way be enabled to restrict the application of the draft articles vis-à-vis a State not a party to the convention.

27. Mr. MATINE-DAFTARY pointed out that the Vienna Convention began with the words "The States Parties to the present Convention". If, therefore, any one of the articles were expressly declared to be applicable to all States, one would have to accept the interpretation put forward by the Special Rapporteur. It was, however, essential to include the provisions of paragraph 2(a) in order to make it possible for a State party to the proposed Convention to apply its provisions restrictively vis-à-vis a non-party State which claimed the benefit of its provisions.

28. Mr. AGO said that the term "States" as used in paragraph 1 could not but mean the signatory States. The draft was only in part a restatement of customary international law. Many of its provisions went far beyond existing international law, and it was unthinkable that a State party to the future Convention should be asked to accord all the privileges stated therein to a State which was not a party. There was, no doubt, an irreducible minimum of privileges and immunities which should be granted to all consuls, but there was no rule of customary international law requiring all consuls to be treated alike.

29. As a general rule, the draft should be brought into line with the corresponding articles of the Vienna Convention. In the case of article 64, however, it would not be advisable to introduce the provisions of paragraph 2(a) of article 47 of the Vienna Convention because those provisions were quite unsatisfactory. The provisions of the draft articles were sufficiently clear and they should be applied as they stood. The suggestion that they might be applied "restrictively" was particularly dangerous because it would tend to weaken the obligations assumed by States under the convention. The use of the term "restrictively" seemed to imply that it was possible, by way of retaliation, lawfully to reduce the obligations set forth in the draft articles.

30. For those reasons, he urged the Commission to retain article 64 as adopted at the twelfth session.

31. Mr. SANDSTRÖM pointed out that the opening words of article 64 "In the application of the present articles" made it plain that the States referred to were the contracting parties.

32. He saw no serious objection to including a provision along the lines of article 47, paragraph 2(a), of the Vienna Convention, for it was conceivable that a particular rule of the draft, for example one concerned with the privileges and immunities of a member of a consular official's family, might be applied in a restrictive way owing to differences of approach as between, say, East or West European countries. Alternatively, more favourable treatment than that laid down in the draft in the matter of customs or tax exemptions might be accorded.

33. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago's interpretation of the Commission's intention. It was possible that a contracting party might expressly undertake to apply the provisions of the convention to a non-contracting party, but the Commission had not intended to cover that eventuality. From the drafting point of view there might be some objection to using the term "Contracting Parties" in article 64, for as it stood the draft was not described as a "convention". The point could be explained in the commentary and a future conference of plenipotentiaries might decide to change the wording.

34. Some articles in the draft stated rules of customary law, and if those rules became conventional rules by virtue of signature of the multilateral convention the contracting parties would still be bound by customary rules vis-à-vis non-contracting parties. However, they

were under no obligation to apply conventional rules created by the Convention to the latter.

35. He did not agree with Mr. Jiménez de Aréchaga's interpretation. In his opinion, article 47, paragraph 2(a) of the Vienna Convention dealt with the restrictive application of the Convention's provisions themselves; paragraph 2(b) by contrast was concerned with the quite distinct case where States agreed to apply, or customarily applied, as between themselves a rule which was more liberal than that laid down in the Convention.

36. Believing that the Vienna Conference had been mistaken in its decision to insert paragraph 2(a), he considered that article 64 should be retained as it stood.

37. Mr. VERDROSS said that article 47, paragraph 2(a), of the Vienna Convention was not particularly felicitous; it simply stated the principle of retorsion. He preferred the text of article 64 as adopted in 1960.

38. Sir Humphrey WALDOCK agreed with the views expressed by Mr. Yasseen and Mr. Ago. It was quite unthinkable that the contracting parties could impose obligations on third States or that a multilateral convention conferred rights on the latter in regard to non-discrimination. Since article 65 did refer to "the Parties", it might be possible to use the expression "Contracting Parties" in article 64, which as it stood was undoubtedly open to misinterpretation, as the discussion had disclosed. Furthermore, it would be appropriate to establish consistent terminology in articles 64 and 65.

39. He associated himself with the criticisms concerning article 47, paragraph 2, (a) of the Vienna Convention, the principal one being that it seemed to imply a possible choice between a restrictive or a liberal interpretation of the Convention. From the legal point of view there could only be one way of applying the Convention, and any dispute would have to be submitted to judicial settlement. If a contracting party violated the provisions of the Convention by a restrictive interpretation, there would be a clear right of retorsion.

40. On the matter of restrictive interpretation the Commission ought to consider the relationship between articles 64 and 65, since the latter provided for the possibility of maintaining in force existing bilateral conventions or the conclusion of new bilateral conventions in the future, which might create a special regime between the two signatory States of a more restrictive character, say, in regard to tax exemptions or other privileges and immunities. At the moment article 64, paragraph 2, provided for a more liberal regime on a reciprocal basis, but not for a more restrictive one. That omission, perhaps should be made good, though not by means of a provision modelled on article 47, paragraph 2 (a), of the Vienna Convention.

41. Mr. FRANÇOIS said he did not see much force in the Chairman's argument that the term "Contracting Parties" could not be used in article 64. All ambiguity should be avoided and members should take warning from the fact that even the Special Rapporteur himself had interpreted the word "States" in the contrary sense to that intended by the Commission.

42. Mr. ERIM agreed with Mr. François that the

drafting of paragraph 1 should be reviewed. Clearly a non-contracting party could not claim any of the benefits conferred under the multilateral convention, but a point of such importance could not be relegated to the commentary. Of course, a contracting party could extend the benefits of the convention to third States, but that situation was not contemplated in article 64.

43. He could not agree with Mr. Ago's opinion concerning article 47, paragraph 2 (a), of the Vienna Convention. In a multilateral convention there was no harm in stating certain self-evident rules and, clearly, if one State applied provisions of the convention restrictively vis-à-vis another State, that other State had the right to retaliate. The fact that the Vienna Conference had decided to insert such a provision indicated that it would serve some purpose.

44. He considered that article 64 should be modelled on article 47 of the Vienna Convention.

45. Mr. PADILLA NERVO expressed a preference for article 64 as it stood. He was not very much in favour of using the term "Contracting Parties" in article 64, the terminology of which should differ from that of article 65 so as to stress that the first dealt with a multilateral convention and the second with bilateral instruments.

46. He had not attended the Vienna Conference and had no direct knowledge of the reasons why sub-paragraph (a) had been inserted in article 47. In his opinion it was quite the most regrettable provision in the whole of the Vienna Convention, because it allowed some latitude of application, whereas in fact what was required was strict compliance with the precise terms of the Convention. It seemed a great mistake to imply that States could avoid fulfilling the obligations of the Convention on the grounds that they were taking retaliatory action. If one contracting party did apply a particular provision restrictively to another State, then that other State could secure redress by diplomatic means. He could only explain the insertion of sub-paragraph (a) by the fact that the mode of applying certain provisions in the Vienna Convention was left to the discretion of States as, for example, those concerning the size of a diplomatic mission or the extent of customs exemptions. Since members of a consulate enjoyed much less extensive privileges and immunities, such a provision was probably unnecessary in the draft under discussion and, in any event, he would be strongly opposed to one modelled on sub-paragraph (a).

47. Paragraph 2 of article 64 should also stand, because the most-favoured-nation clause was often inserted in bilateral conventions, such as the consular convention between the United States and Mexico.²

48. Mr. JIMÉNEZ de ARÉCHEGA, explaining that he had not been present during the discussion of the article at the twelfth session, said that he was surprised to learn that the Commission had intended to refer in article 64, paragraph 1, to the "Contracting Parties", a

² United Nations *Treaty Series*, vol. 125 (1959), No. 431, pp. 302 *et seq.*

meaning which was not borne out by the text itself or by paragraph (1) of the commentary. Clearly both would have to be revised, otherwise the wording was open to the interpretation that any State could claim the right not to be discriminated against as though the provision were *erga omnes*. If the text were appropriately redrafted he would not insist on the inclusion of a provision on the lines of article 47, paragraph 2 (a), of the Vienna Convention which had only seemed essential to him on the assumption that paragraph 1 in article 64 referred to all States.

49. Mr. PAL considered that article 64 should stand as drafted, subject to the revision of paragraph 1 so as to remove any ambiguity.

50. Though he was not in favour of a provision on the lines of article 47, paragraph 2 (a), of the Vienna Convention he would not criticize it as severely as some members of the Commission had done. The paragraph contemplated the possibility of restrictive application of some of the provisions. There were indeed provisions admitting of restrictive or liberal application even without any variation in their construction. Where, for example, there was scope for some discretion, some latitude was necessarily left in the application of such a provision, and that did not necessarily involve two alternative interpretations. Some light had been thrown on that point by Mr. Matine-Daftary at the twelfth session (548th meeting, para. 78), who had suggested a provision reading "In the case of the rules which allow a certain latitude to the receiving State, the scope of their application shall be based upon the principle of reciprocity".

51. Mr. BARTOŠ said that, although inclined to take the universalist point of view in regard to multilateral treaties, he did not think that those instruments always represented a source of international law. In positive international law, according to the principles adopted by the Nuremberg International Military Tribunal, certain clauses of multilateral treaties reflected the legal conscience of mankind and as such were mandatory not only *inter partes*, but also for third States, which had to observe them as rules of positive customary international law. That conclusion of the Nuremberg Tribunal had been endorsed in General Assembly resolution 95 (1). Nevertheless, he did not believe that every provision which the Commission inserted in a multilateral convention could be held to answer that description; most of those provisions therefore constituted obligations between the parties. With regard to the wording used, he believed that it did not make very much difference whether reference was made to States or to contracting parties, since the word "State", for the purposes of the convention, was construed to mean a State party to that instrument.

52. With regard to the negative and positive hypotheses in paragraphs 2 (a) and 2 (b) of article 47 of the Vienna Convention, he observed that the participants in the Vienna Conference had included paragraph 2 (a) for political, rather than for juridical reasons. The result was something which could not be regarded as desirable in international law: no jurist could recommend opening the door to what amounted to reprisals. He believed

that many of those who had voted for the provision had been unaware of its full implications; in any case, the Commission must proceed from juridical grounds, and could leave it to the politicians who would attend the plenipotentiary conference to decide whether or not they wished to introduce a similar provision into the convention on consular intercourse. The Commission was using the analogy of the Vienna Convention to facilitate its work, but it should only follow the provisions of that instrument insofar as they represented an improvement on the Commission's own text; in his opinion, that could not be said of article 47 of the Vienna Convention.

53. Mr. ŽOUREK, Special Rapporteur, said that Mr. Matine-Daftary was attributing to him an opinion which he did not in fact hold. His objection to the Netherlands amendment was based on the difficulty of formulating a general principle and restricting it only to the contracting parties. It had never entered his head, however, that the benefit of the clauses of the Convention might be claimed by States other than the contracting parties and that those States should be able to claim the privileges and immunities of the convention for their consuls. The Drafting Committee must consider the wording carefully, in order to exclude all possibility of such a serious misinterpretation. The whole matter would also be explained in the commentary. Apart from that point, he thought that the Commission was agreed on the substance of the article and could approve it in the form in which it had been approved at the twelfth session.

54. Mr. MATINE-DAFTARY thought that the Commission should take a firm decision on the Netherlands' amendment. He could not agree with Mr. Bartoš and the Special Rapporteur that there was no difference between "States" and "States Parties to the Convention," particularly since paragraph (1) of the commentary stated unequivocally that paragraph 1 of article 64 set forth a general rule inherent in the sovereign equality of States and did not confine that rule to the contracting parties. The fact that the amendment was proposed by the government of a country with such a long tradition of international law seemed to call for the utmost caution in the matter. Members of the Commission were, of course, entitled to their personal interpretations of provisions of the draft, but it should be borne in mind that the resulting convention would be applied and interpreted by national authorities and courts in the future.

55. Furthermore, he could not agree with members who had strongly criticized paragraph 2 (a) of article 47 of the Vienna Convention. The terms of a multilateral instrument could, in his opinion, be applied restrictively. For instance, if State A considered that the term "members of his family" applied only to a consul's wife and minor children, and a consul was appointed to country B, where the term was interpreted to mean a consul's wife and all his children, irrespective of age, it might be said that the application of the provisions was liberal in State B and restrictive in State A. There should be no cause for complaint if the authorities of State B applied

to the consul of State A the treatment extended by the government of his country to the consuls of State B.

56. Mr. LIANG, Secretary to the Commission, observed that the views he had expressed on the subject during the twelfth session (548th meeting, para. 74) coincided with the purport of Mr. Ago's statement both at that session and at the current meeting. He did not think it could be accurate to speak of restrictive or liberal application; application could be either restrictive or liberal, but restrictive application, which was less than the application of the convention, would constitute a violation of the convention. On the other hand, if a State accorded more extensive privileges than did the convention, the question of application did not arise. He had hoped that paragraph 2(a) of article 44 of the draft on diplomatic intercourse would be changed at the Vienna Conference; he now thought it would be unfortunate if the Commission were to perpetuate the obscure provision that had been included in the Vienna Convention, particularly since article 64 as adopted in 1960 was so much more logical and clear.

57. Mr. ERIM said that the existing text of article 64 might be less dangerous if article 47 of the Vienna Convention had not been adopted. If the provision of paragraph 2(a) were omitted from the article, the effect would be that a State wishing to apply the convention on the same footing as another State would be open to criticism for discrimination. For example, if the receiving State referred to in article 50, paragraph 2, of the draft granted negligible privileges and immunities, and the right of retorsion were not recognized, discrimination might be alleged. Article 47 of the Vienna Convention was not so unfortunate as many members seemed to think. If the provision of paragraph 2 (a) of that article were omitted from the draft on consular intercourse, victims of restrictive application as a measure of retorsion could always allege discrimination against them, which would be a shocking claim on the part of a State which itself had begun the application regarded as restrictive. When the same treatment was meted out to it, it should not have the right to complain of discrimination against it. He would welcome the operation of the rule of law in international relations and he hoped that one day it would be impossible to take the law into one's own hands. Unfortunately, that day had not yet dawned. Article 47, paragraph 2(a) might constitute a correct provision regarding a State which strayed from the common interpretation given by the other contracting parties. He believed that participants in the plenipotentiary conference would find it hard to subscribe to a clause without that provision. That had been obvious at the Vienna Conference.

58. Mr. BARTOŠ could not agree with Mr. Matine-Daftary's and Mr. Erim's views on the scope of article 47, paragraph 2(a) of the Vienna Convention. If reciprocity had been stipulated, the situation would be quite different. A number of States were scrupulous in their application of rules of international law, but did not wish those to be rules applied to their nationals in a manner other than that current in their own country. For example, Yugoslavia did not allow its diplomatic agents and consular

officials to enjoy the wider privileges and immunities offered by some countries, because it did not wish its relations with the countries concerned to become those of creditor and debtor in the matter of privileges. The principle of reciprocity was based ultimately on courtesy.

59. Mr. Erim's interpretation was in fact based on the political considerations that had caused paragraph 2(a) to be adopted by the Vienna Conference. If the States did not grant the minimum provisions of the Vienna Convention to diplomatic agents, the right of retorsion could be claimed. In his opinion, that was a dangerous view, which was the consequence of the poor organization of international justice. If governments were to be judges of violations of international instruments and of erroneous interpretations of international law, there would be no end to the resulting abuses. On the other hand, the same objections did not apply to paragraph 2 (b) of article 47 of the Vienna Convention. The Convention guaranteed certain minimum privileges and immunities and, if more favourable treatment was extended by custom or by agreement between States, on a bilateral and reciprocal basis, it might be objected theoretically that a third State could allege discrimination if similar treatment were not extended to its consuls; but it should be borne in mind that certain practices in relations between some States were not admissible in relations between others. Some margin should be left for the interplay of political relations, and the minimum provisions of the conventions should be left as the basis for diplomatic and consular relations, in the hope that more liberal treatment would eventually follow throughout the world.

60. Mr. AGO observed that the Commission must bear some of the responsibility for the adoption of paragraph 2(a) of article 47 of the Vienna Convention, since at its tenth session it had included the provision in article 44 of the draft on diplomatic intercourse (A/3859, chap. III). It was only at its twelfth session, when considering a similar problem in the consular draft, that the Commission had realized the disadvantages of the provision and had omitted it from the 1960 draft (article 64, commentary (3)).

61. He could not agree with Mr. Erim's and Mr. Matine-Daftary's arguments. The fact, for instance, that a State granted more or fewer privileges and immunities to members of the family, as indicated in article 50, paragraph 2, could not be described as restrictive or liberal application of the Convention, but as the mere exercise of a complete freedom. On the other hand, a State which granted more favourable treatment than that required by the provisions of the Convention would in effect not be applying the Convention, any more than would a State which granted less favourable treatment. There was no such thing as restrictive or liberal application, but merely application or non-application and any mention of restrictive application was tantamount to suggesting to States that they might conceal behind that term an actual violation of the terms of the Convention.

62. Sir Humphrey WALDOCK observed that the general view of the majority was against including a provision along the lines of paragraph 2 (a) of article 47

of the Vienna Convention. The fact that that provision had been adopted at the Vienna Conference, however, gave rise to the danger that it might be introduced into the future convention on consular intercourse simply by analogy. It might therefore be advisable to insert a different version of the provision, to show the furthest limits to which the Commission was prepared to go and to take into account Mr. Erim's and Mr. Matine-Daftary's objections. The effects of that provision would be limited exclusively to cases where different methods of application were allowed. He would not, however, make a formal proposal for such a new paragraph.

63. The CHAIRMAN said that a large majority of the Commission seemed to be in favour of retaining article 64 as approved in 1960. He suggested that the article should be referred to the Drafting Committee, with instructions to make it clear in paragraph 1 that the clause related only to contracting parties to the convention.

It was so agreed.

The meeting rose at 6.5 p.m.

609th MEETING

Tuesday, 13 June 1961, at 10.5 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 64 (Non-discrimination) *(continued)*

1. The CHAIRMAN, inviting the Commission to continue its consideration of the draft on consular intercourse and immunities (A/4425), said that Mr. Matine-Daftary wished to make a statement on article 64.

2. Mr. MATINE-DAFTARY said that, although he did not wish to reopen the debate on the advisability of including in the article a provision along the lines of article 47, paragraph 2(a), of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), he wished to draw attention to the views he had expressed on the matter at the twelfth session (548th meeting, para. 78). At that time, he had suggested a radical amendment of the provision. In any case, he would reiterate his view (608th meeting, para. 55) that a restrictive interpretation of a provision of the convention by a particular State did not constitute violation of the convention. He would endeavour to convert his colleagues in the Drafting Committee to that view.

ARTICLE 65 (Relationship between the present articles and bilateral conventions).

3. Mr. ŽOUREK, Special Rapporteur, said that the two alternative texts submitted to governments had been the subject of debate in the Sixth Committee during the fifteenth session of the General Assembly, to which he had referred in his third report (A/CN.4/137, *ad* article 65). Of the governments which had sent in written comment, only that of Chile had preferred the first text (A/CN.4/136/Add.7); the Governments of Norway, USSR, Czechoslovakia, the United States, Poland, Belgium, Spain and Switzerland (A/CN.4/136 and Add. 2, 3, 5, 6, 8, and 11) had expressed general approval of the second text, and the Government of the Netherlands had given detailed and convincing reasons for its support of that text (A/CN.4/136/Add.4). Other governments had taken up an intermediary position or had reserved their opinion on the question. Thus, the Government of the Philippines (A/CN.4/136) had stated that its preference for the variant subordinating bilateral agreements to the convention would depend on whether its reservations to other draft articles were accepted. The Government of Japan had simply reserved its position with regard to the article (A/CN.4/136/Add.9). Finally, the Yugoslav Government (A/CN.4/136) considered that the first text was more acceptable and that it might be supplemented by a saving clause concerning the minimum guarantees stipulated in the draft or, alternatively, that it should be stressed that future conventions might be concluded provided that they were not, at least, in conflict with the basic principles laid down in the text. That solution corresponded more or less to the statement in paragraph (2) of the commentary; in that connexion, he drew attention to the opinion of the Netherlands Government that the principle stated in that commentary, though perhaps correct in theory, was unrealizable in practice.

4. In the light of those observations, he believed that the Commission should adopt the second text of the article without much further debate. One point that had to be settled, however, was whether the Netherlands Government's suggested addition of the words "and multilateral" should be approved. The Commission's intention at its twelfth session had clearly been that the provision should maintain in force only bilateral conventions, the reason being that the object of the draft was to codify the essential rules of consular law. That object would be unattainable if other multilateral conventions were to be kept in force, for either those other conventions contained provisions similar to those in the general convention in which case they were unnecessary, or else they contained provisions differing from those of the unified consular law that the Commission was establishing, in which case they would hamper the unification of consular law (A/CN.4/137 *ad* article 65). It should be noted that the provision in question did not mean that regional conventions on the matter (and the Netherlands Government's comment was concerned with such conventions) could not be concluded in future; but in respect of existing instruments, article 65 should, in his opinion, be limited

to bilateral conventions only, if the Commission wished to accomplish the principal object of writing a convention that codified the consular law for the whole world.

5. Mr. AGO recalled that, during the lengthy debates held on the subject at the twelfth session, some members had argued strenuously that, once the international law concerning consular relations had been codified, the new code should automatically supersede all other conventions on the subject, on the grounds that some of the rules set forth in the new code were imperative and could not be derogated from by bilateral agreement. He himself had finally suggested that two variants of the article should be submitted to governments (576th meeting, para. 5, where discussed as article 59). At that time, this first text had his preference, but in the light of the replies received from governments he had come to the conclusion that the second text was preferable because it eliminated the practical difficulties (such as scrutiny of existing treaties, renegotiation and others) which the first text would involve. Moreover, the second text had the advantage of conforming with the principle that the particular prevailed over the general. In practice, States which found that the provisions of the new code were preferable to those of bilateral agreements would alter their system of consular relations accordingly. If the second text were chosen, however, he could not agree with the Special Rapporteur that a distinction should be made between existing bilateral and existing multilateral treaties. Either all existing law on the matter should be left in force, or none of it; but it could not be said that existing conventions should remain in force if they had been signed by two States and not if they had been signed by a larger number. In the case of a multilateral treaty, if the group of States which had concluded it found that its provisions were worse than those of the general convention, they would take steps to substitute the general system for their own. The Netherlands Government's suggestion on the matter therefore represented the logical conclusion of the adoption of the second text.

6. Mr. EDMONDS said that article 65 was one of the most important provisions of the draft. The Commission was preparing a convention in the hope that it would be usable and would constitute a progressive development of the international law on consular relations. The number of existing conventions on the matter was very large; furthermore, lawyers were, on the whole, conservative, international lawyers were even more so, and international lawyers attached to Ministries of Foreign Affairs were the most conservative of all. That was only natural, for if a bilateral convention had given satisfaction for a number of years, a State would surely hesitate to change its provisions in any way. The only course that the Commission could take if it wished to secure the maximum number of ratifications was to provide that conventions already in force could be maintained and that others could be concluded. Moreover, the Commission had deliberately chosen not to deal with certain aspects of consular law. If a flexible provision were adopted, States which believed that the Commission's articles constituted a progressive development of international law would sooner or later

conform with the articles of the general convention. If ratification of the general convention meant that they would not be able to maintain their existing bilateral obligations, they would be much less willing to become a party to it. Although it might seem desirable that the general convention should govern all consular law, the insertion of an unduly stringent provision was impracticable. It was always difficult to determine whether one contract was in conflict with another; there would be no necessity to make such a determination if the Commission should adopt the second text. That would enable many States to see the advantage of bringing their consular relations into line with the general convention and, hence, to follow the Commission's leadership.

7. Mr. YASSEEN said that article 65 had a direct connexion with the codification of international law. Uniformity of law was one of the main aims of codification, and it was particularly necessary to safeguard the fundamental principles embodied in a general convention of codification.

8. In preparing a draft convention on consular law, the Commission should beware of injecting a germ which could destroy the entire body. Admittedly, not all the draft articles stated fundamental principles of international law, but some, such as the articles dealing with inviolability of the consular archives and freedom of communication certainly did so, and should be maintained and safeguarded. Accordingly, either the first or the second text might be adopted — and he agreed that the latter might be more practicable — but whichever the Commission chose, it should add a clause safeguarding the fundamental principles of the Convention in conformity with the alternative solution supported by some members at the Commission's twelfth session (576th meeting, paras. 2-7). There were no technical objections to the adoption of such a solution, for the principle *lex posterior derogat priori* was not an imperative rule, and States could stipulate among themselves that an earlier instrument would prevail over future ones — *lex prior derogat posteriori*. Some States had expressed themselves in favour of that system in the Sixth Committee and, moreover, the Yugoslav Government had suggested the addition of such a clause.

9. The CHAIRMAN, speaking as a member of the Commission, said that the first text was not only obscure, but was also theoretically untenable. A treaty might lay down rules which constituted *jus cogens*, but that fact did not preclude States from concluding treaties on the same subject. The fact that certain rules constituted *jus cogens* meant only that States could not derogate from them, but did not prevent States from going further than those mandatory rules.

10. The number of rules constituting *jus cogens* in modern international law was undoubtedly increasing; they related to the maintenance of peace and to the basic problems of international relations such as non-interference in the domestic affairs of States, respect of State sovereignty and the like. By contrast, the draft under discussion could hardly be said to contain such rules. The Commission should be careful to go no

further than was necessary and to choose the solution which, in the light of all the circumstances, was most likely to further the progressive development of international law. The observations of governments clearly showed a preference for the second text. He also believed that that text was much more practicable and much less controversial than the first.

11. With regard to the wording of the second text, he agreed with Mr. Ago that multilateral conventions should also be covered. From the logical point of view, he could see no harm in allowing regional conventions to remain in force if the States parties thereto so wished. He suggested that the word "bilateral" should be deleted and replaced by the word "existing," which would cover all conventions in force.

12. Mr. FRANÇOIS said he was glad that Mr. Ago had abandoned the arguments in favour of the first text advanced at the twelfth session. Yet, though preferring the second text, he could not go so far in criticizing the first text as the Chairman had done. That text would be unexceptionable if States were really prepared to agree that all their earlier conventions on the subject would be superseded by the general conventions. The situation if they were to do so would have some theoretical advantages, but the practical disadvantages of application were much greater, and for that reason he was in favour of the second text.

13. He did, however, agree with the Chairman that the intermediary solution advocated by Mr. Yasseen was not tenable. The fundamental importance of article 65 lay not so much in the general principles set forth in the draft, but in the whole question of the limitation of its provisions. In practice, it would be impossible to distinguish between the basic rules of *jus cogens* laid down in the instrument and rules from which States might derogate. Accordingly, the proposed addition would be pointless.

14. He also agreed with Mr. Ago and the Chairman that the provision should cover multilateral conventions. If those treaties were excluded, the implication would be that all existing regional conventions should be abrogated, but could be concluded in the same terms immediately after the entry into force of the new general convention. On the other hand, the Special Rapporteur had rightly pointed out that provisions of multilateral regional conventions which conflicted with those of the Commission's draft would seriously hinder the Commission in its basic aim of codifying international law. Especially in the future, regional legal institutions should exercise caution in drafting new instruments. He thought it extremely regrettable, for instance, that the legal Committee of the Council of Europe had begun to draft a European convention on consular relations before the Commission had completed its work on that subject. It would be most useful if the Special Rapporteur would record that view in his report.

15. Mr. JIMÉNEZ de ARÉCHAGA said that he was in favour of the second text which, moreover, had received the approval of the majority of governments. However, he agreed with the Norwegian Government that there was no reason why the provision should

be made applicable only to bilateral conventions, since the same general considerations applied equally to multilateral conventions and agreements. Furthermore, the Special Rapporteur rightly pointed out in his third report that provisions relating to consular intercourse and immunities were very often incorporated in conventions dealing with other subjects. The wording of the second text should therefore be altered to take into account all treaty provisions which related to consular relations.

16. He further agreed with the speakers who had urged that the provision should cover multilateral as well as bilateral conventions and agreements. Otherwise, article 65 would be at variance with other provisions of the draft which covered both types of agreement. For example, article 64, paragraph 2, could undoubtedly apply to multilateral conventions, and their implicit exclusion from article 65 was therefore illogical. From the practical point of view also, the omission might be interpreted as an attempt to replace existing multilateral conventions the provisions of which were not in conflict with those of the draft under discussion; such a possible interpretation might hamper the ratification of the convention in a number of regions.

17. With regard to Mr. Yasseen's suggestion, he agreed with Mr. François and the Chairman that the Commission would find it difficult to specify which provisions of the draft constituted basic principles of international law. With regard to consular intercourse and immunities, he did not believe that there were any principles of public policy from which States could not derogate in any circumstances; only rules such as that laid down in Article 103 of the United Nations Charter, which affected basic problems of international security, could be regarded as rules of *jus cogens*. Besides, states would be unlikely to forego in their agreements the basic principles of consular law deriving from customary international law.

18. Sir Humphrey WALDOCK said that he supported the second text of article 65 for reasons similar to those given by the Netherlands Government. Failure to adopt a text along those lines would seriously impede the ratification of the convention. The draft did not represent merely a codification of customary law in the matter; many of its provisions might be regarded as innovations and would depend on acceptance for their validity. Moreover, it might be assumed that the entry into force of the convention, when adopted, would be contingent on the deposit of a fairly large number of ratifications; but it should be remembered that only five States out of the requisite twenty-two had as yet ratified such a relatively uncontroversial instrument as the Convention on the High Seas (A/CONF.13/L.53). The Commission should therefore do nothing which would impede the ratification of its text.

19. He agreed with earlier speakers that article 65 should cover multilateral as well as bilateral agreements and shared Mr. François's regret that the Legal Committee of the Council of Europe had begun to draft a convention on consular relations before the Commission had completed its work on the same subject.

Admittedly, that Committee was not making very rapid progress, but it would indeed be a serious criticism of the Commission's work if the European convention departed greatly from the general convention prepared by the Commission.

20. With regard to Mr. Yasseen's suggestion, he drew attention to the difficulty of enumerating the fundamental principles of the draft in view of the fact that the consular relations *per se* were based on the consent of the States concerned. Some fundamental principles were undeniably set forth in the draft; for example, the immunity of consular officials in respect of acts performed in the exercise of their functions and freedom of communication were principles of general international law. It was unlikely, however, that any bilateral treaties specifically departed from those principles.

21. With regard to the wording of the second text, he drew attention to the obscurity of the phrase "shall not affect bilateral conventions". It was not clear from the debate during the twelfth session what the Commission's intentions had been with regard to the relations between the general convention and bilateral agreements. The point in doubt was whether the general convention would be totally displaced by pre-existing conventions, or only *pro tanto*. The general convention should govern the provisions of bilateral agreements, except where that was excluded by the terms of the bilateral agreement. The Commission had not clearly expressed its intentions with regard to the text of the draft, and reference should rather be made to the fact that acceptance of the articles would not put an end to existing bilateral conventions and would not preclude the conclusion of future conventions.

22. Mr. VERDROSS noted that governments had shown a preference for the second of the two alternative texts, which should therefore be adopted by the Commission.

23. There remained the problem whether the article should expressly state that the draft articles contained fundamental principles of consular law which should prevail over existing bilateral agreements and from which subsequent bilateral agreements could not derogate. In that connexion, he said that the expression "fundamental principles" was not sufficiently clear: the article should state that the draft contained certain imperative or *jus cogens* principles of consular law which should be respected.

24. He noted with satisfaction the Chairman's statement acknowledging the existence of *jus cogens* principles in international law and adding that their number tended to increase. He had always maintained that those principles existed and had opposed Professor Paul Guggenheim's contention that all the provisions of international law constituted *jus dispositivum* and that States were free at any time to derogate from them in bilateral conventions.

25. Unless a statement along the lines which he had suggested was included in article 65, the wording of the second text could give the impression that all the

provisions of the draft articles constituted *jus dispositivum* and that States could derogate from them at will.

26. Mr. MATINE-DAFTARY said that the second text was, from the practical point of view, preferable for the States of Europe and America, which already had multilateral and bilateral conventions governing their consular relations.

27. The approach of both texts was similar, in that they would leave the American States with their own system, embodied in the Convention regarding consular agents, signed at Havana in 1928,¹ and the European States with the rules embodied in their numerous bilateral conventions. Indeed, the European States appeared to be about to frame a multilateral system of their own. The work done by the Commission would thus appear to be intended only for the use of the countries of Asia and Africa. Under the second text, the States of Europe and America were not even required to take the trouble of stating explicitly which of the pre-existing conventions would remain in force.

28. He was frankly disappointed with the results of the Commission's work, which did not correspond to the aim set forth in Article 13, paragraph 1(a), of the Charter of the United Nations. By virtue of that provision of the Charter, which constituted the reason for the Commission's existence, it was its duty to codify and develop international law on a universal basis.

29. The least that could be done would be to adopt a provision along the lines suggested by Mr. Verdross, stating that bilateral agreements could not derogate from those provisions of the draft articles which embodied rules of *jus cogens*.

30. Mr. LIANG, Secretary to the Commission, said that from the point of view of theory there should be no difficulty regarding the application of the *lex posterior* rule to which the Chairman and Mr. Ago had referred.

31. If the Commission had adopted the Special Rapporteur's proposal on article 4 and had included in the draft a detailed statement of the consular functions, the problem would, at least in part, have been solved. The Commission, however, had not attempted to unify in great detail all the rules governing consular relations; much less had it intended to unify all existing consular conventions. It had not embarked on a comprehensive codification covering all the ramifications of consular law.

32. In the circumstances, there could be no doubt that the text of the draft articles could not replace existing bilateral conventions. Nor could there be any question of higher law, as under Article 103 of the Charter or the rule of inconsistent treaties under Article 19 of the Covenant of the League of Nations.

33. There undoubtedly existed certain imperative or essential principles, such as that relating to the immunity of jurisdiction of consuls in respect of acts performed in the course of their official duties, to which Sir Humphrey Waldock had referred. Those principles, however,

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 422-425.

existed under customary international law and could always be invoked regardless of whether that fact was stated in the draft convention or not,

34. It might be well to consider the antecedents of article 65. The Havana Convention regarding Consular Agents contained an article 24, which was similar to the second text of article 65 of the Commission's draft. The Harvard draft prepared by Mr. Quincy Wright on the legal position and functions of consuls contained an article 33 reading:

"Nothing in the present Convention shall affect any agreement in force between any of the parties conferring special functions on consuls; nor shall this convention preclude any of the parties from entering into an agreement inconsistent with this convention in so far as it may concern only the interests of the parties thereto."²

35. It was interesting to note that the Harvard draft intended to maintain agreements in force only in so far as they conferred "special functions" on consuls, not in respect of other matters. The latter would include questions of privileges and immunities. Existing consular conventions dealing with those matters would be superseded by the draft convention. That approach was less drastic, if compared with the Commission's draft.

36. Sir Humphrey Waldock had drawn attention to the need to examine the second text so as to make clear the meaning of the expression "shall not affect". If that expression were construed narrowly, the proposed multilateral convention would not affect the existence of a bilateral convention, but, by virtue of the *lex posterior* theory, it could and would affect particular provisions of pre-existing treaties. For example, if a bilateral consular convention contained provisions on taxation and the two countries concerned subsequently signed the multilateral instrument, the provisions of the latter on taxation would override those of a bilateral convention. That might not be what was intended.

37. The CHAIRMAN said that, in the existing state of international law and factual circumstances, it was difficult to imagine that a convention would be concluded containing a clause that precluded all possibility of concluding future agreements on the same subject. With reference to the statement of the Secretary to the Commission, he said it could not be suggested that all rules of customary international law constituted *jus cogens*. States could, by mutual consent, derogate from many rules of customary international law. Only some rules of customary international law, to which he had referred in his previous statement, could be described as *jus cogens*.

38. He saw no reason to set up as *jus cogens* any of the rules embodied in the draft articles. His opposition was based largely on practical considerations: the inclusion of a provision along the lines suggested by some members would make it difficult for many States to accept the draft articles.

39. Mr. BARTOŠ said that the proposed text of article 65 undermined the whole structure of the draft. The adoption of that text would represent the renunciation by the Commission of the results of its labours. The Commission had taken great pains to prepare draft articles which reflected the existing practice of States. It had done so with the aim of unifying international law as far as possible, and it could not then suggest that the work of codification which it had prepared would not be binding on States. The Commission had not been asked to prepare model articles on consular relations, but to codify the international law on the subject.

40. Regardless of the terminology used, whether reference was made to *jus cogens*, to fundamental rules or to basic principles, there could be no doubt that the draft articles set forth certain minimum and mandatory rules. That was true, for example, of the rules relating to the immunity of consuls in respect of acts performed in the course of their official duties, and also of those which safeguarded the free operation of the consulate. The Commission could not, without abdicating its responsibility towards the United Nations and towards international law, virtually invite States in article 65 to derogate at will from the provisions of the draft articles.

41. He did not think that the sovereignty of States enabled them, after having signed a general convention, to enter into special agreements derogating from its provisions without having previously denounced it. In his view, a State which accepted certain international obligations by virtue of a convention, thereby and to that extent limited the exercise of its sovereign rights.

42. He warmly supported the compromise suggestion made by Mr. Verdross, which would safeguard those rules which were imperative without affecting the freedom of States to enter into special agreements in respect of other matters, such as the extension of the consular functions. The functioning of consulates as an institution required the observance of certain rules of positive international law, which the Commission had, by its prolonged labours, carefully formulated, and he urged the Commission not to give States *carte blanche* to derogate from those rules.

43. Mr. AGO said that the existing conventions covered a much wider geographical area than Mr. Matine-Daftary had suggested. Italy, for example, had one well-known consular convention with another European country, that very recently concluded with the United Kingdom, but there existed numerous provisions on consular matters in treaties and other conventions concluded by Italy with countries of Asia and of other continents.

44. The question before the Commission was whether there existed in the draft convention any *jus cogens* rules, in other words, rules rendering null and void any provisions of a later convention which were incompatible with them. He believed that there might exist such rules in international law, but that they were naturally not many. They might include, for instance, those concerning the respect due to the integrity of sovereign States, or

² Harvard Law School, *Research in International Law*. (II), *The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 369.

o the consequences of a tort, or to the freedom of the high seas. Those few rules were laid down by customary international law. But it was doubtful whether only *jus cogens* rules could be introduced by a convention, and it was his belief that the draft under consideration contained no such rules.

45. He had been impressed by the statement of Sir Humphrey Waldock. The text of article 65 would have to be clarified in order to show that if there were pre-existing bilateral conventions, it did not mean that the draft multilateral convention would have no effect on the parties to such bilateral conventions. It was only in matters really covered by the provisions of the pre-existing bilateral conventions — which were often limited rules — that the rules of the multilateral convention were not applicable as a consequence of special law prevailing over general law.

46. Lastly, it would be both unnecessary and dangerous to make any statement on the possibility of concluding conventions on consular relations in the future. It was logical to state the position with regard to existing conventions, but there was no need to refer to future agreements. A convention was never intended to set forth rules for all eternity. States signing a convention were surely not supposed to have renounced the right to conclude new ones.

47. Any reference to future conventions would also be dangerous because, as indicated by Mr. Bartoš, it would detract from the aim pursued in the codification of consular law. The whole purpose of the Commission's work was to endeavour to unify certain rules of international law which were dispersed in numerous texts, often difficult to trace. The Commission should therefore refrain from drawing the attention of the States too much to their undoubted right to conclude other conventions in the future; on the contrary, the commentary should, first, suggest that States should review existing conventions in order to see to what extent they should be maintained, and secondly, express the hope that States would refrain from concluding in the future conventions which materially departed from the principles laid down in the draft articles.

48. Mr. PAL recalled that at the twelfth session the Commission had touched upon a point raised by Sir Humphrey Waldock, but perhaps had not discussed it in sufficient detail. He referred to the interpretation of the provision given by Sir Gerald Fitzmaurice and to his own (Mr. Pal's) deduction from that argument (560th meeting, paras. 13 and 14). The Commission's final conclusion had been that the provisions of the draft would not affect corresponding provisions in bilateral conventions, but that matters not covered by bilateral conventions would be regulated by the multilateral instrument (*cf.* commentary 1(b) on article 65).

49. Mr. AMADO said that the discussion at the twelfth session had taken a somewhat theoretical turn and had provoked some rather extreme opinions. For example, Mr. Scelle had defended the thesis that parties to a general convention could not conclude a limited convention at variance with the general convention without denouncing it (561st meeting, para. 19). He

himself had said it would be deplorable for the Commission to engage in elaborating model rules rather than a multilateral convention, and had described the provision under discussion as a novel method of enabling signatories to make a far-reaching reservation (560th meeting, paras. 50 and 51). He had also expressed regret that Sir Gerald Fitzmaurice had not attempted to discuss the arguments put forward by Mr. Bartoš and Mr. Scelle and had instead approached the problem from a purely practical standpoint (*ibid.*, para. 52).

50. At a later stage in the discussion at the twelfth session, he had pointed out that the draft would serve as a rallying point for States, but that if the instrument were opened for signature, with an escape clause giving all signatories latitude not to comply with its provisions, the unification of international law on consular intercourse and immunities, which must be the goal, would in fact be retarded, and he had accordingly argued against the inclusion of a provision concerning the relationship between the draft and previous conventions (561st meeting, para. 35).

51. It seemed inappropriate to talk of *jus cogens* in the context of consular relations where there was room for slightly different shades of opinion. Nor did he think the Commission could retain the reference to future conventions, since States would not accept dictation of that sort.

52. He could, however, favour a provision on the lines suggested by Sir Humphrey Waldock.

53. Mr. ŽOUREK, Special Rapporteur, said that the Commission was clearly veering towards the second alternative. That text should be read as meaning that if two contracting parties were not bound by a previous consular convention the multilateral convention would apply *in toto*. If, however, they had previously concluded a bilateral convention, then the provisions of that bilateral convention would remain valid, and any matter not covered by the bilateral convention would be governed by the terms of the multilateral convention.

54. He wished to assure Mr. Matine-Daftary, who seemed to minimize the importance of the multilateral convention, that even if it included article 65 the draft would have considerable influence and authority. The convention would *per se* have great persuasive force. In the first place, it would probably be used as a basis for future bilateral conventions even by non-signatory States which would turn to it as a source of the essential rules. Secondly, the existing consular conventions covered a relatively narrow sector of consular relations; even the older States had concluded such conventions with only some ten or twenty states, whereas there were more than 100 States in the modern world. Consequently the draft would also have great immediate practical value.

55. It would be far too difficult and, moreover, unnecessary to draw a distinction between the provisions constituting rules of *jus cogens* and those constituting *jus dispositivum*, and as States had already been invited to comment on two alternative texts for article 65 they would be surprised at being presented with a third variant and were unlikely to find it acceptable. He could

insert in the commentary a statement to the effect that the Commission hoped that future conventions would be based on the present text.

56. Mr. GROS pointed out that a provision of the kind under discussion appeared in many multilateral conventions. A prime example of an international instrument that had to be accepted without reference to the retention of existing conventions was the Convention on the Territorial Sea and the Contiguous Zone (A/CONF.13/L.52), which had made a real contribution to the progressive development of international law by creating new rules; yet even that Convention contained a provision (article 25) recognizing the validity of existing conventions or other international treaties.

57. Perhaps the discussion had gone somewhat beyond the confines of article 65, which he thought useful and even necessary for practical reasons. In matters of codification, there should be no fear of adopting a pragmatic standpoint, and such an attitude in no way diminished the respect due to the doctrine expounded with such mastery by the late Mr. Scelle. The state of consular relations had been well described by Mr. Ago. Some States had a well-established and virtually worldwide system of consular relations established in conventional texts, but for others, particularly the newly-independent States, a multilateral convention would be of special importance. He agreed with the Special Rapporteur that the draft, whether eventually ratified or not, would be of considerable significance. The fact that the 1958 Convention on the High Seas, which to the best of his knowledge did not contain a single new element of law, had not been ratified in no way diminished its value.

58. The world had not reached the stage at which an international legislative authority could impose legislation on States. As the Special Rapporteur had indicated, the Commission's task was essentially to persuade, and he firmly believed that, in the case under consideration, article 65 would not diminish the force of the draft, which would either be accepted by States having no consular relations or be used as a basis for the conclusion of bilateral conventions. By its very existence, therefore, the text would constitute a landmark in the development of international relations.

59. Mr. ERIM favoured the second alternative for article 65 but agreed with other members that the wording was ambiguous and open to different interpretations. Paragraph 1(b) of the commentary did not seem to tally with the text itself.

60. The CHAIRMAN, speaking as a member of the Commission, said the second variant meant that the multilateral convention would not abrogate existing bilateral conventions.

61. Mr. PADILLA NERVO subscribed to the views expressed by Mr. Verdross, Mr. Bartoš and Mr. Amado and also agreed with Sir Humphrey Waldock's analysis of the meaning of the second variant. As in the case of article 47, paragraph 2(a) of the Vienna Convention, he believed that article 65 was unnecessary and ought to be dropped; it neither added to nor modified the powers of States. He had not been particularly impressed by the Special Rapporteur's argument that since two

alternative texts had been submitted to governments for comment, they would expect a provision of some sort concerning the relationship between the draft and multilateral conventions. Some reference to the problem could be made in the commentary so as to help a future conference of plenipotentiaries to reach a decision.

62. He agreed with the doubts expressed at the previous session by Mr. García Amador (560th meeting, para. 9) as to the advisability of including a general provision having the character of a final clause.

63. The Commission had sought to codify the law and also to give some impetus to the progressive development of the law in a liberal direction. In his references to provisions in various consular conventions, he had cited those which were liberal rather than those which were restrictive. He was convinced that the draft would exercise a more effective influence, particularly on new States, which perhaps considered that they had not had a part in the creation of certain existing rules in the sphere of consular relations, if article 65 were deleted. He agreed with Mr. Gros that, irrespective of the number of ratifications, the draft would prove to be valuable.

64. Mr. FRANÇOIS pointed out that the Commission had refrained from inserting a provision in its draft articles concerning the law of the sea about the relationship between them and bilateral conventions, but had mentioned the question in its report (A/3159, para. 31). The United Nations Conference on the Law of the Sea had inserted an identical provision both in the Convention on the Territorial Sea and the Contiguous Zone (A/CONF.13/L.52, article 25) and in the Convention on the High Seas (A/CONF.13/L.53, article 30), reading "The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States parties to them". Thus, no mention had been made of the relationship between those Conventions and future inter-State agreements. Perhaps article 65 might be framed on similar lines.

65. The CHAIRMAN, summing up the discussion, said that the majority seemed to favour the second variant for article 65, subject to the deletion of the words "and shall not prevent the conclusion of such conventions in the future". He suggested that the text be referred to the Drafting Committee, together with the drafting points raised during the discussion.

It was so agreed.

66. Mr. BARTOŠ explained that he would not be altogether satisfied with such a text, which might be regarded as a compromise ensuring that the multilateral convention would not modify existing contractual relations between States. He feared, however, that such a provision might have the effect of maintaining in force certain quasi-colonial clauses in existing consular conventions between the more advanced and the less advanced countries: clauses which were at variance with what he would call the fundamental rules of consular law.

67. Mr. YASSEEN said that if the Commission were unable to adopt the course advocated at the twelfth session by some members, viz. that a clause should be added expressly safeguarding the fundamental principles

of the draft in relation to existing and future conventions, he would support Mr. Padilla Nervo's view that article 65 should be deleted. The problem would thus be subject to the relevant general principles of international law. But it might be decided in a different way by the plenipotentiary conference, as had happened at the first United Nations Conference on the Law of the Sea. The question was a highly political one, for it concerned the value States attached to the maintenance of previous conventions and their future liberty of action in respect of the draft convention under consideration.

68. Mr. MATINE-DAFTARY said that he had been encouraged by Mr. François's observations to express support for the course suggested by Mr. Padilla Nervo. He also felt bound to point out that the insertion of a provision in the Conventions on the Territorial Sea and the Contiguous Zone and on the High Seas had caused certain established maritime States to withhold their ratification, by reason of the existing treaty relations they already had with other States. The inclusion of article 65 in the draft would probably have the same effect.

69. Mr. EDMONDS said he was opposed to the deletion of the final phrase in the second variant now approved by the Commission: he would have preferred the original text.

The meeting rose at 1.15 p.m.

610th MEETING

Wednesday, 14 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

1. The CHAIRMAN invited the Commission to consider the additional articles proposed by the Special Rapporteur for inclusion in the draft on consular intercourse and immunities (A/4425).

ARTICLE 54bis (Legal status of career consular officials who carry on a private commercial or professional activity)

2. Mr. ŽOUREK, Special Rapporteur, said that in his first report (A/CN.4/108) he had included a provision (article 35, paragraph 2) concerning the status of career consuls who engaged in a gainful private activity. That provision had been rejected by the Commission (559th meeting, when discussed as article 58). It would appear,

however, from the observations of governments that a provision of that kind was necessary in the draft because some countries, such as the United States (A/CN.4/136/Add.3), allowed their career consuls to engage in gainful activities outside the consular functions. At the same time, governments were evidently anxious not to extend to that special intermediate category the full privileges and immunities granted to career consuls who pursued no other activity outside their consular functions.

3. The problem did not arise in regard to diplomatic agents who, under article 42 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), were expressly prohibited from practising in the receiving State any professional or commercial activity for personal profit. It seemed unlikely that a parallel prohibition for career consular officials would be accepted by States and he therefore proposed that in the light of existing practice an additional article be inserted in the draft, placing career consuls who engaged in a gainful private activity on the same footing as honorary consuls, so far as consular privileges and immunities were concerned. The new article would read:

"Career consular officials who, while being officials in the public service of the sending State, carry on a private commercial or professional activity, shall be deemed to have the status of honorary consuls."

4. Mr. YASSEEN said that it would be appropriate to treat career consular officials who carried on a gainful activity on a par with honorary consuls, but it should be made clear in the text that that equation applied in respect of privileges and immunities. In addition, the phrase "while being officials in the public service of the sending State", which seemed superfluous, might be deleted.

5. Mr. SANDSTRÖM expressed doubts about the need for such a provision, inasmuch as the position of the career consuls contemplated could be regulated by the sending State.

6. Mr. MATINE-DAFTARY said that such a provision would fit in with the logical structure of the draft and took account of existing practice.

7. He was not, however, wholly satisfied with the wording proposed by the Special Rapporteur. The expression "professional activity" was too broad. It was unthinkable, for example, that a career consul who undertook to give a course of lectures at a university should thereby be deprived of certain privileges and immunities. Surely the phrase "gainful private activity" was preferable.

8. The CHAIRMAN suggested that the wording used in article 42 of the Vienna Convention might serve as a model.

9. Sir Humphrey WALDOCK said that he could not quite see how the new article would fit into the general scheme of the draft in which specific provisions had already been inserted to cover the case of career consuls who engaged in gainful private activity. There would seem to be some inconsistency in bringing career consuls who had been previously treated as officials in the public service within the scope of the chapter dealing with

honorary consuls. For example, how would their precedence be determined?

10. Mr. ŽOUREK, Special Rapporteur, said that the phrase "private commercial or professional activity" had been suggested by the Netherlands Government (A/CN.4/136/Add.4, *ad* article 47). It was true that the expression "gainful private activity" appeared in a number of recent consular conventions, but perhaps it would be preferable, as suggested by the Chairman, to follow the Vienna Convention. At all events that was a drafting point which should be referred to the Drafting Committee.

11. In reply to Sir Humphrey Waldock, he said that there were only two possibilities: either the legal status of career consuls carrying on a private activity should be dealt with in a separate section of the draft or else the provision should be included in chapter III, the title of which might be suitably modified.

12. Mr. AGO said that the wording of article 42 of the Vienna Convention should be followed. It should be made clear that the additional article was meant to refer to a regular activity which brought in some real financial gain. He quite agreed with Mr. Matine-Daftary that activities such as occasional university lectures would not come within the meaning of "professional activity".

13. The legal status of that category of consuls certainly did not deserve a separate section in the draft; it would suffice to add an appropriate passage in article 54 to cover their position.

14. Mr. MATINE-DAFTARY observed that it was incorrect to describe the persons concerned as "career" officials, for they would more probably be engaged under short-term contracts.

15. Mr. ŽOUREK, Special Rapporteur, said that Mr. Matine-Daftary was under a misapprehension. Some countries, as he had already indicated, allowed members of their consular service to engage in commercial or professional activities. That might be a relic of the past, but for those countries even a person engaged on an annual contract would still be regarded as belonging to the consular service, and consequently the expression "career consular official" should not be too narrowly interpreted.

16. Mr. VERDROSS said that he would be able to support the Special Rapporteur's proposal if the intention were expressed with greater accuracy; for example, a career consul who took part in publishing a scientific review should not suffer any diminution of his privileges and immunities.

17. Mr. PAL said that the additional article was necessary, because the Commission had specifically excluded career consuls engaged in a gainful private activity from the application of certain provisions, but had not provided for even any lesser privileges and immunities. Their existing position was worse than that of honorary consuls.

18. With regard to the drafting of the provision, he said that the reference to personal profit, which appeared in article 42 of the Vienna Convention, should not

appear in the additional provision, for that was an inappropriate criterion. The official concerned might be engaged in gainful activities, although not for personal gain.

19. Mr. PADILLA NERVO said that, as articles 45, 46 and 47 already contained express provisos concerning the exercise of a gainful private activity, it was hard to see why a special additional article should be needed assimilating career consuls who carried on such an activity to honorary consuls. The articles he had mentioned dealt adequately with the question.

20. Mr. ŽOUREK, Special Rapporteur, in reply to Mr. Padilla Nervo, said that if his proposed additional article were accepted, the proviso appearing in articles 45, 46 and 47, which from the drafting point of view was rather clumsy, could be eliminated.

21. The purpose of the additional article was to stipulate that career consuls who carried on a private commercial or professional activity should be on the same footing as honorary consuls and would be entitled only to those privileges specified in article 54 and the other provisions of chapter III.

22. Mr. LIANG, Secretary to the Commission, said that he had serious doubts about the advisability of inserting the new article 54 *bis*. It seemed unnecessary to assimilate that category of consuls to honorary consuls and such assimilation might indeed give rise to complications, since career consuls were generically different from honorary consuls. Moreover, as Mr. Padilla Nervo had indicated, the Commission had already drawn the necessary distinction in articles 45, 46 and 47 between career consuls who engaged in outside activities and those who did not. Those articles clearly spelt out the legal consequences for career consuls engaging in gainful activities.

23. The Harvard Draft on the Legal Position and Functions of Consuls¹ contained an article entitled "Consuls other than consuls of career" which corresponded to the text under discussion and he would particularly draw the Commission's attention to a statement in the comment to that article which read: "States have generally refused to consider consuls who are not permanent officials of the sending State as entitled to the same treatment as consuls of career. Often the distinction is not in terms between career consuls and others, but rather a denial of immunities to consuls engaging in another business or profession. Such widespread practice must be taken account of in a codification of the law." It was precisely in order to take account of that practice that the Commission had inserted the provisos in the articles mentioned by Mr. Padilla Nervo, and that seemed a preferable course.

24. Mr. AGO welcomed Mr. Padilla Nervo's reference to the provisos in articles 45, 46 and 47. In fact, the scheme devised at the twelfth session was perfectly consistent. Personally, he would have been inclined to favour an express provision prohibiting career consuls

¹ Harvard Law School, *Research in International Law* (II) *The Legal Position and Functions of Consuls* (Cambridge, Mass., Harvard Law School, 1932), p. 354.

toom engaging in gainful private activity, but realized that there would be cogent practical objections to such a clause.

25. In reality consular officials who carried on a gainful activity must be assimilated to honorary consuls and could not enjoy more liberal treatment. Some of the criticisms which the Special Rapporteur's proposal had provoked were, perhaps, due to members having given too much emphasis to the fact that the persons concerned were career officials.

26. Mr. AMADO maintained that there was a very important difference between career consular officials and honorary consuls, since the former were almost invariably nationals of the sending State, whereas the latter were usually nationals of the receiving State. He was strongly opposed to creating a new category of consuls and, as it were, making a universal rule out of the practice of one country, the United States. All that was necessary was to indicate that if a career consular official engaged in certain activities he would not enjoy certain exemptions provided for in the draft.

27. Mr. ŽOUREK, Special Rapporteur, observed that the discussion seemed to confirm the need for a specific provision of the kind he had proposed.

28. He agreed with Mr. Ago that as far as privileges and immunities were concerned career consuls who carried on a private commercial or professional activity were, in fact, in exactly the same position as honorary consuls. The main reason why honorary consuls were not accorded the full privileges and immunities granted to career consuls was precisely that they engaged in a gainful private activity; that they were often nationals of the receiving State was not a decisive consideration, since it was recognized that career consuls might also be nationals of that State.

29. He was convinced that some provision concerning the legal status of such career consular officials was essential, for otherwise they might be deprived of all privileges and immunities, including tax exemption on emoluments received from the sending State, which would be inadmissible. That argument was supported by the view put forward by the Belgian Government (A/CN.4/136/Add.6) in paragraph 3 of its comment on article 45. He agreed with Mr. Ago that it was undesirable for career consuls to engage in private gainful activities, but since that was allowed by certain States the omission of any provision on the subject might lead to unnecessary friction.

30. Mr. YASSEEN said that undoubtedly there were career consular officials who carried on a private commercial or professional activity, and it would be difficult to accord to such persons the same status as that of career consular officials who were not engaged in such an activity. But, although the principle of the additional article could easily be justified, the text gave rise to some objections. The unlimited assimilation referred to would have only a restricted scope; in fact, the point was to grant to career consular officials carrying on a gainful activity no more extensive facilities, privileges and immunities than were enjoyed by honorary consuls, and that concept should be clearly expressed in the text.

Admittedly, some articles did exclude career consular officials carrying on a gainful activity from the facilities, privileges and immunities enjoyed by career consular officials, but such a negative attitude would not suffice. In that matter, the status of such career consular officials must be determined, and the least that could be granted them was the status of honorary consuls.

31. Mr. SANDSTRÖM said he had some doubts concerning the distinction between career consuls who carried on a private commercial or professional activity and honorary consuls. Moreover, it was difficult to differentiate between such a commercial act as, for instance, importing a motor vehicle, and carrying on a private commercial activity.

32. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's remarks clearly showed that the article was absolutely indispensable. If, for example, the career consuls concerned were deprived of the benefit of article 40, dealing with personal inviolability, their position would be less favourable than that of honorary consuls, since they would not be accorded personal inviolability even in respect of acts performed in connexion with their official duties. With regard to article 46, on exemption from customs duties, the position of those officials was also less favourable than that of honorary consuls. If career consuls who carried on a private activity were not assimilated to honorary consuls, they would not be granted a certain number of essential privileges and immunities.

33. The essence of the proposed additional article lay in its analogy with article 42 of the Vienna Convention, since it implied that if a consul were appointed and allowed to exercise a private occupation, his privileges and immunities would be substantially reduced. The additional article did not, however, lay down the prohibition contained in article 42 of the Vienna Convention, but merely represented a kind of warning to States.

34. So far as the wording of the article was concerned, participants in the Vienna Conference who had voted in favour of article 42 seemed to have done so half-heartedly, and had not been altogether satisfied with the drafting. He agreed with Mr. Pal that the reference to "personal profit" was unwanted, for there might be cases where a career consul might carry on a private commercial activity on behalf of a company without any visible personal remuneration.

35. In any case, if the Commission approved the principle of the additional article, it could leave the Drafting Committee to incorporate it in article 1 or elsewhere in the draft.

36. Sir Humphrey WALDOCK said he was in favour of including an additional article along the lines proposed by the Special Rapporteur, since it would tend to avoid abuse. The Commission should, however, be extremely careful in assimilating career consuls carrying on a gainful activity to honorary consuls in all cases. It was essential to give a consul who was a national of the sending State a certain amount of protection; accordingly, if all career consuls who carried on activities from which they derived the slightest profit were to be assimilated

to honorary consuls, all the provisions of chapter II of the draft should be carefully scrutinized, lest some important point was overlooked.

37. Mr. PADILLA NERVO, agreeing with Sir Humphrey Waldock, said that the Special Rapporteur's explanations had further convinced him that the article as worded was unsatisfactory. If the meaning of the provision was that career consuls exercising a gainful activity were to enjoy only the privileges and immunities granted to honorary consuls, that should be stated unequivocally. The phrase "shall be deemed to have the status of honorary consuls" was vague; honorary consuls had other characteristics than that of exercising a gainful activity, for in a number of cases they were nationals of the receiving State, and hence excluded from a number of immunities. It would therefore be quite inaccurate to say that the career consuls concerned should be assimilated to honorary consuls merely on the grounds that they carried on a private activity, when the real intention seemed to be to provide for a restriction of privileges and immunities in some very rare cases. He agreed that it would be advisable to follow the wording of article 42 of the Vienna Convention if the Commission wished to discourage States from appointing such persons as career consuls; that would serve the Commission's purpose better than an admission of the existence of the category concerned. However, if the majority of the Commission wished to add an article providing for such exceptional cases, it should state clearly that career consuls who carried on a private commercial or professional activity enjoyed certain privileges and immunities. The first question to be settled, however, was whether or not those career consuls should be assimilated to honorary consuls.

38. The CHAIRMAN said that the two points of substance involved were, first, whether the Commission could accept the concept of the assimilation of career consuls who carried on a private activity to honorary consuls, and secondly, what the scope of that assimilation should be. Members might, of course, oppose the idea of total assimilation, but consider that the career consuls in question should be equated with honorary consuls in respect of privileges and immunities only.

39. Mr. ERIM said it was clear that the category of career consuls dealt with in article 54 *bis* was quite exceptional. In continental law, such a practice was wellnigh inconceivable, since the term "career consular official" had a very precise meaning.

40. The Special Rapporteur had said that the status of the officials concerned would be uncertain if no special provision were made for them. Perusal of chapter II, section III (Personal privileges and immunities) of the draft showed that articles 39, 41, 42, 43, 44, 48, 49, 50, 51, 52 and 53 were applicable to that special category; thus, they were excluded only from the benefits of articles 40, 45, 46 and 47. Honorary consuls, on the other hand, did not enjoy so many privileges and immunities, and the assimilation of the two categories would result in reducing the benefits accorded to career consuls who carried on a gainful activity. The Commission should make it quite clear whether it wished to treat those

career consuls on exactly the same footing as honorary consuls, or to create a separate, third category of consular official.

41. Mr. BARTOŠ considered that the Special Rapporteur had been quite right to raise the question of career consuls who carried on a private activity. Although such officials might be rare in consular practice, they did in fact exist, and some solution should be found for their situation.

42. From the technical point of view, he drew attention to the proposal made at the twelfth session (A/CN.4/L.86, article 60) that States ratifying the convention should not be obliged to ratify the chapter relating to honorary consuls. Accordingly, the solution of assimilation could not be applied and the position of the career consular officials concerned should be determined separately. He believed that those officials should be deprived of certain privileges and immunities, not only on legal, but also on moral grounds.

43. Finally, he stressed that article 42 of the Vienna Convention referred to professional in the broad sense of the word as well as to commercial activity; the exercise of a professional activity did not seem to be compatible with the functions of a diplomatic agent or of a career consul. At the Vienna Conference, there had been criticism of diplomatic agents engaging in gainful professional activities outside the field of commerce, such as practising medicine. The prohibition or at least limitation of privilege should therefore be given more ample provision.

44. Mr. ŽOUREK, Special Rapporteur, said that most of the difficulties raised by members stemmed from the general concept of assimilation to honorary consuls. If the article clearly stated that the assimilation related exclusively to privileges and immunities, many of those doubts might be dispelled. He had thought it unnecessary to add such a stipulation, for in any case it would be obvious from its context. However, the Drafting Committee should not find it difficult to recast the article in accordance with the majority view.

45. In enumerating the articles which applied to career consular officials who carried on a private activity, Mr. Erim had failed to point out that chapter III, instead of referring back to certain articles held not to be directly applicable to honorary consuls, contained separate provisions concerning, e.g., the inviolability of the consular archives of honorary consuls (article 55) and their exemption from taxation (article 58). Those provisions should be applicable to career consuls who carried on a gainful occupation, for otherwise that exceptional category of officials would be placed in a less favourable situation than honorary consuls. Indeed, it was not enough to provide that that category of career consular officials were not eligible for the benefit of articles 45 and 46, as did the existing draft. It should further be settled what was their legal status in the matter of privileges and immunities. Without such a provision there would be a gap in the draft.

46. In reply to Mr. Bartoš, he recalled that he had originally proposed an article on complete or partial

acceptance, but had later withdrawn that proposal (563rd meeting, para. 37). The Commission had subsequently found a different solution, that of including article 63 (Optional character of the institution of honorary consuls), under which each State was free to decide to appoint or receive honorary consuls (575th meeting, para. 80). Accordingly, the convention could be accepted as a whole.

47. In conclusion, the debate had shown that the additional article was indispensable and could be referred to the Drafting Committee for revision in the light of the comments made.

48. The CHAIRMAN observed that the majority of the Commission was in favour of including a provision assimilating career consular officials who carried on a private commercial or professional activity to honorary consuls with respect to privileges and immunities only. He suggested that article 54 *bis* be referred to the Drafting Committee with that clarification and with instructions to decide where the article should be placed in the draft.

It was so agreed.

ARTICLE 4 *bis* (Power to represent nationals of the sending State)

49. Mr. ŽOUREK, Special Rapporteur, recalled that, at its twelfth session (563rd and 564th meetings) the Commission had discussed an additional article proposed by him concerning the power of consuls to represent the nationals of the sending State, but had deferred its decision until it had obtained the observations of governments on that proposal (commentary (12) to article 4).

50. The reaction of governments had been varied. The Danish Government (A/CN.6/136/Add.1) had adopted a negative attitude. The Governments of Norway and Yugoslavia (A/CN.4/136) wished the consul's powers to be limited to matters connected with the settlement of the estates of deceased persons. The Government of Finland (*ibid.*) had proposed that the consul's powers should be limited to preserving the rights and interests of nationals of the sending State. The Governments of the Soviet Union (A/CN.4/136/Add.2) and Belgium (A/CN.4/136/Add.6) favoured the proposed article, the substance of which was contained in bilateral consular conventions entered into by them with other countries. The Swiss Government (A/CN.4/136/Add.11) appeared to favour the proposal, provided that the consul's participation in proceedings in such circumstances did not mean that the rule *audi et alteram partem* had been satisfied.

51. He had taken into consideration the proposal of Finland, and in his third report (A/CN.4/137, section III) had put forward a new text limiting the scope of the consul's right of representation to safeguarding the rights and interests of nationals of the sending State. As drafted, the additional article constituted an indispensable provision. Unless empowered to act on behalf of his absent nationals until those nationals were in a position to act themselves, the consul would have difficulty in carrying out his essential duty of protecting the interests of the nationals of the sending State.

52. At the twelfth session, some members of the Commission had voiced the fear that the consul's powers under the article might conflict with the law of the receiving State, especially in matters of jurisdiction and procedure. He would assure those members that the consul could only act with due regard to the rules of procedure in force in the receiving State. If, for example, those rules did not allow him to appear on behalf of his national, he would have to appoint a lawyer for the purpose.

53. Mr. JIMÉNEZ de ARÉCHAGA said that the qualification introduced by the Special Rapporteur did not limit sufficiently the scope of the article, which was thus open to the same criticisms as had been voiced during the discussion at the twelfth session.

54. Mr. Amado had then pointed out that, under the article as proposed, a consul was to be given by a multilateral instrument what amounted to a statutory proxy (564th meeting, para. 11).

55. Mr. Padilla Nervo had found the article unacceptable because it would give the consul a right not of protection but of representation, without the consent of the represented parties (*ibid.*, paras. 16-22).

56. Mr. Erim (563rd meeting, paras. 58-60) and Mr. Hsu (564th meeting, para. 23) had pointed out that the broad terms of the provision would give the consul the right to represent, without their consent, all his nationals, even those (e.g., political refugees) who were not on good terms with their own authorities.

57. Mr. Ago had expressed concern at the liability which a sending State might incur in the event of a mistake committed by its consul in the exercise of the powers that would be conferred upon him by the proposed article. In addition, the provisions of the article, although intended to benefit the foreigner concerned, might have an adverse effect, such as making him lose his right to the retrial of the case where a decision had been obtained against him in his absence (*ibid.*, paras. 35 and 36).

58. Equally valid objections had been submitted to the proposed article by Mr. Yokota (*ibid.*, para. 38), Mr. Matine-Daftary (563rd meeting, para. 57), Mr. François (*ibid.*, para. 66) and Mr. Edmonds (564th meeting, paras. 9 and 10). Even Mr. Bartoš, who had favoured the proposed article, had conditioned his approval on its being amended so as to indicate that it would only apply to measures of conservation. He had also thought that the consul's powers should be confined to matters of inheritance (*ibid.*, paras. 24 and 25). Mr. Sandström had likewise expressed the opinion that the consul's powers should be confined to matters of inheritance (*ibid.*, paras. 26-28).

59. Government comments had not shown any broad measure of support for the provision as it stood. Denmark was opposed to the article. Finland and Yugoslavia wished to restrict the scope of the consul's powers to matters of inheritance and to measures of conservation respectively. The United States Government considered it unnecessary to give a consul the powers under discussion in view of the ease of communications in modern times.

60. It was true that some governments, such as that of

Belgium, had introduced a provision along the lines of article 4 *bis* in their consular conventions. But the Commission should refrain from including in a multilateral instrument a provision which was very controversial and to which a great many countries would object, in particular the countries of immigration. The omission of article 4 *bis* would not prevent the countries which favoured such a provision from including it in their bilateral conventions.

61. Mr. VERDROSS said that he approved the idea underlying article 4 *bis*, which was to protect the interests of an absent national of the sending State. A clear distinction however, should be drawn between substantive rights and procedure.

62. In matters of substance, it was inadmissible to give a consul the right to represent nationals of the sending State. It would, for example, be unthinkable for a consul to accept or refuse an inheritance on behalf of one of his nationals.

63. The consul's action was, on the other hand, quite understandable in matters of procedure but should be strictly limited to measures of conservation. That appeared to be the intention of the introductory passage in the Special Rapporteur's new text: "With the object of safeguarding the rights and interests of nationals of the sending State . . ."

64. It should also be made clear that the consul's right could be exercised only until his national was in a position to act for himself.

65. Mr. BARTOŠ recalled that, at the twelfth session (564th meeting, para. 24), he had advocated the inclusion of a provision along the lines of article 4 *bis*, subject to appropriate limitations. A clause of that type had been included in the convention between Yugoslavia and the United States of America with the purpose of safeguarding, in the event of the death of a migrant, the rights and interests of his heirs in his country of origin. Treaties concluded by Yugoslavia with Austria, Italy and a number of other European countries also contained a clause empowering a consul to take measures of conservation in the interests of nationals of his sending State.

66. The idea of a consul's right to represent his nationals with a view to safeguarding their interests had met with opposition on the part of certain countries of immigration. In some Latin American countries, for example, there existed legislative provisions which declared forfeited to the State the estates of persons whose heirs had not entered a claim within a very short period, in one case a mere six months. That type of provision appeared to have points of similarity with the "escheat" or reversion to the Crown of the estate of an alien (*droit d'aubaine*), which had once formed part of the law of many European countries.

67. The same contrast between the approach of countries of emigration and that of countries of immigration was discernible in regard to the duty of the authorities of the receiving State to advise a consul of the death of one of the nationals of the sending State. Whereas the country of emigration regarded the estate of the migrant as the

accumulated product of his work, the country of immigration often appeared to consider that estate in terms of the conservation of wealth within its boundaries.

68. The powers of the consul should, of course, be subject to certain limitations. First, there could be no question of a consul accepting or refusing an inheritance on behalf of a national of the sending State. Second, the consul should only be empowered to take measures of conservation. Third, the right of the consul in that respect should not be construed as conferring upon the State a monopoly of the representation of its nationals abroad; such a State monopoly existed under the legislation of certain countries. Even in respect of measures of conservation, the consul's powers lapsed as soon as the national appeared in order to take action himself or through his attorney.

69. Mr. JIMÉNEZ de ARÉCHAGA, replying to Mr. Bartoš, said that his opposition to article 4 *bis* was not based on the idea of the enrichment of a State at the expense of resident aliens. The laws of Uruguay, and those of many other Latin American countries with which he was familiar, did not contain a provision of the type described by Mr. Bartoš.

70. He would find article 4 *bis* quite acceptable, provided that it was confined in scope to measures of conservation solely in matters of inheritance, and provided that the interested parties were not resident in the receiving State.

71. What he opposed was the granting to a consul of statutory powers to represent the nationals of a sending State.

72. Mr. ERIM recalled that at the twelfth session (563rd meeting, para. 58) he had opposed the provision then proposed because it referred to representation. Since no such reference was contained in article 4 *bis*, he was prepared to accept that article, provided that it specified that it concerned only measures of conservation. He was quite prepared to accept the idea that a consul was entitled to safeguard the interests of the nationals of the sending State; but the consul had no right to substitute himself for those nationals.

73. The CHAIRMAN, speaking as a member of the Commission, said that the statements of the Special Rapporteur and Mr. Bartoš had shown the necessity for some provision along the lines of article 4 *bis*. It was, however, necessary to limit its scope, in particular in the manner specified by Mr. Verdross.

74. Mr. MATINE-DAFTARY said that it was not sufficient to limit the scope of article 4 *bis* to procedure. Some procedural steps could be of major importance. For example, the law of many countries made a special form of recourse available to a person against whom decision had been obtained in his absence, so as to enable that person to secure a retrial of the case. It was essential to make it clear that any action taken by a consul would not prevent that defendant from exercising his right to secure retrial.

75. Accordingly, he could only accept the proposed article if, in the first place, its scope were restricted to measures of conservation and, in the second place, it

was clearly stated that in no event could any act or omission of the consul prejudice the rights of the absent national or be binding upon the latter in any way.

76. Mr. YASSEEN said that the formulation proposed by the Special Rapporteur represented an improvement on the 1960 text. By introducing the limitation suggested by the Government of Finland, the Special Rapporteur had confined the scope of article 4 *bis* to what was necessary — the safeguard of the rights and interests of nationals of the sending State. That formulation was equivalent to limiting the scope of the article to measures of conservation.

77. In reply to Mr. Erim, he said that the question of representation arose also in connexion with measures of conservation. Even steps of that nature normally required the person taking them to hold a power of attorney or to act as statutory proxy.

78. From the point of view of drafting, he suggested that the last sentence should be amended so as to replace the words "have appointed" by "can appoint", and the words "have themselves assumed" by "can assume".

79. Those amendments were necessary because the text as drafted seemed to suggest that the consul could act for a national of the sending State who, although already in a position to do so, had neither appointed an attorney nor himself assumed the defence of his rights and interests.

80. Mr. SANDSTRÖM said that in Sweden, if an interested party was absent, the court itself appointed a person to act in his interest.

81. He could accept the idea of a consul being empowered to take steps limited to measures of conservation in order to protect the interests of a national of the sending State. The text proposed by the Special Rapporteur, however, did not embody the limitation proposed by Finland. That text merely specified that the consul would have the right to appear on behalf of the national concerned "with the object of safeguarding" that national's rights and interests. That formulation did not limit the scope of the consul's action, but merely expressed the purpose of that action. He therefore suggested that the article should be redrafted to state that, in so far as necessary for the purpose of safeguarding the rights and interests of nationals of the sending State, the consul could, on their behalf, apply for measures of conservation.

82. Mr. PAL drew attention to article 22 of the Anglo-Swedish Consular Convention of 1952,² which contemplated various possibilities and set forth the limitations of a consul's action in representation of nationals of the sending State. He suggested that the Drafting Committee should draw upon the language of that article when formulating the final text of article 4 *bis*.

83. The CHAIRMAN suggested that the Drafting Committee be instructed to re-draft article 4 *bis* taking into consideration the government comments, the

remarks of members of the Commission and article 22 of the Anglo-Swedish Convention. He further suggested that the Commission should defer its final decision until the Drafting Committee had prepared the new text.

It was so agreed.

The meeting rose at 1 p.m.

611th MEETING

Thursday, 15 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add.1-11; A/CN.4/137)

(continued)

Agenda item 2

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 52 *bis* (Members of diplomatic missions responsible for the exercise of consular functions)

1. The CHAIRMAN invited consideration of additional article 52 *bis*, proposed in the Special Rapporteur's third report (A/CN.4/137, section III) for inclusion in the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that article 52 *bis* embodied a proposal by the Soviet Union (A/CN.4/136/Add.2) and filled a gap in the draft to which attention had been drawn by a number of governments, including that of Spain (A/CN.4/136/Add.8). Its provisions were necessary to define the legal status of members of the diplomatic staff who were assigned to consular functions.

3. Under a general modern practice diplomatic missions performed consular functions within the scope of their normal duties. Many bilateral conventions, including those concluded recently by the United Kingdom and the Soviet Union with a number of other countries, contained provisions on the subject.

4. Article 52 *bis* was intended to cover two situations. First, the exercise of consular functions by the diplomatic mission itself. Secondly, the case where a diplomatic officer was assigned to direct the work of a consulate situated in the city where the diplomatic mission was situated.

5. Lastly, he pointed out that only States which became parties to the proposed multilateral convention would be able to claim the benefit of the provisions of article 52 *bis*.

6. Mr. VERDROSS agreed that article 52 *bis* would fill a gap in the draft. The idea contained in it was a sound

² *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 478 and 479.

one and was based on a practice reflected in a number of consular conventions, including that between Austria and the Soviet Union of 28 February 1959 (article 32).

7. As he understood it, paragraph 1 meant that the diplomatic officer appointed to carry out consular functions had the same duties as a consul and therefore had to obtain an exequatur in order to deal directly with the local authorities.

8. Paragraph 2 made it clear that the rights of the diplomatic agent concerned were not affected, in that he would continue to enjoy diplomatic privileges and immunities. It was therefore only for the purpose of consular functions and obligations that his position was that of a consular official.

9. The CHAIRMAN, speaking as a member of the Commission, said that article 52 *bis* was intended to cover an existing practice. The interpretation given by Mr. Verdross was generally correct: paragraph 1 stated that, where a diplomatic officer performed consular duties, he enjoyed certain rights which were indispensable for the performance of those duties, and he was required to respect the obligations laid down in the draft articles for persons who exercised consular functions.

10. The status of the person concerned as a diplomat was not altered by his exercise of consular functions; paragraph 2 therefore expressly stated that, in accordance with the existing practice, his diplomatic privileges and immunities were not affected.

11. Mr. FRANÇOIS said that he would go further than Mr. Verdross. A diplomatic agent needed an exequatur in order to be able to act in a consular capacity and not merely in order to deal directly with the local authorities. Unless he obtained an exequatur, any action taken by him would be deemed to have been taken in his diplomatic capacity and not as a consular official.

12. Mr. VERDROSS said that Mr. François had expressed the idea which he had in mind.

13. Mr. MATINE-DAFTARY said that when the question had been raised at the Vienna Conference of the performance of consular functions by a diplomatic mission, he had obtained information on the practice followed by Iran. He had been informed that, with the exception of the Embassy in Baghdad and the delegation to the United Nations in New York, every Iranian diplomatic mission dealt with consular matters in the capital city where it was situated.

14. He had learnt that in none of those cases had an exequatur been required. If therefore the Commission intended to impose the requirement of an exequatur, it would certainly represent an innovation in existing practice.

15. Mr. ERIM asked whether the provisions of paragraph 1 were intended to apply only to a diplomatic agent responsible for the consular section of a diplomatic mission or also to a diplomatic agent assigned to the work of a consulate situated in a city other than that where the mission was situated.

16. Mr. JIMÉNEZ de ARÉCHAGA agreed to the

substance of article 52 *bis*, though the provision should state that an exequatur was necessary, as indicated in bilateral conventions.

17. The Drafting Committee should be instructed to co-ordinate the provisions of article 52 *bis* with those of the other articles of the draft. For example, article 37, paragraph 2, specified that a consul could not address the Ministry of Foreign Affairs of the receiving State unless the sending State had no diplomatic mission to that State. Where the consul was himself a diplomatic agent, the application of that provision would create an awkward situation.

18. Another article to be considered was article 42, which stated that a consul was liable to attend as a witness in court; it was difficult to reconcile that provision with the immunity enjoyed by a diplomatic agent who acted as consul. It was clear that the provisions of paragraph 2 were not sufficient to correct the consequences of paragraph 1 which, by imposing certain duties, could affect the standing of diplomatic officers.

19. Sir Humphrey WALDOCK said that he was in general agreement with the proposed article 52 *bis*. Recent consular conventions concluded by the United Kingdom with a number of other countries contained a provision which in substance was close to article 52 *bis*. For example, article 8 of the Consular Convention of 1952 between the United Kingdom and Sweden specified that the sending State could assign to the work of a consulate situated at the seat of the central government of the receiving State one or more members of its diplomatic mission accredited to that State; in so far as their consular functions were concerned, the persons in question were subject to the provisions of the consular convention, without prejudice to their personal privileges and immunities as diplomatic agents.¹

20. The same clause in the Anglo-Swedish Convention specified, however, that the consular assignment in question must take place "with the permission of the receiving State" and that it was necessary to obtain an exequatur. In addition, it limited the scope of the assignment to the seat of the central government of the receiving State.

21. Article 52 *bis* should be redrafted so as to mention not only the rights and duties of consuls, but also with the rights and duties of the receiving State. The draft articles were intended to form the basis of a multilateral convention and should therefore refer to the rights and duties of States and not only of consuls.

22. The CHAIRMAN, speaking as a member of the Commission, said that, since the article had its origin in a Soviet Union proposal, he would endeavour to clarify its intention. The proposed article reflected the existing practice and was not intended to introduce any innovation. According to the existing universal practice, diplomatic missions exercised consular functions on notification to the Ministry of Foreign Affairs of the receiving State, without any need for an exequatur. It

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 470.

was apparent, however, that under the practice of the United Kingdom and a number of other countries an exequatur was required, in the circumstances contemplated, for the performance of certain consular functions, such as that of appearing in court. He suggested that the article be revised so as to reflect that United Kingdom practice.

23. The provisions of the article did not state clearly whether a diplomatic agent who acted in a consular capacity was entitled to address the Ministry of Foreign Affairs of the receiving State. Probably the intention was that, since in most countries the Ministry of Foreign Affairs had a consular division, the consular section of an embassy should, as a general rule, deal with that consular division.

24. Mr. GROS supported the views of Mr. Verdross, Mr. François and Sir Humphrey Waldock.

25. The text of the proposed article 52 *bis* was not consistent with the provisions of articles 2 and 3. Under its provisions, it might be open to a State to establish in effect a consulate in the territory of another by merely notifying the Ministry of Foreign Affairs of that State that its diplomatic mission was setting up a consular section; and yet that State might perhaps not wish to establish consular relations with it. In the case mentioned by Mr. Erim, the sending State in question might even open a consular office in a city other than the capital of the receiving State, again by merely notifying the Ministry of Foreign Affairs.

26. The Commission should either accept the interpretation of Mr. Verdross that the duties referred to in paragraph 1 of the article included that of obtaining an exequatur, or replace the exequatur by the acceptance of (and not merely the notification to) the Ministry of Foreign Affairs of the receiving State. The question was not one of mere drafting but one of substance. It was for the Commission to decide whether a diplomatic mission could perform consular functions without first obtaining the acceptance of the receiving State.

27. Mr. AGO said that the provisions of the article were undoubtedly necessary. Indeed, the question of the exercise of consular functions by diplomatic missions should be dealt with in perhaps more than just one article.

28. When the Commission had discussed article 2 at its 582nd and 583rd meetings, it had arrived at the conclusion that the establishment of diplomatic relations included the establishment of consular relations unless one of the two States made objection at the time when the diplomatic relations were established. The Commission had also agreed that consular functions could be performed by diplomatic missions. It was therefore necessary to specify the manner in which a diplomatic mission could perform those functions.

29. In that regard, the provisions of article 52 *bis* were insufficient. The Commission had decided that, where consular functions were performed by a consulate, the head of post required an exequatur, but the subordinate consuls did not. In pure logic, therefore, it could be argued that the head of the consular section of an embassy

should also need an exequatur. He was prepared to consider any other system, but the Commission had to decide clearly which system it preferred. If the article left that point obscure, the head of the consular section of an embassy could encounter difficulties when endeavouring to carry out his duties because it would not be known whether he required a special form of acceptance or not. He was, of course, referring to specifically consular functions and not to certain consular functions which could also constitute diplomatic functions, such as the issuing of visas on passports.

30. Another point which needed to be clarified was whether a diplomatic agent assigned to consular work was entitled to address the Ministry of Foreign Affairs of the receiving State. If so, that agent would be placed in a better position than other consuls, who were not entitled to deal with the head of the consular division of the Ministry. It was obvious that the provisions of article 37, paragraph 2, would have to be examined very carefully in conjunction with those of article 52 *bis* so as to establish a uniform system.

31. He could not help thinking that the formula in paragraph 1 of article 52 *bis* over-simplified the position. The statement that the diplomatic agent concerned had the same rights and duties as a consul could give rise to serious doubts in certain instances. For example, in connexion with the liability to give evidence, would the provisions of article 42 be applicable or, on the contrary, was the person concerned covered by the appropriate immunity set forth in the Vienna Convention on Diplomatic Relations (A/CONF. 20/13)?

32. The statement in paragraph 2 that the diplomatic agent concerned retained his diplomatic immunity was correct. It was, however, inconsistent with that statement to say in paragraph 1 that the diplomatic agent had all the obligations set forth in the consular draft, for some of those obligations were incompatible with diplomatic immunity. It was therefore essential to specify in paragraph 1 which of the articles of the draft, particularly in chapter I, actually applied.

33. Lastly, he urged that the provisions of the article should be limited to the case where consular functions were exercised by the diplomatic mission itself, in other words at the seat of the central government of the receiving State. If a diplomatic agent were to be assigned to the work of a consulate situated outside the capital, he would become a consular official and would have to divest himself of his diplomatic capacity.

34. Mr. ŽOUREK, Special Rapporteur, said that to his mind the provisions of article 52 *bis* were general in scope and would apply to a diplomatic agent assigned to consular work, whether in a diplomatic mission or outside it; they should apply even to the case where the consulate which was in another city was temporarily in the charge of a member of the diplomatic staff. In Paris, no fewer than twenty-two States maintained consulates in premises outside their diplomatic missions, but in the charge of a diplomatic agent who appeared in the diplomatic list. It was by reason of that practice that the Czechoslovak Government (A/CN.4/136) had proposed that the draft should include a provision under

which a diplomatic agent assigned to a consulate retained his diplomatic privileges.

35. On the question whether an exequatur would be required by the diplomatic agent assigned to consular work, his research had revealed that only a minority of States imposed that requirement in order that a diplomatic agent assigned to consular functions could deal directly with the local authorities. Existing practices of that type would be respected. Article 52 *bis* was in no way intended to change the existing practice; its sole object was to codify the practice.

36. Mr. PADILLA NERVO said that in Mexico consular functions could only be combined with diplomatic functions if four conditions were fulfilled: first, that the duality in question was of a transitory and not of a permanent character; second, that the authorities of the receiving State gave the diplomatic agent concerned express permission to exercise consular functions, whether in the form of an exequatur or of another document to the same effect; third, that the functions were exercised in the capital city and not at any place outside the capital; and, fourth, that in all cases, the status of a diplomatic agent was higher than that of a consular official.

37. The provisions of the article tended to establish that duality of functions as a permanent institution. If the Commission intended that result, it was even more necessary to require an exequatur or similar document than where that duality represented only a temporary situation. He could not accept the idea that the formal permission of the receiving State should be replaced by a mere notification by the sending State's diplomatic mission to the Foreign Office of the receiving State.

38. Lastly, the Commission should decide that the provisions of the article covered only the case where the consular functions were performed in the capital city.

39. Mr. PAL supported the substance of article 52 *bis*, but thought that its provisions were incomplete. It was necessary to specify, in a separate article or otherwise, how the double function could be conferred. It would for that purpose be appropriate to specify whether an exequatur was needed by the diplomatic agent for the purpose of performing consular duties. He did not attach much importance to the new formalities, because the appointment of diplomats and their continuance in office were subject to the consent of the receiving State. Since the element of consent was already there, the manner in which that consent was given for the double function was not particularly material. It was, however, desirable to state the form in which that consent would be given and also to specify what particular privileges and immunities attached to the person exercising the double functions in question.

40. The CHAIRMAN, speaking as a member of the Commission, fully agreed with Mr. Ago that the case of a diplomatic agent assigned to the work of a consulate situated outside the seat of the central government of the receiving State should be left out of the discussion. Article 52 *bis* should apply only to the case where a diplomatic agent was in charge of the consular section of the diplomatic mission in the capital city.

41. In any event, under article 12 of the Vienna Convention, a diplomatic agent of the sending State could not be sent to establish a consular office in a city outside the capital without the receiving State's express prior consent.

42. Article 52 *bis* was not intended to create a new institution but to codify a universal practice. In all capital cities where the Soviet Union maintained embassies, including Mexico City, those embassies had a consular section. To the best of his knowledge, the notification to the Ministry of Foreign Affairs of the receiving State, as provided for in article 52 *bis*, paragraph 1, had been sufficient.

43. Though some States did require an exequatur for the exercise of certain consular functions by members of a diplomatic mission, it would be an innovation to frame a universally mandatory rule in that sense.

44. With regard to communication with the authorities of the receiving State, as in the cases he had mentioned the consular section formed part of the diplomatic mission, the provisions of article 41, paragraph 2, of the Vienna Convention, according to which all official business had to be conducted with or through the Ministry for Foreign Affairs, would apply. However, in order to take account of the practice of such countries as the United Kingdom, the article might stipulate in addition that consular sections could communicate with other authorities of the receiving State if the latter so permitted.

45. The question whether the article should contain cross-references to specific articles, as suggested by Mr. Ago, could be left to the Drafting Committee.

46. Mr. FRANÇOIS said that it was premature for the Commission to reach a decision before having seen the Drafting Committee's redraft of article 2.

47. If, however, the Commission wished to come to some conclusion immediately, he would support the view — which seemed to be that of the Chairman — that States should be free either to adhere to their existing practice or to choose another. If that course were followed, the Commission would not have to spend time in considering whether or not the majority of States were satisfied with a mere notification, as contemplated in article 52 *bis*, paragraph 1. Contrary to the conclusion reached by the Chairman, his impression was that States usually required a diplomatic agent to have an exequatur for the purpose of performing consular functions.

48. Since a diplomatic agent who was head of a consular section in an embassy was usually a subordinate member of the diplomatic staff, he should not enjoy the right of direct communication with the Ministry of Foreign Affairs of the receiving State.

49. Mr. ERIM presumed from the Chairman's remarks that article 52 *bis*, paragraph 1, would not apply to consular posts that did not form part of a diplomatic mission. On that understanding, he considered that paragraph 1 was desirable and filled a gap in the Commission's draft.

50. He shared the views expressed by other members concerning paragraph 2; it would be easier to decide on the article as a whole once the Drafting Committee had submitted a text.

51. Mr. BARTOŠ said that a provision was certainly necessary on the important matter under discussion, concerning which practice was extremely diverse. On that point he could not agree with the Chairman. For example, Yugoslavia maintained consular relations with some eighty countries, of which over forty either required a diplomatic agent who exercised consular functions to obtain an exequatur or insisted on formal acceptance of the notification that the agent was assigned to consular duties. In view of that diversity of practice, the Yugoslav Government had found that the only way of dealing with the matter was on a basis of reciprocity.

52. He himself would have a slight preference for the simpler procedure of mere notification, particularly as it seemed reasonable to assume that a person found acceptable in a diplomatic capacity would also be acceptable to the receiving State in a consular capacity. However, there had been cases of the receiving State objecting to members of a diplomatic mission being appointed to carry out consular functions, without regarding them as unacceptable in their capacity as members of the diplomatic mission.

53. Nor was the practice of States uniform in the matter of the consular district of an embassy's consular section; that was a point on which greater uniformity was desirable and should be fostered by the Commission. Under the general practice in Europe, by contrast with that of the United States, the district of an embassy's consular section comprised any part of the territory of the receiving State that was not covered by the exequatur of the head of another consular post. He subscribed to the theory underlying that practice and also considered that the head of the consular section of a diplomatic mission should be entitled to communicate direct with the local authorities of the receiving State. That view was not universally held. According to one doctrine, heads of such sections could only communicate with the authorities of the receiving State through the Ministry of Foreign Affairs and according to another they could address local authorities, but any replies had to be channelled through the Ministry. In his opinion, the head of a consular section duly recognized as such, even if not holding an exequatur, should not be in a less favourable position than heads of consular posts for the purpose of communications with the receiving State's authorities.

54. With regard to the question of privileges and immunities, diplomatic agents who carried out consular functions, whether holding an exequatur or not, should be regarded as entitled to diplomatic privileges and immunities. But it was not clear what should be the situation of such persons when seconded from a diplomatic mission to a consular post outside the capital or when appointed acting heads of a consular post on a strictly temporary basis.

55. As far as he could judge from the correspondence he had had occasion to examine, consular sections of embassies corresponded direct with Ministries of Foreign Affairs, mostly by *notes verbales*, and there was nothing to distinguish their correspondence from that of the diplomatic mission itself.

56. Mr. VERDROSS said that, as practice was not

uniform, the article would have to be supplemented by a clause leaving States free to require an exequatur for the purpose of the exercise of some consular functions by diplomatic agents.

57. Mr. PADILLA NERVO said that the scope of the article went beyond the question of the establishment of consular sections in diplomatic missions and some of its implications would have to be thoroughly examined. In his earlier remarks he had purposely not mentioned consular sections in diplomatic missions, since it was self-evident that a diplomatic mission could set up any section it needed, whether consular, legal, commercial or any other. Communications from the consular section of an embassy would be addressed to the Ministry of Foreign Affairs of the receiving State as emanating from the diplomatic mission itself.

58. It was not clear whether the passage "the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions" was applicable only in the case where the consular functions were exercised in the capital of the receiving State.

59. Secondly, was that passage intended to confer upon diplomatic agents exercising consular functions greater rights than those accorded under the Vienna Convention? Furthermore, did the passage mean that diplomatic agents who exercised consular functions would enjoy only the more restricted immunities granted to consuls and would have to fulfil the same obligations, for example, in regard to personal services and customs regulations in the receiving State?

60. Lastly, would members of the diplomatic mission, who normally communicated direct with the Ministry of Foreign Affairs, also have access to the local authorities of the receiving State when exercising consular functions?

61. The Commission would have to consider whether by inserting the new provision in a multilateral convention it would be creating a new category of consular official with wider privileges and immunities, for example in regard to immunity from jurisdiction.

62. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Padilla Nervo, said that, if the article related only to the consular sections of diplomatic missions, the questions of direct communication with the Ministry of Foreign Affairs of the receiving State was automatically solved by the fact that those sections formed part of diplomatic missions which, except as otherwise agreed, had the duty to address themselves to the Ministry. It was the question of contacts with the local authorities which should be settled by suitable redrafting, possibly along the lines suggested by Mr. Verdross.

63. Earlier in the debate, a number of members had referred to double functions. He did not believe that that expression was quite appropriate to describe the performance of consular functions by members of a diplomatic mission, in particular those working in its consular section. Those officials would carry out consular functions within the framework of the regular duties of the mission,

and any reference to double functions was not in keeping with the facts.

64. All the questions raised in the article seemed to have been exhaustively discussed and the article might be referred to the Drafting Committee for revision.

65. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of including an article along the lines of that proposed in the Special Rapporteur's report, but had some doubts concerning the precise meaning and scope of the text as set forth in that document. He thought that the new text might contain four specific provisions. First, it might indicate that certain articles of the draft were applicable to the performance of consular functions by members of diplomatic missions; it would be for the Drafting Committee to decide whether such a reference was advisable. Secondly, it should state that the names of members of the diplomatic mission appointed to exercise consular functions should be notified to the Ministry of Foreign Affairs of the receiving State. Thirdly, it should provide that, in the exercise of consular functions, members of the diplomatic mission might enter into contact with the Ministry of Foreign Affairs and also with other authorities, if the law of the receiving State so permitted; that permission might, of course, be qualified by the receiving State. Finally, it should specify that the privileges and immunities of the diplomatic agents concerned would be governed by the rules of international law on diplomatic relations.

66. Mr. PADILLA NERVO said that, for the purpose of precise instructions to the Drafting Committee, two questions should be settled by the Commission. In the first place, did the article refer exclusively to the consular sections of diplomatic missions? Secondly, did it refer to the exercise of consular functions throughout the receiving State, or only in the capital of that country, where the diplomatic mission was situated?

67. The CHAIRMAN said that the intention was that the article should deal only with the consular sections of the diplomatic mission. Accordingly, consular functions could not be carried out by diplomatic agents elsewhere than at the seat of the mission, unless the receiving State agreed otherwise.

68. He suggested that article 52 *bis* be referred to the Drafting Committee with the directions he had mentioned.

It was so agreed.

69. Mr. BARTOŠ said that his approval of the Commission's decision was contingent upon the text ultimately prepared by the Drafting Committee. It was possible that that text might go beyond the principles agreed upon during the debate and might introduce other, contradictory principles.

PROPOSED ADDITIONAL ARTICLE CONCERNING MEMBERS OF DIPLOMATIC MISSIONS ASSIGNED TO A CONSULATE

70. Mr. ŽOUREK, Special Rapporteur, said that the Czechoslovak Government had proposed such an additional provision (A/CN.4/136). The question of the privileges and immunities of a member of the diplomatic mission who was assigned to a consulate of the sending State had been mentioned on several occasions during the Commission's deliberations. The practice of assigning a

diplomatic agent to a consulate was fairly frequent. Two possible situations could occur. Firstly, the diplomatic agent assigned to a consulate might remain at the headquarters of the embassy and continue to act as a member of the diplomatic mission. In that case, there was no reason to refuse him the status of diplomatic agent. Secondly, a member of the diplomatic mission might be seconded away from the capital to head a consulate in another town temporarily. Owing to the transitory nature of his consular functions, he should in such exceptional circumstances likewise retain his diplomatic privileges and immunities, though he would, of course, be subject to the obligations laid down in the draft for heads of consular post. The situation if a member of the diplomatic mission were permanently assigned to a consulate was quite different, but he thought that the receiving State would never fail to query the correctness of such a procedure.

71. If the Commission agreed in principle to include such a provision in the draft, the Drafting Committee could be instructed to prepare a text on which a decision would be taken later.

72. Mr. AMADO said that, if such a provision was adopted, States would naturally avail themselves of the opportunity of sending diplomatic agents, with extensive privileges and immunities, rather than consuls, whose privileges were much more restricted, to head consular posts. While some States might not take the opportunity, the existence of the provision would provide a great temptation to any country which wished to protect its commercial and other interests with the greatest possible impunity. Accordingly, the article would leave the door open for considerable abuse.

73. Mr. ERIM shared the doubts expressed by Mr. Amado. If the provision were limited exclusively to temporary assignments, then perhaps such an article would do no harm; but if it were drafted generally, the difficulties referred to by Mr. Amado were bound to arise. He therefore thought that the Commission could not give a decision in the absence of a draft of the proposed provision. As Mr. Amado had pointed out, if the door were opened wide, many countries would see no need to send consuls at all, but would appoint diplomats to consular posts, in order that the sending State might profit by their immunities. Moreover, in the foreign service regulations of several countries no distinction was made between career diplomats and career consuls for the purpose of their assignments; they could be appointed either to a diplomatic mission or to a consulate. Only the functions of such officials determined their privileges and immunities in the receiving State.

74. The CHAIRMAN observed that there was a lack of information on the practice of States in the matter. It might be wise to obtain particulars concerning the practice.

75. Mr. VERDROSS said he had serious misgivings concerning the advisability of adopting such a new article in so far as it concerned the members of a diplomatic mission acting exclusively as heads of a consular posts. If a member of a diplomatic mission performed consular functions only and yet enjoyed diplomatic privileges and immunities, the result would be total

discrimination between that official and consuls who performed exactly the same functions. The provision would render the whole draft null and void, since it would mean a complete abolition of the consular status in favour of the diplomatic status. Such a revolutionary proposal could not be introduced indirectly into the draft; the proposal was quite unacceptable in so far as it dealt with a diplomatic agent performing exclusively consular functions.

76. Mr. YASSEEN said he was convinced that the granting of privileges and immunities was justified only by the functions performed. If diplomatic agents performed nothing but consular functions, there was no reason to give them diplomatic status. If, on the other hand, a diplomatic agent performed consular functions temporarily in addition to his diplomatic functions, he must of course retain his diplomatic privileges and immunities. He was not sure whether the practice of States conformed with the proposed article. A consul-general in Antwerp who had been brought to trial in 1959 for having killed his wife had been described as a career diplomatic agent, counsellor to the embassy, who had been latterly performing the functions of consul-general, but neither he nor his government had invoked his status as a diplomatic agent in order to question the criminal jurisdiction of the receiving State.

77. Mr. ŽOUREK, Special Rapporteur, said he wished to dispel a misunderstanding. There was as yet no text of the article suggested to be added by the Czechoslovak Government. For the time being, all the Commission had to do was to discuss the advisability of including the provision.

78. In reply to Mr. Yasseen, he pointed out that in the circumstances contemplated the consular functions formed part of the diplomatic functions. Diplomatic agents who served in consular sections of a diplomatic mission enjoyed diplomatic privileges and immunities, and their names were notified to the Ministry of Foreign Affairs as members of the mission. Accordingly, if the head of such a consular section were assigned to become the head of a consulate, with the consent of the receiving State, it seemed logical that he should continue to enjoy diplomatic privileges and immunities. Nevertheless, he agreed with the Chairman that the Commission was as yet insufficiently informed on the practice of States in the matter.

79. It was generally agreed that the sending State could assign a diplomatic agent to head a consular post on a temporary basis. Accordingly, an express provision on that subject in the draft seemed to be necessary; the status of such diplomatic agents must be established, since otherwise the door would be open for a variety of interpretations. Those cases, moreover, were known in State practice; for example, the embassy counsellor of Czechoslovakia after the second world war had acted as consul-general in London for several years.

80. Mr. BARTOŠ said that there was a practice, particularly widespread in New York, of giving consuls-general the honorary title of minister plenipotentiary. It was understood, however, that in such cases the persons concerned did not enjoy diplomatic privileges and

immunities, but only certain privileges relating to precedence and etiquette. In principle, all States disliked the secondment of diplomatic agents of foreign diplomatic missions to perform consular functions away from the headquarters of the diplomatic mission; moreover, such secondment could not be effected without the consent of the authorities of the receiving State. He further agreed with Mr. Verdross that in such cases there would be discrimination against the other consuls at the post. It was inadmissible in inter-State relations that some persons exercising consular functions should enjoy diplomatic privileges and immunities, while others merely enjoyed consular privileges and immunities. Moreover, the rank of such persons in relation to other consuls was questionable.

81. The performance of consular functions by a diplomatic agent on a strictly temporary basis might be regarded as admissible. The assignment of diplomatic agents to consulates, however, was in conflict with the distinction which should be drawn between diplomatic agents and consular officials. It should be borne in mind that the purpose of granting immunities was to facilitate the performance of certain functions. The head of a consular post exercised consular functions only; otherwise, the consular post could not be maintained as such by the sending State. In short, the proposed provision conflicted with the practice of States.

82. Mr. AGO observed that the Special Rapporteur's general hypothesis that, if a diplomatic mission assigned a member of the staff of its consular section to act as consul, it would be illogical to accord him different treatment merely because he had changed his post, in fact referred back to the argument that a diplomatic agent had an unlimited right to exercise consular functions. If it were indeed illogical to prescribe different treatment for the diplomatic agents concerned, the whole system of differentiating between diplomatic agents and consular officials was illogical, and the effect of the proposal would be to assimilate diplomatic agents to consular officials. Within the limited sense of the provision, however, if the head of a consular post was temporarily prevented from exercising his functions and a diplomatic agent had to be assigned to take his place, it would be normal for the agent so assigned to retain his diplomatic privileges and immunities, since he would eventually return to his diplomatic post. In the broader case, if the sending State appointed a diplomatic agent as permanent head of a consular post, it would be excessive to grant him diplomatic privileges and immunities. As Mr. Amado and Mr. Verdross had pointed out, a large number of States would take the opportunity of appointing heads of consular post with those extensive privileges. The provision should therefore be confined exclusively to cases where a diplomatic agent retained his diplomatic status and acted temporarily as head of consular post.

83. Mr. PADILLA NERVO thought that the questions he had raised in connexion with article 52 *bis* acquired even more importance in the light of the debate on the Czechoslovak Government's proposal. If the Commission were to overrule the objection that had been raised to the article by adopting that objectionable provision in a separate article, the final result would be the complete

assimilation of career consuls to diplomatic agents so far as privileges and immunities were concerned.

84. He recalled that the Chairman had replied in the affirmative to the two questions he had asked with regard to article 52 *bis*. On the other hand, the Special Rapporteur stated in his third report (A/CN.4/137, section III, para. 6) that the case contemplated by the Czechoslovak Government's proposal was covered by article 52 *bis*. The Commission must make up its mind whether the persons concerned were diplomatic agents or consular officials. Unless the proposal were limited to temporary assignments only, it would carry the far-reaching and dangerous implications for which the Special Rapporteur's text of article 52 *bis* had been criticized.

85. Mr. ŽOUREK, Special Rapporteur, reiterated that no specific article covering the case under discussion had yet been submitted. The Commission seemed to be agreed that the provision should relate only to temporary assignments of diplomatic agents to a consulate; he would be perfectly prepared to leave the matter at that.

86. The CHAIRMAN suggested that the Drafting Committee be instructed to submit a text along the lines proposed by Mr. Ago, covering only cases where diplomatic agents were assigned to act as heads of consular post on a temporary basis.

It was so agreed.

The meeting rose at 1.5 p.m.

612th MEETING

Friday, 16 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 50 *bis* (Waiver of immunity from jurisdiction)

1. The CHAIRMAN invited consideration of the Special Rapporteur's new article 50 *bis* on waiver of immunity from jurisdiction which he had prepared in his third report (A/CN.4/137, section III, para. 9) for inclusion in the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, referring to the earlier debate (600th meeting, para. 22) and to the comments of the Governments of Norway and Yugoslavia (A/CN.4/136) on the subject of the waiver of immunity, said that the Norwegian Government considered that the immunities mentioned in articles 40 (Personal inviolability), 41 (Immunity from jurisdiction) and 42 (Liability

to give evidence) should be capable of being waived, while the Yugoslav Government considered that only those mentioned in article 40 should be capable of being waived. His draft article followed approximately article 32 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13). Paragraph 1 applied to consuls and members of the consular staff. It might be desirable to specify in that paragraph the articles mentioning the immunities that could be waived; he would suggest that articles 40, 41 and 42 should be mentioned. Paragraph 2 provided that the waiver had invariably to be express. With regard to the second sentence of the same paragraph, the immunity of consuls covered only acts performed in the course of duty; accordingly, since they were acts of the State, the sending State must be given every opportunity of satisfying itself that immunity would be waived only in cases in which such action was possible. That was why the article required that the waiver should be express. The stipulation that waivers had to be communicated through the diplomatic channel would offer a further guarantee. Paragraph 3 followed the provision of paragraph 4 of article 32 of the Vienna Convention and had provided for separate waiver of immunity from the measures of execution resulting from a judicial decision. That analogy with the Vienna Convention was reasonable. Diplomatic agents enjoyed immunity in respect of their private acts also, whereas the immunity of consuls was limited to acts performed in the exercise of their functions. The waiver, therefore, must invariably relate to functional acts. For that reason, every caution should be used and all the necessary guarantees provided.

3. The article would be particularly useful in cases where a consul was to give evidence. Under article 42, he could refuse to testify in respect of acts performed in the exercise of his official functions and could decline to produce documents relating to those functions. The sending State might, however, decide to waive his immunity and to authorize him to testify in respect of official matters; the decision always had to be made exclusively by the sending State. The terminology of the article would, of course, have to be adapted to that of the earlier provisions, particularly article 1, containing the definitions. For the time being, therefore, the Commission should consider the substance of the article, which would then be referred to the Drafting Committee. With regard to its position in the draft, the most logical place would be immediately before article 51 (Beginning and end of consular privileges and immunities).

4. Mr. EDMONDS said that he was in favour of including an article along the lines proposed, but the provision as drafted by the Special Rapporteur did not make it quite clear what immunity was involved. Jurisdiction in ordinary legal parlance meant the right of a court to determine a controversy; but the Special Rapporteur was using the expression to excuse a consul from appearing in court to give evidence, which was not strictly a jurisdictional matter.

5. The article contained another, even more serious defect. Under paragraph 3, the enforcement of a judgement would require a separate waiver. That seemed to imply that there were two immunities, first, immunity

from jurisdiction for the purpose of the adjudication of a controversy and, secondly, immunity from the consequences of the proceedings. Usually, in American law, certain objections to jurisdiction which rested upon the right of the court to hear and determine the controversy might be made at any time during the proceedings. But a litigant was not allowed to gamble with the outcome. A defendant could not first submit to the jurisdiction of the court and subsequently claim immunity from the enforcement of the judgement. To allow such a procedure would mean that if the sending State was not satisfied with the decision of the court, it might, by withholding the waiver of immunity from execution, prevent that decision from being enforced. Such a result would be contrary to all the fundamental principles of the administration of justice.

6. Mr. VERDROSS said that article 50 *bis* was extremely useful and filled a gap that had been left in earlier drafts. With regard to paragraph 2, however, some might query whether the waiver of immunity for the purposes of civil or administrative proceedings should be express. The Commission's 1958 draft on diplomatic intercourse (A/3859, chap. III, article 30, para. 3) had provided that the waiver of immunity in a civil action could also be implicit; that provision had, however, been altered at the Vienna Conference. In the draft under consideration, since a consul enjoyed immunities in respect of official acts only, and since those acts would in all cases be imputable to the State, it would be accurate to provide that the waiver should always be express.

7. Mr. MATINE-DAFTARY agreed with Mr. Verdross concerning the need for the article. Moreover, it was correct that it should be narrower than article 32 of the Vienna Convention, inasmuch as only consular officials enjoyed personal inviolability and as other members of the consular staff enjoyed immunity only under article 41 in respect of acts performed in the exercise of their functions.

8. He asked why article 50 *bis* did not contain a provision corresponding to paragraph 3 of article 32 of the Vienna Convention, which seemed to apply *a fortiori* to consuls who might, in the circumstances contemplated, take the initiative in obtaining a waiver of their immunity from jurisdiction.

9. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. Verdross and Mr. Matine-Daftary that the new article would be extremely useful. There was, however, a problem of co-ordination that might arise. The Vienna Convention contained a single article, article 31, relating to immunity from jurisdiction, which dealt with criminal as well as with civil and administrative jurisdiction. In the draft on consular intercourse, however, article 40 related to personal inviolability and article 41 to immunity from jurisdiction; the former dealt in substance with immunity from criminal jurisdiction, while the latter related to immunity from civil and administrative jurisdiction. He was afraid that the new article as drafted might be held to apply to article 41 only.

10. He would be interested in the Special Rapporteur's reply to Mr. Matine-Daftary's question. It was possible that a consul might institute proceedings which might give

rise to a counter-claim, for instance, in connexion with the dismissal of an employee of the consulate.

11. Mr. ŽOUREK, Special Rapporteur, in reply to Mr. Jiménez de Aréchaga, referred to his earlier suggestion that articles 40, 41 and 42 should be mentioned specifically in paragraph 1 of the new article. He quite agreed with Mr. Verdross that the waiver should in all cases be express where consular relations were concerned.

12. With regard to Mr. Matine-Daftary's question, he said that the status of diplomatic agents differed radically from that of consular officials. Diplomatic immunities covered not only the functional acts, but also all the private activities of the diplomatic agent, and it had therefore been necessary to provide for cases where the diplomatic agent himself might institute proceedings in respect of a private act, to which the other party should be able to submit a counter-claim. By contrast, in the case of consular officials, whose immunities covered only acts performed in the course of duty, it was hard to imagine that a consul should personally submit to the local jurisdiction as a plaintiff. The only cases that would be likely to arise would be those where the sending State was asked to waive the consular officials immunity: because a national of the receiving State wishes to bring an action against that official. The question of counter-claims would not arise in any cases governed by article 40 or article 42; and so far as article 41 was concerned, the immunity from jurisdiction was restricted to acts performed in the exercise of the functions of members of the consulate. Nor did he think that the case cited by Mr. Jiménez de Aréchaga justified the inclusion of a clause concerning counter-claims, for the contractual or other relations of public officials were governed by the law of the sending State, and litigation concerning the dismissal of a consular employee would certainly not be brought in the courts of the receiving State. If a subordinate official sued the consul for wrongful dismissal, the latter's answer would be that the act in question had been performed in the exercise of his functions, and the judge would be obliged to accept the answer. If, however, the sending State agreed to waive the consul's immunity for the purpose of the action, then the case would be adjudicated in the normal way. The consul being the defendant, counter-claims could be lodged only by him; but such a case would be already covered by the original waiver. In general, because consular immunities were limited, consuls were, save for exceptions provided in international agreements, subject to local jurisdiction in respect of private acts, and a provision based on paragraph 3 of article 32 of the Vienna Convention would have no relevance.

13. Mr. PAL said that article 50 *bis* did not make it sufficiently clear whether or not the consul himself could waive his immunity. It was only if that possibility was open to the consul that a provision on the lines of paragraph 3 of article 32 of the Vienna Convention should be included in the draft.

14. Mr. AGO said he had not been convinced by the Special Rapporteur's reply to Mr. Matine-Daftary's question. If a consular official instituted a civil or administrative proceeding, he was estopped from invoking

immunity in respect of counter-claims to his suit. The Special Rapporteur had stated categorically that consular officials enjoyed immunity only in respect of acts performed in the exercise of their functions; but if, for example, a consul proceeding by motor vehicle to an official meeting was in collision with another vehicle, he would probably be immune from civil jurisdiction and could not be sued for damages. But if the consul suffered injury and sued the other party, he should not be able to plead immunity in respect of a counter-claim brought by that other party. Although it might be used less often for consular officials than for diplomatic agents, he thought it essential that a clause based on article 32, paragraph 3, of the Vienna Convention should be included in draft article 50 *bis*.

15. Sir Humphrey WALDOCK fully agreed with Mr. Ago. The dividing line between the official and the private acts of consular officials was not always clearly drawn, and the Commission was labouring under some disadvantage through its lack of knowledge of the actual practice. A consul might often have to conclude agreements and contracts—in connexion with renting premises, for example—which might concern both official and private acts. Because the private was not always distinguishable from the official capacity of consular officials, there would certainly be no harm in including a provision along the lines of paragraph 3 of article 32 of the Vienna Convention and thus safeguarding the position of such officials.

16. Mr. SANDSTRÖM endorsed the views expressed by Mr. Ago and Sir Humphrey Waldock.

17. Mr. VERDROSS observed that the Special Rapporteur himself had distinguished in certain articles of the draft between official acts and acts performed in the exercise of functions of consular officials. The latter included certain private acts; he therefore supported the views expressed by Mr. Ago and Sir Humphrey Waldock.

18. Mr. ŽOUREK, Special Rapporteur, said he had no objection in principle to including a provision modelled on article 32, paragraph 3, of the Vienna Convention, although he still could not see how it could be applied to consular officials in practice. In the case cited by Mr. Ago, if it were established that the consul was exercising his official functions at the time of the accident, he would certainly try to avoid bringing an action in the receiving State for that might place him in an awkward position.

19. Mr. YASSEEN expressed misgivings concerning the usefulness of the article as a whole, in view of the extremely limited nature of consular privileges and immunities. Since those immunities were granted only in respect of acts performed in the exercise of consular functions, their waiver would be very rare indeed. In the case of diplomatic agents who enjoyed immunity even in respect of their private acts, it was obviously necessary to add a provision on waiver of immunity by the sending State, but the proposed article might to some extent be justified in respect of the personal inviolability conferred upon the consul under article 40 and of refusal to give evidence under article 42.

20. Be that as it might, it would not be right to insert in the proposed article paragraph 3 of article 32 of the Vienna Convention concerning counter-claims. The right to waive immunity was vested in the State and the consul enjoyed immunity only in respect of acts performed in the exercise of his functions. The insertion of a paragraph along the lines of the above-mentioned paragraph 3 would be tantamount indirectly to enabling the consul himself, in instituting proceedings, to waive an immunity which was given to him solely in respect of acts performed in the exercise of his functions, i.e., acts that might be imputed to the State itself. Such a paragraph was acceptable in the case of diplomatic agents, because they enjoyed immunity even in respect of their private acts.

21. Mr. GROS said that, although Mr. Yasseen's theory might be correct, the practice of States in the matter was quite different. For example, French consuls were not authorized to initiate proceedings relating to functional acts without the permission of the Ministry of Foreign Affairs, and he believed that a similar situation obtained in other countries. Moreover, a consul could not include the costs of proceedings in his budget and would have to ask the sending State for funds before he could engage counsel. Accordingly, he could only regard Mr. Yasseen's objections to the new article as purely academic.

22. Mr. VERDROSS pointed out to Mr. Yasseen that a distinction was drawn throughout the draft between official acts and acts performed in the exercise of consular functions. The logical consequences should be drawn from that distinction.

23. The CHAIRMAN, speaking as a member of the Commission, observed that article 50 *bis* was in fact consequential. The fact that certain immunities were granted to consular officials made it necessary also to provide for the possibility of waiving those immunities. Moreover, such an article had been adopted at the Vienna Conference, and the doubts that had been raised concerning its usefulness were not, in his opinion, substantiated by practice. Nor could he agree with members who asserted that the draft under discussion accorded immunities only in respect of acts performed in the exercise of consular functions. Article 40 admittedly granted an incomplete immunity, but it gave immunity from arrest or detention pending trial in respect of all acts performed by consular officials. He therefore saw no harm in including a provision along the lines of article 32, paragraph 3, of the Vienna Convention; although such a provision might not in practice cover very important cases, it might be useful if read in connexion with other articles of the draft.

24. Mr. AMADO thought that it would be useful to include a clause based on article 32, paragraph 3, of the Vienna Convention to provide for cases where a sending State did not prohibit consular officials from initiating proceedings.

25. Mr. TSURUOKA considered that, since under the Vienna Convention the right of waiver had been granted to diplomatic missions, a like right might be granted to consular officials also. Because the questions involved would often be of little importance, and a

consular official, like a diplomatic agent, represented his country, his dignity as such should be respected by granting him the right of waiver.

26. The CHAIRMAN noted that the consensus was in favour of an article along the lines proposed by the Special Rapporteur. It had been suggested that another paragraph should be added based on article 32, paragraph 3, of the Vienna Convention, and the Special Rapporteur had raised no objection to that suggestion. The second sentence of paragraph 2 of the new article had no parallel in the Vienna Convention, and might therefore be omitted from the new article also, for a consul might receive direct instructions to waive the immunity of subordinate staff of the consulate. The Special Rapporteur had suggested that articles 40, 41 and 42 should be referred to specifically in paragraph 1; the Drafting Committee might consider whether any other articles of the draft should also be mentioned. Finally, Mr. Edmonds had raised the question whether it was advisable to provide in article 50 *bis*, paragraph 3, for a separate waiver of immunity from measures of execution resulting from a judicial decision. He would point out that a corresponding provision appeared in article 32, paragraph 4, of the Vienna Convention, and there seemed to be no reason to depart from that text.

27. He suggested that the article be referred to the Drafting Committee with instructions to take into account the points raised during the discussion.

It was so agreed.

RIGHT OF A STATE TO MAINTAIN CONSULAR RELATIONS WITH OTHER STATES.

28. Mr. ŽOUREK, Special Rapporteur, replying to the Chairman, said that he had no further additional articles to propose, but wished to give an explanation on the subject of the right of a State to maintain consular relations with other States. The question had been raised by the Czechoslovak Government, which had considered that the draft should include an article for that purpose. He had dealt with the subject in his third report (A/CN.4/137, section III, paras. 10 and 11). He recalled that, in his first report (A/CN.4/108, article 1), he had included a provision which, in deference to the objections by some members, he had later redrafted and submitted at the eleventh session, which read: "Every sovereign State is free to establish consular relations with foreign States." (496th meeting, para. 17.)

29. The late Professor Scelle had proposed another wording: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected" (*ibid.*, para. 26). That formulation embodied a principle, broadly similar to the right of legation, by virtue of which all States had the right to maintain consular relations.

30. The Vienna Conference had not included an article on the right of legation in the Convention on Diplomatic Relations. He appreciated therefore that a provision on the right to maintain consular relations would not be likely to receive unanimous support in the Commission. Since, however, the question was an important one,

he had thought that he owed an explanation to the Commission on the subject.

31. Mr. YASSEEN expressed doubts on the advisability of including a provision such as that described by the Special Rapporteur. A somewhat similar provision, on the subject of the "right of legation," had been proposed at the Vienna Conference, but had not been adopted.

32. The right to maintain consular relations was not technically a "right." Under existing international law, it was open to a State to propose to another State the establishment of consular relations, but those relations could not be actually established without the consent of that other State. Besides, the "right" in question was not enforceable, for there was no counterpart obligation owed by the other State. And in any case, the provision in question would probably conflict with the terms of article 2, which stated that the establishment of consular relations took place by the "mutual consent" of the States concerned.

33. Mr. MATINE-DAFTARY agreed that, under existing international law, a State could not be said to have a right to conduct consular relations. Speaking, however, as a professor and not as an agent of the government, he found the idea contained in the Czechoslovak proposal very attractive and worthy of study by the Commission.

34. As the late Professor Scelle had maintained during the discussion of similar proposals at previous sessions, it was in the interest of the progress of international law to indicate that a State could not arbitrarily refuse to have consular relations with another. There were cases in which it would be altogether illogical and unjust for a State to refuse another's request to open consular relations for the purpose of protecting existing interests. For example, there was a constant movement of pilgrims and businessmen between his own country, Iran, and its friend and neighbour Iraq; it would be most unreasonable for one of those countries to refuse to maintain consular relations with the other and thereby deprive those travellers of necessary consular services.

35. Mr. ERIM said that the terms of article 2 of the draft, and the similar provisions contained in article 2 of the Vienna Convention, showed clearly that mutual consent was necessary for the establishment of both diplomatic and consular relations.

36. The provision under discussion could not therefore be accepted without dropping article 2. The formula proposed by the late Professor Scelle did not add anything to article 2, from the strictly legal point of view. A right which could not be exercised without the agreement of other States could hardly be described as a right at all. The only purpose of such a provision would be to give moral support to the idea that States should consider in the future whether they did not have some duty to maintain economic, commercial and cultural relations with one another.

37. Mr. GROS believed that he was faithful to the French school in observing that, apart from the stoutly-defended thesis of the late Professor Scelle, a practical approach to the question should be adopted. States

were certainly entitled to conduct consular relations, but the establishment of those relations took place in each case by the mutual consent of the two States concerned. It had been the intention of the late Professor Scelle to suggest that it might in the future be impossible for a State to withhold from another State the establishment of either diplomatic or consular relations. He was thus developing the idea that, with the growth of the international community and the development of international organizations, a time would come when the relations between States would no longer be conducted on the purely bilateral basis of diplomatic and consular relations, where the appreciation of each situation necessarily lay with the States.

38. Mr. AGO said that the term "right" could not appropriately be used in the context. Even at the time of the establishment of diplomatic relations, it was possible for one of the two States concerned to refuse to establish consular relations as well. It was therefore clear that no right to exact from another State consent to the establishment of consular relations could be said to exist.

39. Moreover, the draft made provision for the possibility of severing consular relations. If a State could thus break off consular relations, it was clear that the other State concerned could not be held to have the right to maintain them.

40. The provision in question was inadmissible because it would undermine the whole structure of the draft, which was based on the premise that consular relations were established and maintained by the mutual consent of the States concerned. It might be suggested that the Commission should urge States to increase the scope of their consular relations, but that would not justify the provision under discussion. It might be appropriate to make propaganda in favour of marriage, but every marriage nevertheless required the consent of the two interested parties.

41. Mr. MATINE-DAFTARY said the analogy was wrong: marriage was a question of inclination, whereas consular relations were maintained by States because of the material interests at stake. When a State opened its frontiers to the nationals or the goods of another State, it could no longer refuse to admit the consul of that State, whose mission it was to protect both nationals and trade. It could not therefore be said, with Mr. Ago, that it was like imposing marriage on a person, but rather denying a spouse access to the matrimonial home. The Commission might do well to reflect on the possibility of including some provision in the draft to the effect that a State could not arbitrarily refuse to conduct consular relations with other States.

42. Mr. AMADO said that the formula of the late Professor Scelle contained an element of irony: it began with the proposition that every State had the right to establish consular relations with foreign States, but went on to specify that the right in question could only be exercised if the States concerned were "in agreement that such consular relations shall be effected". The late Professor Scelle had been a visionary, but able to smile at his own dreams.

43. It was the task of the Commission to define the legal rules in force among States and applied by them — codification of international law — and also to formulate certain other rules which were already alive in the legal conscience of peoples — progressive development of international law. The proposed rule, however, was not yet in existence in State practice and he did not think that it would come to life in the near future.

44. The CHAIRMAN, speaking as a member of the Commission, said that the proposal of the Czechoslovak Government had been largely misunderstood by those members who had spoken so far. There was no doubt that, under existing international law, and even in the foreseeable future, no State could be said to owe an obligation to accept the establishment of consular relations with another.

45. In fact, the proposal of the Czechoslovak Government did not conflict in any way with the rule that mutual consent was necessary for the establishment of consular relations. The right embodied in the Czechoslovak proposal was similar to the "right of legation" which had been accepted for many centuries as one of the attributes of a sovereign State. The right of legation did not mean that a State could send a diplomatic mission to a foreign country without that country's consent. It merely meant that every sovereign State had the right to maintain diplomatic relations with foreign States.

46. In like manner, the idea embodied in the proposal was that every sovereign State had the capacity to conduct consular relations. The affirmation of that legal capacity would introduce a progressive idea into the draft articles but, since the question was largely a theoretical one, it might perhaps be expedient not to include it, in view of the practical difficulties to which it might give rise.

47. Mr. ŽOUREK, Special Rapporteur, said that the Chairman had aptly described the theory on which the proposal was based. The right of a State to conduct consular relations was of the same order as the right of legation and the right to conclude treaties. No one had suggested that, because all sovereign States had treaty-making capacity, a State was under any obligation to agree to enter into a particular type of treaty with another.

48. The right to conduct consular relations, like the right of legation, was an attribute of the sovereign State. At a time when entities other than States were increasing in number in the international scene — in the form, in particular, of intergovernmental organizations — it was of more than theoretical interest to specify that only States possessed those rights.

49. The use of the term "right" in the context was not inappropriate. It was quite common in law — and particularly in constitutional law. By virtue of the principle of the sovereign equality of States, the right of a State to maintain consular relations could, in each specific case, be exercised only with the agreement of the other State concerned.

50. The fact that the right to maintain consular relations was not backed by a sanction was not a valid argument against the proposal. Since Roman times, the concept of *lex imperfecta* had been familiar to all lawyers. That

concept was also familiar in international law, which differed radically from municipal law in so far as sanctions for enforcing that right were concerned.

51. Since the Vienna Convention did not contain any provision on the right of legation, he was prepared, solely as a matter of expediency, not to press for the inclusion of an article concerning the right to maintain consular relations, but he still believed that the idea was a sound one and that the draft without an article concerning the right to maintain consular relations would be incomplete.

52. Mr. MATINE-DAFTARY said that if a State admitted into its territory nationals of another State in large numbers, it would be most unfair for it to refuse to those aliens the consular facilities to which they were legitimately entitled.

53. He recalled that, in the course of the discussion during the eleventh session, the late Professor Scelle had pointed out (496th meeting, para. 28), that "the consular function was one of the typical examples of the organization of international law. International trade was the foundation of international law... As long as trade relations subsisted, and the interests of nationals of the sending State continued to need protection, even if the diplomatic relations were severed, consular relations should continue despite the severance of diplomatic relations... Furthermore, consular relations should be established with a sovereign or semi-sovereign State, even if in the absence of diplomatic relations."

54. At the twelfth session, the late Professor Scelle had reiterated the same views (547th meeting, para. 37) and had maintained that, under international law, a State was not absolutely free to maintain or not to maintain diplomatic and consular relations with other States: a State which recognized another was "under an obligation to maintain diplomatic and consular relations with it".

55. Sir Humphrey WALDOCK supported the suggestion that the draft should not contain any provision on the question under discussion. The fact that the Vienna Conference had not included in the Convention on Diplomatic Relations any provision on the subject of the right of legation fully justified that approach.

56. Mr. YASSEEN said that the Chairman's conception was correct. It was not a question of a right, but of capacity, capacity of enjoyment, but there was no need to say so expressly in the draft, since that principle was clearly implicit in article 2.

57. Mr. BARTOŠ agreed with Mr. Yasseen and added that that capacity could not be regarded as analogous to certain so-called constitutional rights which had been proclaimed in nineteenth century liberal constitutions of some countries, but which were not backed by any specific remedies or means of enforcement. Even those countries now stated those rights in a different form and had established constitutional remedies.

58. In the case under discussion, the Commission had no need to go further than to uphold the thesis, so cogently argued by Mr. Scelle and championed by Mr. Matine-Daftary, that States which belonged to

the international community should respect the institutions of that community, one of them being the institution of consuls as a means of protecting the rights of individuals. Mr. Scelle had even gone so far as to argue that States were not entitled to repudiate at discretion consular relations once they had been established. That extreme view had not been endorsed by the Vienna Convention, which had provided for the severance of diplomatic relations. Consular law, as it stood, also recognized the possibility of severance of consular relations. For reasons of State or out of political considerations, consular relations could be severed at any time, and in his view the question was whether the severance depended solely on the political decision of the State desiring it or whether it was conditioned as observance of the procedure laid down in the consular convention for renunciation. In practice, severance depended on the unilateral, political decision of the State.

59. Circumstances were not propitious for transforming the capacity to establish consular relations into an enforceable right, and a statement on those lines might be inserted in the commentary in order to explain why the Commission considered that a provision on the subject should not be inserted in the draft.

60. The CHAIRMAN said he would take it that the Commission did not wish to reverse the decision taken at the previous session not to include an article in the sense proposed by the Czechoslovak Government (*cf* commentary (4) to article 2).

It was so agreed.

PROPOSAL BY MR. HSU

61. Mr. HSU said that he had arrived late during the session and had been surprised to find that the Special Rapporteur's third report made no mention of the comments of the Government of China (A/CN.4/136/Add. 1). He appreciated that they might have been overlooked by inadvertence, but that was particularly unfortunate at a session during which one of the Commission's main tasks was to examine the comments by governments in order to determine whether or not they could be taken into account in the draft. Its efforts to encourage governments to submit comments would certainly not be successful if such omissions were allowed to occur.

62. At that late stage in the discussion he would not ask the Commission to review the Chinese Government's comments, but only wished to draw its attention to the last comment concerning a provision for the settlement of disputes. As such an addition might not be found acceptable, he proposed that the Commission should recommend in its report that the conference of plenipotentiaries should consider an optional protocol analogous to that adopted by the Vienna Conference concerning the compulsory settlement of disputes.

63. A provision of that kind had been inserted in other drafts prepared by the Commission.

64. The CHAIRMAN remarked that to complain that comments made by the Kuomintang Group had not been taken into account seemed strange, because

one of the most serious violations of international law at the moment was the fact that the great Chinese people was not represented in the United Nations.

65. Mr. GARCÍA AMADOR said it was most regrettable that any special rapporteur appointed by the Commission should deliberately ignore comments made by a government. As a matter of principle, such action was unjustified so long as that government was officially recognized by the General Assembly, of which the Commission was a subsidiary organ. He also wished to protest against the Chairman having taken advantage of his position to introduce a political issue that was not connected with the work of the Commission.

66. The CHAIRMAN observed that he was free to express his view as a member of the Commission and it was in that capacity that he had done so. He did not know whether or not the Special Rapporteur had taken the comments in question into account and wished simply to indicate the impropriety of raising the matter.

67. Mr. ŽOUREK, Special Rapporteur, said he was perfectly prepared to discuss which government, in the light of the rules of international law, was authorized to represent China in the United Nations. He would be able to rely on the memorandum (S/1466) prepared by the Legal Office of the Secretariat, from which it must be concluded that the Government of the People's Republic of China was the only one qualified to represent that country.

68. Mr. García Amador's remarks were wholly unjustified for the reasons he had stated. Moreover, he had not received the comments in question before completing his task.

69. Mr. HSU pointed out that, although the comments of the Government of China had been received before 1 April 1961, there was no mention of them in paragraph 4 of the introduction to the Special Rapporteur's third report. He had been greatly surprised to hear international lawyers voice the opinions just expressed. The question of the representation of China in the United Nations was outside the Commission's competence and so long as the United Nations recognized the Government of the Republic of China, the Commission must accept that fact.

70. Mr. VERDROSS stated that the Commission's task was to codify the law on consular intercourse and immunities, and the question of an optional protocol concerning the compulsory settlement of disputes lay outside the range of problems on its agenda.

71. Mr. EDMONDS said he was not quite clear what charge had been made by Mr. Hsu. Had he wished to assert that comments from an official source were entitled to consideration, or that certain comments had been forwarded to the Special Rapporteur by the Secretariat but had not been mentioned in his report?

72. The CHAIRMAN pointed out that the comments had been circulated in document A/CN.4/136/Add.1.

73. Mr. FRANÇOIS said that, although the Chinese Government's comments, together with those of other governments, had been circulated, it was very regrettable

that the Special Rapporteur had not taken that government's comments into account. He hoped, as Mr. Hsu had suggested, that they had been overlooked by inadvertence, because so long as the Chinese Government was represented in the United Nations, whatever might be the personal preferences of the Special Rapporteur, he should have mentioned that government's observations in his report.

74. With regard to Mr. Hsu's proposal, it would not be advisable to make a recommendation concerning the settlement of disputes: that issue must be decided by the conference of plenipotentiaries.

75. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. François's views concerning Mr. Hsu's proposal. The possibility of an optional protocol was not likely to be overlooked by a conference of plenipotentiaries in view of the two precedents established in that regard by the Vienna Conference and the United Nations Conference on the Law of the Sea. There was no need to make any recommendations on the subject.

76. Sir Humphrey WALDOCK said that, although he agreed in general with Mr. François, the question of the compulsory settlement of disputes was regarded as extremely important by many international lawyers, and that the Commission should indicate in its report that the matter had been discussed. He recognized that recent experience at international conferences showed that no useful purpose would be served in recommending the insertion of a provision in the text of the draft itself. The Commission should state that it had studied what had transpired on that point at the Vienna Conference and assumed that the question would also be examined at any future conference on consular intercourse and immunities.

77. The CHAIRMAN suggested that the procedure outlined by Sir Humphrey Waldock should be followed.

It was so agreed.

The meeting rose at 1 p.m.

613th MEETING

Monday, 19 June 1961, at 3.10 p.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

(Resumed from the 605th meeting)

[Agenda item 5]

1. The CHAIRMAN said it had been agreed at the 581st meeting that the Commission would not at the current session discuss the topic of State responsibility; he would, however, invite Professor Louis B. Sohn, of the Harvard Law School, to introduce a revised draft

"Convention on the International Responsibility of States for Injury to Aliens", prepared by the Harvard Law School.

2. Mr. SOHN expressed his thanks for the opportunity to present to the Commission the final draft of the "Convention on the International Responsibility of States for Injury to Aliens", which he had prepared with Mr. Baxter as part of the programme of international legal studies of the Harvard Law School pursuant to a suggestion by Mr. Liang. The draft had been prepared with the help of a distinguished advisory committee, of which Professor Briggs and several other professors and practising lawyers had been members.

3. The draft had been prepared as a contribution to the Commission's work of codification. It was a purely private work; neither Harvard nor the authors personally had received any special compensation from any source for the execution of a long and arduous task.

4. The original idea had been to bring up to date the Harvard Draft of 1929, but it had soon been found that, in view of changed circumstances and both theoretical and practical developments over the past thirty years, an entirely new work was necessary. Twelve drafts had been prepared in six years. Each article of the final text was accompanied by a note explaining the reasons for preferring one approach to the subject rather than another. In addition, the authors were working on a statement of existing law, which would contain with respect to each article of the draft convention as complete a survey as possible of international and national case-law, treaties, diplomatic practice and legal writings. The material to be sifted was so voluminous that it had been found necessary to employ a staff of six research assistants. More than half the work had been completed and over 1,000 pages should be ready for the printer before the end of 1961. The complete printed text of all three parts of the work should be available to the Commission in the spring of 1963.

5. One general observation might be made about the difficult problem of the relationship between codification of the law and development of the law. In dealing with State responsibility an attempt should be made to reconcile the precedents with modern needs. Precedents should of course be evaluated in the light of circumstances in which the decisions had been rendered. To the extent that circumstances had changed the rules might have to be modified. On the other hand, to the extent that the decisions of international tribunals reflected the basic principles of international law which were of permanent validity, it would be extremely undesirable to depart from them for the sake of satisfying the temporary interests of any particular group of nations. If a text could not please everybody, the interests of the developing world community should be the decisive factor governing the choice. Neither history nor temporary national interests should be permitted to impede progress, but, at the same time, the idea of progress should not automatically lead to discarding the experience of the past or logical deductions from fundamental principles of international law. In all work of codification it was necessary to weigh those factors carefully and to arrive at necessary compromises.

6. So far as the topic of State responsibility was concerned, cases in which there were important differences between various groups of States had to be distinguished from those where the interests of all coincided. Although there might be disagreement on the scope and importance of property rights, all States were interested in giving the utmost protection to individuals against personal injury, unjust arrest and unequal treatment. Thousands of young men were studying in foreign countries, thousands of technicians from many countries performed useful functions abroad and tourism had increased beyond expectation. All that growth in international co-operation and in the intermingling of citizens of many nations, regardless of their social systems, required a proper international legal system to protect them. It was the task of a convention on the international responsibility of States for injuries to aliens to provide such protection and to adapt old principles to new needs. In trying to find solutions which did not accept the extreme points of view on a subject, the authors of a draft naturally exposed themselves to attacks from both sides. Many criticisms of the draft had been received and many of them had been taken into account; others had cancelled each other out, and the authors had maintained their previous draft with some explanations as representing a reasonable compromise between those different points of view. The authors did not presume that their draft was the last word on the subject, but they did hope that at least it indicated a direction in which the work of codification should be proceeding. They also hoped that their work might be useful to the Commission as raw material from which it would shape its own approach to a difficult and challenging subject.

7. The CHAIRMAN expressed the Commission's appreciation of the work presented. It was to be hoped that similar efforts would be undertaken in other parts of the world reflecting other points of view. That would be very useful to the Commission when it began its consideration of the subject in detail.

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-11; A/CN.4/137)
(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 1 (Definitions)

8. The CHAIRMAN, inviting the Commission to resume consideration of the draft on consular intercourse and immunities (A/4425), said that the Drafting Committee had prepared the following re-draft for article 1 :

"1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

"(a) 'Consulate' or 'consular post' means any establishment entrusted with the exercise of consular functions, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

"(b) 'Consular district' means the area within which

the consulate has competence to exercise its functions;
 “(c) ‘Head of consular post’ means any person in charge of a consulate;

“(d) ‘Consular official’ means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

“(e) ‘Consular employee’ means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

“(f) ‘Members of the consulate’ means, collectively, the head of post, the other consular officials and the consular employees in a consulate;

“(g) ‘Members of the consular staff’ means the consular officials, other than the head of post, and the consular employees;

“(h) ‘Member of the service staff’ means any consular employee in the domestic service of the consulate;

“(i) ‘Member of the family’, of a member of the consulate means the spouse and the unmarried children not of full age, who live in his home;

“(j) ‘Member of the private staff’ means a person employed exclusively in the private service of a member of the consulate;

“(k) ‘Consular premises’ means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

“(l) ‘Consular archives’ means all the papers, documents, correspondence books and registers of the consulate, as well as the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping;

“(m) ‘Nationals’ means both individuals and bodies corporate having the nationality of the State in question;

“(n) ‘Vessel of a State’ means any craft which is used for maritime or inland navigation and which flies the flag of the State in question or is registered there”.

9. He invited the Commission to consider the definitions one by one.

Sub-paragraph (a): Consulate, Consular post

10. Mr. ŽOUREK, Special Rapporteur, said that certain comments by governments on the definitions had been discussed in his third report (A/CN.4/137) especially those of Norway and the Philippines (A/CN.4/136) and the USSR (A/CN.4/136/Add.2). Since then, comments on article 1 had been received from other governments, in particular those of the United States of America, Netherlands, Belgium, Spain and Japan (A/CN.4/136/Add. 3, 4, 6, 8 and 9). The Drafting Committee had done its best to take those comments into account.

11. Mr. ERIM said that the word ‘Definitions’ should be inserted as a title, as in the 1960 draft.

12. In sub-paragraph (a) he doubted whether the reference to “consular post” was appropriate, as it was an expression often used in municipal law to indicate the functional post, whereas “consulate” was used in international law. The words “in foreign territory” might be added, since the consulate was always abroad. He further thought that the passage “whether it be . . .”

was unnecessary; the immediately preceding phrase would suffice.

13. Mr. LIANG, Secretary to the Commission, shared Mr. Erim’s doubts about the reference to “consular post”. Not only was the expression more generally used in municipal law, but a question of language was involved. The term “post” was more allied to the idea of the mission, whereas the “consulate” was a place. In draft article 14 the expression “consular post” certainly meant a consular mission. He therefore had very serious doubts whether the two expressions “consulate” and “consular post” were coterminous. Furthermore, the establishment did not exercise consular functions; it was the consul himself who exercised those functions. An establishment was simply the premises where the consul exercised his functions.

14. Mr. EDMONDS agreed with Mr. Liang. The “establishment” was not the consul or any consular official; it was those persons, not the “establishment” who were entrusted with the exercise of consular functions. The wording should be changed.

15. Mr. SANDSTRÖM said that the definition failed to specify one essential point—namely, that the consulate was established by one State in the territory of another.

16. Mr. AMADO averred that he would in no circumstances accept the word “establishment”.

17. Mr. YASSEEN wished to raise a point of method in connexion with the article as a whole. When a draft convention was preceded by a definitions clause, the definitions should be restricted to expressions which recurred repeatedly in that convention. In other cases, the definition of isolated expressions — if required — might be given in the particular articles in which they occurred. There was no need to define a “vessel”, “consular archives or consular premises”, for those expressions occurred but once or twice in the whole draft.

18. With regard to sub-paragraph (a), the word “entrusted” was inappropriate. As Mr. Amado had opposed the use of the word “establishment”, another term might be found — perhaps “organ” — and the words “entrusted with the exercise” might be replaced simply by “which exercises”.

19. Mr. ŽOUREK, Special Rapporteur, said that the expression “consular post” had been added by the Drafting Committee. The expression was used several times in the draft (e.g. in the expression “head of consular post”), undoubtedly as synonymous with “consulate”, and might therefore be properly placed in sub-paragraph (a). The word “consulate” could not be interpreted as meaning the place where the consular functions were exercised. For the building, the expression “consular premises” was used. The idea that “consulate” meant the four classes enumerated had met with wide acceptance. In reply to Mr. Erim’s query concerning the phrase “whether it be . . .”, he said that the enumeration corresponded to that in article 8. Some bilateral conventions used the term “consulate” and others the expression “consular post” in a generic sense. The best solution was, therefore, to use both terms as equivalents. Mr. Yasseen’s point about the excessive number of definitions in article 1

might well be dealt with as the Commission considered each sub-paragraph.

20. Mr. AGO said that he had been somewhat surprised at certain remarks about the meaning of "consulate" and "consular post". His own view was precisely the opposite of those expressed. It was odd to say that the "consulate" was a building and the "consular post" a mission. As a matter of fact, the Drafting Committee had used them as valid synonyms. Article 14 used the expression "consular post", whereas article 16 used both that and "consulate". The Commission's task was not to give final definitions applicable at all times and in all circumstances, but simply definitions for the purposes of the draft. The enumeration in the phrase "whether it be. . ." was also necessary for clear understanding; otherwise it might be asked whether the Commission intended vice-consuls to be covered by the definition or not. With regard to the word "establishment" he had been under the impression that, in the French text at least, *établissement* meant an organ established on foreign territory. Some members, however, appeared to give it a more physical meaning. That point might be made clearer. It would be perfectly possible to add the expression "in foreign territory", though it might be redundant.

21. Mr. GROS said that in French *établissement* seemed to be the best possible word. In French public law it did not signify a physical establishment, but a body corporate; *établissements publics*, for instance, were public services with a degree of autonomy. As to the word "organs", it was possible to speak of the "organ" of an international organization, but the term would not be suitable in the draft. "Establishment" would certainly be preferable.

22. Mr. EDMONDS said that the Commission was trying to express the idea that any mission in foreign territory entrusted with consular functions, whether under the direction of a consul-general, a vice-consul or any other consular official, was as a whole entrusted with the function. It was not the establishment but the mission headed by a particular person, that was entrusted with the function. The term "establishment" was misleading.

23. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago with regard to the use of the terms "consulate" and "consular post". It was essential to mention "consular post," as it often occurred in the draft. He would prefer the word "organ" to "establishment," but when he had suggested the term at the Vienna Conference, he had been told that it was not appropriate either in French or in English, although it appeared in many books on French constitutional theory. The substantive question, however, was whether it was possible to say that an "establishment" was entrusted with the exercise of consular functions. Two different opinions had been advanced. One, which seemed to be purely that prevalent in the United States of America, held that a certain person was entrusted with the discharge of State functions, whereas in the other view the organ of the State was entrusted with certain functions, and the person who directed the organ was simply its head. The latter view corresponded more to modern realities, whereas the other view had been widely accepted in feudal times when the personal rela-

tionship had been the basic one. The problem had been discussed at the Vienna Conference and it had finally been decided that it was really the organ of the State which was entrusted with the performance of diplomatic functions, and that was the basis of the whole philosophy of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13). It would therefore be justifiable to take a consulate as the institution entrusted with certain functions. The word "entrusted" should therefore be retained, whether the term "establishment" was used or not. He might agree with Mr. Yasseen's suggestion that the phrase should read "which exercises consular functions". He was not sure that it was necessary to specify that the functions were exercised in foreign territory.

24. Mr. ERIM said that, in a further study of the draft, he had not found the expression "consular post" as such in a single article; articles 12 and 16 spoke of "heads of consular posts." "Consular post" was thus not a suitable term to use in the draft and consequently did not require definition. He was doubtful whether "consulate" and "consular post" were synonyms.

25. Mr. AMADO said that he could not accept the word *établissement* in the French text because it reminded him of the old colonial *comptoirs*. He supposed that one more impropriety would not matter greatly, but he was not open to conviction.

26. The CHAIRMAN suggested that the Drafting Committee be instructed to revise sub-paragraph (a) in the light of the comments made.

It was so agreed.

Sub-paragraph (b): Consular district.

27. Mr. ŽOUREK, Special Rapporteur, observed that the new definition of "consular district" was a simplification of the 1960 definition, which had included the phrase "in relation to the receiving State".

28. Mr. BARTOŠ pointed out that very often the consular district mentioned in the consular commission did not coincide precisely with that specified in the exequatur. So far as the sending State was concerned, the competence for the district was recognized in the consul's commission. For example, the United States of America did not specify the consular district when establishing a consulate, but merely stated that it was a certain city and its neighbourhood, leaving it to the receiving State to define the exact district in the exequatur. The 1960 definition was therefore closer to reality and should be retained.

29. The CHAIRMAN, speaking as a member of the Commission, thought that the difficulty might be avoided if the word "competence" were dropped and the phrase read instead: "within which the consulate exercises its functions." Some such phrase would to some extent meet Mr. Bartoš's point.

30. Mr. JIMÉNEZ de ARÉCHAGA observed that the definition would depend on whether the functions were exercised in fact or whether the consul was merely regarded as competent to exercise them.

31. The CHAIRMAN, speaking as a member of the

Commission, said that he thought that "exercises" covered both the actual exercise and the competence to exercise consular functions.

32. Mr. YASSEEN said that while it was true that one could hardly speak in a convention of the illicit exercise of functions, it might be better to avoid any misunderstanding by inserting a reference to the legitimate exercise.

33. The CHAIRMAN suggested that the Drafting Committee should revise sub-paragraph (b) in the light of the comments made.

It was so agreed.

Sub-paragraph (c) : Head of consular post

34. Mr. ŽOUREK, Special Rapporteur, said that the new definition of "head of consular post" was a somewhat simplified version of the 1960 definition, which had included a reference to persons appointed by the sending State. That reference had seemed to be self-evident and therefore redundant. The new simplified version should be interpreted in the light of the provisions of the convention.

35. Mr. LIANG, Secretary to the Commission, observed that classes of heads of post were enumerated in article 8 and that enumeration indicated a degree of normality, i.e. regular appointment. If, however, it was said that a head of consular post was any person in charge of a consulate, the concept was reduced to a temporary measure, and might include, for example, a diplomatic agent temporarily assigned to head a consulate. In other words, the words "in charge" indicated a degree of temporary tenure. The new definition was, as the Special Rapporteur had said, simpler than the original, but simplification was not necessarily identical with precision. Article 8 carried no connotation of temporary functions; it had been based on the corresponding article of the 1958 draft on diplomatic intercourse (A/3859, chap. III, article 13), as had the definition of "head of consular post" approved by the Commission in 1960. Moreover, a person temporarily in charge of a consular post was not in fact the head of a consular post. He therefore considered the 1960 definition to be more precise.

36. The CHAIRMAN, speaking as a member of the Commission, suggested taking the text of article 1(a) of the Vienna Convention as a model. Although that formula might not be perfect, it had been adopted by the Vienna Conference, and the situation was practically analogous with that contemplated by sub-paragraph (c).

37. Mr. AGO said that the Drafting Committee had considered using the wording of article 1(a) of the Vienna Convention, but had decided against that course and had adopted the simpler text of sub-paragraph (c). A person could be put in charge of a consular post, but would not become the real head of consular post without the exequatur which represented his recognition by the receiving State. It might be said that a diplomatic agent "charged by the sending State with the duty of acting" as head of the mission was likewise not the effective head until the agrément had been given; the answer to that argument could, however, be that the grant of the agrément was a less formal procedure than the grant of the exequatur.

Accordingly, the words "in charge" in the new definition implied that both States had to take whatever action was necessary before the head of a consular post could enter on his functions.

38. Mr. JIMÉNEZ de ARÉCHAGA said that he preferred both the 1960 definition and the new definition to the wording used in the Vienna Convention. Since the term "consulate" was defined as meaning also a vice-consulate or a consular agency, the head of post in a consular district might not be the person charged by the sending State to act as head of post, since he might be exercising his functions under the direction of a consul-general. It would be wise not to introduce that element of uncertainty into the definition.

39. Mr. PAL observed that, in preparing its new draft of article 1, the Drafting Committee must have taken into account the use of the terms in all the articles of the draft. Any criticism of the definition must show how and where the proposed definition did not accord with the uses of the expression in the draft. Accordingly, the definitions used in other Conventions were irrelevant; the meanings used in the draft on consular intercourse should be the only ones taken into consideration.

40. The CHAIRMAN suggested that sub-paragraph (c) be referred to the Drafting Committee for revision in the observations made.

It was so agreed.

Sub-paragraph (d) : Consular official

41. Mr. ŽOUREK, Special Rapporteur, said that the difference between the new definition of "consular official" and the 1960 definition was one of drafting only; the 1960 text defined a consular official by exclusion of members of a diplomatic mission, whereas the new text contained a positive formulation. It would be wise to accept the new version, particularly since the Government of Norway had criticized the passage "and who is not a member of the diplomatic mission".

42. The CHAIRMAN suggested that, in the absence of comments on sub-paragraph (d), it should be adopted.

It was so agreed.

Sub-paragraph (e) : Consular employee

43. Mr. ŽOUREK, Special Rapporteur, said that the new text of the definition contained some drafting changes. In particular, the expression "consular employee" had been introduced, in lieu of "employee of the consulate" in keeping with the terminology used in a number of recent consular conventions.

44. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (e), it should be adopted.

It was so agreed.

Sub-paragraph (f) : Members of the consulate

45. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considerably revised the definition of "members of the consulate". The concordance of the English and French texts presented a difficulty.

46. Sir Humphrey WALDOCK said that in the Draft-

ing Committee he had had some doubts as to the advisability of referring to the members of the consulate collectively, as a unit. The definition should, rather, refer to the members of the consulate comprising all the persons at the consulate. He therefore suggested that the sub-paragraph should read: "Members of the consulate" means all the members of the consulate, including the head of post, the other consular officials and the consular employees".

47. The CHAIRMAN, speaking as a member of the Commission, thought that it might be advisable to follow article 1(b) of the Vienna Convention, which did not contain the words "collectively" or "including". It might be best simply to omit the word "collectively".

48. Mr. ERIM said that, according to the definition given in sub-paragraph (d), the expression "consular official" included the head of post. Accordingly, there seemed to be no reason to mention the head of post in sub-paragraph (f). It would be enough to say that the members of the consulate were all consular officials and consular employees.

49. Mr. ŽOUREK, Special Rapporteur, said that a solution along the lines suggested by Mr. Erim had been considered in the Drafting Committee, but that it had been decided, for purely technical reasons, to mention the head of post specifically in sub-paragraph (f), so that it should be unnecessary to refer to another definition to see what category of person was included in the term "consular official".

50. Mr. AGO, supported by Mr. AMADO and the CHAIRMAN, suggested that the sub-paragraph might be considerably simplified if it stated simply that "members of the consulate" meant all consular officials and employees.

51. The CHAIRMAN suggested that the sub-paragraph be referred to the Drafting Committee for revision in the light of the comments made.

It was so agreed.

Sub-paragraph (g): Members of the consular staff

52. Mr. ŽOUREK, Special Rapporteur, said that the definition of "members of the consular staff" was self-explanatory and did not differ materially from the 1960 definition.

53. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (g), it should be adopted.

It was so agreed.

Sub-paragraph (h): Members of the service staff

54. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the service staff" was new, inserted by the Drafting Committee because the Commission had excluded service staff from the benefit of several articles, in compliance with the comments of governments. The Drafting Committee had based the definition on article 1(g) of the Vienna Convention.

55. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (h), it should be adopted.

It was so agreed.

Sub-paragraph (i): Member of the family

56. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the family" was also new; it had been included because several governments had drawn attention to the need for such a definition. Moreover, some members of the Commission had raised the question during the debate on certain articles. In his opinion, the draft would be incomplete without such a definition, for without it every State would interpret the expression according to its own law. He thought that the Drafting Committee's text would satisfy the majority of governments and, if adopted by the Commission, would probably be acceptable to the plenipotentiary conference. Like all definitions, it was imperfect; for example, it did not cover the case where the sister of an unmarried consul kept house for him. But the Drafting Committee had finally decided that such cases should be left to agreement between the sending and the receiving States, for the definition could not be based on exceptional cases. The consent of the receiving State would, he was sure, always be obtained if convincing reasons were advanced for granting consular privileges and immunities to certain persons.

57. Mr. ERIM agreed that a definition was desirable, but was not sure that the text proposed by the Drafting Committee would satisfy governments or reflected existing practice. The definition of the family merely as the consul's spouse and minor children was too narrow; if the consul had his mother living with him or children who were not minors but were studying and were dependent on their parents, it seemed unjust to exclude them from the definition. The Drafting Committee should therefore be instructed to broaden the definition at least to include the parents of the consular official and his dependent children, irrespective of age.

58. Mr. VERDROSS said that, while he would have been in favour of a precise definition of "member of the family", he doubted whether a sufficiently accurate definition could be devised. The Vienna Convention contained no such definition. After all, polygamy was still legal in certain States; and presumably some consular officials had not only their mothers, but also their mothers-in-law living with them. In his opinion, the Commission should either decide, as the Vienna Conference had done, to leave the question for States to decide, or to lay down a narrow definition.

59. Mr. MATINE-DAFTARY said that he had been inclined in the Drafting Committee to take the same view as Mr. Erim and to advocate a broader definition. The argument used against his view, however, had been that members of the consulate themselves did not have very extensive privileges and that members of the family were excluded from the benefit of many articles of the draft. He still believed, however, that a broad definition would be desirable.

60. Mr. AMADO said that the phrase "unmarried children not of full age" was excessively detailed, although he realised, of course, that cases of the marriage of minor children were not unknown. A number of specific examples could be added to those mentioned by previous speakers; for instance, the unmarried female relatives

of consular officials might be most anxious to accompany them to their posts abroad. But the Commission should not set itself up as an international welfare society. The simplest solution might be to refer to the spouse and children of the consular official and other persons dependent on him who lived in his home.

61. Mr. YASSEEN said that the rules of family law differed greatly from country to country, and so did the definition of the family; some countries accepted a broader definition than others. It would therefore be difficult to establish a definition which would be acceptable to the large majority of participants in a conference of plenipotentiaries.

62. He recalled the failure of the attempt made at the Vienna Conference to draft an acceptable definition of the family for the purposes of the application of diplomatic immunities and urged the Commission to abandon the idea of incorporating such a definition in the consular draft. It would be better to leave the matter to the State practice in the application of the convention, by agreement between the parties.

63. The CHAIRMAN, speaking as a member of the Commission, said that when the Vienna Conference had discussed the problem, a number of proposals had been put forward, ranging from a restrictive to a very broad definition of the family. After considerable discussion and private consultations, it had been decided not to include any definition of the family in the Vienna Convention.

64. In view of the different concepts of the family in the various countries, he therefore doubted very much the wisdom of including such a definition in the draft on consular intercourse.

65. If an acceptable definition of the family had been found, it would have been useful in the Vienna Convention because members of the family of a diplomatic agent enjoyed the same privileges as the diplomatic agent himself. In the case of consuls, very few privileges were extended to their families and that definition was therefore less necessary.

66. If, as he suggested, the definition were omitted, the consequence would be that the meaning of "family" would be determined by the law of the receiving State, by custom or by a bilateral arrangement between the States concerned. In practice, problems rarely arose and any that did occur were generally settled to the mutual satisfaction of the States and persons concerned.

67. Sir Humphrey WALDOCK, speaking as a member of the Drafting Committee, said that the Committee had felt that it would seem somewhat strange not to include a definition of "member of the family" when other expressions which were much easier to interpret were defined in article 1.

68. It was true that the privileges enjoyed by members of the family of a member of the consulate were fewer than those enjoyed by members of the family of a diplomatic agent, but the privileges in question were important for they affected fiscal and customs matters. Some of the privileges had not in the past been given to the members of the consul's family. Accordingly,

a strict definition of "member of the family" should be adopted for the purposes of the draft, for otherwise States might be reluctant to ratify the future convention.

69. The Drafting Committee had considered the cases cited during the discussion but had found it extremely difficult to formulate a definition allowing for all possibilities.

70. He stressed that the Commission was not attempting to define the family in general, but was doing so only for the purposes of the application of the draft. For that purpose, it was necessary to have a narrow definition; he would rather that the Commission adopted no definition than that it adopted a broad definition which might impair the draft's chances of acceptance by governments.

71. Mr. MATINE-DAFTARY emphasized that, although the Vienna Conference had not adopted an actual definition of "members of the family", it had added to that expression, in particular in article 37, the words "forming part of his household". Those words introduced an element of definition, because they would cover, e.g., the widowed mother of a diplomatic agent.

72. He suggested, therefore, that the Committee might drop the definition of "member of the family" and add the words "forming part of his household" wherever reference was made to the members of the consul's family.

73. The CHAIRMAN, speaking as a member of the Commission, explained that in the Vienna Convention the purpose of the qualification "forming part of his household" had not been to broaden the scope of the term "members of the family", but rather to restrict it to those members of the family who were actually living under the same roof as the diplomatic agent. The intention had been to exclude from the benefit of diplomatic privileges persons who, though actually members of the family of a diplomatic agent, did not live with him.

74. Personally, he would have been ready to accept a definition such as that proposed by the Drafting Committee, but in view of the experience of the Vienna Conference he thought that any definition, even if adopted by the Commission, would hardly commend itself to any future conference.

75. Mr. ŽOUREK, Special Rapporteur, said that those in favour of a broad definition of the family wished it to cover exceptional cases and to include, e.g., the widowed mother or unmarried sister of the consul. In the case of diplomatic relations, the status of such persons had always been settled without any difficulty by *ad hoc* arrangements. For the purpose of a multilateral convention, however, a broad definition was clearly unacceptable; only a definition which covered the normal cases would be acceptable.

76. In reply to Mr. Amado, it was necessary to specify that the children should not only not be of full age, but also that they should be unmarried. It was not uncommon for a consul's minor daughter to get married,

in which case she would leave the family of her father and would therefore not be entitled to any privileges and immunities.

77. He agreed with Mr. Yasseen that it would be impossible to find a definition of the family which would satisfy all countries, but the definition under discussion was intended to apply solely for the purpose of the multilateral convention. It would not prejudice in any way the definition of the family for purposes of municipal law or for the purpose of other international conventions.

78. He urged the Commission to adopt a definition of "member of the family". A definition of that sort might not have been essential in the Convention on Diplomatic Relations because the members of the family of diplomatic agents had always enjoyed, by international custom, diplomatic privileges and immunities. In the case of consular officials, however, it was proposed in the draft articles to give their families a few privileges, particularly in the matter of taxation and customs, which were not based on any existing general practice. States would therefore wish to know, before ratifying the proposed convention, the exact scope of those new privileges.

79. Lastly, if no definition were adopted, controversies could arise between the sending State and the receiving State: the authorities of the latter would endeavour to apply their own definition of the family and the former might object that that definition was much narrower than the definition under its own municipal law. If the draft did not contain a definition of "members of the family" of a member of the consulate such differences of opinion would be insoluble. It was therefore essential to lay down some definition which could be applied in all cases covered by the convention being prepared by the Commission.

80. Mr. PAL agreed with the Chairman and Mr. Verdross that no attempt should be made to define the family. Even with the inclusion of the persons mentioned by Mr. Verdross, the term "member of the family" might give a normal picture of the family in Western countries but would not reflect the Eastern concept of the family and would therefore be difficult to accept for the countries of the East.

81. Mr. AMADO said that the explanations given by the Special Rapporteur had not convinced him that the word "unmarried" was necessary.

82. It was an exaggeration to suggest that States would decline to ratify a convention which embodied so many useful and important rules of consular relations merely because of the fear that some of its provisions might unduly favour a consul who wished to bring with him his unmarried daughter or his widowed mother.

83. If the proposal to drop the definition were put to the vote, he would vote for it.

84. Mr. JIMÉNEZ de ARÉCHAGA also found the proposed definition too restrictive. The expression "member of the family" should cover not only the consul's spouse and minor children, but also other dependants living under the same roof.

85. Sir Humphrey Waldock had pointed out that it was not intended to define "family" in general, but merely to define it for the strictly limited purposes of the draft, in the hope that the draft would as a consequence be more acceptable to governments. However, if the Commission were to approve a definition, there was a danger, particularly in view of the non-adoption of such a definition at the Vienna Conference, that the Commission's interpretation of "family" might be regarded as applicable much more generally than it intended.

86. For those reasons, unless the majority of the Commission were prepared to accept a broader definition, it would be better to omit the sub-paragraph altogether.

87. Sir Humphrey WALDOCK said that many countries strongly opposed the undue extension of immunities in fiscal matters; hence any definition that extended such immunities to a large circle of persons would materially affect the draft's prospects of acceptance.

88. The issue was not the different concept of the family in Western and Eastern countries. Even in Western countries, the family included other persons than those specified in sub-paragraph (i). The intention of the Drafting Committee had been simply to restrict the meaning of "family" for purposes of the grant of consular privileges and immunities.

89. If no definition of "member of the family" were to be included, there would be a lacuna in the draft. He accordingly suggested that the definition should be referred back to the Drafting Committee for redrafting in the light of the debate, although not in substantially broader terms.

90. Mr. YASSEEN said that he could not accept the distinction drawn between the "family" for purposes of the draft and the family in general. If it was admitted that certain privileges should be extended to "members of the family", those privileges could surely not be denied to persons who belonged to the consul's family. If the draft were to exclude any such person from the "family", it would thereby be stating that the person in question did not belong to the family.

91. In point of fact, the definition proposed by the Drafting Committee was the most restrictive one that could be put forward; even the countries that had adopted the most limited conception of the family included in it many more persons than those indicated in the proposed text.

92. Because in different countries the word "family" varied in the scope of its meaning, it was preferable to leave the matter to State practice. Any problems would thus be solved by specific agreements between States.

93. The CHAIRMAN said the Commission had before it the proposal that sub-paragraph (i) should be omitted, and also a proposal that the definition be referred back to the Drafting Committee together with members' comments. Since the first of those proposals was farther removed from the text, he would put it to the vote first.

The Commission decided, by 9 votes to 7, with 2 abstentions, that sub-paragraph (i) (definition of "member of the family") should be omitted.

94. Mr. MATINE-DAFTARY said that, in view of the Commission's decision, the Drafting Committee might consider his suggestion that the words "forming part of his household" should be added wherever the expression "members of the family of a member of the consulate" occurred.

95. The CHAIRMAN said that the point had been raised during the discussion of the various articles and would no doubt be taken into account by the Drafting Committee.

Sub-paragraph (j): Member of the private staff

96. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the private staff" was identical with the 1960 definition. The expression "member of the private staff" had been retained in preference to "private servant", appearing in article 1 (h) of the Vienna Convention. The Drafting Committee regarded the expression "private servant" as unduly restrictive; it did not cover, for example, a governess brought from the sending State by the consul.

97. The CHAIRMAN suggested that, in the absence of comments on sub-paragraph (j), it should be adopted.

Sub-paragraph (j) was adopted.

Sub-paragraph (k): Consular premises

98. Mr. ŽOUREK, Special Rapporteur, said that the definition of "consular premises" had been amended so as to bring it into line with the corresponding definition in article 1 (i) of the Vienna Convention.

99. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (k), it should be adopted.

It was so agreed.

Sub-paragraph (l): Consular archives

100. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had amended and broadened the 1960 definition of "consular archives", in deference to government comments. The Soviet Union Government (A/CN.4/136/Add.2), for example, had proposed that the 1960 definition be replaced by broader language; the Netherlands Government (A/CN.4/136/Add.4) had made a proposal along the same lines, but going even further in the same direction.

101. The definition raised chiefly problems of language. In some countries, "archives" meant only files of settled matters. Until a matter was settled, the relevant papers were regarded as "correspondence" or "documents."

102. The Vienna Convention did not contain any definition of diplomatic archives, but that definition was perhaps not so necessary because of the status enjoyed by the premises of the diplomatic mission, the residence of diplomatic agents and the diplomatic agents themselves. The consular archives enjoyed a specific inviolability, and it was therefore important to define the term. Moreover, the definition of "consular

archives" should be as broad as possible, in order to give the sending State every possible safeguard in respect of the correspondence, documents, books, ciphers and codes at its consulate.

103. Lastly, there was the special problem of monies belonging to the sending State and held by the consulate (cf. Netherlands comments, A/CN.4/136/Add.4), which were hardly covered by the term "consular archives". However, there could be no doubt that, as monies belonging to a foreign State, they were inviolable in the receiving State wherever they might be, and it would therefore be desirable to add an express clause to that effect either in the article on inviolability of premises or in a separate article.

The meeting rose at 6.5 p.m.

614th MEETING

Tuesday, 20 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425); A/CN.4/136 and Add.1 to 11 (A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) *(continued)*

ARTICLE 1 (Definitions) *(continued)*

Sub-paragraph (l): Consular archives (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the Drafting Committee's redraft of article 1 (613th meeting, para. 8) of the draft on consular intercourse and immunities (A/4425).

2. Mr. YASSEEN said that the Vienna Convention on Diplomatic Relations (A/CONF. 20/13) did not contain any definition of the diplomatic archives. That was, of course, not a reason for excluding a definition of the consular archives from the draft on consular intercourse, if such a definition appeared necessary. However, article 1 should only define those terms which occurred frequently in the draft. In the case of the consular archives, which were mentioned in articles 33 and 55, it would be better to follow the example of the Vienna Convention, which defined the term "official correspondence" not in article 1, but in article 27, concerning freedom of communication.

3. He therefore suggested that, if the Commission approved the proposed definition of "consular archives", it should incorporate it in article 33, dealing with the inviolability of these archives. As to article 55, it merely constituted the adaptation of article 33 to honorary consuls and the expression "consular

archives" as used therein must be construed in the light of article 33.

4. Mr. PAL pointed out that article 33 referred to "the documents and the official correspondence of the consulate" as distinct from the consular archives. If, therefore, it were proposed that the definition of "consular archives" should cover the documents and correspondence also, the language of article 33 would need to be modified.

5. Mr. AGO said that the correspondence intended to be covered by the word "archives" was correspondence relating to matters which had been terminated. The draft should therefore lay down separately the inviolability of the official correspondence of the consulate relating to current matters.

6. Mr. ŽOUREK, Special Rapporteur, said that, although agreeing with Mr. Yasseen's general approach to the matter of definitions, in the specific case of the consular archives there were good reasons for leaving the definition in article 1. In the first place, there was the practical reason that persons reading the draft would normally consult article 1 for the definition of terms used throughout the text. In the second place, the term "consular archives" was used in articles 33 and 55 and the latter article was independent of the former: it did not merely refer back to article 33.

7. Mr. ERIM said the proposed definition of consular archives was satisfactory. He agreed, however, with Mr. Pal that all inconsistency between that definition and the terms of article 33 should be removed. The same was true of article 55, which also spoke of the consular archives, the documents and official correspondence of the consulate.

8. The CHAIRMAN, speaking as a member of the Commission, said that a definition of the consular archives was necessary in article 1.

9. With reference to the point raised by Mr. Pal, he suggested that the Drafting Committee should review articles 33, 36 and 55 and remove any inconsistencies. Article 36, dealing with freedom of communication, would refer to the inviolability of the consular correspondence as a means of communication.

10. Speaking as Chairman, he said that if there were no objection, he would take it that the Commission agreed to that suggestion.

It was so agreed.

Sub-paragraphs (m): Nationals and (n): Vessel

11. Mr. ŽOUREK, Special Rapporteur, said that he had prepared the definitions of the terms "nationals" and "vessel" in deference to government comments; the definitions had been revised by the Drafting Committee.

12. Mr. ERIM said that the two definitions in question were unnecessary in the draft articles. Article 1 should define only terms employed in the terminology of consular relations. The Commission should avoid defining general legal terms, which were defined elsewhere than in instruments dealing with consular relations.

13. The meaning of "national" should be left to be determined by the general rules of international law, and that of "vessel" by the rules of maritime and commercial law.

14. Many general legal terms were used in the draft, but that was no reason for defining them in article 1. He recalled that the Commission had had to abandon the attempt to define the meaning of "member of the family", even though such a definition would have been useful (613th meeting, para. 93).

15. Mr. AGO, agreeing with Mr. Erim that article 1 should not define general legal terms, said that, if "nationals" and "vessel" were not defined in article 1, it would be essential to make it clear, in the appropriate articles, firstly, that the term "nationals" meant also bodies corporate, and, secondly, that the term "vessel" included not only sea-going ships, but also inland navigation craft.

16. There was a practical disadvantage in that the wording of the articles as so amended would become unduly cumbersome. It was for the Commission to decide whether it wished the Drafting Committee to adopt that course or whether it preferred to retain the definitions in article 1. What the Commission could not and should not do was to leave unsettled the two questions to which he had referred; in the absence of an explicit statement, doubts would subsist on those two points and serious difficulties of interpretation would arise.

17. Mr. ŽOUREK, Special Rapporteur, said that he saw no difficulty in including sub-paragraph (m). It was not intended to lay down a criterion for the purpose of determining who was a national of the sending State, or what bodies corporate were deemed to have the nationality of that State. Its object was merely to make it clear that, in so far as the article in question could apply to bodies corporate, they were entitled to the same protection as individuals, if they had the nationality of the sending State. A statement to that effect was absolutely necessary because, as he had mentioned in his third report (A/CN.4/137, *ad* article 4), during the debate in the Sixth Committee at least one delegation (that of Indonesia) had suggested that the term "nationals" should be construed to mean individuals only, not bodies corporate.

18. Lastly, from the practical point of view, it was simpler to settle the point in the definitions article than to amend the drafts of all the relevant articles. Article 1 would normally be consulted for the purpose of the interpretation of the terms occurring in the draft.

19. Mr. LIANG, Secretary to the Commission, said that there was much to be said in favour of the view expressed by Mr. Erim. At the Vienna Conference one representative had asked whether the term "national" as used in the diplomatic draft included also bodies corporate or juridical persons; the question had been answered to his satisfaction, but no provision on the subject had been included in the Vienna Convention.

20. It would no doubt be somewhat singular to find definitions of the terms "nationals" and "vessels" in

article 1, which dealt with matters relevant to consular relations. He fully agreed with the statement by Mr. Ago that, of the two alternatives before the Commission, the second was preferable: it would leave the definitions out of article 1, and involve a change in the wording of the relevant articles.

21. Sub-paragraph (n) involved a more complex question. Its provisions were at variance with the terms of article 5 of the Geneva Convention on the High Seas of 1958 (A/CONF.13/L.53), according to which the registration of a ship in the territory of a State was a prior condition for that ship to have the right to fly that State's flag. It would be quite abnormal for a ship to fly the flag of one country and be registered in another; such a situation had not been envisaged in the Convention on the High Seas. Article 6, paragraph 1, of the same Convention, stated that ships were subject to the exclusive jurisdiction of the flag State on the high seas.

22. In view of those provisions of the Convention on the High Seas, the disjunctive terms of sub-paragraph (n) could give rise to complications.

23. The CHAIRMAN said that it would be useful to know from the Special Rapporteur in how many articles the term "nationals" was used to mean both individuals and bodies corporate. Also, how many articles referred to "vessels".

24. Mr. ŽOUREK, Special Rapporteur, said that references to vessels occurred three times in article 4 and article 5(c). With reference to the statement by the Secretary to the Commission, he explained that, in some countries, small craft (e.g. fishing smacks) were not entitled to fly the national flag; their nationality was evidenced by their registration.

25. For the purposes of article 5(c), it was particularly useful to have a broad definition of the term "vessel". The sending State was interested in being informed through its consulates of any mishap to one of its ships, whether a sea-going vessel or an inland navigation craft, and regardless of whether the ship was large enough to fly its flag.

26. Several bilateral conventions defined the term "vessel", e.g. the Anglo-Swedish Consular Convention of 1952, article 2 of which also provided that the term "nationals" included, where the context permitted it, "all juridical entities duly created under the law" of one of the States concerned.¹

27. Sir Humphrey WALDOCK suggested that it would suffice if it were stated simply that, where appropriate in the draft, the term "nationals" included bodies corporate and the term "vessels" included inland navigation craft.

28. The Commission would be wise not to attempt the more challenging task of endeavouring to determine in what circumstances a person was a national of the sending State or a ship a vessel of that State. In regard to ships, any attempt to go into that question would

involve dealing with the awkward and controversial problem of flags of convenience. It was not necessary, for the purposes of the draft, to touch upon the conditions which had to be fulfilled in order that a vessel could be considered a vessel of a particular State. Moreover, if the Commission were to go into that question it would have to explore it fully.

29. References to vessels occurred in article 5(c) and in article 4 of the draft. In all those contexts, reference could be made to "vessels of the sending State", and the Commission would thus avoid going into the difficult legal questions of registration and the right to fly the flag of a State.

30. The CHAIRMAN, speaking as a member of the Commission, suggested that the Drafting Committee should decide where the statement that the term "nationals" included bodies corporate should be inserted, whether in article 1 or in the various articles where the term was intended to cover more than just individuals.

31. With regard to sub-paragraph (n), he said its provisions were inconsistent with those of article 5 of the Geneva Convention on the High Seas. He agreed with those members who had suggested that the Commission should not go into the legal problem of the determination of the nationality of ships. For the purposes of the consular draft, it was sufficient to refer to vessels "having the nationality of the sending State". He recalled that the manner in which the nationality of a vessel was determined had given considerable difficulties to the first United Nations Conference on the Law of the Sea, and also to several International Labour Conferences; it was therefore wiser for the Commission not to examine the conditions under which a vessel was entitled to fly the flag of a State.

32. Mr. YASSEEN doubted whether it was really correct to speak of the nationality of bodies corporate. For many authorities the similarity between an individual and a body corporate was more apparent than real.

33. In any event, the sole purpose of including a definition of "nationals" had been to make it clear that certain rules set forth in the draft articles applied not only to individuals, but also to bodies corporate. That statement, however, was made in far too broad and absolute terms in the proposed sub-paragraph (m). The definition given in that sub-paragraph could patently not be applied to all the articles where the term "nationals" was used. For example, where reference was made to "nationals" in article 6(b) and 6(c), dealing with persons in custody or imprisoned, and article 11, on the appointment of nationals of the receiving State, it was obvious that the term could only refer to individuals. The only provisions which applied to both individuals and bodies corporate seemed to be those of article 4 on the protection of nationals and, with some qualifications, the provisions of article 6(a) on communication with the consul.

34. In the circumstances, the appropriate course was to insert, in the relevant places in articles 4 and 6(a), a reference to bodies corporate immediately after the word "nationals".

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities. United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 468.*

35. Mr. VERDROSS agreed that the problem under discussion only concerned the protection of bodies corporate. Since, however, there was an extensive legal literature on the subject, the Commission should tackle the problem. Somewhere in the draft articles, the Commission should make it clear that if a State granted its nationality to a body corporate, it had the right to extend consular protection to it.

36. Mr. ERIM said that the discussion had confirmed him in the view that it was better to delete sub-paragraphs (m) and (n). There was no reason why the terms "nationals" and "vessel" should be defined in article 1, any more than the large number of general legal terms used in the draft, such as "State" or "municipal law". Moreover, any reference to the nationality of persons, bodies corporate or vessels would create more problems than it would solve. A reference of that type would evoke such problems as that of dual nationality, which the Commission had no intention to solve.

37. Mr. JIMÉNEZ de ARÉCHAGA said that he agreed with Mr. Ago that the definition of "nationals" might be deleted from draft article 1 and the explanation that the term covered both individuals and bodies corporate be included in article 4. The Commission need not decide there and then whether bodies corporate had a nationality and if so, what nationality. The definition of "vessel" should be amended, as it was at variance with the Geneva Convention on the High Seas. The Commission should be very careful not to sponsor definitions which conflicted with definitions drafted by it on earlier occasions and accepted by a plenipotentiary conference. Article 5 of the Geneva Convention spoke of the flag which the vessel was entitled to fly, whereas the definition in draft article 1 under consideration spoke of the flag actually flown. The definition submitted by the Drafting Committee also dropped the concept of the "genuine link" mentioned in the Convention on the High Seas. The phrase might therefore run: "having the nationality of the State in question".

38. Mr. AGO observed that almost all members agreed that the second of the two elements in the definition of "vessel" should be eliminated and that the Drafting Committee should be asked to consider what consequential amendments were needed in the draft articles. The definition of "nationals" was required only in articles 4 and 6. It was not the Commission's task to inquire into the modes of determining the nationality of vessels or, consequently, into the questions of the "genuine link" and registration.

39. Mr. FRANÇOIS agreed with Mr. Ago. Mr. Erim seemed to have overlooked the fact that the Commission was not drafting a convention on nationality but an instrument defining the functions of consuls. Naturally, consuls could protect bodies corporate which were regarded as their nationals under their own law. To make that clear, it was sufficient to state in the draft that the consul had the necessary competence. The same applied to the question of vessels. If the definition mentioned both the flag and the registration, the question arose what would be the status of a ship flying the flag of one State but registered in another. The definition of

"vessel", if retained, should be broadened to cover vessels which, according to the law of the sending State, were regarded as having its nationality.

40. Mr. ŽOUREK, Special Rapporteur, explained that the definition of "vessel" in sub-paragraph (n) was an abridged version of an earlier definition prepared by him for the Drafting Committee in which the term "vessel" of a State was defined as "any ship or craft, other than a warship, which is used for maritime or inland navigation and which flies the flag of the State in question or (in the case of craft not entitled to fly the national flag) is registered in the State in question". The clause about registration had been included as merely accessory. Whatever the Commission decided, however, it must be stated somewhere in the draft that the term "vessel" meant any craft which was used for maritime or inland navigation, since several governments had so requested.

41. The CHAIRMAN said that the consensus was that sub-paragraph (m) should be deleted and that the Drafting Committee be instructed to insert a reference to bodies corporate in the articles intended to cover not only individuals but also bodies corporate. With regard to sub-paragraph (n), it might be awkward to repeat in each appropriate article that vessels meant any craft which was used for maritime or inland navigation, and such awkwardness of drafting might justify the retention of the definition in draft article 1. That was for the Drafting Committee to decide, but, in any case, the last phrase should be deleted and should be replaced by the phrase "having the nationality of the sending State" or "having the nationality of the State in question".

It was so agreed.

42. The CHAIRMAN said that the Commission had concluded its preliminary examination of draft article 1 (Definitions).

Planning of future work of the Commission (A/CN.4/138)

(resumed from the 597th meeting)

[Agenda item 6]

43. The CHAIRMAN said that, according to General Assembly resolution 1505 (XV), the item "future work in the field of the codification and progressive development of international law" would be placed on the provisional agenda of the Assembly's sixteenth session. The Commission was not instructed to take any decision under that resolution, but members might wish to take the opportunity to place their views on record for the use of the Sixth Committee of the Assembly.

44. Mr. VERDROSS said that four general principles should guide the planning of the Commission's future work. The first was that the Commission could codify only the law concerning topics of universal importance; the second that it could not codify the law concerning extremely controversial topics; the third that the codification should already be in progress as reflected in generally established practice; since the Commission was

not competent to make entirely new international law; and the fourth that the Commission's work should not overlap with that of other competent international organs such as the Commission on Human Rights. The Commission's programme of work contained three very important topics which satisfied those principles: the law of treaties, the general law of State responsibility and the more particular topic of the international responsibility of States for injury to aliens. New suggestions were, however, in order. One topic of capital importance was that of the succession of States. With the emergence as States of former colonies and Trust Territories immense problems arose. The four topics were all of general importance; they were not the subject of insurmountable divergencies of opinion and the practice concerning them was sufficiently firmly established. With those four topics the Commission would probably have enough work to fill its next five-year period. That, however, did not prevent the Commission from beginning to codify other topics proposed by the General Assembly if it had the time.

45. Mr. AMADO said that his personal experience as a representative of his country to the United Nations and later as a member of the International Law Commission had led him to the conclusion that there was only one attitude to take with regard to General Assembly resolution 1505 (XV). The League of Nations had been guided by the Institute of International Law in choosing a list of subjects suitable for codification; for it was obvious that at all times the work of codification of international law should be entrusted to experts in the matter, since experienced jurists were best qualified to settle the text of multilateral conventions which were to become the law of States. For the Hague Conferences of 1899 and 1907 the Institute of International Law had proposed a number of topics, from which the League of Nations had chosen a few. It was obviously difficult for politicians to realize in what the work of the Commission consisted. To achieve positive results, progress must of necessity be slow. For example, the vast amount of effort that had been expended on the Commission's draft on the law of the sea could not have been compressed into a relatively short debate. He could not countenance the facile way in which politicians approached the work of codification, for that work had to be done deliberately. At the stage of civilization reached by the world, it was all the more important that experienced jurists should provide States with carefully thought out legal instruments. Accordingly, he thought that the Commission should be allowed to continue with its work on such subjects as State responsibility, even if it took time.

46. Mr. SANDSTRÖM, referring to the second preambular paragraph of the General Assembly resolution, asked what branches of international law, if any, had been suggested as tending to strengthen international peace, develop friendly and co-operative relations among nations, settle disputes by peaceful means and advance economic and social progress throughout the world.

47. Mr. LIANG, Secretary of the Commission, replying to the previous speaker, said he could give a list of the

topics, but it would not be exhaustive. They included the right of asylum; State responsibility; the compulsory jurisdiction of the International Court of Justice; the principles and practices governing the registration of treaties; methods and procedures in use by the General Assembly; the question of the definition of aggression; legal questions connected with the peaceful co-existence of States; legal problems created by disarmament; legal problems created by the final abolition of colonialism; the question of neutrality; the succession of States; the use of outer space; the theory of the sources of international law; the right of all peoples to exploit their national resources; violation of national sovereignty; and the international aspects of land reform.

48. He drew attention to operative paragraph 2 of the General Assembly resolution, under which Member States were invited to submit any views or suggestions they might have on the question to the Secretary-General before 1 July 1961. He had inquired from the United Nations Headquarters whether any comments on the subject had yet been received, and had been informed that no government had submitted views or suggestions by 20 June 1961.

49. Mr. GARCÍA AMADOR said that in accordance with General Assembly resolution 1505 (XV) it was for governments alone to submit views or suggestions on the Commission's future work for discussion by the Sixth Committee of the General Assembly at its sixteenth session. The Commission had not been asked to comment, but he wished to take advantage of the opportunity offered by the Chairman to make some observations on the discussions in the Sixth Committee at the fifteenth session.

50. Resolution 1505 (XV) in itself was not only unobjectionable, but filled a growing need, as was evidenced by its references to the many new trends in the field of international relations which had an impact on the development of international law and to recent developments in international law. The only surprising thing was that those new trends had not been noticed long before. Very soon after the Second World War, writers and even government representatives had drawn attention with increasing urgency to the need for the re-examination and revision of international law in the light of the profound changes taking place in the internal life of States and in their international relations. The Assembly resolution was therefore no more than a culmination of such individual moves.

51. That was why it was the more regrettable that the resolution had been so closely associated with one of the most aggressive and demagogic propaganda campaigns in the history of the United Nations. It was quite obvious to anyone who had heard the discussions in the Sixth Committee or who had read the summary records and the Committee's report to the plenary that a group of countries which had never been concerned with the development and codification of international law, but had customarily opposed them, had suddenly tried to pose as the champion of the progress of international law and as the defender of its principles. It was the same group of countries which repeatedly and consistently had

subordinated and were subordinating the validity of international law to the principle of national sovereignty and had opposed and continued to oppose compulsory arbitration.

52. While he would not dwell on the details, he must raise the question of the unfair — when they were not wholly unfounded — attacks on the Secretariat, the Special Rapporteur and even the Commission itself in connexion with the topic of State responsibility.

53. The question had arisen on the pretext of the invitation to the Harvard Law School to collaborate with the Commission's work on that subject. In that connexion, it was gratifying to see that Professor Sohn had once again been invited to report on the work undertaken by the Harvard Law School with a view to co-operating with the Commission. It was equally satisfactory to have heard that similar efforts were being made in other parts of the world. He was sure that the Commission would also welcome such efforts, regardless of whence they came, and that no delegation or group of delegations in the Sixth Committee would in the future object to them.

54. The Secretariat had been able to show fully that co-operation with the Harvard Law School was not incompatible with the relevant provisions of the Commission's Statute, much less incompatible with Article 101 of the United Nations Charter. It should be noted, however, that the arrangements for that collaboration had been made in 1955 and had been announced at that time, and that for six years no one, so far as he could recall, had impugned their validity.

55. The five reports of the Special Rapporteur on the topic of State responsibility (A/CN.4/96, 106, 111, 119, 125), though widely circulated, had not been noticed by the delegations in question until the autumn of 1960. However, those delegations had not only criticized the Legal Office of the United Nations for its remissness in submitting important matters to the Sixth Committee, for having violated the principle of geographical distribution in the recruitment of staff, and for the invitation to the Harvard Law School, but had also severely criticized the method of preparing those reports and, indeed, their substance. The fact that the Special Rapporteur had visited the Harvard Law School and had also collaborated with the Legal Office of the Pan American Union had been censured, and it had been openly stated, not merely insinuated, in the Sixth Committee of the General Assembly that the collaboration with the Harvard Law School had been in the nature of a consultation and that the Harvard draft reflected reactionary views (657th meeting of Sixth Committee, para. 27).

56. As the Special Rapporteur concerned, he hardly thought it necessary to reply to such criticism. It was well known that there were countries and universities where intellectual work was directed by the authorities and others in which prevailed full freedom of research and expression. It was hard to see what objection could be taken to the Special Rapporteur's having chosen a place to prepare his reports where he could enjoy the fullest intellectual freedom. Neither was it worth going into the criticisms of the substance of the reports, but it was worth mentioning that they were sometimes so

unfounded that it was really doubtful whether the critics had actually read the documents in question.

57. The topic of State responsibility had also been used as grounds for criticising the International Law Commission. In that case, too, unfounded criticisms had been launched, such as that only one aspect of the topic — responsibility for injury to aliens — had been studied and that other aspects, such as responsibility for the violation of territorial sovereignty, subversive activities and espionage, etc., had been ignored.

58. The CHAIRMAN, observing that the Commission was not discussing the work of the Sixth Committee, but the future codification of international law, requested Mr. García Amador to keep within the limits of the subject under consideration.

59. Mr. GARCÍA AMADOR replied that that was precisely the point to which he was referring. It was regrettable that no member of the Sixth Committee had explained the Commission's reasons for limiting for the time being the scope of the codification of State responsibility. It would not, however, have been so easy to answer another criticism made during the discussions, namely that little progress had been made in that codification. The Assembly, in resolution 799 (VIII) of 1953 had requested the Commission to undertake the codification as soon as it thought advisable. Two years later, the Commission had elected the Special Rapporteur, who had submitted his first report in 1956, when the Commission's agenda had become appreciably lighter since it had finished the draft on the law of the sea. Since that time there had only been two items on its agenda of which the Assembly had specifically requested codification: diplomatic immunities and State responsibility, except for the revision of the draft on arbitral procedures. During those six years many delegations had repeatedly stressed the importance of carrying the codification of State responsibility further, as had done recently the United Nations Commission on Permanent Sovereignty over Natural Resources. How was it then that the Commission, which had produced such fruitful work in its first six years, had continually deferred the study and codification of the topic of State responsibility? He could only hope that the Commission would undertake at its next few sessions the examination of a topic of such vital importance in the relationships between States and between them and private persons of foreign nationality, a topic with regard to which such profound and interesting changes were occurring.

60. As a member of the Commission, he had been surprised to note that in a resolution designed to promote the codification and progressive development of international law the Assembly should have completely ignored the Commission and the provisions of its Statute. The records of the Sixth Committee showed that the problem had been duly raised by certain delegations, but unfortunately the view seemed to have prevailed that the work should be left to the governments and to political bodies such as the Sixth Committee. It was doubly regrettable that anyone representing the International Law Commission should have remained completely silent during the discussion of that topic, as of

others involving the Commission's prestige. One reason for their silence might have been that some delegations had pressed for the establishment of a special committee of government representatives to cope with the preparatory work for the plan contemplated in resolution 1505 (XV) (*cf.* excerpts from Sixth Committee's report cited in A/CN.4/138). However that might be, it would be desirable that in future members of the Commission representing it in the General Assembly should lay stress on the provisions of its Statute, as had always been done in the past, and should do their best to ensure that its prestige was not in any way diminished.

61. Mr. FRANÇOIS endorsed the views expressed by Mr. Verdross and Mr. Amado and agreed with the four criteria advanced by Mr. Verdross as a basis for the choice of topics for the Commission. He would, however, add a fifth criterion, namely, that the topics should not be too broad and too complicated. The Commission could be said to have succeeded in its work on the three subjects of the law of the sea, diplomatic relations and consular intercourse and immunities. The reason for that success was that the topics concerned were to some extent limited in their scope. Even the subject of the law of the sea, although vast, had been restricted by the method employed by the Commission, which had completed its work on the subject within the time limit of five years, the term of the Commission's membership. It should be remembered that governments had to be given two years in which to submit their comments; accordingly, that left the Commission a relatively short time to reconsider its drafts in the light of those comments. A remedy for that situation might be to prolong the term of office of members, but it was hardly the time to make any suggestions to that effect. Such far-reaching topics as State responsibility and the law of treaties could not be dealt with in five years if the Commission's sessions lasted for a mere ten weeks. The Harvard Law School, which had been preparing a draft on State responsibility for a number of years, was in a much more favourable situation to deal with that subject since it had far more time to devote to it. Accordingly, if the organization of the Commission's work were to remain unchanged, it could not be expected to discuss such broad topics exhaustively; its discussions would either be too hasty or would be prolonged beyond the five-year term of the Commission's membership, in which event there would be the additional difficulties of a change of membership and of a change of special rapporteurs. He would not deny the increasing importance of a study by the Commission of a vast subject of the law of nations, such as State responsibility or the law of treaties, but so long as the organization of the Commission remained unmodified it would be impossible in practice for it to deal with more than certain specific aspects of such subjects.

62. Mr. ERIM, commenting on General Assembly resolution 1505 (XV), noted that it referred to a new need to take into account certain extremely far-reaching subjects, concerned with such matters as the strengthening of international peace, the development of friendly and co-operative relations among nations, the peaceful settlement of disputes and the advancement of

economic and social progress throughout the world. It seemed that the need for giving priority to certain subjects had arisen in a little over one year, for in its latest directives to the Commission the General Assembly had instructed it to study only the right of asylum and the question of the juridical regime of historic waters, including historic bays (General Assembly resolutions 1400 (XIV) and 1453 (XIV)). Whereas in 1959 the General Assembly had been content with the programme comprising consular intercourse and immunities, State responsibility, the law of treaties, together with the right of asylum and the regime of historic waters, it apparently wished to reconsider that programme in the light of certain new trends. On the other hand, the Secretary had just told the Commission that no views or suggestions had yet been received from Member States in response to operative paragraph 2 of resolution 1505 (XV). The Commission thus found itself in a vacuum; it was called upon to take new trends into account and to give priority to new topics, but had not received any precise directives from the General Assembly, although the comments of governments might give some guidance. Personally, he could not say with any confidence that he had observed in the juridical field any pressing new trends in international relations that had reached the stage of codification. For the time being, there was no subject having such high priority as to cause the Commission on that account to delay its study of the topics already entrusted to it. A perusal of General Assembly resolution 1505 (XV), however, had given him the idea that the objectives contained therein might be achieved by an exhaustive study of compulsory international jurisdiction and of the gradual surrender of the exclusive jurisdiction of States. It was extremely unlikely, however, that States would be prepared to accept a suggestion that the Commission should deal with that topic. The Commission would therefore be hard put to it to find a subject for a draft which would serve to promote the objectives set forth in the General Assembly resolution. It could only await the views or suggestions of governments, especially those of the governments of the States which had sponsored the resolution in the General Assembly. After that stage, the Commission could usefully reconsider the matter and make a suggestion.

63. The CHAIRMAN pointed out that the Commission was not expected to make any recommendation or take any decision on the subject. The debate had been initiated only because some members of the Commission had wished to put on record their views on future work in the field of the codification and progressive development of international law.

The meeting rose at 12.55 p.m.

615th MEETING

Wednesday, 21 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Planning of future work of the Commission

(A/CN.4/138)

(continued)

[Agenda item 6]

1. The CHAIRMAN invited continued debate on item 6 of the agenda, with special reference to General Assembly resolution 1505 (XV).

2. Mr. EDMONDS said that such subjects as State responsibility and the law of treaties, with which the Commission had already begun to deal, should be kept on its agenda, as Mr. Erim had said (614th meeting, para. 62). On the other hand, he saw considerable merit in Mr. François's argument (*ibid.*, para. 61) that either the Commission should undertake more restricted topics or that its sessions should be prolonged. Because the Drafting Committee's draft texts were submitted to the plenary Commission late in each session, it was impossible to discuss them as thoroughly as they deserved. He realised that the prolongation of the Commission's sessions would run into serious difficulties, but thought that, if at least part of the Drafting Committee's drafts could be submitted earlier, the Commission would have more time to consider them and produce more careful thought out instruments.

3. Mr. YASSEEN said that, having been present at the Sixth Committee's discussion of the text which had become General Assembly resolution 1505 (XV), he wished to clarify some points and to dispel certain doubts. He did not think that the resolution needed any defence. The Assembly's competence in the matter of the progressive development of international law and its codification was based on Article 13(a) of the Charter; it had not abdicated that competence in establishing the Commission, which was its creature. It had the right to propose to the Commission subjects to be considered, and had exercised the right on a number of occasions, and to suggest a programme of work. That in no way impaired the competence or prestige of the Commission. Nor did anyone challenge the Commission's right to choose subjects to be considered or codified, and no representative in the Sixth Committee had doubted the Commission's competence in that respect.

4. The object of the sponsors of the resolution had been that the Assembly should take an active part in the codification and progressive development of international law. Admittedly, the Commission had a programme; but it had not been useless for the Assembly to express its opinion on the matter. For whereas the choice of subjects had a technical aspect, it also had an eminently political aspect which was influenced by a number of factors.

Nobody had argued that the Commission was not qualified to weigh those factors; it had merely been stressed that the Assembly and, more particularly, the Sixth Committee, which consisted of jurists who were at the same time representatives of governments, were highly qualified to do so. The Sixth Committee had at all times been mindful of the idea, so admirably expressed by Mr. Amado, that international law was the work not of professors but of statesmen. Even from the point of expediency one could not challenge the right of the jurists who represented States in the Assembly to "survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law" (General Assembly resolution 1505 (XV), operative paragraph 1).

5. The Sixth Committee's debate on that question had been most useful and had evidenced the great interest which many States took in the progressive development of international law and its codification. It should perhaps be mentioned that in the course of the debate several representative had stated that the draft resolution did not imply the slightest criticism of the Commission, and the Sixth Committee had gone out of its way in the resolution itself to express its satisfaction with the Commission's work. The relevant provision had not been opposed by any delegation. The Assembly resolution in question provided for a reasonable and helpful method of work. The second draft resolution which had been submitted by twenty-four States¹ had met with particular favour in the Sixth Committee and had been adopted unanimously. That draft had differed from the first in that it omitted the provision concerning the appointment of a special committee whose function would have been simply that of making preliminary studies to facilitate the Assembly's task.

6. In conclusion he thought that the resolution reflected the common concern of all states to promote the codification and progressive development of international law and was to be heartily welcomed.

7. Mr. HSU said that he, too, had attended the debates in the Sixth Committee which had culminated in the adoption of General Assembly resolution 1505 (XV); he regarded that text as a concession to certain criticisms of the Commission's work made during the debate. As some representatives had pointed out, the resolution was, in a manner of speaking, a reflection on the methods used by the International Law Commission; nevertheless, the Sixth Committee had been relatively considerate, and had not included in the resolution any recommendation for the establishment of a special committee: operative paragraph 1 simply stated that the question should be placed on the provisional agenda of the sixteenth session of the General Assembly. It was noteworthy that few, if any, governments had as yet submitted any views or suggestions on the question

¹ Afghanistan, Argentina, Brazil, Canada, Ceylon, Colombia, Denmark, Ethiopia, Ghana, Indonesia, Iran, Iraq, Lebanon, Liberia, Mexico, Morocco, Netherlands, Pakistan, Thailand, Tunisia, Turkey, United Arab Republic, Venezuela, Yugoslavia.

to the Secretary-General in response to operative paragraph 2.

8. Thirteen years previously, the Secretariat had made a special study of the whole field of international law from the point of view of its codification, and the General Assembly had recommended a list of topics for the Commission to work on (A/925). In his opinion, that study was still valid; but it might be a good idea if a small committee reviewed the enumeration and decided which of the topics not yet discussed should receive priority. A notable omission from the original list was, however, the international law of war. Some might think that since war had been outlawed, it should not be endowed with the dignity of a code; it would be naïve, however, to assume that human nature had changed and that no more wars would take place simply because the concept had been outlawed. Indeed, the United Nations itself had gone to war against North Korea in 1950. Over the past three or four hundred years, a great deal of attention had been paid to the subject, and there would be no lack of precedents and rules for codification.

9. The Commission had acquired a great deal of experience in the thirteen years of its existence. One of the greatest difficulties it had encountered was that of the quinquennial change of membership and the consequent anxiety as to whether or not topics entrusted to certain Special Rapporteurs might have to be shelved. Mr. François had even gone so far as to express the view that the Commission should not undertake to deal with topics which it could not complete in five years (614th meeting, para. 61). But in that case, when would the Commission be able to deal with important and vast topics? Perhaps individual special rapporteurs might be replaced by a small body of experts, not necessarily members of the Commission. That solution would, of course, involve a revision of the Commission's Statute, but the General Assembly might agree to make the amendment. In that way, much of the preliminary work could be done outside the Commission and the area for government observations would be reduced. Moreover, members of the Commission were prone to speak at some length for the record; if part of the preliminary work were done beforehand, lengthy debate would no longer be necessary. He was sure that the method of entrusting certain topics to bodies of special rapporteurs would help to remove the causes for much of the criticism that had been levelled at the Commission in the Sixth Committee.

10. Mr. BARTOŠ, commenting on the relations between the General Assembly and the Commission, said that the Commission was a subsidiary body of the Assembly and that, under the Charter, the codification and progressive development of international law was a prerogative of the General Assembly, which was entitled to take the initiative in the matter. Nor was that hierarchical subordination the only consideration; the Commission provided the technical basis for the consideration of topics at the political level. Mr. Yasseen had rightly pointed out that the selection of topics for codification was both a political and a technical ques-

tion; the political aspect was the establishment of priorities to meet the needs of the international community, while the technical aspect was to ascertain whether certain topics were ripe for codification and for progressive development. Accordingly, the Sixth Committee and the International Law Commission should work hand in hand.

11. The Sixth Committee seemed to believe that the Commission was unduly conservative in its approach and that it laid down academic rules, rather than codifying customary rules of international law. The Commission had also been criticized for not paying enough attention to developing the principles of the Charter into rules of international law. He thought there was some ground for that criticism, which should be borne in mind when considering the future work of the Commission. It was essential that the Commission should be realistic in its choice of subjects. For example, when the third and fourth drafts of the Convention on Fishing and Conservation of the Living Resources of the High Seas had been prepared, the question of fisheries had had to be settled not in accordance with established legal principles, but in the light of the need to safeguard certain interests. The Commission would make progress by accepting institutions which might not be confirmed in theory but which were necessary in practice. It should not balk at considering questions which might be of less importance to some countries than to others, such as the succession of States and the legal status of new States. The General Assembly had in effect asked the Commission very politely to take a more realistic view of its work. The criticisms made in the Sixth Committee should be accepted, particularly since the Assembly had made no categorical demands on the Commission. The Assembly's requests should be studied closely, and a somewhat different approach adopted, so that sooner or later the Commission would be able to deal with the kind of topic suggested in resolution 1505 (XV).

12. The Commission had selected only a few topics from a relatively long list. Of course, it could hardly have done otherwise, in view of the short time at its disposal every year. He agreed with Mr. François that in principle it was unwise to undertake subjects which would take more than five years to deal with, but did not think that that rule should be applied strictly. It was conceivable that a topic might be handed on to a group of new members, even if the work done by the special rapporteur concerned could not all be used.

13. On the occasions when the Commission had dealt with such political subjects as the code of offences against the peace and security of mankind (A/1858, para. 59), the declaration on the rights and duties of States (A/925, para. 46) and the definition of aggression (A/1858, para. 53), the General Assembly had received the relevant drafts without any great enthusiasm; it had merely taken note of the Commission's work, recommended that it should be taken as a guide or had set up special committees to work on the subjects concerned. That attitude was different from that taken by the General Assembly at its fifteenth session. On the

one hand, the Assembly seemed to be encouraging the Commission to study political questions, and on the other hand, it did not seem to take the results of that work seriously. The Commission was thus placed in the invidious position of having to familiarize itself with new trends in international law and yet retaining its strictly juridical character. In any case, the Commission in its new composition should begin its work by examining the list of topics which had been drawn up thirteen years previously and which had been added to by the General Assembly. It should then choose at least five topics at a time which were ripe for codification, for example, the recognition of States, the succession of States, questions of relations in respect of technical and economic assistance, and others for which there were certain rules laid down in multilateral conventions, in resolutions of the General Assembly and in the day-to-day application of the Charter.

14. In conclusion, he said that there seemed to be a misunderstanding between the General Assembly and the Commission, attributable to the fact that current political trends were viewed in a more conservative way by the Commission than by the Assembly. It did not appear, however, that the General Assembly really wished the Commission to study more political topics. On the other hand, the Commission should be less reluctant to deal with more difficult questions, which were governed by few rules acceptable to all States. It was the Commission's duty to help other United Nations organs by showing them the correct trend of the development of principles of international law.

15. Mr. PAL said he did not find anything wrong in the resolution of the General Assembly and did not think that the records of the debate in the Sixth Committee disclosed any mistrust of the Commission or any misunderstanding between the Commission and the General Assembly. From the list of topics submitted to the Commission at its first session, it had selected the subjects it could deal with; it had also been obliged to give priority to new topics chosen by the General Assembly. Accordingly, the Commission's inability to deal with all the subjects on its list was not due to any laxity on its part. An account of the work done by the Commission would be found in its 1958 report (A/3859).

16. The Commission's Statute drew a sharp distinction between the progressive development of international law and its codification. Nevertheless, experience had shown that it was difficult to keep the work of codification within the limits laid down in article 16 of the Statute, and that progressive development was often also introduced. The General Assembly had shown no dissatisfaction with that method of operation, but it seemed to feel that State representatives, who knew exactly where the area of the greatest tension lay, were the most competent to select topics for codification.

17. Even the views expressed by the Commission on the present occasion would rather go to support the action taken by the General Assembly. Some members of the Commission opined that the codification or

progressive development of law within the competence of the Commission would only comprehend the law reflected in the "generally established practice" and not the law "concerning extremely controversial topics". The controversial topics, however, were the very matter to be brought under the control of the rules of law if law was to be retained or established as the ordering principle in international relations. If the changes and developments envisaged by the Sixth Committee were real, it would serve no useful purpose to simply reproach those developments as having marred the structure of international society. It was hardly possible to demand back the past conditions so that the world might function once again according to the schedule of the jurists. With those changes there would hardly be any law in the field which would be acceptable as reflected in the "generally established" practice, unless the term "generally" itself was assigned the specific sense of meaning and referring only to a fraction of the present international society. Even with this limited sense there might not have been any generally established practice, as had been asserted by Professor Lauterpacht in dealing with the question of codification. In any case, rules or practices of international law were not an absolute value but were required and brought about by certain circumstances in the development of human society. New developments involving new contacts and new tensions had to be dealt with and had immediately to be dealt with. Even those whose accepted practices were to be presented as "generally established practice" had not been immune from changes. Even amongst themselves their policies, interests, intentions, once coinciding, might have become widely divergent. Even within their narrow range it would be necessary to allow for at least the time lag between the evolution of the legal forms and the changing needs of the society life. Further, the so-called generally accepted norms might be taken as mostly reflecting a factual situation of relative power or weakness. Their perpetuation, instead of providing for stability, was often made to deny the vicissitudes of changing power relations.

18. But the changes and developments had been more far-reaching and comprehensive. The international field had become one of the focal points of political crisis of modern times. The social centre of gravity was now almost entirely in the field of political institutions. If the members of the Commission failed to adapt their juristic imagination to realities of the world in which political organization had actually superimposed itself on economic processes, then indeed they would have to proclaim the end of international law. Unless international law was adjusted to those developments, the result would be a sweeping idolizing of power, with all its chaotic consequences. The matter, however, was certainly not solely or even mainly juridical questions in the sense of being within the competence of the experienced jurists as such. Any dealing with juristic and scholastic rigour would be likely to conceal from the view the underlying new tension in social relationships.

19. It had been pointed out that there was no such thing as pure codification without progressive development of international law. Members of the Commission,

and particularly special rapporteurs, would indeed be helpless without expert help and, in the circumstances, it was most desirable that a politically aware body should select topics to meet the demands of the new developments. The new tension would necessarily be experienced by those shouldering the responsibility of working the State-machinery: they it was who would feel and know where the real conflict arose and once they would specify the fields of tension and the extent and character of such tension, the experienced jurists would usefully come in with their formulations to relax, remove or release them. As he read the resolution, in conjunction with the debate in the Sixth Committee, he did not find anything to associate the same, closely or otherwise, with any "aggressive and demagogic propaganda campaign". It was just what was to be expected in the circumstances envisaged. The States members of the international community life alone were essentially and justly qualified to specify the field of tension and the character and height of tension in each sphere. That was essential to determine which way to direct law-making energy. The preparation of a list of topics would not go further.

20. With regard to the methods of dealing with various topics, he wished to point out that it could hardly be denied that the Committee had made out a just case for revision of the international law and made out such a case for immediate attention. The problem of the revision of the law in the international field was not an easy one and certainly was not wholly within the competence of jurists. It would hardly be denied that a legal rule, once issued, would always, from its very nature, have a tendency to become obsolete or inapt after some time. It prescribed a certain behaviour in order to solve a specific difficulty of the then social relationships. With changes intervening they might, instead of producing order and harmony, begin to beget difficulties and friction. In domestic systems, the "will" giving the law would always be in existence and ready to adjust. In the international field, the rule would not generally be supported in action by any continuous adaptation to changing circumstances. The discrepancy between the "reality of life" and the legal rule might soon become intolerable and unless the legislative unit of will was brought into operation in time the only alternative to revision would appear in the undesirable form of outright defiance. Under existing conditions in the international community, especially in view of the present effort to bring it within a constitutional framework, it would have been proper and wise to provide the community organizations with a permanent institutionalized or organized legislative unit of will. Law having to do with life would have to face continuous change and would thus require continuous adaptation to changing circumstances through the help of a constantly watchful, discerning and active body.

21. As a concrete suggestion, he would have liked to see the International Law Commission itself placed on a permanent footing at least like the Court, with the provision that a certain fraction only of the membership would retire at intervals and that the Commission itself could withdraw from routine retirement those of

its members appointed as special rapporteurs who had already submitted their reports the acceptance of which had not been completed by the Commission. The absurdity of the present position of the Commission would be easily visualized if it was remembered that even with its extended term of five years no complete work was possible. During the first year, the Commission would take up the study of a subject and would appoint a special rapporteur who would be expected to produce a draft during the second year. After the first reading of the draft the matter would go to the governments for their comments and suggestions. They would get two years for that purpose, and in that way the second reading of the draft would never be possible before the fifth year. By 1962, the whole complexion of the Commission might change. It was indeed lucky that special rapporteurs such as Dr. François, Dr. Sandström, and Dr. Zourek had been re-elected and it was thus sheer luck that the Commission had been able to finish the work undertaken with their help as Special Rapporteurs.

22. He would not suggest any specific topics for discussion: in order fully to meet the demands of the changes in international life, the world, he suggested, must be prepared to face at least two of the complexities presenting themselves in two distinct dimensions, namely (1) the dimension of the structures of the United Nations itself as also of its various organs and perhaps also of its member units; and (2) the dimension of the legal norms. He agreed generally with some of the suggestions made by Mr. Verdross (614th meeting, para. 44). He also considered that the topics of the succession of States, the structure of the United Nations and rules of law, if any, governing the recognition and membership of States should be taken up as soon as possible.

23. Mr. AGO said that he had read with much care what had been said during the discussions in the Sixth Committee on the need to revise the programme of work of the International Law Commission. The suggestion that the Commission's whole programme should be overhauled was a new one; in the past, the General Assembly had been content to add on occasion a further subject to the original list of topics drawn up at the inception of the Commission's work.

24. Much had also been said in the Sixth Committee of the need to take into account new trends and developments in the fields of international law and to favour the development of international co-operation and friendly relations among nations. Some of the ideas which had been put forward by some members of the Committee did not appear entirely clear in the records. Nevertheless, the opinions voiced were of great interest, particularly in so far as they expressed the aspirations of new States to participate in the formulation of the rules of international law.

25. Hopes had also been expressed for the development of international justice. Indeed, perhaps the most interesting part of the discussion had been that concerning the role of the International Court of Justice. The reluctance to submit cases to that court was plainly due

not to any lack of confidence in the court, but rather to a feeling of uncertainty regarding the rules of international law which the court would apply. In many instances, States might be uncertain as to the exact content of those rules; in addition, the new States considered that they had had no part in the formation of the rules of customary international law over the centuries.

26. In the circumstances, the feeling that the International Law Commission should prepare the codification of more of the rules of international law was a natural one. Also, it was true to say that the task of codifying international law had become much more urgent. In normal circumstances, he preferred the rules of law to develop naturally and gradually and had no great enthusiasm for codification *per se*. In a revolutionary situation, however, codification might become an imperative necessity and the situation facing the international community, in particular as a result of the very rapid doubling of the number of sovereign States, was indeed revolutionary.

27. Codification was, however, a long, slow and arduous process. The German Civil Code, which was a good model of codification, was the result of one century of work. The Commission was expected to cope with the enormous task of codifying international law in only ten weeks annually, and the General Assembly should take that fact into consideration.

28. The General Assembly had discussed the question whether to set up a special Committee to select new topics for codification, or to entrust the International Law Commission with that task. In the end, it had been decided that the General Assembly would undertake the task itself, on the basis of government comments. As yet, however, the response from governments had not been very encouraging.

29. Of course, the Commission should be happy with the renewed interest taken by the General Assembly in questions of international law and should welcome its suggestions. The Commission should recognize that the General Assembly was best qualified to deal with the political implications of the choice of topics for codification. The General Assembly, for its part, should leave it to the Commission to decide whether a topic was really suitable for formulation in rules of law or not. The Secretary to the Commission had read at the previous meeting a long list of subjects, and he (Mr. Ago) had noticed that some of the subjects had barely any legal implications. But, above all, it should be left to the Commission to decide whether a topic was really ripe for codification or not. Much had been said of new topics, but some could hardly be said to be ripe for codification. International conventions could be entered into in relation to those new topics but the formulation of general rules of international law thereon would be premature; the Commission itself could not be expected to invent an entirely new set of rules for a matter on which no rules of international law existed as yet.

30. The General Assembly was thus in an excellent position to make useful suggestions for new topics but the Commission should be entrusted by the Assembly

with the decision on the question of priorities. In drawing up a list of topics, a political body might easily reach the result of establishing too long a list, with the consequence that the Commission would be given a task which it would be unable to perform if it were not free to make a choice and to establish priorities.

31. He agreed with Mr. François that the Commission's time was short, in particular if it was remembered that its members were elected for only five years. He could not, however, subscribe to the conclusion that the Commission should only undertake small subjects. Future generations would remember the Commission for its achievements in connexion with great subjects, in particular the codification of the law of the sea and of the rules governing diplomatic and consular relations. And it was precisely to Mr. François that the Commission and the world owed a debt of gratitude for his outstanding contribution to the study of the law of the sea, a subject on which the Commission's labours had met with a very broad measure of success.

32. It was his considered opinion that the Commission should concentrate on a small number of important subjects, of which State succession, which had been mentioned in the discussion, could well be one. There were also in the Commission's agenda three important subjects which stood in need of codification and which called for special priority: the law of treaties, State responsibility and the international law relating to the treatment of aliens.

33. It was essential that those three subjects should be codified first, before any attempt was made to codify other, smaller subjects. It should not be forgotten that the great majority of international legal disputes which arose were in practice connected in some way or another with the law of treaties, State responsibility or the treatment of aliens.

34. The General Assembly should therefore be urged to enable the Commission to carry out its essential task of codification in regard to those important subjects. Their codification would give to the new States confidence in international law and hence in international justice.

35. In conclusion, he did not believe that there was any opposition between a so-called conservative approach on the part of the Commission and a more progressive one on the part of the General Assembly. There was nothing conservative in urging priority for the codification of some of the major topics of international law. Moreover, the General Assembly could rest assured that it was precisely in connexion with the great subjects which he had mentioned that significant new developments had taken place in international law. There was no conflict of views between the General Assembly and the Commission; the General Assembly wanted the Commission to perform certain tasks and the Commission, which was the competent technical body, should be given the time, the means and the possibility of choice which were indispensable in order to carry out those tasks successfully.

36. Mr. MATINE-DAFTARY pointed out that resolution 1505 (XV) of the General Assembly was not directly addressed to the Commission. Members had, however, discussed in the course of the current debate the functioning of the Commission and he accepted the idea that something should be done in the matter.

37. The Commission had no doubt done splendid work in the past, but it was perhaps true that it might have done more. One important reason why it had not was the inevitable lack of continuity in regard to special rapporteurs. For the topic of the law of treaties, the Commission had recently appointed the fourth special rapporteur; in the circumstances, it was difficult to complete the work on that topic.

38. Some more permanent solution would have to be found for the problem of special rapporteurs. One solution might well be to appoint eminent international lawyers from outside the Commission. If necessary, the Statute of the Commission should be amended in order to make that possible. There were some eminent international jurists, qualified to act as special rapporteurs, who were debarred from membership of the Commission because they had the same nationality as one of its members.

39. If the Commission should continue to operate as before, it would have to concentrate on a few subjects but it would then hardly be fulfilling the function assigned to it by the General Assembly in pursuance of Article 13 of the Charter.

40. Article 13 of the Charter gave expression to an imperative need of the international community. It was the duty of States Members of the United Nations, under Article 33 of the Charter, to settle their disputes by peaceful means, including arbitration and judicial settlement. It was difficult, however, for States to accept judicial settlement when the content of international law was unknown, in other words if its rules were not settled in advance. Hence the need for the codification and development of that law.

41. By virtue of Article 38, paragraph 1(b), of its Statute, the International Court of Justice was called upon to apply the rules of customary international law. It followed that those rules needed definition. The Court had not yet built up a sufficient body of precedents to clarify international custom.

42. Another problem arose in connexion with the provisions of Article 2, paragraph 7, of the Charter, concerning "matters which are essentially within the domestic jurisdiction" of States. Many States had not accepted the jurisdiction of the International Court of Justice in all the legal disputes specified in Article 36, paragraph 2, of the Statute of the Court. Others, like the United States of America, had accepted that jurisdiction subject to a reservation regarding matters essentially within their domestic jurisdiction and some had even gone so far as to reserve to themselves the right to determine what matters came within the domestic jurisdiction. It was clear that States were reluctant to submit their disputes to the Court so long as the exact scope and meaning of Article 2, paragraph 7, of the

Charter remained undefined. That was one of the matters which might be placed on the Commission's programme.

43. It was therefore apparent that the work of codification of international law would have to be advanced in order to give States more confidence not only in international law but also in international justice. The United Nations had a judicial organ, but one which depended for its operation on the will of States. The failure of that organ to function normally was due to the inadequacy of the legislative process within the United Nations system.

44. The General Assembly should give the International Law Commission the means of carrying out the tasks entrusted to it. He suggested that a small committee should be set up to prepare, in the light of the Commission's thirteen years' experience, proposals to the General Assembly for the revision of the Commission's Statute.

45. Mr. AMADO said that the Sixth Committee and the General Assembly should be told emphatically that a Commission of scholars took four days to formulate a rule of international law governing a specific diplomatic or consular immunity.

46. He had been a member of the Committee which had drafted the Statute of the International Law Commission. It had not been the intention to draw in that Statute a clear-cut distinction between the codification of international law and its progressive development. A codification should fill any gaps which might appear; the rules had to be arranged, clarified and if necessary amplified. The task of codification and that of development of international law could not therefore be separated.

47. One of the most important phenomena of the modern world was the appearance of new States, eager to participate in the formulation of the rules by which international society was governed. He had consistently argued that international law was made by States and not by jurists.

48. He regretted that he could not accept Mr. François's suggestion that the Commission should devote its attention only to small subjects. He did, however, believe that the Commission should concentrate on the practical aspects of important subjects, leaving aside theoretical questions.

49. Thus, the subject of the law of treaties had been chosen for codification not because of its general theoretical aspects but because of the desire to clarify the rules of international law governing new types of international agreements which were becoming increasingly important. For example, a new type of treaty, which did not need to be ratified in order to enter into force, had made its appearance and it was important to determine how far the traditional rules governing the law of treaties applied to that type of instrument.

50. The law of treaties and that of state responsibility were both vast subjects and it was therefore essential to extract from them those portions which could usefully be codified.

51. Lastly, it was essential to inform the General Assembly that the Commission did not have the

necessary time to carry out fully the immense task which was expected of it.

52. Mr. ŽOUREK said he was happy that the General Assembly of the United Nations had given expression in its resolution 1505 (XV) to its interest in the codification and progressive development of international law. The resolution rightly stressed the growing importance of international law as a means of establishing friendly relations and co-operation between nations, of strengthening international peace, of settling international disputes peacefully and of furthering economic and social progress throughout the world. International law was, after all, the only basis for the pacific settlement of disputes between States with different economic and social systems and also for the solution of all problems arising in their co-operation and rivalry. The resolution further emphasized the importance of international law in the maintenance of peace, a point which had not always been recognized in the early years of the existence of the United Nations. Indeed, the strict observance of articles 1 and 2 of the Charter was the best means of ensuring peace.

53. The resolution in question had the great merit of drawing special importance to international law and to the work of its codification. For that reason one should not countenance the attempt made at the 614th meeting by the Special Rapporteur on the topic of state responsibility to discredit the sponsors of so important a resolution, which had been adopted unanimously by the General Assembly.

54. The question of future work in the field of codification should be considered and the programme established in the light of the importance of the topics in question for the maintenance of international peace. In 1949, the Commission had chosen fourteen subjects for codification which had been approved by the General Assembly. From time to time, the Assembly had added other topics and presumably would continue to do so in the future. Of the fourteen topics originally selected (A/925, chapter II, para. 16) the Commission had completed six. Consequently, if one remembered the difficulties inherent in the work and in particular the need to study international treaties, the case-law of international courts and the practice of States in a particular matter, the Commission had accomplished an appreciable volume of work.

55. At its next session the General Assembly would certainly consider what subjects should receive priority for purposes of codification. If its methods of work remained unchanged, the Commission would be unable to study more than a very small number of topics. Hence, the list of topics placed on the Commission's agenda should not be excessively long. Past experience showed that there was little point in having several topics on the agenda if the Commission was unable to study them. Where that happened, reports accumulated and after a number of years the special rapporteurs ceased to be members of the Commission on the expiry of their term of office or left it for some other reason, and then the Commission had to elect a fresh rapporteur who had to do the work all over again.

56. The Commission should concentrate on the most important questions and disregard secondary ones. Two large topics were already on its agenda: the law of treaties and state responsibility. A third — the status of aliens — had been placed on the agenda by implication by the way in which the special rapporteur had dealt with the topic of state responsibility. The members of the Commission had suggested other important topics, in particular the succession of states, but he thought that the list should not be too long.

57. It would, of course, be the Assembly's responsibility to decide what priority those topics should receive; in making its decision it might, in the case of large topics, indicate what subdivisions of the topic should be discussed first by the Commission. The Commission, for its part, should try to devise fresh methods of work, for otherwise progress would be very slow. When at its eleventh session in 1959 the Commission had discussed only a small part of the law of treaties he had estimated that it would take at least seven full sessions to deal with all the questions which the last Special Rapporteur on the particular subject, Sir Gerald Fitzmaurice, had treated in his reports to the Commission.

58. The Commission's study of the topic of state responsibility had been held up by lack of time. It had been unable to do more than hold a general debate at its eighth session in the course of which considerable differences of opinion had appeared amongst the members. Many of them had openly criticized the ideas voiced in the first report submitted by Mr. García Amador, the Special Rapporteur for that topic (A/CN.4/96). The Commission had then asked the Special Rapporteur to continue his study with instructions to take into account the views expressed in the course of the discussion. The Special Rapporteur had complained that his reports had been criticized by some delegations in the Sixth Committee of the General Assembly; but surely he could only blame himself for that for he had failed in his reports to take into account the views expressed during the general debate in the Commission in 1956.

59. The study of the topic of state responsibility should in his (Mr. Zourek's) opinion concentrate first on the general principles governing the responsibility of States. When once those general principles had been identified and laid down, then it would be possible to apply them in the different branches of international law. It would be wrong to begin with secondary questions and to ignore the fundamental problems of the day. The first subject to be studied was that of the international responsibility incurred by the violation of the rules of international law which were essential for the maintenance of international peace and security and which were laid down specifically in articles 1 and 2 of the Charter. In the course of that study one of the matters that would crop up would be that of the responsibility of the State by reason of aggression. It would be strange to try to study the responsibility of the State or injuries caused to the property of aliens and to disregard the vastly more serious responsibility for acts of aggression which could cause incalculable harm to all mankind. All

specific problems would have to be dealt with in the order of their importance.

60. Mr. SANDSTRÖM said that the General Assembly had the indisputable right to indicate to the Commission topics for codification, and it had made ample use of that right. It was worth recalling that only three or four of the thirteen or fourteen topics to be codified had been selected, for purposes of codification, on the Commission's own initiative: the law of the sea, arbitral procedure, the law of treaties and possibly consular immunities, as a corollary to diplomatic intercourse and immunities. At first, the Commission had wished to undertake primarily work which did not have undue political implications.

61. It had been suggested that the Commission's method of work should be reviewed. He agreed with all that had been said by Mr. François and Mr. Ago. The suggestion of Mr. Hsu that assistant special rapporteurs might be recruited from outside the membership of the Commission was worth considering.

62. Sir Humphrey WALDOCK said that he had studied the records of the Sixth Committee's debates at the fifteenth session and agreed with the views expressed by Mr. Ago. In particular, he agreed that there was not and should not be any basic divergence between the views of the Commission and those of the General Assembly, since it was the aim of both to further the codification of international law. He felt, however, that the General Assembly might be unable to appreciate the technical difficulties inherent in the Commission's work. He fully recognized the General Assembly's political interest in the list of topics which the Commission should undertake, but statesmen could not always be expected to understand the difficulties of drafting in legal terms the practices which they had established.

63. The Commission, he thought, had an undoubted right to give an expert view on the technical aspects of codification and it would be of real advantage to the General Assembly if it did so, since it certainly would not serve the interests of the General Assembly to ask the Commission to undertake projects which could not be brought to fruition for technical reasons.

64. There was an absolute limit to what the Commission could produce in a session of ten weeks. Although it might be suggested that the Commission should speed up its methods of work, that could be done only to a very slight extent. The pace of work was dictated by the subject matter and by the very process of codification. Unless there was a full exchange of views, it would be impossible to obtain a synthesis of the opinions held in various parts of the world. One of the chief uses of the Commission was as a forum for bringing together differing points of view. The idea that it should, in certain cases, break up into sub-commissions (A/3859, chapter V, para. 60, footnote 33) was therefore not to be recommended since that might seriously weaken the effectiveness of the Commission as an instrument for harmonizing divergent opinions and producing modern formulations of the law acceptable to all.

65. An excessively long list of topics was also open to objection, because it would result in a lack of focus. He agreed that fundamental topics must be tackled, however much work that entailed. Moreover, they corresponded in many respects with the preoccupation of the Sixth Committee to codify subjects that would make a contribution to peace. For example, the law of treaties might seem a dull subject, but the work of the International Court of Justice showed that the law of treaties was a very large and growing part of international law and of the greatest relevance to the maintenance of international peace. If the Commission succeeded in producing an authoritative statement on the law governing the termination of treaties, that would certainly be a major contribution to the settlement of disputes and the maintenance of friendly relations.

66. The Chairman had stated that the discussion would be merely for the record and that the Commission was not asked to take any action. After Mr. Ago's statement, however, it might be thought that it should attempt to draft an agreed statement on some of the technical difficulties involved in connexion with the planning of the Commission's future work, since that was the best way to make an impression on the Sixth Committee.

67. The CHAIRMAN reminded Sir Humphrey that, when the Commission had decided to deal with item 6 of its agenda, it had been made clear that it could do no more than record an expression of members' views on the subject. The Commission had not been instructed to submit any statement to the General Assembly. There would in any case hardly be time to draft such a statement at the current session.

68. Sir Humphrey WALDOCK observed that so much general agreement had been expressed that it was to be hoped that it would not be hard to draft the statement.

69. The CHAIRMAN replied that that idea had been discussed on many previous occasions and the Commission had always found almost insuperable difficulties in arriving at agreed conclusions.

70. Mr. LIANG, Secretary to the Commission, said he would first comment on some points of an organizational nature raised in the discussion.

71. The Commission was not unaware of the difficulties of continuing its treatment of a topic if a special rapporteur was not re-elected. It had in fact taken a decision on that subject at its fifth session (A/2456, para. 172). If a special rapporteur was re-elected, he would continue his work unless and until the Commission, as newly constituted, decided otherwise.

72. The suggestion that outside help should be recruited in the form of assistants to special rapporteurs raised a different question, which had been discussed very thoroughly when the Commission's Statute had been drafted. At that time it had been decided that the system would not be feasible, since the assistants could not be supervised if they were not members of the Commission or of the Secretariat. The suggestion also raised the very delicate question of the area from which such assistants should be recruited. Unless the General

Assembly saw fit to reverse its decision, it would therefore not be feasible to recruit from outside the United Nations.

73. The suggestion that associate special rapporteurs who were also members of the Commission be appointed was, however, workable, and arrangements for such a system might be examined later.

74. The Secretariat had issued a document for the Commission's first session in 1949 (A/CN.4/1/Rev.1, cited in report on the Commission's first session, A/925, chapter II, para. 13), listing topics for codification. That document had not, of course, been exhaustive. Comments had been made with regard to the stage of ripeness for codification, but the Commission had not spent much time in discussing each subject, and the Chairman, Judge Manley O. Hudson, had taken the initiative, with the Commission's consent, of proposing the four main subjects which had been before the Commission ever since. There remained, however, an almost embarrassing choice of topics to be undertaken.

75. It was the Secretariat's experience with regard to the selection of topics that in most cases they could not be compartmentalized. But there were subjects which by their nature were broad in scope. State responsibility and the law of treaties were cases in point. He himself had ventured on previous occasions to urge that the larger subjects should be broken up. When State responsibility had originally been placed on its agenda, it had been understood that the Commission's work would, at the outset at least, be limited to the question of the responsibility of the State for injuries caused in its territory to aliens. If the topic of State responsibility were to include the violation of State sovereignty and other rules of international law, it would be virtually equated with the whole field of international law. Certain subjects must, therefore, be treated separately. The international legal aspects of land reform, for example, which he had mentioned at the 614th meeting, might be regarded as an aspect of State responsibility, but might equally be taken as a limited subject in itself. Such restricted treatment might also be given to certain aspects of the law of treaties.

76. The CHAIRMAN said that, in view of the short time remaining at the Commission's disposal, he wished to close the list of speakers.

77. Mr. AGO asked that the list should be left open, as points were likely to be raised that required a reply.

78. The CHAIRMAN replied that members could hardly speak twice on the same subject, but perhaps they might make short explanatory statements.

The meeting rose at 1.10 p.m.

616th MEETING

Thursday, 22 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Planning of future work of the Commission (A/CN.4/138) (concluded)

[Agenda item 6]

1. The CHAIRMAN invited further comment on the planning of the Commission's future work in the light of General Assembly resolution 1505 (XV).

2. Mr. GROS said that since the Commission had decided that the debate would not produce a conclusion, he felt bound, owing to the capital importance of the question, to state his views briefly.

3. Mr. Ago had explained magisterially both what codification was and what it could not be. And virtually all the speakers seemed to have supported those views.

4. In the first place, as an organ of the General Assembly, the Commission had the duty to provide the Assembly with the technical elements necessary for deliberations on the codification of international law. In that connexion, he wished to clear up a certain myth concerning codification, a confusion of two ideas: the first was that codification was a simple operation involving no more than adding up rules of law and reducing them to a common denominator; and the second that the factors of modern international life lent the rules of law a new aspect with the consequence that it became possible to re-write international law in rules entirely different from those known.

5. Those were two errors of judgement. As had been said before, codification had never been a rapid and simple operation. It involved first a knowledge of the laws and usages of many countries. The labour of compiling repertories of international law, which were after all mere documentary reference works and which constituted the first step towards codification, showed that teams of specialized jurists would take years to codify a particular topic.

6. But there was more to it than that. For the purposes of codification, it was not enough just to know; one had to think out anew the rules in the light of the evolution of life. That was the progressive development of international law. It was an intellectual exercise which the Commission performed with excellent effect in its drafts; it was not, as some people thought, merely noting that existing rules had fallen into desuetude and replacing them by new rules called for by a new system of law. It involved more than that, for the simple reason that international law had no other source than the consent of States and that if they were not agreed to admit a new rule, that rule might become part of national or regional law, but never of international law.

7. It followed that reflection, the maturing of ideas in the Commission, were essential for the progress of codification, and the General Assembly should be told those elementary truths. For if the Assembly took the view that codification had become a priority task, changes in structure might become necessary in the interest of advancing the work. There was, however, a limit even to structural reforms: for the purposes of codification, those concerned had at all times to remain in touch with international events. The Commission's successes were attributable to the fact that it brought together experts who approached their task in a spirit of comprehension and tolerance. What the Commission, reflecting the different systems of law, could accept, that the States could likewise accept. Conversely, if *ad hoc* experts or legislators tried hastily to impose something, that would have no chance of acceptance.

8. For those reasons, he associated himself with the views expressed by Mr. Ago and Sir Humphrey Waldock: the two great subjects of codification should be the law of treaties and the international responsibility of the State. Treaties constituted the sum of the daily experiences of each State. In France, for example, an international agreement was concluded every two days. If the Commission provided the international community with unambiguous rules concerning the conclusion, application and termination of treaties, and concerning the circumstances in which the responsibility of the State was incurred, then nobody would be entitled to complain of a lag in the codification of international law. The General Assembly should be thanked for the special interest it had taken in codification, and the summary record of the current debate should not fail to reflect the agreement of the members of the Commission as evidenced by all that had been said concerning the essential content of codification.

9. Mr. PADILLA NERVO said it was agreed that General Assembly resolution 1505 (XV) did not ask the Commission to select new topics for codification, nor did it express an opinion as to the aspects of codification or progressive development of international law to which special attention should be paid. The resolution was not an expression of political differences in the Commission, but did reflect the feelings of States which the Commission itself could not ignore. Extreme political concern certainly existed and found expression through many channels, one of which — the Assembly — was of considerable importance to the Commission, which, as a body of experts sitting in a personal capacity, was perhaps the Assembly's principal non-political organ. It was true that the same might be said of the International Court of Justice, but its comments had a different significance; many of the newer countries felt that they had not participated in framing the rules that would be applied to them by the Court. The Commission, on the other hand, reflected the views of experts from countries and regions with widely differing social and political structures and legal systems. The opportunity should therefore be taken to use the Commission's undoubted authority to allay the misgivings certainly entertained by many States.

10. Undoubtedly, at the sixteenth or seventeenth session of the General Assembly many States would suggest topics of international law for codification and possible progressive development. The Commission should take note of the uneasiness felt by some States and should express its opinion on the topics suggested and the difficulties they might present. It should also express its opinion that many of the concerns felt by the States could be overcome by a study of the more specific items on the Commission's agenda. It would, however, be preferable to refrain from expressing an opinion until governments had made their suggestions at the General Assembly. The Commission would then be able to take those suggestions as a basis and voice any reservations it might have, with added authority.

11. The Mexican Government would probably suggest a number of topics. One might be the study of the legal consequences of the peaceful co-existence of States with differing political, economic and social structures. Peaceful co-existence itself was, of course, a political idea and could not therefore be codified, but the economic, political and cultural relations between different systems would have international legal consequences in, e.g., trade and international services.

12. The Mexican Government would probably also suggest a study of the succession of States and governments. That was a topic of special importance, owing to the emergence of so many new States and its study would involve such problems as the validity of treaties, the problem of nationality, acquired rights, compensation and even certain problems relating to membership of international organizations.

13. Another topic might be the permanent sovereignty of States over natural resources, which was of particular interest to Mexico. The principle was being gradually accepted in practice by States and in the international organizations. It might be dealt with within the framework of State responsibility, if that were given a broader scope. Resolution 1 A, addressed to the General Assembly through the Economic and Social Council, of the Commission on Permanent Sovereignty over Natural Resources (E/3511-A/AC.97/13, annex) specifically requested the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly. The first paragraph of the preamble and sub-paragraphs 2 and 4 of the first operative paragraph would be of particular concern to the Commission.

14. Another possible subject was the study of the international consequences of land reform. The comments made in connexion with the permanent sovereignty over natural resources were partly relevant to land reform also. Land reform might also be studied as a separate topic; although essentially a matter of domestic concern, it undoubtedly had international consequences.

15. An attempt might be made to formulate certain basic legal rules for the control of outer space. That might contribute to the study of political and military topics. The competent committee of the United Nations was studying procedure and had come to the conclusion that decisions should be taken not by majority vote,

but by general agreement. The question had so many aspects apart from the scientific that a legal study of the implications of the use of space might well be undertaken with a view to finding certain moral and non-mandatory rules before the political and military aspects made such a study far more difficult. Other studies connected with international relations, such as the study of neutrality, should be carried out in the light of recent international instruments and recent changes in those relations. Another suggestion for the General Assembly which might act as a guide for the Commission might be a study of the sources of international law in the light of resolutions adopted by international organizations which had a strong impact on international law, directly or indirectly. The legal aspects of the consequences of nuclear explosions might also be examined.

16. Probably, many other subjects would be suggested and the Commission's opinion on them would be very useful, especially if it could convince governments that many of their apprehensions concerning the application of international law might be allayed if the Commission continued to give priority to the topics already on its programme and were given the means to speed up its work on those topics. The Commission might even say that the codification of such topics would require a change in the Commission's methods of work and even of its Statute.

17. With better means at its disposal, the Commission might in time be able to give advisory opinions, in addition to continuing its work on the codification and progressive development of international law. It might work out draft treaties for such matters as disarmament and the cessation of nuclear tests. Such legal studies of political matters would not be misplaced, since the Commission was composed of individual experts, not of political representatives.

18. The Commission should therefore continue with its present programme, but should be given more facilities. It should not adopt any specific position on the matters raised in General Assembly resolution 1505 (XV) until after hearing what had transpired at the General Assembly's sixteenth session.

19. Mr. TSURUOKA observed that nobody had contested the view that codification involved both the statement of existing law and its systematic and progressive development. The existence of international law presupposed the existence of customary law. Codification since the nineteenth century had only been possible when not dominated by extra-legal considerations. The Commission should jealously maintain its position as an expert legal body, though at the same time it should naturally pay due attention to new facts as they emerged.

20. The law of treaties and state responsibility should be given priority for codification for the reasons given by Mr. Ago (615th meeting, para. 26) and Mr. Gros. Some of the suggestions put forward in the Sixth Committee in 1960 were covered by the codification of those two topics. The Commission might well add to its programme the topic of succession of States and governments.

21. So far as his experience went, it would hardly be possible to improve the Commission's work unless the Commission was prolonged. Its work would, however, be facilitated if States, instead of awaiting a report, submitted their comments as soon as it began to study a particular topic. A legal library might also be formed to help the special rapporteurs in their work.

22. With regard to relations between the Commission and the General Assembly, all the Assembly's apprehension should be allayed. The Commission should, of course, pay careful attention to the Assembly's legitimate wishes, but it should also make great efforts to ensure that the Assembly appreciated the Commission's endeavours to carry on its work efficiently. That might be done partly by statements by the Commission's members who sat in the Sixth Committee and partly by personal contacts between them and government representatives in the General Assembly.

23. Mr. EDMONDS said it was unfortunate that Sir Humphrey Waldock's suggestion for a special statement addressed by the Commission to the Sixth Committee (615th meeting, para. 66) had not been acted on owing to shortage of time and the pressure of work. In order that the views of each member should be presented in full, he would propose formally that the sound recordings of the meetings on item 6 be transcribed and be made available to the members of the Commission and to members of the Sixth Committee.

24. Mr. LIANG, Secretary to the Committee, explained that according to the regulations only the principal organs of the United Nations were entitled to verbatim records. It would not therefore be feasible to issue verbatim records for certain meetings of the Commission. Members' statements might be recorded more fully than usual in the summary records.

25. Mr. YASSEEN requested that the statements made in the debate on item 6 should receive fuller treatment than usual in the summary records.

26. Mr. AMADO said that, speaking extemporaneously and not reading from written notes, he had to rely to some extent on subsequent interpretation. What he said represented in any case what he considered right.

27. The CHAIRMAN said that naturally all members listened with the greatest interest to everything said by every other member of the Commission, but the summary record would be sufficient to convey to the Sixth Committee the essence of the views stated in the discussion. Fuller treatment than usual might well be given in the summary records.

28. Mr. MATINE-DAFTARY, Rapporteur, suggested that a detailed account of the discussion might be given in the Commission's report.

29. Mr. JIMÉNEZ de ARÉCHAGA said he agreed with the general tenor of the statements made by previous speakers. Plainly, the General Assembly had the original competence under article 13 of the Charter to promote the codification and progressive development of international law. Since the Assembly had not delegated that responsibility, it was quite logical for it

to take a decision *ex novo* on the topics to be codified, particularly at a time when the composition of the Commission was about to be changed, and when certain members might be unable to complete the tasks allotted to them as special rapporteurs. He was convinced that the renewal of the Assembly's interest in international law would strengthen the role of the Commission as the main subsidiary organ of the Assembly for the codification and development of international law.

30. In his opinion, the Commission's work went far beyond pure codification and its achievements already had historical value. Owing to the impending change of its membership, the Commission should not at that time establish a definite line for its future work but, as Mr. Ago had pointed out (615th meeting, para. 35), whatever topics were selected, the last word should rest with the Commission itself, for it was better qualified to decide whether the topics concerned were ripe for codification. The two main items on the Commission's existing agenda — the law of treaties and state responsibility — were likely to yield positive results. With regard to the disagreement on state responsibility at the Commission's twelfth session (566th and 568th meetings), he thought there had been of late a tendency which gave hope of positive results, even with respect to the international law affecting injuries to aliens in the territory of the State. All States now recognized the principle of their obligation towards States whose nationals were affected by nationalization measures taken in their territories. The question was not one of international protection of private property or of acquired rights, but of the principle that, if a State was enriched by capital belonging to nationals of another country, the latter must be compensated for losses incurred as a result of expropriation or nationalization. He cited certain recent treaties concluded amongst themselves by socialist countries (e.g., that between Yugoslavia and Czechoslovakia of 11 February 1956 and that between Poland and Czechoslovakia of 29 March 1958) which recognized the principle of compensation and mutual settlement of obligations in connexion with claims arising out of nationalization measures or other provisions depriving the legal subjects of one party of rights of ownership in the territory of the other.

31. He considered that the topics suggested by certain members, especially by Mr. Padilla Nervo, were most interesting, but thought that if too many subjects were proposed, the Commission would have difficulty in completing detailed drafts on each one. With regard to Sir Humphrey Waldock's suggestion made at the previous meeting, he pointed out that the General Assembly had not asked the Commission for any recommendation; it was therefore questionable in what form a statement of the kind suggested by Sir Humphrey could be submitted to the Sixth Committee. Finally, he had not enough experience of the Commission's work to make suggestions for the improvement of its method of work, but he had been most impressed by Mr. Pal's statement (615th meeting, paras. 15-22).

32. The CHAIRMAN, speaking as a member of the Commission, said that criticisms of General Assembly

resolution 1505 (XV) were unjustified and were motivated by considerations foreign to the codification and progressive development of international law. The Commission should be grateful to the General Assembly and to the States which had sponsored a resolution drawing the attention of governments to the importance of international law in international relations and envisaging the reconsideration of the whole subject in the light of new developments throughout the world.

33. The first question to be considered in connexion with the codification and progressive development of international law was which of the branches of international law should receive priority. It was obvious that they should be the branches most closely connected with the maintenance of peace and security and the development of friendly relations among nations.

34. The resolution itself stated that the programme of codification should take into account the need to promote friendly co-operation among States. Several members had rightly pointed out that the subjects concerned were vast; they included, for example, codification of the principles of peaceful co-existence, of State responsibility and of the succession of States. That did not mean, however, that other branches of international law should be neglected. There seemed to be no difference of opinion in the Commission on that score, and although Mr. François had expressed the view that more restricted topics should be dealt with, he would surely not object to giving priority to the most important subjects.

35. The question was obviously one of approach, rather than of fundamental disagreement. Certain doubts had been voiced concerning passages of the General Assembly resolution which mentioned the possibility of a broader approach towards the selection of subjects for codification and the establishment of the programme in the light of recent developments in international law. The Commission's existing programme was over ten years old and the main question to be answered was whether any developments had in fact taken place which would warrant its reconsideration. He was convinced that a review of the programme was fully justified, firstly, because it was generally useful to reconsider a programme from time to time and, secondly, because important changes had in fact taken place in international society. It was enough to mention the disintegration of the colonial system and the emergence of new States during the past fifteen years; that fact could not fail to have serious repercussions on the development of international law. Again, the important changes that had taken place in the past few decades had not yet been fully digested, even by international lawyers, and it could be said with certainty that not all the necessary conclusions had yet been drawn from those changes. For example, so far as the subject of state responsibility was concerned, fundamental changes had taken place in consequence of the establishment of the principles of non-aggression, the prohibition of the use and threat of force and the principles of peaceful co-existence. The establishment of those principles had completely transformed the international law relating to state respon-

sibility. He could not agree with the Secretary to the Commission that state responsibility in the broad sense did not exist in international law, but was dispersed among all its component branches. In his opinion, there was a branch of international law dealing with the responsibility of States, and that branch should constitute a separate subject for codification; the fact that the Commission had for a number of years been confusing the subject of state responsibility as a whole with that of responsibility for injury to aliens did not mean that the topic in its broad sense did not exist as such in international law. The new concept of state responsibility followed from the new principles and practices of States and was reflected in the post-war settlements, but not as yet in the doctrine of international law or in the work done by the Commission on the subject. There were, however, definite new trends from which logical consequences must follow. The Commission should pay the utmost attention to new developments and should draw the necessary conclusions.

36. With regard to the programme of the Commission's work, he agreed with previous speakers who had stressed the fact that the codification and progressive development of international law required much patience and was necessarily a slow process. The whole complex of international relations was involved and, as Mr. Gros in particular had emphasized, the work of codification in itself was extremely complicated. The Commission was agreed that it should always present drafts of high quality, embodying its best efforts to contribute to the maintenance of peace and of friendly relations among States. It should therefore heed the recommendations of the Sixth Committee, and some practical steps might be taken to draw the Commission's attention to specific remarks made in the Committee. The Secretariat might supply the Commission with a comprehensive paper summarizing the relevant observations made during the debate of the Sixth Committee and the Chairman should report to the Commission on the discussion of its report in the General Assembly. Moreover, the Commission should be modest and should concede that its work was not impeccable. It had been suggested that its sessions should be prolonged, in order to increase the volume of its production; he very much doubted the necessity and advisability of such a course, since some members were unable to attend sessions in their entirety, even when they lasted for a mere ten weeks.

37. In his opinion, the Commission's work might be best expedited by a thorough preparation of its drafts. In that connexion, it was most important that the special rapporteurs should know in advance what the Commission expected of them. On many occasions, the instructions given to special rapporteurs had been so vague that they had been obliged to rely on their own judgement only. Mr. Zourek had said (615th meeting, to deal adequately with the subject of the law of treaties. A considerable amount of work had already been done on the subject, but the absence of specific instructions had brought about the situation that if the Commission took up the present draft articles it could hardly produce a draft acceptable to States. It had been suggested that

non-members of the Commission could be appointed as special rapporteurs; in the five years during which he had been a member of the Commission, there had always been enough members willing and able to undertake the study of various topics and, moreover, the Secretary had pointed out that it was inadmissible for administrative reasons to call in outside assistance. He was sure that contacts between special rapporteurs and regional juridical bodies studying the same subject could be extremely valuable. Mr. Verdross's suggestion that either two special rapporteurs or a committee of three members might be appointed to examine certain topics deserved consideration.

38. Mr. ŽOUREK drew attention to the view put forward (614th meeting) that the subject of State responsibility was so vast that it could hardly be dealt with otherwise than from the restricted point of view of injury to aliens in the territory of a State. There could be no doubt that such material injuries in violation of international law were regrettable and could cause friction between States; but the violation of fundamental rules of international law, especially those established with the purpose of maintaining international peace and security, had even more regrettable consequences, and, as experience had shown, could lead to the infliction of incalculable losses on mankind. Accordingly, after establishing the general rules governing State responsibility, the Commission would be in duty bound to tackle the particular problem he had mentioned. Moreover, its studies might be based on some of its earlier work in the field: in particular, he had in mind the codification of the principles recognized in the Charter and Judgement of the Nürnberg Tribunal.

39. Mr. AGO thought that the main question before the Commission was how it could best inform the General Assembly of the tenor of its debates. All members would agree that the summary records might be expanded by careful correction; but all the members of the Sixth Committee could not be expected to read those in detail, and it was essential that they should be given a general and comprehensive view of the Commission's ideas. Accordingly, the Commission should ask the Chairman, in presenting the Commission's report to the Sixth Committee, to interpret its views on the subject, in order to remove all misunderstandings and to convey to the General Assembly the Commission's appreciation of the renewal of interest in international law as a factor of peace and co-operation among nations. The General Assembly's attention might also be drawn to the fact that the work of codification was of necessity long and slow. Moreover, it should not be forgotten that that work did not end in the Commission, but was continued at plenipotentiary conferences. Thus, despite the many years of hard work that the Commission had expended on the law of the sea, it had then been necessary to hold two plenipotentiary conferences on the subject, and the subject was still not exhausted. The codification of the international law of diplomatic relations had culminated in the signature of the Vienna Convention; but that success, achieved in a relatively short time, was due essentially to the very long and careful preparation of the draft in the Commission. He

agreed with the Chairman that it was sometimes possible to improve the Commission's work by giving more precise instructions to special rapporteurs. But miracles should not be expected so long as the Commission had only ten weeks at its disposal annually. So far as the prolongation of the Commission's sessions was concerned, that course had both advantages and disadvantages, and it was not for the Commission to make any recommendations on the subject: the General Assembly usefully consider it. But the essential point in his opinion was that a choice among the very many topics proposed for codification was indispensable and that, at the moment, priority should be given to the most important and general topics, to those which were the most essential if the codification of international law was to make real and substantial progress. Those were, he thought, the main points of the Commission's views which he hoped the Chairman would put before the Assembly and the Sixth Committee.

40. The CHAIRMAN said he would do his best to convey the views of the Commission to the Sixth Committee.

41. Mr. LIANG, Secretary to the Commission, replying to the Chairman's remarks on the question of State responsibility, said that he did not disagree with him in theory. He had merely pointed out that the principle of State responsibility in the widest sense was implicit in every branch of international law; the whole field of international law must be applied in the light of those principles, just as constitutional law was governed by the principle of governmental responsibility. Taken in that sense, State responsibility would be an extremely broad subject, and he wondered whether it was practical to codify it in all its ramifications. For that reason, past attempts at codification had been limited to the topic of injury to aliens in the territory of a State.

42. Mr. GARCÍA AMADOR said that he had examined with care the records of the Sixth Committee's discussions, in the course of which some criticisms had been expressed regarding the extent and scope of the reports submitted by him as Special Rapporteur on the subject of the international responsibility of States.

43. He wished to explain that his first report (A/CN.4/96) had dealt with the subject of State responsibility as a whole. In his subsequent reports (A/CN.4/106, 111, 119, 125 and 134), he had dealt only with the problem of the responsibility of the State for injuries caused in its territory to the person or property of aliens. He had done so not by his own choice, but in pursuance of the Commission's wishes and in deference to the views expressed by its members (A/3623, chapter III, para. 17). During the five years which he had devoted to the study of the question of the international responsibility of the State for injuries to aliens, there had been no objection to that limitation of the subject by any member of the Commission; nor had there been any criticism from the Sixth Committee or the General Assembly.

44. In the circumstances, he could not therefore understand the objections voiced in the Sixth Committee at

the fifteenth session of the General Assembly. Much had been said about the need for the Commission to deal with certain important subjects. There could be no doubt that matters affecting property rights as a result of measures of expropriation and nationalization, matters for which considerable enthusiasm had been shown, were directly connected with the international responsibility of States for injuries to aliens. Indeed, long before that enthusiasm had become manifest, he had devoted a considerable portion of his reports to a detailed study of those particular matters. In doing so, he had taken into account not only the traditional principles of international law, but also the new trends and recent developments in the matter.

45. A tendency had been apparent during the Sixth Committee's discussion to criticize his reports for not having taken sufficiently into account new developments in international law. Those criticisms would have been more helpful if specific reference had been made to a particular development, explaining how he had omitted to take it into account. As a matter of fact, none of the critics had mentioned a single such development. In reality, the one leading recent development in the matter had been the impact of the progressive internationalization of human rights on the whole subject of the international law of state responsibility and the treatment of aliens. He had, of course, devoted considerable attention in his reports to that new development, but regretted to note that the criticisms to which he had referred came from those quarters least sympathetic to the concept of international human rights as accepted by the United Nations as a whole.

46. Lastly, it had been said that he had not taken into consideration problems of violations of territorial sovereignty. In fact, those problems were dealt with in the Charter of the United Nations itself. He wondered whether his critics would have had the same enthusiasm for the study of the problem of the violation of a country's sovereignty by means of infiltration and subversion by States pursuing a policy of expansion.

47. The CHAIRMAN said that the subject of state responsibility was not being dealt with by the Commission at the current session; some members had referred, in the course of the discussion on the Commission's future work, to the fact that the two subjects of state responsibility and the rights of aliens had become somewhat intermingled.

48. He declared the discussion on item 6 closed.

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1 to 11, A/CN.4/137)
(*resumed from the 614th meeting*)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING

49. The CHAIRMAN invited the Commission to consider on second reading the draft articles on consular relations (A/4425).

ARTICLE 1 (Definitions)

50. The CHAIRMAN said that the following (partly new) text had been prepared by the Drafting Committee for article 1.

"1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

"(a) 'Consulate' means any consular post, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

"(b) 'Consular district' means the area assigned to a consulate for the exercise of its functions;

"(c) 'Head of consular post' means any person in charge of a consulate;

"(d) 'Consular official' means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

"(e) 'Consular employee' means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

"(f) 'Members of the consulate' means all the consular officials and consular employees in a consulate;

"(g) 'Members of the consular staff' means the consular officials, other than the head of post, and the consular employees;

"(h) 'Member of the service staff' means any consular employee in the domestic service of the consulate;

"(i) 'Member of the private staff' means a person employed exclusively in the private service of a member of the consulate;

"(j) 'Consular premises' means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

"(k) 'Consular archives' means all the papers, documents, correspondence, books and registers of the consulate, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

"2. Consular officials may be career officials or honorary consuls. The provisions of section III of chapter II of this draft apply to officials who are career consuls; the provisions of chapter III apply to honorary consuls as well as to career officials who are assimilated to honorary consuls under article 54 *bis*.

"3. The particular status of members of the consulate who are nationals of the receiving State is governed by article 50 of this draft."

51. The CHAIRMAN invited comments on paragraph 1 (a) to (k).

Paragraph 1 (a) was adopted.

Paragraph 1 (b) was adopted.

52. Mr. LIANG, Secretary to the Commission, referring to paragraph 1 (c), pointed out that the expression "person in charge" suggested that the situation envisaged was temporary in character. The language of the provision was not consistent with the terms of article 16 on acting heads of post.

53. Mr. ŽOUREK, Special Rapporteur, said that probably the expression used in English was too broad.

Perhaps the language of article 16 might be adjusted to avoid any inconsistency.

54. Sir Humphrey WALDOCK said that the expression "person in charge" was no broader than the French *personne qui dirige*.

55. The CHAIRMAN said that under article 19 of the Vienna Convention on Diplomatic Relations the acting head of a diplomatic mission was deemed to be head of the mission.

Paragraph 1 (c) to (k) was adopted.

Paragraph 1, as a whole, was adopted.

56. The CHAIRMAN invited comments on paragraph 2.

57. Mr. BARTOŠ said that there was a discrepancy between the English "career officials or honorary consuls" and the corresponding French *fonctionnaires de carrière ou honoraires*.

58. Sir Humphrey WALDOCK said that there was no difference in substance. It would have been awkward to refer to "honorary officials".

59. Mr. AMADO said that the French *fonctionnaires honoraires* was equally awkward.

60. Mr. ŽOUREK, Special Rapporteur, said that the expression "honorary consuls", which was one of long standing, had been replaced by "honorary consular officials" in deference to an observation by the Netherlands Government (A/CN.4/136/Add.4). In view of the difficulties of translation, he thought perhaps the best solution would be to revert to the use of "honorary consuls" and to explain in article 54 that the expression covered also persons who served as consular officials, other than head of post, in an honorary capacity.

61. The CHAIRMAN suggested that paragraph 2 should be re-drafted to read:

"2. Consular officials may be career officials or honorary. The provisions of section III of chapter II of this draft apply to officials who are career officials. The provisions of chapter III apply to honorary consular officials, as well as to career officials who are assimilated to them under article 54 *bis*.

Paragraph 2, as so amended, was adopted.

62. The CHAIRMAN invited comments on paragraph 3.

63. Mr. ERIM asked what was the purpose of paragraph 3. Article 50 already specified the status of members of the consulate who were nationals of the receiving State.

64. Mr. ŽOUREK, Special Rapporteur, said that by drawing attention to article 50 in the definitions article, the Commission would avoid having to include in a large number of articles a reference to the status of persons who were nationals of the receiving State.

65. The CHAIRMAN, speaking as a member of the Commission, said that the paragraph was a useful one. If a provision of that type had been included in the draft on diplomatic relations, many doubts and uncertainties would have been dispelled and much discussion avoided at the Vienna Conference.

66. Mr. BARTOŠ said that it was particularly useful to have in article 1 an indication of the status of a whole category of members of the consulate.

Paragraph 3 was adopted.

Article 1, as amended, was adopted as a whole.

67. Mr. AGO, speaking as Chairman of the Drafting Committee, said that the titles of chapter I and section I, like all the titles, were provisional. The Drafting Committee would take a final decision on those titles when all the articles had been adopted. The same was true of the order in which the articles were placed.

68. The CHAIRMAN said that the Commission would do well to defer its decision on the placing of the articles and the titles until it had adopted all the draft articles, when comments of members on these points would be taken into account.

ARTICLE 2 (Establishment of consular relations)

69. The CHAIRMAN invited comments on article 2, for which the Drafting Committee had prepared the following text:

"1. The establishment of consular relations between States takes place by mutual consent.

"2. The consent given to the establishment of diplomatic relations between two States implies, unless otherwise stated, consent to the establishment of consular relations.

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

Paragraph 1 was adopted.

70. Mr. ŽOUREK, Special Rapporteur, said that he had no objection to paragraph 2. It was, however, his opinion that, if the receiving State refused to accept the establishment of consular relations, it could not be said to maintain diplomatic relations but only political relations with the other State.

Paragraph 2 was adopted.

Paragraph 3 was adopted.

Article 2, as a whole, was adopted.

ARTICLE 2bis (Exercise of consular functions)

71. The CHAIRMAN said that the following text had been submitted by the Drafting Committee for article 2 bis:

"Consular functions are normally exercised by consulates. They are also exercised by diplomatic missions within the limits of their competence."

72. Mr. ŽOUREK, Special Rapporteur, proposed the deletion of the word "normally". He had examined the practice of States very carefully in the matter and had found, for example, that all Swiss diplomatic missions exercised consular functions throughout the territory of the receiving State, with the exception of the districts for which the sending State had established consulates. The practice of other countries was similar, as would be obvious from a glance at the list of the diplomatic missions of the various States.

73. If the word "normally" were left in the first sentence the impression might be given that consulates had some sort of priority, even where there existed a diplomatic mission. The reverse was true, and there were even some other arrangements which deserved to be noted: for example, in some cases, the embassy's consular section in the capital dealt with all particularly important matters and the consulates throughout the receiving State had to refer those matters to that consular section.

74. The CHAIRMAN, speaking as a member of the Commission, supported the proposal that the word "normally" be deleted. The word suggested that the exercise of consular functions by diplomatic missions, referred to in the second sentence, was in some way not normal.

75. Mr. FRANÇOIS said that he had no objection to the deletion of the word "normally", but thought that the concluding words of the second sentence "within the limits of their competence" were ambiguous. That phrase would certainly have to be explained in the commentary.

76. Mr. ŽOUREK, Special Rapporteur, said that he would explain the phrase in the commentary. He recalled the terms of article 3, paragraph 2, of the Vienna Convention: "Nothing in the present convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

77. It was one of the functions of a diplomatic mission, by virtue of article 3, paragraph 1 (b), of the Vienna Convention, to protect in the receiving State the interests of the nationals of the sending State. For that purpose, and therefore within the normal limits of their competence, diplomatic missions could exercise consular functions.

78. Mr. AMADO criticized the phrase "within the limits of their competence". He agreed to the deletion of the word "normally". The whole article could, with advantage, be revised to read: "Consular functions are exercised by consulates. They may also be exercised by diplomatic missions."

79. Mr. PADILLA NERVO said that by including the phrase "within the limits of their competence" the intention had been to cover much the same ground as in article 3, paragraph 2, of the Vienna Convention. In the circumstances, the actual words of article 3, paragraph 2, of the Vienna Convention might be included in article 2 bis of the draft.

80. Mr. LIANG, Secretary to the Commission, agreed included in article 2bis of the draft.

81. As to the phrase "within the limits of their competence", it did not appear to fulfil the purpose for which it had been intended. Questions of competence were implicit in all the provisions of the draft, and a phrase of that type could be used almost anywhere.

82. Mr. ŽOUREK, Special Rapporteur, said that the purpose of the phrase under discussion was to indicate that a diplomatic mission did not need to be invested with new functions in order to be able to carry out consular duties.

83. The language of article 3, paragraph 2, of the Vienna Convention was well suited to an instrument on diplomatic relations, but in the draft on consular intercourse it would be necessary to be more explicit; a purely negative formula of that type would not meet the case and would seem strange in a multilateral convention dealing specifically with consular relations and immunities.

84. Mr. BARTOŠ said that he had no objection to article 2 *bis*, but considered that it would have been desirable to make the question of the exercise of consular functions by diplomatic missions the subject of a separate section.

The meeting rose at 1.10 p.m.

617th MEETING

Friday, 23 June 1961, at 10 a.m.

Chairman; Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137) (continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING (continued)

ARTICLE 2*bis* (Exercise of consular functions) (continued)

1. The CHAIRMAN invited the members to continue the debate on article 2 *bis*.¹
2. Mr. YASSEEN said that in connexion with article 2 *bis* two points had to be settled: first, whether a diplomatic mission could exercise all consular functions; secondly, whether that exercise of consular functions was normal, in other words whether it was admissible at all times and without any conditions.
3. So far as the first point was concerned, State practice showed that diplomatic missions performed all consular functions without distinction. Indeed, from the practical point of view, it would be difficult to draw any distinction between the various consular functions for that purpose. So far as the second point was concerned, he believed that the exercise of consular functions by diplomatic missions was normal. He therefore supported the deletion of the word "normally" from the first sentence. However, he felt that that whole sentence was unnecessary; it was unnecessary to state the obvious truth that consular functions were exercised by consulates. Article 2 *bis* might consist simply of a provision stating that consular functions "may be exercised" (*pourront être exercées*) by a diplomatic mission.
4. Mr. MATINE-DAFTARY supported the suggestion for the deletion of the phrase "within the limits of their

competence". He also noted that the English and French versions of that phrase differed, the French word *attributions* being rendered in English by "competence". Moreover, the term *attributions* was far too vague and would give rise to difficulties of interpretation.

5. Sir Humphrey WALDOCK said it was difficult to render the French term *attributions*. The phrase was intended to mean that, if a diplomatic mission exercised consular functions, it was acting within its province and within the limits of its duties.

6. The suggestion of Mr. Yasseen raised a more general question. It was necessary to avoid any clash with the compromise formula embodied in article 3, paragraph 2, of the Vienna Convention on Diplomatic Relations. A simple statement to the effect that a diplomatic mission could exercise consular functions might be open to the interpretation that such a mission could exercise consular functions without restriction throughout the territory of the receiving State. From the point of view of substance, it should be made clear to what extent the exercise of consular functions by a diplomatic mission was controlled by the provisions of the draft concerning consular intercourse.

7. The CHAIRMAN, speaking as a member of the Commission, said that he could not support Mr. Yasseen's suggestion for the deletion of the first sentence. It was true that, with the omission of the word "normally" the sentence stated a more or less obvious fact, but it was quite usual to express a self-evident fact as an introduction to another provision logically connected with that fact. The first sentence was rendered necessary by the presence of the second sentence of article 2 *bis*.

8. With regard to the concluding phrase, he was inclined to consider that it could perhaps be best omitted.

9. Mr. PADILLA NERVO said that if article 2 *bis* were put to the vote as it stood he would vote against it.

10. The provisions of article 2 *bis* were intimately connected with those of article 2 on the establishment of consular relations and also with those of article 52 *bis* on members of diplomatic missions responsible for the exercise of consular functions. He recalled that when the Commission had discussed article 52 *bis*, he had raised the question whether its provisions were intended to cover only the cases where consular functions were performed in the capital city, or also the exercise of those functions at a place outside the capital (611th meeting, para. 66).

11. It was essential to limit the scope of the statement in the second sentence of article 2 *bis*, which in its Spanish version at least, stated without any qualification that consular functions could be exercised by diplomatic missions and that such exercise came within the scope of the powers or faculties of those missions (*dentro de la esfera de sus atribuciones*).

12. Some contrast should be established between consular functions as exercised by consulates and the same functions as exercised by diplomatic missions. Some reference should be made to the fact that they were exercised by the consular section of the diplomatic mission concerned; it should also be made clear that the

¹Text in summary record of 616th meeting, para 71.

provisions of the draft articles as a whole applied to such a consular section. Otherwise, article 2 *bis* should be omitted.

13. Lastly, if article 2 *bis* were omitted altogether from the draft, that omission would not interfere with the practice regarding consular sections of embassies.

14. Mr. PAL recalled that the Commission's prolonged discussion on article 52 *bis* had been inconclusive (611th meeting, paras. 1-69). The Commission had merely referred article 52 *bis* to the Drafting Committee with the members' comments. The Chairman had also indicated that the intention was that the article should deal only with the consular section of the diplomatic mission; consular functions could not be carried out by diplomatic agents elsewhere than at the seat of the mission, unless the receiving State agreed otherwise.

15. Since the Drafting Committee had not yet prepared the final text of article 52 *bis* and since the provisions of that article were related to those of article 2 *bis*, he proposed that further discussion on article 2 *bis* be deferred until the Commission had seen the final text of article 52 *bis*.

16. Mr. MATINE-DAFTARY said that the provisions of article 3, paragraph 2, of the Vienna Convention would suffice as a statement of the proposition that a diplomatic mission could perform consular functions. Accordingly, article 2 *bis* was unnecessary in the draft under discussion.

17. The Commission could, of course, decide to introduce at the end of article 4 (Consular functions) an additional paragraph along the lines of article 3, paragraph 2, of the Vienna Convention. Perhaps the provision might be framed in positive terms, so as to state that diplomatic missions could, by mutual agreement between the two States concerned, perform all or some of the various functions specified in article 4.

18. Mr. AMADO said that the discussion on article 2 *bis* illustrated the truth of what he had said at the 615th meeting: it took days to formulate even one provision of a draft that was to represent codification of existing international law.

19. The Commission might perhaps now take a vote on article 2 *bis*.

20. The CHAIRMAN said that Mr. Pal had proposed that further consideration of article 2 *bis* should be deferred until the Commission had before it the text of article 52 *bis*. If there were no objection, he would take it that the Commission accepted the proposal.

It was so agreed.

ARTICLE 3 (Establishment of a consulate)

21. The CHAIRMAN said that the Drafting Committee had prepared the following text for article 3.

"1. A consulate may be established in the territory of the receiving State only with that State's consent.

"2. The seat of the consulate and the consular district shall be determined by mutual agreement between the receiving State and the sending State.

"3. Subsequent changes in the seat of the consulate or in the consular district may be made by the sending

State only with the consent of the receiving State.

"4. The consent of the receiving State shall also be required if the consulate desires to open a vice-consulate, an agency or an office in a locality other than that in which the consulate itself is established."

Paragraph 1 was adopted.

Paragraph 2 was adopted.

Paragraph 3 was adopted.

22. Mr. BARTOŠ asked what was the meaning of the word "office" as used in paragraph 4.

23. Mr. ŽOUREK, Special Rapporteur, said that a consulate might find it necessary to open an office in another locality for the convenience of its nationals. The presence of a large number of nationals in a particular locality might be a seasonal phenomenon.

24. Mr. BARTOŠ said that he could not accept the idea of an office being opened elsewhere than at the seat of the consulate if the status of the consular "office" in question was not defined.

25. It would be appropriate for a consulate-general or a consulate to open, with the consent of the receiving State, a vice-consulate or a consular agency at another locality in its consular district, for the status of a vice-consulate (or a consular agency) was well known. But it was not clear what privileges attached to a consular "office" and whether the person in charge of it was deemed to be a head of post.

26. The fact that the consent of the receiving State was required was not sufficient. It was undesirable to create conditions likely to complicate international relations. A sending State might ask permission to open consular offices in a number of villages and the receiving State's refusal to permit those offices to be opened could result in unnecessary friction between the two States concerned.

27. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Bartoš had raised a very real point. Unless some indication were to be given of the legal status of the "office" under discussion, it would be better to drop the term altogether.

28. Mr. AMADO thought that the whole of the last phrase of paragraph 4 should be omitted ("Or an office . . . is established").

29. The concept of a consular "office" was unknown in consular practice. No such term existed in consular terminology and he found it strange that it should be suggested that a consulate, more or less like a bank, should be able to open branch offices.

30. Mr. ŽOUREK, Special Rapporteur, did not agree. The position was similar to that obtaining in the case of diplomatic missions. He pointed out that article 12 of the Vienna Convention on Diplomatic Relations provided for the possible establishment of an office of the diplomatic mission in a locality other than that in which the mission itself was established.

31. Sir Humphrey WALDOCK said that the whole rule was based on the consent of the receiving State. That State had therefore complete control over the opening of the office in question, in the same manner as

in regard to the opening of a vice-consulate or a consular agency.

32. Perhaps the Commission might consider adopting paragraph 4 as it stood and introducing an explanatory provision in the article dealing with consular premises.

33. Mr. MATINE-DAFTARY said that there was no analogy with the situation contemplated in article 12 of the Vienna Convention. A diplomatic mission constituted a single and indivisible unit; normally, there could be no question of any separate offices. The intention of article 12 was to cover the exceptional case in which, mainly for reasons of climate, for example, embassies moved to another city for part of the year.

34. In the case of consulates, it was not clear what the term "office" implied in the context and it was therefore preferable to delete it.

35. Mr. YASSEEN said that any reference to an office, in the sense of an extension of the premises of the consulate, should appear, not in paragraph 4, which mentioned vice-consulates and consular agencies, but in another article, that dealing with consular premises.

36. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 12 of the Vienna Convention referred to the establishment of "offices forming part of the mission in localities other than those in which the mission itself is established".

37. The legal status of the offices in question was established. It was completely settled by the statement that they formed part of the diplomatic mission.

38. In article 3 of the draft under discussion, on the other hand, the "office" appeared to be a separate institution; hence the difficulties to which the provision had given rise. Accordingly, he suggested that the passage "or an office. . . is established" should be deleted and that an additional sentence, similar to the relevant portion of article 12 of the Vienna Convention, should be inserted in paragraph 4 on the following lines: "A like consent shall be required if a consulate proposes to establish an office forming part of the consulate in a locality other than that in which the consulate is itself established."

39. Mr. TSURUOKA considered that the reference to a consular "office" should preferably be omitted. If the States concerned were in agreement, an office of the type envisaged could always be set up.

40. Mr. ŽOUREK, Special Rapporteur, accepted the Chairman's amendment which would remove all possible misunderstanding. There was a difference between the opening of an office and the establishment of a vice-consulate or of a consular agency. A vice-consulate or a consular agency would constitute separate consular posts whose head would require a separate exequatur, whereas the offices under discussion formed part of the existing consulate.

41. Sir Humphrey WALDOCK supported the Chairman's amendment. There was a real difference between the establishment of a consular agency and the opening of an office as envisaged in paragraph 4. It was not uncommon for a consul to be required to cover a very large area and to need to rent a room in a town where he

spent only one or two days of the week. The office in question did not constitute a separate institution but an extension of the consulate.

42. It was particularly important to enable arrangements of that kind to be made because they resulted in a considerable saving of money for the sending State. By way of example, he mentioned that some of the foreign consuls at Strasbourg performed consular functions at Nancy and perhaps other industrial cities of France and might find it necessary to maintain offices in some of those cities in order to carry out their duties effectively.

43. The CHAIRMAN put to the vote his amendment to paragraph 4.

The amendment was adopted unanimously.

44. Mr. PADILLA NERVO observed that the word "consulate" used in paragraph 4 was defined in article 1, paragraph 1 (a) as meaning any consular post, including a vice-consulate or a consular agency. It was hardly likely that either of the last two mentioned would ever open a vice-consulate or agency in a locality other than that in which it was itself established. Accordingly, paragraph 4 should have a narrower meaning.

45. Mr. ŽOUREK, Special Rapporteur, said that probably only a consulate or a consulate-general would have the power to open a vice-consulate or agency. The point might be made clear in the paragraph.

46. The CHAIRMAN suggested that the words "consulate-general or consulate" be used. The final drafting might be left to the Drafting Committee.

Paragraph 4, as amended, was adopted, subject to final drafting.

Article 3 (Establishment of a consulate) as amended, was adopted, subject to final drafting.

ARTICLE 4 (Consular functions)

47. The CHAIRMAN said that the Drafting Committee had prepared the following redraft for article 4:

"Consular functions consist more especially of:

"(a) Protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

"(b) Promoting trade and furthering the development of economic, cultural and scientific relations between the sending State and the receiving State;

"(c) Ascertaining conditions and developments in the economic, commercial, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

"(d) Issuing passports and travel documents to nationals of the sending State, and visas or other appropriate documents to persons wishing to travel to the sending State;

"(e) Helping and assisting nationals of the sending State;

"(f) Acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature;

"(g) Safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State;

"(h) Safeguarding the interests of minors and persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

"(i) Serving judicial documents or executing letters rogatory in accordance with conventions in force or, in the absence of such conventions, in any other manner compatible with the laws of the receiving State;

"(j) Exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels used for maritime or inland navigation, having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

"(k) Extending necessary assistance to vessels and aircraft mentioned in the previous sub-paragraph, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping ships' papers and conducting investigations into any incidents which occurred during the voyage;

"(l) Settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws of the sending State".

48. Mr. VERDROSS, referring to paragraph (a), said that, according to article 3(b) of the Vienna Convention, the protection of nationals was one of the functions of a diplomatic mission, and diplomatic missions might also exercise consular functions in certain cases. There might be some confusion between diplomatic and consular protection unless it was specified in the draft under discussion that consular protection was exercised *vis-à-vis* the local authorities.

49. Mr. ŽOUREK, Special Rapporteur, replied that the difficulty was how to define the meaning of "local authorities". At the twelfth session there had been considerable debate on the question whether a consul might also address central authorities if the laws of the State of residence so permitted (*cf.* debate on article 30, Communication with authorities of the receiving State, in 533rd and 572nd meetings). When the Drafting Committee had discussed the matter anew, it had decided that it could not retain article 4, paragraph 2, in the form given in the report on the twelfth session. All that it would be possible to do in the present case was to explain the difficulty in the commentary. The fact that the matter had been raised was a further argument in favour of including article 2 *bis* in the draft. The difference between consular protection (whether by a consulate or by a diplomatic mission) and diplomatic protection was that consuls were entitled to protect nationals by representations to local authorities of first instance or, in States where some services were centralized, sometimes even to the central authorities (e.g. patent and inventions office, immigration office, etc.), but not at the inter-State level, whereas diplomatic protection was exercisable only after the aggrieved national had exhausted all local

remedies, when the matter would be taken up between the States concerned through the diplomatic channel. He would explain that in the commentary.

50. The CHAIRMAN, speaking as a member of the Commission, said that, while he appreciated the point raised by Mr. Verdross, the draft convention must be taken as a whole. All the remaining articles referred to the ways in which consulates exercised their functions, as distinct from diplomatic missions, and thereby met Mr. Verdross's point.

51. Mr. MATINE-DAFTARY thought that Mr. Verdross had raised a valid point. The Special Rapporteur had said that it was not easy to define "local authorities" for the purposes of the draft. The distinction to be drawn, however, was between governments and authorities. For example, a court of cassation had full competence, but was not the government. Diplomatic missions addressed themselves to the government, to ministries, whereas consuls approached authorities subordinate to ministries.

52. Mr. VERDROSS said that he agreed entirely with the Special Rapporteur and would accept his suggestion that the explanation be given in the commentary.

53. Sir Humphrey WALDOCK thought that the point had been largely met by inserting the phrase "within the limits permitted by international law", which was also used in article 3, paragraph 1(b), of the Vienna Convention.

54. Mr. FRANÇOIS observed that the description of the other consular functions in article 4 showed clearly that they could not be functions of a diplomatic mission. It was impossible to include in paragraph (a) everything that was covered by the following paragraphs and articles.

55. Mr. PADILLA NERVO noted that article 3, paragraph 1(b), of the Vienna Convention did not contain the phrase specifying that "nationals" meant both individuals and bodies corporate. He wondered whether the inclusion of the phrase in article 4(a) of the draft under discussion would raise the same objections as had been raised at the Vienna Conference.

56. Mr. LIANG, Secretary to the Commission, replied that the question had been raised in the Committee of the Whole in connexion with article 3, paragraph 1(b), of the final text of the Convention. The Swedish representative had asked whether bodies corporate were included in addition to natural persons. After consultation with the delegations, the representative of the Secretary-General had said that bodies corporate were included in the term. No disagreement had been expressed in the Committee of the Whole. That fact had been stated in the report of the Conference.

57. Mr. PADILLA NERVO remarked that if that view had been accepted by the Vienna Conference, he could not see any particular reason to spell out the definition of "nationals" in the draft, especially as it had been agreed that the draft should follow the Vienna Convention as closely as possible in order to obviate unnecessary discussion at the future consular conference.

58. Mr. LIANG, Secretary to the Commission, replied that he thought it would be more useful to include the

phrase in the draft in order to avoid similar discussions at the future conference of plenipotentiaries. As every international lawyer knew, the doctrine of *travaux préparatoires* was accepted by certain States and doubted by others. It would therefore be preferable to retain the phrase rather than refer to the matter later on in the form of further explanations.

Article 4(a) to (i) was adopted.

59. Mr. ŽOUREK, Special Rapporteur, referring to article 4(j), pointed out that the phrase "having the nationality of the sending State" might not cover all cases. The matter had arisen during the discussion of the term "vessel" (614th meeting, paras. 11-41) in connexion with a draft of article 1. In certain cases the phrase might be too narrow, because a vessel registered in State A might be chartered by a national of State B for a short period. The vessel would therefore have the nationality of State A but would be entitled to fly the flag of State B. Perhaps a paragraph should be added stating that the expression "vessels of the State" meant vessels used for maritime or inland navigation, flying the flag of the State in question and, in the case of vessels not entitled to fly any flag, vessels or craft having the nationality of the sending State. He would include the term "craft" because there were small craft which, in accordance with the laws and regulations of certain States, did not fly a flag but still had the nationality of the State of registry.

60. The CHAIRMAN observed that the question had been very fully discussed and the Commission had decided (*ibid.*, para. 41), for the sake of simplicity, to accept merely a reference to the nationality of the sending State, leaving the details to be settled in specific conventions.

61. Mr. BARTOŠ said that there was no need to re-open the discussion as the point about the nationality of vessels had been settled by the 1958 Geneva Convention on the High Seas (A/CONF.13/L.53). He was satisfied with the wording of paragraph (j). It correctly stated that the rights of supervision and inspection were exercised under the laws and regulations of the sending State, not by virtue of international conventions. It was the duty of the State which had accorded the nationality to ensure that those rights were exercised.

62. The CHAIRMAN observed that the Special Rapporteur had not made any specific proposal.

Article 4(j) was adopted.

Article 4(k) was adopted.

63. Mr. BARTOŠ, referring to paragraph (1), said that he was satisfied with the intention of the provision but considered that the vessel should be mentioned. The provision did not apply to disputes between masters and seamen who were of a nationality different from that of the flag State.

64. Sir Humphrey WALDOCK observed that it had been his impression that the Drafting Committee had decided to merge paragraphs (k) and (l) and to define the nationality of the vessel in paragraph (j) in order to avoid the repetition of a rather long phrase.

65. Mr. ŽOUREK, Special Rapporteur, agreed; that was why the phrase had not been repeated in paragraph (1).

66. The CHAIRMAN said that paragraph (1) would be eliminated and the sentence in it would be added to paragraph (k). The point raised by Mr. Bartoš would thus be covered.

On that understanding, article 4 was adopted.

ARTICLE 4 bis (Exercise of consular functions in a third State)

67. The CHAIRMAN said that the Drafting Committee had prepared the following text for the article:

"The sending State may, after notifying the States concerned, entrust a consulate established in a particular State with the exercise of consular functions in a third State, unless there is express objection by one of the States concerned."

Article 4 bis was adopted.

ARTICLE 4 ter (formerly article 7) (Exercise of consular functions on behalf of a third State)

68. The CHAIRMAN said that the Drafting Committee had prepared the following text for the article:

"With the prior consent of the receiving State and at the request of the third State a consulate established in the first State may exercise consular functions on behalf of that third State."

Article 4 ter was adopted.

ARTICLE 5 (formerly articles 9 and 10) (Appointment and admission of heads of consular post)

69. The CHAIRMAN drew attention to the Drafting Committee's text of article 5, which read:

"Heads of consular post are appointed by the sending State and are admitted to the exercise of their functions by the receiving State."

70. Mr. YASSEEN observed that the article did not refer to the idea expressed in article 10 (Competence to appoint and recognize consuls) of the 1960 draft (A/4425), although the Commission had not decided to exclude that concept. He thought that the article should specify that the competence to appoint consuls and the competence to grant recognition to consuls were governed by the municipal law of the sending State and by that of the receiving State, respectively.

71. Mr. ŽOUREK, Special Rapporteur, said that, in the interests of the structure of the draft, the Drafting Committee had devoted a special article (article 9) to the essential rule mentioned by Mr. Yasseen.

72. Mr. YASSEEN thought that, so far as the appointment of heads of consular post was concerned, article 5 laid down a rule which was absolutely self-evident and hence probably unnecessary.

73. The CHAIRMAN observed that the article meant that two separate actions, one by the sending State and the other by the receiving State, were required for the appointment and admission of heads of consular posts.

Article 5 was adopted.

ARTICLE 6 (formerly article 8)
(Classes of heads of consular post)

74. The CHAIRMAN said that the Drafting Committee had prepared the following text of the article:

" 1. Heads of consular post are divided into four classes: (1) Consuls-general; (2) Consuls; (3) Vice-consuls; (4) Consular agents.

" 2. The provision of the foregoing paragraph in no way restricts the power of the Contracting Parties to fix the designation of the consular officials other than the head of post."

Paragraph 1 was adopted.

75. Mr. MATINE-DAFTARY doubted whether the English word "designation" was equivalent to the French *dénomination*.

76. Sir Humphrey WALDOCK said that the Drafting Committee had had some difficulty in deciding on the term to be used. However, one of the meanings of the English word "designation" was very close to that of the French word *dénomination*.

77. He pointed out that paragraph 2 did not correspond to any provision of the 1960 draft.

78. The CHAIRMAN said that the purport of the paragraph was not quite clear.

79. Mr. ŽOUŘEK, Special Rapporteur, said that the paragraph had been added at the insistence of certain members, who had pointed out that the commentary to the article would not be retained in the final text. Paragraph (7) of the commentary to former article 8 stated that the article in no way purported to restrict the power of States to determine the titles of the consular officials and employees who worked under the direction of the head of post; the provision of article 6, paragraph 2, was therefore useful, in that it made it clear to States that they would not be obliged to revise the whole structure of their consular service in order to comply with paragraph 1 of the article.

80. Mr. YASSEEN considered that paragraph 2 was quite unnecessary, since paragraph 1 referred only to the head of post and not to any subordinate officials. Moreover, the corresponding article of the Vienna Convention (article 14) contained no similar provision. In strict logic, paragraph 1 did not exclude the possibility of giving any title to a subordinate consular official.

81. Mr. AMADO said he shared Mr. Matine-Daftary's doubts concerning the English word "designation".

82. He also shared Mr. Yasseen's doubts concerning paragraph 2. In a draft codifying rules of international law and the practice of States, it seemed almost frivolous to ask States to subscribe to a provision which was self-evident.

83. Mr. MATINE-DAFTARY, referring to Mr. Yasseen's and Mr. Amado's remarks, said that, in practice, a consulate-general might be composed of a consul-general as the head of post and a number of consuls, vice-consuls and consular agents. If article 6 consisted of the first paragraph only, the provision might be read to mean that a head of post could bear one of the

four titles mentioned, while other consular officials at the same post could not bear those titles. He did not think that the paragraph would do any harm, but, on the contrary, would emphasize the existing practice in the matter.

84. Mr. YASSEEN drew Mr. Matine-Daftary's attention to the possibility that diplomatic agents bearing the title of ministers plenipotentiary were not heads of post.

85. He proposed formally that paragraph 2 of article 6 should be deleted.

86. Mr. ŽOUŘEK, Special Rapporteur, agreed with Mr. Matine-Daftary that under the regulations of a number of consular services it was possible for vice-consuls and consular agents to serve in a consulate, in addition to a consul-general. Paragraph 2 was therefore necessary in that it avoided the interpretation to which Mr. Matine-Daftary had referred. He agreed with Mr. Yasseen that the paragraph added no new rule to the draft. Since the four classes of heads of posts were being proposed for codification for the first time, however, some States might hesitate to accept the classification without the assurance that it would not involve a revision of the structure of their consular services.

87. Mr. LIANG, Secretary to the Commission, pointed out that there were a number of other appellations, such as, for example, *élève-consul*, which did not apply to heads of post.

88. He believed that the word "designation" was perfectly correct in the context.

89. Mr. MATINE-DAFTARY thought furthermore that the phrase "of whatever designation" which the Drafting Committee had added in article 13² was clearer and should be retained.

90. The CHAIRMAN, speaking as a member of the Commission, said that the statements made by the Special Rapporteur and Mr. Matine-Daftary had convinced him of the need to retain paragraph 2.

91. Speaking as Chairman, he put Mr. Yasseen's proposal to the vote.

The proposal was rejected by 11 votes to 3, with 2 abstentions.

92. Mr. BARTOŠ said that, though in favour of the provision in principle, he had been obliged to abstain because paragraph 2 as worded by the Drafting Committee did not state that consular officials other than the head of post could bear the titles listed in paragraph 1. He would have been prepared to vote against Mr. Yasseen's proposal if that addition had been made.

Article 6 as a whole was adopted, subject to drafting changes.

ARTICLE 7 (formerly article 12)
(The consular commission)

93. The CHAIRMAN drew attention to the following text submitted by the Drafting Committee for article 7:

² For text see summary record of the 618th meeting, para. 8.

"1. The head of a consular post shall be furnished by the sending State with a document certifying his capacity in the form of a commission or similar instrument, made out for each appointment, and showing, as a general rule, the full name of the head of post, his category and class, the consular district, and the seat of the consulate.

"2. The sending State shall communicate the commission or similar instrument through the diplomatic or other appropriate channel to the government of the State in whose territory the head of consular post is to exercise his functions.

"3. If the receiving State so accepts, the commission or similar instrument may be replaced by a notice to the same effect, addressed by the sending State to the receiving State".

94. Mr. BARTOŠ did not think that the French word *acte* was synonymous with the English word "instrument" since an *acte* could mean both an instrument and a *negotium juris*.

95. Sir Humphrey WALDOCK said that, although the two words might not be absolutely synonymous, they both conveyed the meaning of a formal document and corresponded very closely.

96. Mr. EDMONDS suggested that the construction of paragraph 1 might be improved by transferring the words "certifying his capacity" to follow the phrase "made out for each appointment".

97. Sir Humphrey WALDOCK, speaking as a member of the Drafting Committee, accepted that change.

Article 7 was adopted, subject to drafting changes.

ARTICLE 8 (formerly article 13) (The exequatur)

98. The CHAIRMAN said that the Drafting Committee proposed the following text for article 8:

"1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving State termed an exequatur, whatever the form of this authorization.

"2. Subject to the provisions of articles 10 and 12, the head of a consular post may not enter upon his duties until he has received an exequatur."

Article 8 was adopted.

ARTICLE 9 (new article) (Formalities of appointment and admission)

99. The CHAIRMAN said that the Drafting Committee had prepared the following text for article 9:

"Subject to the provisions of articles 7 and 8, the formalities for the appointment and the admission of the head of a consular post are determined by the law and usage, respectively of the sending and of the receiving State."

100. Mr. ŽOUREK, Special Rapporteur, explained that, according to the Drafting Committee's understanding, the term "formalities" also covered the questions which organs of the sending State were competent to appoint the head of a consular post and which organs of the receiving State were competent to admit him.

101. The CHAIRMAN, speaking as a member of the Commission, said that the purport of the article was not clear to him. It was self-evident that, except as otherwise provided in the draft or in other rules of international law, States were free to act as they pleased. He was not at all sure whether the article was necessary.

102. Mr. ŽOUREK, Special Rapporteur, said that the article in fact reproduced article 10 of the 1960 draft in a different form. The usefulness of the rule lay in the fact that the formalities of appointment and admission differed widely from one country to another; under the laws and regulations of some countries, appointments of consuls were made by the head of State, the government, the Ministry of Foreign Affairs, or even by consuls themselves. In the past it had been asserted in doctrine and even in practice that all appointments should be made by the head of State. The draft must cover cases of consuls appointed to countries holding those views concerning appointment. In connexion with article 10 of the 1960 draft, some members had criticized the language of the provision on the grounds that it might be construed as granting competence to appoint consuls. That difficulty had now been removed. As articles 7 and 8 contained provisions relating to the appointment and admission of consuls, an appropriate saving clause had had to be added in the article.

103. Mr. MATINE-DAFTARY observed that the Drafting Committee had discussed article 9 in connexion with article 5. It might therefore be advisable to place the two articles more closely together. In article 7, reference was made to "a commission or similar instrument", while article 8 referred to "an authorization . . . termed an exequatur, whatever the form of this authorization". Thus, the consular commission and the exequatur were the classical forms of appointment and admission, but in actual fact authorizations contained in a letter from the Ministry of Foreign Affairs might replace the exequatur in some countries. Articles 5, 7, 8 and 9 seemed to be complementary, but article 6 was out of place.

104. Mr. AMADO said that, if he had not read the commentary to article 10 of the 1960 draft very carefully, he would not have realized that the word "formalities" referred to modes of appointing consuls. Abstract words should be used very carefully in a legal text. Moreover, he was not sure that article 9 was really necessary.

105. Mr. AGO said that article 10 of the 1960 draft had been bad. The new article 9 was harmless in that it stated nothing which was not true; nevertheless, he had some doubts as to its usefulness. Article 8, paragraph 1, already stated that a head of post was admitted by an authorization from the receiving State, whatever the form of that authorization, and a similar provision was included in article 7, paragraph 1, so far as the sending State's authorization was concerned. All contingencies therefore seemed to be provided for.

106. Mr. ŽOUREK, Special Rapporteur, said that, if the article were omitted, it would be impossible to find a legal basis for settling disputes between countries

in cases in which one, the sending state, had appointed a consul by means of a commission signed by the Minister for Foreign Affairs and in which the receiving State declined to admit the consul on the ground that the document should be signed by the head of State.

107. The CHAIRMAN, speaking as a member of the Commission, said that the debate had convinced him of the usefulness of the article.

108. Mr. BARTOŠ also supported the Special Rapporteur's views. Some States whose consular commissions were always signed by the head of State declined to accept commissions not signed by the Head of State of the sending State, on grounds of hierarchical symmetry.

Article 9 was adopted.

The meeting rose at 1.5 p.m.

618th MEETING

Monday, 26 June 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137) (continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425) : SECOND READING (continued)

ARTICLE 10 (formerly article 14) (Provisional admission)

1. The CHAIRMAN invited the Commission to continue its second reading of the draft on consular intercourse and immunities.

2. The Drafting Committee had submitted the following draft of article 10:

"Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions and to the benefit of the present articles."

Article 10 was adopted.

ARTICLE 11 (formerly article 15) (Obligation to notify the authorities of the consular district)

3. The CHAIRMAN said the Drafting Committee proposed the following text for article 11:

"As soon as the head of a consular post is admitted to the exercise of his functions, the receiving State shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of the consular post to carry out the duties of his office and to have the benefit of the provisions of the present articles."

Article 11 was adopted.

ARTICLE 12 (formerly article 16) (Temporary exercise of the functions of head of a consular post)

4. The CHAIRMAN said that the Drafting Committee proposed the following text for article 12:

"1. If the position of head of post is vacant, or if the head of post is unable to carry out his functions, an acting head of post may act provisionally as head of the consular post. He shall as a general rule be chosen from among the consular officials or the diplomatic staff of the sending State. In the exceptional cases where no such officials are available to assume this position, the acting head of post may be chosen from among the members of the administrative and technical staff.

"2. The name of the acting head of post shall be notified, either by the head of post, or, if he is unable to do so, by any competent authority, to the Ministry of Foreign Affairs of the receiving State or to the authority designated by it. As a general rule, this notification shall be given in advance.

"3. The competent authorities shall afford assistance and protection to the acting head of post and admit him, while he is in charge of the post, to the benefit of the present articles on the same basis as the head of the consular post concerned."

Paragraph 1 was adopted.

5. Mr. ERIM said that the words "by any competent authority" as used in paragraph 2 were not sufficiently precise. It should be stated that the authorities in question were those considered competent by the sending State. Otherwise it might be thought that the receiving State could dispute the competence of the authorities notifying it of the name of the acting head of post.

6. Mr. AGO said that Mr. Erim's remark was correct and suggested that the passage in question should be amended to read: "by any competent authority of the sending State".

It was so agreed.

7. The CHAIRMAN said that, at the Vienna Conference, on the suggestion of the United Kingdom delegation, the expression "Ministry for Foreign Affairs" had been adopted in preference to "Ministry of Foreign Affairs". He therefore suggested that the expression adopted at Vienna should be used in the draft under discussion.

It was so agreed.

Paragraph 2 was adopted as amended.

Paragraph 3 was adopted.

Article 12, as amended, was adopted as a whole.

ARTICLE 13 (formerly article 17) (Precedence)

8. The CHAIRMAN said that the Drafting Committee proposed the following text for article 13:

"1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.

"2. If, however, the head of the consular post, before obtaining the *exequatur*, is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the pro-

visional admission; this precedence shall be maintained even after the granting of the exequatur.

"3. The order of precedence as between two or more heads of consular posts who obtained the exequatur or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments were presented or of the notice referred to in article 7, paragraph 3.

"4. Acting heads of posts rank after all heads of posts in the class to which the heads of posts whom they replace belong, and, as between themselves, they rank according to the order of precedence of these same heads of post.

"5. Heads of posts, of whatever designation, have precedence over consular officials not holding such rank."

Paragraph 1 was adopted.

9. Sir Humphrey WALDOCK proposed the deletion of the word "even" from paragraph 2. Provisional recognition was precisely intended to enable the consular official concerned to rank for the purposes of precedence from the date of that recognition.

10. Mr. AGO supported that amendment.

The amendment was adopted.

Paragraph 2, as amended, was adopted.

11. Mr. ERIM said that paragraph 3 did not solve all problems of precedence. Two heads of post might present their commissions on the same date.

12. Mr. ŽOUREK, Special Rapporteur, pointed out that no government had put forward any objections to former article 17. The question raised by Mr. Erim was not likely to arise frequently in practice. It could also arise in the case of diplomatic agents and no attempt had been made to solve it in the Vienna Convention on Diplomatic Relations. The rare cases that might occur could be left to be decided in accordance with the usage prevailing in the receiving State.

13. The CHAIRMAN said that since there were no specific proposals before the Commission, he would take it that the Commission accepted paragraph 3 as drafted.

It was so agreed.

14. Sir Humphrey WALDOCK said that, everywhere in the draft and in particular in paragraphs 4 and 5 of article 13 "heads of posts" should be corrected to read "heads of post".

It was so agreed.

Paragraphs 4 and 5, as amended, were adopted.

Article 13, as amended was adopted as a whole.

ARTICLE 14 (formerly article 18) (Performance of diplomatic acts by the head of a consular post.

15. The CHAIRMAN said that the Drafting Committee proposed the following text for article 14:

"In a State where the sending State has no diplomatic mission, the head of a consular post may, with the consent of the receiving State be authorized to, perform diplomatic acts."

Article 14 was adopted.

ARTICLE 15 (formerly article 7 *bis*) (Appointment of the same person by two or more States as head of a consular post)

16. The CHAIRMAN said that the Drafting Committee proposed the following text for article 15:

"Two or more States may appoint the same person as head of a consular post in another State, unless this State objects."

Article 15 was adopted.

ARTICLE 16 (formerly article 21)
(Appointment of the consular staff)

17. The CHAIRMAN said that the Drafting Committee proposed the following text for article 16:

"1. Subject to the provisions of articles 17, 19 and 20, the sending State may freely appoint the members of the consular staff.

"2. The sending State may, if such is required by its law, request the receiving State to grant the exequatur to a consular official appointed to a consulate in conformity with paragraph 1 of this article who is not the head of post."

Paragraph 1 was adopted.

18. The CHAIRMAN said that while he had no objection to paragraph 2, its purpose did not seem quite clear to him. As formulated, the provision did not seem to imply any obligation at all.

19. Sir Humphrey WALDOCK said that in some cases the law of certain countries, particularly that of England, did not recognize an act performed by a consular official abroad unless that official had an exequatur from the receiving State. In practice, the States concerned solved that type of problem without difficulty even in the absence of a provision along the lines of paragraph 2.

20. The CHAIRMAN said that he recalled the discussion on the matter, but did not feel that the provision laid down any very positive rule.

21. Mr. ŽOUREK, Special Rapporteur, said that the provision had been introduced as an indication, so as to serve as a basis for a useful practice. The Drafting Committee had avoided laying down any obligation upon the receiving State because there were some States which gave an exequatur only to the head of post, and those States would not accept a provision which laid down obligations conflicting with their law and practice.

Paragraph 2 was adopted.

Article 16 as a whole was adopted.

ARTICLE 17 (formerly article 22)
(Size of the staff)

22. The CHAIRMAN said that the Drafting Committee proposed the following text for article 17:

"In the absence of an express agreement as to the size of the consular staff, the receiving State may require that the size of the staff be kept within reasonable and normal limits, having regard to circumstances and conditions in the consular district and to the needs of the particular consulate."

23. Mr. ŽOUREK, Special Rapporteur, drew attention to the Netherlands objection, based on very sound

a matter for objective criteria, but was political. If a consulate had a larger staff than the receiving State thought desirable, it would have to express its disapproval or else reach an agreement beforehand. States which had reservations about unduly large diplomatic staffs would certainly be even more reluctant to admit large consular staffs, for whereas the central authorities could exercise some supervision over diplomatic staffs the consular staffs were likely to be distant from the capital and subject to supervision only by local authorities. It would be easier for the States concerned to discuss what were the reasonable and normal limits for the size of the staff than to take a dispute to the International Court of Justice. The receiving State would, of course, have quite as much knowledge as the sending State of the circumstances and conditions in the consular district and the needs of the particular consulate, especially with regard to trade and the protection of nationals. The doubts of the receiving State might not be justified, but if they existed, they were good grounds for requiring a prior agreement between the parties concerned. For all those reasons he considered that the formula used in the Vienna Convention should be followed.

60. The CHAIRMAN called for a vote on the proposal that draft article 17 be amended to read "... within limits considered by it to be reasonable and normal ...".

The amendment was rejected by 8 votes to 6, with 4 abstentions.

61. The CHAIRMAN called for a vote on the Drafting Committee's text for article 17.

That text was adopted by 9 votes to 1, with 8 abstentions.

62. Mr. AMADO said that he had abstained from voting as he had previously announced. He hoped that the Commission's representative to the General Assembly would make it clear that a number of members had not been in favour of the formula used in article 11 of the Vienna Convention but had thought that the Commission should present a text of its own.

63. Sir Humphrey WALDOCK expressed the hope that the Special Rapporteur would not say anything in his commentary that might suggest that the Commission considered the Vienna formulation to be devoid of all legal meaning. If it were left entirely to the receiving State to decide what were the reasonable and normal limits of the consular staff, that decision could be completely arbitrary. The Commission should not go so far. The decision must be made in good faith in accordance with the criteria laid down in the convention. That was also particularly important with reference to the provisions in the draft forbidding discrimination.

64. Mr. MATINE-DAFTARY said that in the second vote he had abstained in deference to the majority of the Commission, but he was almost sure that the future conference would adopt a formulation based on article 11 of the Vienna Convention.

ARTICLE 18 (Order of precedence
as between the officials of a consulate)

65. The CHAIRMAN said that the Drafting Committee proposed the following text for article 18:

"The order of precedence as between the officials of a consulate shall be notified by the head of post to the Ministry for Foreign Affairs of the receiving State or to the authority designated by the said Ministry."

Article 18 was adopted.

ARTICLE 19 (formerly article 11)
(Appointment of nationals of the receiving State)

66. The CHAIRMAN said that the Drafting Committee proposed the following text for article 19:

"1. Consular officials should in principle have the nationality of the sending State.

"2. Consular officials may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

"3. The receiving State may reserve the same right with regard to nationals of a third State who are not also nationals of the sending State."

Article 19 was adopted.

ARTICLE 20 (formerly articles 20 and 23) (Withdrawal
of exequatur; persons deemed unacceptable)

67. The CHAIRMAN said that the Drafting Committee proposed the following text for article 20:

"1. If the conduct of the head of a consular post or of a member of the consular staff gives serious grounds for complaint, the receiving State may notify the sending State that the person concerned is no longer acceptable. In that event, the sending State shall, as the case may be, either recall the person concerned or terminate his functions with the consulate.

"2. If the sending State refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving State may, as the case may be, either withdraw the exequatur from the head of post concerned or cease to recognize him as a member of the consular staff.

"3. A person may be declared unacceptable before arriving in the territory of the receiving State. In any such case, the sending State shall not proceed with his appointment."

68. Mr. AGO suggested that in paragraph 2 the words "head of post" should be replaced by the word "person".

It was so agreed.

69. Sir Humphrey WALDOCK suggested that in paragraph 3 the words "withdraw his appointments" be substituted for "shall not proceed with his appointment".

70. Mr. GROS suggested that in French the phrase should read *retirer sa nomination*.

The drafting amendments were adopted.

Article 20, as amended, was adopted.

ARTICLE 21 (formerly article 24) (Notification of the
appointment, arrival and departure of members of the
consulate, members of their families and members of
the private staff)

71. The CHAIRMAN said that the Drafting Committee proposed the following text for article 21:

"1. The Ministry for Foreign Affairs of the receiving State, or the authority designated by that Ministry, shall be notified of:

"(a) The appointment of members of the consulate, their arrival after appointment to the consulate, as well as their final departure or the termination of their functions with the consulate;

"(b) The arrival and final departure of a person belonging to the family of a member of the consulate and, where appropriate, the fact that a person becomes or ceases to be a member of the family of a member of the consulate;

"(c) The arrival and final departure of members of the private staff in the employ of persons referred to in sub-paragraph (a) of this paragraph and, where appropriate, the fact that they are leaving the employ of such persons;

"(d) The engagement and discharge of persons resident in the receiving State as members of the consulate or as members of the private staff entitled to privileges and immunities.

"2. Where possible, prior notification of arrival and final departure shall also be given."

72. Mr. AGO asked whether the expression "member of the family of a member of the consulate" (paragraph 1 (b)) was used consistently throughout the draft.

73. Mr. ŽOUREK, Special Rapporteur, thought that the expression had had to be varied in some cases. The text closely followed that of the Vienna Convention, which, incidentally, was based on the former article 24 of the draft on consular intercourse.

74. Mr. AGO suggested that the Commission should adopt paragraph 1 (b) provisionally pending concordance with other articles.

75. Mr. ŽOUREK, Special Rapporteur, supported Mr. Ago's suggestion.

76. The CHAIRMAN said that the Drafting Committee would look into the matter.

Subject to that understanding, article 21, paragraph 1, was adopted provisionally.

Article 21, paragraph 2, was adopted.

ARTICLE 22 (formerly article 25) (Modes of termination of the functions of a member of the consulate)

77. The CHAIRMAN said that the Drafting Committee proposed the following text for article 22:

"1. The functions of the head of a consular post come to an end in particular:

"(a) On notification by the sending State to the receiving State that the functions of the head of post have come to an end;

"(b) On the withdrawal of the exequatur.

"2. Except in the case referred to in paragraph 1 (b) of this article, the functions of a member of the consulate other than the head of post come to an end on the same grounds. In addition, his functions shall cease on notification by the receiving State to the sending State that, in conformity with article 20, paragraph 2, the receiving State refuses to recognize him as a member of the consular staff."

78. The CHAIRMAN remarked that the drafting was far too complicated, especially that of paragraph 2; it should be possible to state in simple language the idea that, as far as members of the consular staff were concerned, their functions terminated if the receiving State, in conformity with article 20, paragraph 2, refused to recognize them as members of the consular staff in certain circumstances. It should be noted that the provision in paragraph 1 (b) might also refer to members of the consulate other than the head of post.

79. Mr. AGO asked whether it was correct to say that, when the State of residence ceased to consider a person as a member of the consular staff, his functions were terminated, and whether the person concerned thereupon ceased to be regarded as a member of the consulate by the sending State.

80. Mr. YASSEEN said that what was meant was that the person concerned ceased to exercise consular functions. That point might be expressed more clearly.

81. The CHAIRMAN, speaking as a member of the Commission, agreed. The functions were terminated and therefore the person concerned was no longer in a position to exercise them.

82. Mr. ERIM agreed with the Chairman, especially in the light of the new article 16 (Appointment of the consular staff), under paragraph 2 of which the exequatur might be granted to a consular official who was not the head of post.

83. Mr. MATINE-DAFTARY asked what the phrase "on the same grounds" meant in paragraph 2; there was no reference to "grounds" in paragraph 1. It would be simpler to state that paragraph 1 (a) applied to members of the consulate other than the head of post. The phrase seemed to have been reproduced inadvertently from article 25 of the 1960 draft.

84. The CHAIRMAN, speaking as a member of the Commission, said that the withdrawal of the exequatur did not necessarily mean that the person concerned ceased to exercise consular functions if he was not the head of post, for his exequatur might have been granted for specific purposes.

85. Sir Humphrey WALDOCK supported Mr. Matine-Daftary's objection to the phrase "on the same grounds". He also pointed out that in the United Kingdom and other countries which required an exequatur for subordinate staff, its withdrawal meant the termination of functions. If, as indicated by the title of the article, it was intended to deal with ways in which the functions of a member of the consulate were terminated, paragraph (b) would apply to junior members of a consulate in such instances.

86. Mr. PAL considered that article 22 should be referred back to the Drafting Committee as the text was not at all satisfactory.

87. Mr. AGO suggested that paragraph 2 might be replaced by a third sub-paragraph (c) incorporating the substance of the second sentence in that paragraph.

88. Mr. ŽOUREK, Special Rapporteur, pointed out that paragraph 1 (b) was applicable to the head of post only.

89. Mr. ERIM supported Mr. Ago's suggestion but thought it would be more logical to combine into one his suggested sub-paragraphs (b) and (c) since they both dealt with modes of termination initiated by the receiving State.

90. The CHAIRMAN proposed that the article should be referred back to the Drafting Committee for redrafting in the light of the foregoing discussion.

It was so agreed.

ARTICLE 23 (formerly article 27) (Right to leave the territory of the receiving State and facilitation of departure)

91. The CHAIRMAN said that the Drafting Committee proposed the following text for article 23:

"The receiving State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property."

92. Mr. FRANÇOIS noted that the proviso at the beginning of former article 27, paragraph 1, had been dropped and that the words "irrespective of their nationality" had been added in the new article 23. Had those changes been made deliberately and, if so, had they been made on the Commission's express instructions?

93. Mr. ŽOUREK, Special Rapporteur, explained that the Drafting Committee had omitted the proviso on the ground that it was self-evident.

94. The addition to which Mr. François had referred derived from article 44 of the Vienna Convention. Personally he did not find it particularly satisfactory.

95. Mr. AGO, amplifying the Special Rapporteur's explanation, pointed out, in regard to the first change, that the Drafting Committee had thought it undesirable to refer to article 40 since it was obvious that a consul who had been detained by the receiving State would not be allowed to leave. It would be extremely unfortunate if a receiving State were to be encouraged at times of armed conflict to detain members of a consulate in order to prevent their departure.

96. The other change was of far greater significance; it was designed to ensure that, for example, a consul's wife who had retained the nationality of the receiving State could leave with him. On that point there were no grounds whatever for deviating from the Vienna Convention.

97. Mr. ŽOUREK, Special Rapporteur, considered that such an addition would only be justifiable if the draft clearly defined which persons were to be regarded as members of the family. Since the members of the consulates of the sending State established in the territory of the receiving State were often more numerous than the members of a diplomatic mission, he thought it extremely unlikely that States would accept an international obligation to allow their own nationals to leave the

country. A very important issue of principle was involved which should be carefully considered by the Commission.

98. Mr. AGO said that States would probably interpret the expression "members of the family" narrowly.

99. Mr. FRANÇOIS said that he was not opposed to article 23. However, he hoped that the Commission would be informed of any important changes introduced by the Drafting Committee in any of the other articles.

100. Mr. ERIM referred the Commission to the decision taken earlier on article 27 (595th meeting, para. 14); the directive given to the Drafting Committee was certainly not very precise.

101. Mr. BARTOŠ supported the text proposed by the Drafting Committee because it upheld the principle of the unity of the family.

Article 23 was adopted.

ARTICLE 24 (formerly article 28) (Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances)

102. The CHAIRMAN said that the Drafting Committee proposed the following text for article 24:

"1. In the event of the severance of consular relations between two States:

"(a) The receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with its property and archives;

"(b) The sending State may entrust the custody of the consular premises, together with its property and archives, to a third State acceptable to the receiving State;

"(c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.

"2. In the event also of the temporary or permanent closure of a consulate, the provisions of paragraph 1 of the present article shall apply if the sending State has no diplomatic mission and no other consulate in the receiving State.

"3. If the sending State, although not represented in the receiving State by a diplomatic mission, has another consulate in the territory of that State, that consulate may be entrusted with the custody of the archives of the consulate which has been closed and, with the consent of the receiving State, with the exercise of consular functions in the district of that consulate."

103. Sir Humphrey WALDOCK pointed out that the phrase "together with its property and archives" was rendered slightly differently in paragraph 1(a) and (b) in the French text. He asked whether the variation was intentional.

104. The CHAIRMAN observed that the French text followed that of article 45 of the Vienna Convention.

105. Mr. GROS said that the different status of consular premises would justify a departure from the text of the Vienna Convention. He thought that in the French text the latter part of paragraph 1(a) should be redrafted so as to follow the wording of paragraph 1(b).

106. Mr. SANDSTRÖM said that the text should follow that of the Vienna Convention, for otherwise

motor vehicles of the consulate would not be covered.

107. The CHAIRMAN suggested that the question should be referred to the Drafting Committee.

It was so agreed.

ARTICLE 25 (formerly article 29)

(Use of the national flag and of the State coat of arms)

108. The CHAIRMAN said that the Drafting Committee proposed the following text for article 25:

"The consulate and its head shall have the right to use the national flag and coat of arms of the sending State on the building occupied by the consulate and at the entrance door and on the means of transport of the head of post."

Article 25 was adopted.

ARTICLE 26 (formerly article 30) (Accommodation)

109. The CHAIRMAN said that the Drafting Committee proposed the following text for article 26:

"1. The receiving State shall either facilitate the acquisition in its territory, in accordance with its laws, by the sending State of premises necessary for its consulate or assist the latter in obtaining accommodation in some other way.

"2. It shall also, where necessary, assist in obtaining suitable accommodation for the members of the consulate."

110. Mr. ŽOUREK, Special Rapporteur, said that paragraph 1 was modelled on article 21 of the Vienna Convention, but he considered that the latter text was not very clear and that the Commission's own wording of the former article 30 (1960 draft) was preferable. The provision in the Vienna Convention seemed to impose on the receiving State the obligation, alternatively, either of facilitating the acquisition of the premises necessary for the mission or of helping the sending State to obtain accommodation in some other way, whereas in reality, in cases in which the law of the receiving State did not allow a foreign State to acquire the ownership of consular premises, the receiving State had only one obligation, viz, the second of the two mentioned. It had to be borne in mind that some States did not allow foreign States to buy property and the text of the Vienna Convention failed to indicate which of the two States concerned was to decide what alternative would be followed.

111. The CHAIRMAN, speaking as a member of the Commission, found article 26 satisfactory.

112. Mr. ERIM agreed that the text proposed by the Drafting Committee did not imply that the receiving State was obliged to allow the acquisition of premises. Mr. Verdross, in explaining the purport of article 21 of the Vienna Convention (595th meeting, para. 32), had made that perfectly clear.

Paragraph 1 was approved.

113. Sir Humphrey WALDOCK pointed out that in the English text there was no phrase equivalent to *dans la mesure du possible* (para. 2). To the best of his recollection the Commission had decided to insert that phrase

because it might be more difficult to find suitable accommodation for members of a consulate than for diplomatic staff.

114. Mr. ŽOUREK, Special Rapporteur, explained that the Commission had decided not to follow article 21, paragraph 2, of the Vienna Convention strictly so as not to place too onerous an obligation on the receiving State in the case of consular relations.

115. Mr. ERIM considered that the text of the Vienna Convention should be followed faithfully, for in the provision under discussion the authorities of the receiving State were only to "assist" in obtaining suitable accommodation, which involved no absolute obligation.

116. Mr. YASSEEN considered that in practice the addition of the words *dans la mesure du possible* would make no difference at all, for it was always an implied condition that nobody was expected to do the impossible.

117. The CHAIRMAN, speaking as a member of the Commission, believed it advisable to adhere to the text of the Vienna Convention.

118. Mr. AMADO saw no need to depart from the text of the Vienna Convention. After all, the establishment of consulates was in the reciprocal interest and the receiving State stood to benefit as well as the sending State. Hence, the receiving State would not be averse, presumably, to giving the kind of assistance referred to in paragraph 2.

119. The CHAIRMAN suggested that paragraph 2 should be approved as it stood in the English text and that the French should be amended accordingly.

It was so agreed.

Article 26 was adopted, subject to that change.

The meeting rose at 6.10 p.m.

619th MEETING

Tuesday, 27 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)

(continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of the text of the draft articles prepared by the Drafting Committee.

ARTICLE 27 (formerly article 31) (Inviolability of the consular premises)

2. The CHAIRMAN said that the Drafting Committee proposed the following text for article 27:

" 1. The consular premises shall be inviolable. The agents of the receiving State may not enter them, save with the consent of the head of post.

" 2. The receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consulate or impairment of its dignity.

" 3. The consular premises, their furnishings and other property therein and the means of transport of the consulate shall be immune from any search, requisition, attachment or execution."

3. Mr. FRANÇOIS pointed out that under the proposed text of article 27, the means of transport of the consulate would be immune from search, requisition, etc. The consequence would be that in cases of traffic offences the police of the receiving State would be unable to examine a car belonging to a consular official. He considered that extension of the immunity unacceptable, and asked for an explanation.

4. Mr. AGO, speaking as Chairman of the Drafting Committee, explained that as instructed the Committee had followed the text of article 22 of the Vienna Convention on Diplomatic Relations, where a reference to means of transport had been inserted by decision of the Vienna Conference; the reference had not appeared in the corresponding provision of the Commission's 1958 draft on diplomatic intercourse (A/3859.)

5. Mr. FRANÇOIS said that the provision he was criticizing illustrated once again how wrong it was to try to equate the privileges and immunities of consuls with those of diplomats. He thought that States would be unwilling to agree to such virtual assimilation.

6. Mr. AGO said that it was becoming increasingly difficult to maintain a distinction between consuls and diplomats after the decision of the Vienna Conference to extend to members of the administrative and technical staff of a diplomatic mission the privileges and immunities accorded to the diplomatic staff. It would be hard to deny to a consul-general an immunity enjoyed by junior members of a diplomatic mission.

7. Mr. FRANÇOIS stated that he must enter a reservation regarding article 27, paragraph 3.

8. Mr. ŽOUREK, Special Rapporteur, said that Mr. François's concern should be somewhat allayed by the fact that the provision in question referred to vehicles belonging to the consulate: the immunity did not cover vehicles which were the personal property of members of the consulate.

9. Mr. PAL urged the Commission not to reopen the discussion since it had decided to follow article 22 of the Vienna Convention.

Article 27 was adopted.

ARTICLE 28 (formerly article 32)
(Exemption from taxation of consular premises)

10. The CHAIRMAN said that the Drafting Committee proposed the following text for article 28:

" 1. The sending State and the head of post shall be exempt from all national, regional or municipal

dues and taxes whatsoever in respect of the consular premises, whether owned or leased, other than such as represent payment for specific services rendered.

" 2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to the said dues and taxes if, under the law of the receiving State, they are payable by persons who contracted with the sending State or the head of the consular post."

Article 28 was adopted.

ARTICLE 29 (formerly article 33)
(Inviolability of the consular archives and documents)

11. The CHAIRMAN said that the Drafting Committee proposed the following text for article 29:

" The consular archives and documents shall be inviolable at any time and wherever they may be."

Article 29 was adopted.

ARTICLE 30 (formerly article 34) (Facilities
for the work of the consulate)

12. The CHAIRMAN said that the Drafting Committee proposed the following text for article 30:

" The receiving State shall accord full facilities for the performance of the functions of the consulate."

Article 30 was adopted.

ARTICLE 31 (formerly article 35) (Freedom of movement)

13. The CHAIRMAN said that the Drafting Committee proposed the following text for article 31:

" Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State shall ensure to all members of the consulate freedom of movement and travel in its territory."

Article 31 was adopted.

ARTICLE 32 (formerly article 36)
(Freedom of communication)

14. The CHAIRMAN said that the Drafting Committee proposed the following text for article 32:

" 1. The receiving State shall permit and protect free communication on the part of the consulate for all official purposes. In communicating with the government, the diplomatic missions and the other consulates of the sending State, wherever situated, the consulate may employ all appropriate means, including diplomatic or consular couriers, the diplomatic or consular bag and messages in cipher. However, the consulate may install and use a wireless transmitter only with the consent of the receiving State.

" 2. The official correspondence of the consulate shall be inviolable. Official correspondence means all correspondence relating to the consulate and its functions.

" 3. The consular bag, like the diplomatic bag, shall not be opened or detained.

" 4. The packages constituting these bags must bear visible external marks of their character and may

contain only official correspondence and documents or articles intended for official use.

"5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. In the performance of his functions he shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

"6. A consular bag may be entrusted to the captain of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag but he shall not be considered to be a consular courier. The consulate may send one of its members to take possession of the consular bag directly and freely from the captain of the aircraft."

15. The CHAIRMAN, speaking as a member of the Commission, referring to paragraph 1, asked for information concerning the practice of States. The freedom conferred by the second sentence of paragraph 1 seemed to be more extensive than was necessary; the provision in question should speak only of the consulate's freedom to communicate with the diplomatic mission and other consulates in the same territory.

16. Mr. ERIM saw no real objection to the scope of paragraph 1 and believed it would be difficult in practice to restrict it in the way suggested by the Chairman, particularly since there would be nothing to prevent the consulate from sending a communication to anywhere in the world through a diplomatic mission or another consulate in the same territory. It would not be right to restrict the application of an article designed to further the efficient conduct of consular work.

17. Mr. ŽOUREK, Special Rapporteur, said that in their comments the Governments of Denmark and Spain (A/CN.4/136/Add.1 and 8) had suggested a restriction of the kind mentioned by the Chairman. The practical objection to that course was that a consulate wishing to communicate with another consulate of the sending State in a neighbouring State would then have to channel its communication via the government of the sending State.

18. The usual practice was to send consular correspondence in the diplomatic bag but where there was no diplomatic mission in the receiving State a consular bag was used. Those two alternative methods were covered in paragraph 1.

19. The CHAIRMAN, speaking as a member of the Commission, said that he was not so much concerned with correspondence through the diplomatic bag as with telegraph messages in cipher. However, he did not wish to press for any modification of paragraph 1.

20. He noted that the reference to messages in code had been omitted, though it appeared in article 27, paragraph 1, of the Vienna Convention.

21. Mr. ŽOUREK, Special Rapporteur, explained that inasmuch as messages in code could be sent even by private individuals, it had not been thought necessary to mention them in the draft on consular intercourse.

22. Mr. AGO suggested that nevertheless the wording of the Vienna Convention should be followed and the words "code or" should be inserted before the word "cipher" in the second sentence of paragraph 1.

It was so agreed.

23. Mr. TSURUOKA questioned the utility of the phrase "like the diplomatic bag" in paragraph 3.

24. Mr. AGO, chairman of the Drafting Committee, explained that the words had been inserted because consular papers were sometimes sent in the diplomatic bag.

Article 32 was adopted.

ARTICLE 33 (formerly article 6) (Communication and contact with nationals of the sending State)

25. The CHAIRMAN said that the Drafting Committee proposed the following text for article 33:

"1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

"(a) Nationals of the sending State shall be free to communicate with and to have access to the competent consulate, and the officials of that consulate shall be free to communicate with and, in appropriate cases, to have access to the said nationals;

"(b) The competent authorities shall, without undue delay, inform the competent consulate of the sending State if, within its district, a national of that State is committed to prison or to custody pending trial or is detained in any other manner. Any communications addressed to the consulate by the person in prison, custody or detention shall also be forwarded by the said authorities without undue delay;

"(c) Consular officials shall be free to visit a national of the sending State who is in prison, custody or detention, for the purpose of conversing with him and arranging for his legal representation. They shall also be able to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.

"2. The freedoms referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must not nullify these freedoms."

26. Mr. FRANÇOIS thought that the expression "legal representation" used in the English text of paragraph 1 (c) had a broader meaning than the French *représentation en justice* which presumably meant representation in court.

27. Mr. EDMONDS said that the phrase "legal representation" had two possible meanings: either representation by an authorized person such as an attorney, or representation in judicial proceedings. The provision contained in paragraph (c) should not be limited to the latter because the person concerned might be detained in connexion with some matter which would not come up before the court. The text should be more precise.

28. Sir Humphrey WALDOCK believed that for the purposes of the present text the phrase "legal represen-

reasons, to the use of the term “normal” (A/CN.4/136/Add.4, *ad* article 22).

24. Mr. EDMONDS said that the term “normal” could conveniently be dropped. That term suggested that there existed some average size of staff. By indicating, however, that the size of the staff should be reasonable, having regard to the circumstances and conditions in the consular district and to the needs of the particular consulate, it was being suggested that no such average size existed.

25. Mr. BARTOŠ asked why the Drafting Committee had not adopted the language used in article 11, paragraph 1, of the Vienna Convention, which spoke of the size of the staff being “kept within limits considered by it [the receiving State] to be reasonable and normal, having regard to...”

26. The CHAIRMAN pointed out that article 17 (former article 22) had been referred to the Drafting Committee without any specific instructions (594th meeting, para. 61).

27. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee, considering that the Vienna Convention gave excessive latitude to the receiving State in the matter of the size of the staff, had preferred the objective formula which the Commission had originally adopted both in the 1958 draft on diplomatic intercourse (A/3859) and in the 1960 draft on consular intercourse (A/4425.)

28. Mr. BARTOŠ said that he preferred the text adopted at Vienna by a simple majority of the Committee of the Whole and by a two-thirds majority of the plenary Conference.

29. Mr. AMADO said that he, too, preferred the Vienna text. The mere reference to “reasonable and normal limits” was inadequate. The term “reasonable” was open to subjective interpretation. He did not like the term, but if it were to be used, he thought that it should be made clear who was going to decide what size was reasonable and normal.

30. The CHAIRMAN, speaking as a member of the Commission, recalled that the draft on diplomatic intercourse had originally contained a provision similar to article 17, but that it had been amended at the Vienna Conference; article 11 of the Vienna Convention had been the result of that amendment.

31. The two texts differed materially, but in practice their effects would be very much the same.

32. He did not think the decision adopted at Vienna was a very happy one, for it seemed to leave the matter very much to the discretion of the receiving State. A consulate was an organ of the sending State, and that State should have a say in determining the size of its staff.

33. For those reasons, he preferred the objective criterion, admittedly not very precise, of article 17, to leaving the matter to be decided by the receiving State.

34. Mr. AGO said that he shared the preference of the Chairman for the text of article 17.

35. Article 17 gave an objective criterion, albeit a somewhat vague one. In case of disagreement between

the receiving State and the sending State, an impartial authority — arbitrator or court — could determine what size of staff was reasonable and normal in the particular circumstances.

36. In the Vienna text, on the other hand, there was no objective criterion on which an impartial ruling could be given, the criterion being not what was reasonable and normal but what the receiving State considered reasonable and normal.

37. He supported the retention of the word “normal”, which introduced an element of comparison. A receiving State could not, for example, claim that a staff of fifty was normal for the consulate of one sending State and a staff of two normal for that of another.

38. Mr. BARTOŠ said that the amendment introduced at the Vienna Conference had been sponsored and supported by the small States, which wanted some safeguard against the introduction of an excessive number of foreign consular officials into their territory. The problem was a very real one in practice: there had been cases where a State which had few if any nationals in the area concerned and little or no commercial intercourse with the receiving State, and none of whose ships visited that State's ports, maintained therein a consulate having a staff of two hundred. With some States it was impossible to come to terms on that point because they did not accept the judicial settlement of disputes. The only means left to the small States was to reserve to themselves the right to say what constituted a reasonable size of staff.

39. Mr. MATINE-DAFTARY, speaking from his experience of the Vienna Conference, said that it was his impression also that the small States strongly favoured the innovation embodied in article 11 of the Vienna Convention. Unless a similar text were adopted in the draft on consular intercourse, those States might fear that their attempts to keep within bounds the numbers of foreign diplomatic agents might be circumvented by means of the appointment of a large number of consular officials.

40. Diplomatic functions were often intangible and it was therefore difficult to assess what number of diplomatic agents constituted a reasonable size of staff for a diplomatic mission. By contrast, in the case of consulates, the functions performed were visible and were connected with such tangible elements as the number of nationals of the sending State and the volume of trade between the two States concerned.

41. He urged the Commission to adopt the Vienna formula, which was the one likely to be accepted by governments at the future conference of plenipotentiaries. In the plenary Conference at Vienna the delegations of certain great Powers had proposed the restoration of the Commission's text as amended in the Committee of the whole in favour of the receiving State, but that proposal had been rejected by a two-thirds majority.

42. The CHAIRMAN, speaking as a member of the Commission, said that it was not accurate to describe the situation at Vienna as a clash between small and big Powers. Some great Powers had supported the amend-

ment incorporated into article 11 of the Vienna Convention.

43. The purpose of the objective rule of article 17, as of the corresponding article of the 1958 draft on diplomatic relations, was to avoid the misuse of the powers of limitation of the receiving State in the matter. Cases had occurred in which unnecessary limitations had been imposed on certain diplomatic missions in order to harass a particular State for purely political reasons. The language of article 17 was a much better juridical formulation than article 11 of the Vienna Convention.

44. Mr. AMADO pointed out that the territory affected by the size of the staff of a consulate was that of the receiving State; hence his preference for the Vienna formula. However, he would not press his point of view and would abstain in the vote on the proposed article 17.

45. Mr. ŽOUREK, Special Rapporteur, said that the formula adopted at Vienna provided no criterion for the settlement on a juridical basis of a dispute between a receiving State and a sending State. That formula would therefore tend to complicate relations between States rather than help to solve difficulties.

46. Mr. ERIM pointed out that article 11 of the Vienna Convention did not give the receiving State an absolute and uncontrolled right to limit the size of the staff of a foreign diplomatic mission. The words "considered by it to be reasonable and normal" were qualified by the phrase "having regard to circumstances and conditions in the receiving State and to the needs of the particular mission".

47. If a dispute occurred between the two States concerned, the dispute could be peacefully settled, if necessary by arbitration or judicial settlement, on the basis of the criterion thus set forth.

48. The Commission had consistently endeavoured to bring the draft on consular intercourse into line with the corresponding provisions of the Vienna Convention and he suggested that the Commission should adopt that course in the case of article 17. That was particularly indicated since, as the Chairman had pointed out, the two texts would not in practice produce very different effects.

49. Mr. SANDSTRÖM said that the question before the Commission was not which of the two texts was the more rational one from the juridical point of view but simply which of the two was the more practical one. The Commission was faced with the fact that a conference of plenipotentiaries had adopted article 11 of the Vienna Convention and there was every reason to believe that a receiving State would want to have the same control over the size of foreign consular staffs as over that of foreign diplomatic missions in its territory.

50. The governments represented at a future international conference dealing with consular relations were very unlikely to accept a text different from the Vienna formulation.

51. Mr. AGO said that where the choice lay between two equally good formulations, he would always agree that preference should be given to the Vienna text. The position in the present case, however, was different.

52. Under international law, a sending State had always been completely free to determine the size of its missions. In the text adopted by the International Law Commission for diplomatic missions, some say had been given to the receiving State in the matter. The Vienna Conference had carried that development even further by giving the receiving State the last word.

53. In his opinion, the Vienna Conference had gone too far. A text such as that of article 17 under discussion provided some criterion for a judicial settlement of a possible dispute between the receiving State and the sending State. In the case of article 11 of the Vienna Convention, no such criterion existed, because it left it to the receiving State to say what size it considered reasonable and normal.

54. For those reasons, he urged the Commission to adopt the text of article 17 as proposed by the Drafting Committee.

55. Mr. BARTOŠ said that it was not easy to obtain a two-thirds majority at an international conference, especially against large States and their supporters. It was significant that the smaller States had been able to gather such a majority at Vienna for article 11.

56. Much had been said of the possibility of judicial settlement. In the first place, not all States accepted that form of settlement. In the second place, even if a possibility of judicial settlement existed, article 17 as drafted placed the onus of proof on the receiving State: that State would have to prove why it considered that the size of the staff of the consulate concerned exceeded what was normal and reasonable. He therefore proposed that draft article 17 should be amended so as to bring it into line with article 11 of the Vienna Convention, which was not weighted in favour of the sending State.

57. Mr. ŽOUREK, Special Rapporteur, recalled that it was only after prolonged discussion that the Commission had adopted a formula analogous to that given in draft article 17 both in the 1958 draft on diplomatic intercourse and in the 1960 draft on consular intercourse. That formulation gave every safeguard to the receiving State, while providing an objective criterion in regard to the size of staff. He did not agree with Mr. Bartoš's interpretation of article 17. As pointed out in commentary (3) to the former article 22, if the receiving State considered that the consular staff was too large, it should first try to reach an agreement with the sending State, but if those efforts failed it would have the right to limit the size of the sending State's consular staff.

58. Lastly, he stressed that no objections had been put forward by governments in their comments. It would be strange for the Commission to amend an article which had received such general approval from governments.

59. Mr. PADILLA NERVO said that some of the arguments in support of the Drafting Committee's text for article 17 did not seem well founded. Although the future could not be predicted, it was virtually certain that the prospective conference of plenipotentiaries would follow the wording of article 11 of the Vienna Convention. A different version would undoubtedly provoke arguments. The question was not entirely a legal one and

tation" would probably be adequate. Otherwise he would suggest as a possible alternative the phrase "representation in legal proceedings." Presumably there was no intention to exclude representation prior to the court proceedings which were a necessary part of the defence. In that connexion, there might be some difference between English and Continental criminal procedure.

29. The CHAIRMAN asked whether "legal representation" meant also representation for business or other purposes not connected with judicial proceedings.

30. Mr. EDMONDS pointed out that a person might be detained in connexion with quarantine or customs regulations, matters which might not necessarily be referred to the courts at all.

31. Mr. ŽOUREK, Special Rapporteur, stated that the proviso in paragraph 2 was open to misinterpretation as he had indicated in the Drafting Committee, but it had been proved impossible to devise a more satisfactory wording. Under the procedural codes of most countries, persons in prison, custody or detention could be visited on the judge's authorization which was sometimes withheld, particularly if the person in custody or detention were held *incomunicado*. In such a case a consul was not entitled to rely on the proviso in paragraph 2 as a ground for claiming that in a specific instance action taken in conformity with the laws and regulations of the receiving State nullified the rights and freedoms specified in article 33.

32. Mr. PAL believed that the general expression "legal representation" should be retained because, for the purpose of the protection of the interests of a national of the sending State in the receiving State, he might need to be represented in matters not necessarily connected with any proceedings before a court. Article 33 should be viewed in conjunction with article 4 and it should be remembered that clause (c) provided for the case where the national would otherwise be helpless. Clause (c) was really intended to secure freedom of access to the person in detention. The purpose for which access was sought was not material so long as the person seeking access was otherwise competent. Any specification of the purpose would tend to curtail the freedom of access.

33. Mr. ŽOUREK, Special Rapporteur, agreed with Mr. Pal's argument but pointed out that the Drafting Committee would be submitting a new article dealing with representation in general. Article 33 dealt with the more limited question of the representation of detained nationals, or nationals against whom criminal proceedings had been instituted. Accordingly, in article 33 it was only necessary to make provision for their defence.

34. The CHAIRMAN believed that the French text of paragraph 1 (c) might be accepted as it stood and that in the English text the phrase in question might be amended to read "representation in legal proceedings."

That amendment to the English text of paragraph 1 (c) was adopted.

35. Mr. JIMENEZ de ARÉCHAGA said he had no objection to the amendment suggested by the Chairman

but was unable to endorse the Special Rapporteur's restrictive interpretation of paragraph 1 (c).

36. Mr. GROS said that there was no fundamental difference between the English and French texts since the latter certainly should be interpreted to mean that a detained person could be represented before the court proceedings had begun.

37. Mr. TSURUOKA suggested that the word "free" should be substituted for the word "able" in the second sentence of paragraph 1 (c).

*Mr. Tsuruoka's amendment was adopted.*¹

38. Mr. AMADO said that the difficulties of interpretation to which the expression "his legal representation" had given rise could be avoided if the passage beginning "arranging..." were replaced by "making the necessary arrangements for his defence" (*pourvoir aux besoins de sa défense*).

39. He had supported the proposal in Mr. Tsuruoka's amendment because it was evident from the language used in paragraph 2 that the rights specified in paragraph 1 (c) constituted freedoms.

40. The CHAIRMAN, speaking as a member of the Commission, pointed out that in view of the provisions of paragraph 2, it would be going too far to use the expression "shall be free" in paragraph 1 (c). It would be more correct to say "shall be able" in both sentences of that paragraph.

41. Sir Humphrey WALDOCK said that the word "able" was technically inadequate. In order to maintain the balance between the various provisions of paragraph 1, it would be more correct to use the word "free" throughout.

42. With reference to Mr. Amado's suggestion, he said that the Drafting Committee had been instructed to formulate paragraph 1 (c) in such a manner as to cover not only cases of detention in criminal proceedings but also other forms of detention, such as committal to a lunatic asylum. Such cases were important and it was essential that the consul should be allowed to visit his nationals in order to make arrangements for the purpose of taking legal steps to challenge the propriety of the committal in question. Mr. Amado's suggested formulation would only cover the case of detention in criminal proceedings.

43. The CHAIRMAN, speaking as a member of the Commission, said that it was appropriate to use the words "shall be free" in paragraph 1(a), which dealt with freedom of communication in ordinary circumstances. In the particular case of an imprisoned national, covered by paragraph 1(c), the consul could not have the same freedom of communication. It was therefore justified to use a different expression.

44. Mr. AMADO suggested that in paragraph 1(c) an expression such as "shall be permitted" or "shall be allowed" should be used.

45. Sir Humphrey WALDOCK said that "shall be permitted" would be acceptable.

46. Mr. YASSEEN suggested that in French the

¹ But see paragraphs 72 and 78 below.

expression *avoir la possibilité* should be used in paragraph 1(c).

47. He agreed that the expression to be used in that paragraph should not be the same as that used in paragraph 1 (a). The latter dealt with freedom of communication in ordinary circumstances, the former with the right to visit a person under detention.

48. Mr. BARTOŠ said that, under the municipal law of most countries, a lawyer did not represent his client in criminal proceedings; he assisted his client and gave him all the technical help needed by him for his defence. The lawyer did not act as his client's attorney and did not commit him in the manner in which a representative would do. It was therefore inappropriate to speak of "legal representation," an expression which was used chiefly in civil law and which denoted the right to act on behalf of another person. That important distinction was reflected in consular conventions, which did not refer to legal representation but to the right to organize the defence of persons arrested or imprisoned.

49. For those reasons, he wished to enter an express reservation in regard to the use of the expression "legal representation". He proposed to abstain from voting on the passage concerned.

50. Mr. JIMÉNEZ de ARÉCHAGA agreed that there was an important difference between paragraph 1(a) and paragraph 1(c). Paragraph 1(a) dealt with the freedom of communication between a consul and his nationals without any previous authorization. In that paragraph, it was appropriate to use the expression "shall be free."

51. Paragraph 1(c) dealt with the possibility of visiting a person in prison, and a visit of that type would be subject to prior authorization. For that reason, he supported the suggestion that in paragraph 1(c) the expression "shall be permitted" should be used.

52. As a result, paragraph 2 would have to be amended to read: "The freedoms and permissions (*les libertés et facultés*) referred to ...".

53. Mr. AGO agreed that it would not be appropriate to speak of "freedoms" in connexion with the provisions of paragraph 1(c), which differed from those of paragraph 1(a). The rights envisaged were more in the nature of legal faculties and were exercisable in the special case of visiting an arrested or imprisoned national of the sending State.

54. He supported Mr. Amado's suggestion that paragraph 1(c) should refer to the organization of the prisoner's defence. The consular official did not himself undertake that defence: he took steps to arrange for a lawyer to defend him.

55. Mr. ŽOUREK, Special Rapporteur, said that, as explained by Sir Humphrey Waldock, the Drafting Committee had intended to cover in paragraph 1(c) all forms of deprivation of freedom and not only arrest or imprisonment in connexion with criminal proceedings. Accordingly, it would not be appropriate to use the narrower and more precise wording suggested by Mr. Amado.

56. He therefore urged the Commission to retain the more general expression "legal representation."

57. Mr. GROS said that the expression *représentation en justice* was the broadest one possible in French. It would cover arrangements for the defence of any person deprived of his freedom, regardless of the circumstances and of the authority dealing with his case. It would cover, for example, the case of a person accused of tax evasion, which was dealt with by an administrative body.

58. Mr. BARTOŠ pointed out that a lawyer who defended a person accused of tax evasion did not "represent" his client: he could not, for example, enter into a settlement on his client's behalf.

59. Mr. PADILLA NERVO said that, regardless of the language used, the purpose of paragraph 1(c) was to enable the consul to visit his imprisoned national.

60. It was, however, essential to use the same language in both sentences of paragraph 1(c), the first of which dealt with a prisoner awaiting trial and the second with a prisoner serving a sentence.

61. The CHAIRMAN said that the Commission had accepted Mr. Tsuruoka's suggestion that the same language should be used in both sentences of paragraph 1(c).

62. Mr. AGO noted that paragraph 2 spoke of "freedoms" in connexion with all the provisions of paragraph 1. It would therefore perhaps be preferable to amend the expression.

63. The CHAIRMAN, speaking as a member of the Commission, suggested that it would be more appropriate to replace the word "freedoms" by "rights" in paragraph 2.

64. Mr. JIMÉNEZ de ARÉCHAGA supported the Chairman's suggestion.

65. Mr. YASSEEN pointed out that the Chairman's suggestion would meet the point raised by Mr. Ago. Both the freedoms specified in paragraph 1(a) and the "ability" proposed in paragraph 1(c) constituted rights.

66. Sir Humphrey WALDOCK said that it would not be inappropriate to speak of "rights and freedoms" in paragraph 2.

67. Mr. AMADO stressed that it was not customary to speak of freedoms being "exercised." "Freedom" was essentially an abstract concept.

68. Mr. PADILLA NERVO emphasized that article 33 set forth the rights of a consul in the exercise of his most important duties.

69. Consular functions were set forth in article 4. By virtue of sub-paragraphs (e), (g) and (h) of that article, a consul was entitled to take all steps necessary to arrange for the legal defence of the interests of a national of the sending State who was accused of an offence, or committed to a lunatic asylum.

70. Article 33 did not add anything to those functions; its provisions dealt with the right of a consul to communicate with the nationals of the sending State. Paragraph 1(c) set forth the right to visit a national of the sending State who was imprisoned and to converse with

him; the consul could use that opportunity to give the prisoner news of his family or to discuss arrangements for his defence.

71. To his mind, it was unnecessary in paragraph 1(c) to refer specifically to the organization of the defence of the national concerned or to his legal representation.

72. The CHAIRMAN said that he had been asked by Mr. Ago, who had been called away from the meeting, to propose on his behalf an amendment replacing in paragraph 1(c) the words "shall be free" in the first sentence, and "shall be able" in the second sentence, by the uniform expression "shall have the right."

73. As a result, in paragraph 2, the word "freedoms" would be replaced by "rights."

74. Speaking as a member of the Commission, he said that that proposal was quite acceptable to him.

75. Mr. SANDSTRÖM said that he preferred the use of the words "shall be free" throughout. In that manner, the word "freedoms" could be retained in paragraph 2.

76. He pointed out that the provisions of paragraph 1(b) could not be governed by those of paragraph 2.

77. Mr. ŽOUREK, Special Rapporteur, said that the point mentioned by Mr. Sandstrom could be dealt with by transferring paragraph 1(b) to article 34, dealing with certain obligations of the receiving State.

78. The CHAIRMAN said that, if there were no objection, he would consider that the Commission agreed to adopt paragraph 1 with the amendment proposed by Mr. Ago.

Paragraph 1, as amended, was adopted.

79. Mr. PADILLA NERVO said that he was not submitting an amendment, but wished to record his opinion that the phrase in paragraph 1(c) "arranging for his legal representation" expressed part of the consul's functions and did not depend on the right to visit a national in prison, custody or detention. A consul would have that right whether he visited such a national or not. The consul's right to visit a national in prison should not be restricted to the limited purpose of arranging for his defence.

80. The CHAIRMAN drew attention to paragraph 2 and the proposal that the word "rights" should be substituted for the word "freedoms."

81. Mr. PADILLA NERVO said that the word "rights" appeared only in the amended paragraph 1 (c), so that the reference in paragraph 2 would be to that sub-paragraph alone.

82. The CHAIRMAN disagreed. The Draft Covenant on Human Rights (E/2573), for instance, included all liberties and rights.

83. Mr. PADILLA NERVO said that he could not accept paragraph 2. The proviso related only to paragraph 1(c), for the general right of communication laid down in paragraph 1(a) was a fundamental right and the basis of the protection of nationals and of consular functions, and hence could not be qualified by the proviso. The only possible limitation on that fundamental right

was that mentioned in article 31. No other limitation was admissible in the case of nationals who were at liberty. So far as detained nationals were concerned the consul's right to visit them should be subject to no other limitations than those laid down in the relevant regulations.

84. The CHAIRMAN noted that no objection had been raised to the amendment substituting the word "rights" for the word "freedoms" in paragraph 2.

Article 33, paragraph 2, as amended, was adopted.

85. Mr. PADILLA NERVO entered a reservation to paragraph 2.

Article 33, as amended, was adopted.

ARTICLE 34 (formerly article 5) (Obligations of the receiving State)

86. The CHAIRMAN said that the Drafting Committee proposed the following text for article 34:

"The receiving State shall have the duty:

"(a) in the case of the death of a national of the sending State, to inform the consulate in whose district the death occurred;

"(b) to inform the competent consulate without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending State;

"(c) if a vessel used for maritime or inland navigation, having the nationality of the sending State, is wrecked or runs aground in the territorial sea or internal waters of the receiving State, or if an aircraft registered in the sending State suffers an accident on the territory of the receiving State, to inform without delay the consulate nearest to the scene of the occurrence."

Article 34 was adopted.

ARTICLE 35 (formerly article 37) (Communication with the authorities of the receiving State)

87. The CHAIRMAN said that the Drafting Committee proposed the following text for article 35:

"1. In the exercise of the functions specified in article 4, consular officials may address the authorities which are competent under the law of the receiving State.

"2. The procedure to be observed by consular officials in communicating with the authorities of the receiving State shall be determined by the relevant international agreements and by the municipal law and usage of the receiving State."

88. He asked for an explanation concerning the phrase "relevant international agreements".

89. Mr. ŽOUREK, Special Rapporteur, explained that the reference to international agreements had been included in article 37 of the 1960 draft and had been considered necessary, as communication with the authorities of the receiving State was regulated in certain international conventions.

Article 35 was adopted.

ARTICLE 36 (formerly article 38) (Levying of fees and charges and exemption of such fees and charges from taxes and dues)

90. The CHAIRMAN said that the Drafting Committee proposed the following text for article 36:

"1. The consulate may levy in the territory of the receiving State the fees and charges provided by the laws and regulations of the sending State for consular acts.

"2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees or charges, shall be exempt from all taxes and dues in the receiving State."

Article 36 was adopted.

ARTICLE 37 (formerly article 39) (Special protection and respect due to consular officials)

91. The CHAIRMAN said that the Drafting Committee proposed the following text for article 37:

"The receiving State is under a duty to accord special protection to consular officials by reason of their official position and to treat them with due respect. It shall take all appropriate steps to prevent any attack on their persons, freedom or dignity."

Article 37 was adopted.

ARTICLE 38 (formerly article 40)
(Personal inviolability of consular officials)

92. The CHAIRMAN said that the Drafting Committee proposed the following text for article 38:

"1. Consular officials may not be subjected to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

"2. Except in the case specified in paragraph 1 of this article, consular officials shall not be committed to prison or subjected to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

"3. If criminal proceedings are instituted against a consular official, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible."

Article 38 was adopted.

ARTICLE 39 (Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings)

93. The CHAIRMAN said that the Drafting Committee proposed the following text for article 39:

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

Article 39 was adopted.

ARTICLE 40 (formerly article 41)
(Immunity from jurisdiction)

94. The CHAIRMAN said that the Drafting Committee proposed the following text for article 40:

"Members of the consulate shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions."

Article 40 was adopted.

ARTICLE 41 (formerly article 42)
(Liability to give evidence)

95. The CHAIRMAN said that the Drafting Committee proposed the following text for article 41:

"1. Members of the consulate may be called upon to attend as witnesses in the course of judicial or administrative proceedings. Nevertheless, if a consular official should decline to do so, no penalty may be applied to him.

"2. The authority requiring the evidence of a consular official shall avoid interference with the performance of his functions. In particular it shall, where possible, take such testimony at his residence or at the consulate or accept a statement from him in writing.

"3. Members of the consulate may decline to give evidence concerning matters connected with the exercise of their functions and to produce official correspondence and documents relating thereto. In this case, the authority requiring the evidence shall refrain from imposing any penalty on them."

96. Pointing out that the phrase "no coercive measure" had been used in the 1960 text, he asked whether the word "penalty" was broad and strong enough.

97. Mr. ŽOUREK, Special Rapporteur, said that the change had been made by the Drafting Committee because the question had been raised whether a fine was a coercive measure or not. The French word *sanction* was unambiguous.

98. Mr. JIMÉNEZ de ARÉCHAGA suggested that the words "coercive measure" should be restored; under the procedural law of most Latin American countries a witness who refused to testify was liable to be conducted before the judge by force. Such action could hardly be called a penalty.

99. Mr. SANDSTRÖM observed that a similar procedure existed in Swedish law.

100. Mr. ŽOUREK, Special Rapporteur, said that he thought merely a matter of language was involved. Under many conventions a *subpoena* could not be served on a consul. In other words he could not be threatened with a fine or with being physically brought before the court in the event of non-appearance. The French word *sanction* covered all cases.

101. Sir Humphrey WALDOCK said that the English word "penalty" did not do so. It would be better to use two terms together: "no coercive measure or penalty."

102. Mr. BARTOŠ pointed out that other sanctions than those mentioned existed. A witness might be detained. Under Belgian law a witness who refused to

testify was liable to be fined a specified sum for each day of refusal. In other countries a recalcitrant witness was liable for damages caused by his non-appearance. An English expression should therefore be found to correspond to the French term *sanction*.

103. The CHAIRMAN, speaking as a member of the Commission, said that he also preferred the use of two terms in English. He suggested that the phrase "no coercive measure or penalty" should be used in the English text and *aucune mesure de coercition ou autre sanction* in the French.

It was so agreed.

104. The CHAIRMAN, speaking as a member of the Commission and referring to paragraph 3, suggested that the last sentence was not necessary. The similar sentence was necessary in paragraph 1, because that paragraph established the obligation to give evidence and it might follow that coercion might be applied in case of refusal to do so, but no such obligation was stated in paragraph 3.

105. Mr. ŽOUREK, Special Rapporteur, explained that the sentence had been included by the Drafting Committee in paragraph 3 after considerable discussion. The article applied to two categories of persons. In paragraph 1 the exemption was recognized only in the case of consular officials, whereas paragraph 3 covered all members of the consulate. The exemption had therefore had to be repeated in paragraph 3 to cover also employees of the consulate other than consular officials. Its retention might be of great practical use in certain States.

106. Mr. LIANG, Secretary to the Commission, observed that the last sentence in paragraph 3 was not only useless but might cause difficulties. It seemed to imply that the authority was entitled to impose a penalty and would in fact be applying a self-denying ordinance if it did not do so. But the paragraph referred to the official acts of members of the consulate and to the receiving State's duty under international law not to require evidence concerning matters connected with the performance of official acts.

107. Sir Humphrey WALDOCK agreed with the Secretary. The sentence was inappropriate because the immunity referred to in paragraph 3 was really the immunity of States, not of individuals.

108. The CHAIRMAN, speaking as a member of the Commission, recalled that during the debate on article 42 of the 1960 draft he had drawn the Drafting Committee's attention to the expression "may decline". It would be better to replace it by "are under no obligation". If there was no obligation, the question of a penalty did not arise at all. The second sentence in paragraph 3 should therefore be deleted.

Those two amendments were adopted.²

Article 41, as amended, was adopted.

The meeting rose at 1.5 p.m.

620th MEETING

Wednesday, 28 June 1961, at 10.20 a.m.

Chairman: Mr. Grigory I. TUNKIN

Law of treaties

[Agenda item 4]

1. The CHAIRMAN said that a great deal of material on the law of treaties had accumulated, but the Commission had not been able to discuss more than part of it. At its eleventh session, in 1959, the Commission had discussed fourteen articles in the first report by Sir Gerald Fitzmaurice, the then Special Rapporteur (A/CN.4/101). The topic had been dealt with by a succession of Special Rapporteurs whose methods had not been identical. The first Special Rapporteur (Professor Brierly) had tried to draft some articles. The most recent Special Rapporteur had tried, with the Commission's authorization, to prepare a code. The problem was now what the Commission should do in the future and what instructions it should give to the new Special Rapporteur, Sir Humphrey Waldock. The Commission had a certain amount of experience and should be able to give the Special Rapporteur specific instructions. The first question was whether an attempt should be made to prepare a code or a draft convention. If the Commission decided in favour of a draft convention, it would then have to decide what kind of articles it wished, whether they should be extremely detailed, as in Sir Gerald Fitzmaurice's drafts, or more general. The Commission should also decide what parts of the law of treaties should be taken first by the Special Rapporteur, since he could hardly be expected, even on the basis of the material already available, to submit a report covering the whole field to the Commission's next session.

2. Mr. JIMÉNEZ de ARÉCHAGA observed that the law of treaties was too vast a subject for the Commission or its Special Rapporteur to cover in its entirety in one year. The three previous Special Rapporteurs had never attempted to deal with the topic as a whole, but had covered specific aspects in separate reports. It was true that enough reports were now available to embrace the whole subject, but the Commission should not expect a mere digest. The differences of approach and incompatibilities in the previous reports alone made it imperative that the new Special Rapporteur should submit his own original report. The Special Rapporteur himself should select some specific aspect; the Commission should not attempt to indicate to him what it should be, but should leave him ample discretion. When surveying the earlier reports, the Special Rapporteur might well find that certain aspects of the law of treaties were riper than others for codification.

3. If that restriction were imposed on the Special Rapporteur, the Commission must also accept it for itself at its next session. That was essential if progress were to be made. The Commission would not be devoting its time to minor subjects, but would be approaching important subjects step by step. Mr. Žourek had esti-

² With the consequential change of "and to produce" to "or to produce".

mated (615th meeting, para. 57) that it would take the Commission seven years to complete the work on the law of treaties. If so, that was a cogent argument for the piecemeal approach to the subject. Even if it confined itself to a small part of the topic, the Commission would have work enough during its next quinquennial period, as it was also expected to select other subjects for codification and to discuss them. If it wished to increase the tempo of the work on the law of treaties, it might well appoint additional Special Rapporteurs to deal with specific aspects. That would not create confusion or contradictions, as the Commission would remain responsible for the work as a whole. That method might be used in the preparatory work and the results might finally be synthesized in a single instrument.

4. The Special Rapporteur should be instructed clearly that the Commission would not require lengthy commentaries, although it could not dispense with the essential explanations of the articles as drafted. It had already had before it Professor Brierly's reports (A/CN.4/23 and 43), distinguished for their simplicity, Professor Lauterpacht's bold and striking suggestions (A/CN.4/63 and 87) and Sir Gerald Fitzmaurice's detailed and precise text and commentary (A/CN.4/101, 107, 115, 120 and 130). What the Commission would require at its next session was a report by the Special Rapporteur condensing the previous work into a few articles on the topics selected by him, leaving aside any statement of practices accepted without question by the majority of chancelleries. The object of codification was to settle the law in cases where the possible divergences existed. It would be unduly cumbersome to write a code or manual on treaty-making or to reduce to rules all the procedures employed by chancelleries.

5. It would be preferable to defer for the time being the decision whether the draft should take the form of a code or of a convention, as the answer to the question whether the draft would represent codification or the progressive development of international law would depend on the provisions to be drafted by the Special Rapporteur.

6. Mr. EDMONDS agreed in the main with Mr. Jiménez de Aréchaga's views, though he would prefer the preparation of a draft convention. He agreed with the previous Special Rapporteur that international agreements required a separate study, but the draft should cover all forms of treaty, from full treaties to exchanges of notes, with references to details where necessary. He agreed that the topic was a very large one and that the Commission would find plenty of work in carrying it out in sections.

7. The CHAIRMAN observed that the previous Special Rapporteur had in fact drafted 165 articles.

8. Mr. MATINE-DAFTARY said that, as the membership would be renewed in 1962, anything decided at the current session would not bind the future Commission. The Commission could not, therefore, give directives to the Special Rapporteur. It would be more practical if the Special Rapporteur declared his intentions and heard the Commission's reactions to them. He personally could not express a final opinion about what should happen to the draft articles submitted to the Commission on the topic of the law of treaties, for some parts were

more suited to a draft convention and others to a code or commentary.

9. Mr. FRANÇOIS also supported the views of Mr. Jiménez de Aréchaga, except with regard to the suggestion that the form should be settled later. Mr. Edmonds seemed to prefer the form of a draft convention. For the three main subjects dealt with in the past by the Commission — the law of the sea, diplomatic intercourse and immunities and consular intercourse and immunities — draft conventions had been prepared, but for special reasons. The law of the sea formed a whole, and it had been necessary to obtain the acceptance of certain rules if States were to accept other rules. As there had been almost unanimous agreement on most aspects of diplomatic and consular intercourse and immunities, a draft convention had been indicated. It was doubtful, however, whether the same reasons held good in the case of the law of treaties. It did not form a whole and there would be a considerable difference of views. It might therefore be preferable to prepare a series of standard rules. He could not agree with Mr. Jiménez de Aréchaga that the Commission should make its decision at a later stage. There would be a certain advantage in knowing beforehand what the final result would be. Even when there were no great differences of opinion, the acceptance and ratification of a convention gave rise to considerable difficulties. The presentation of standard rules by a body with the Commission's standing would have a greater impact on international law than a convention ratified by very few States with many reservations and restrictions. It was therefore essential to decide the question of form at the outset.

10. Mr. PAL said that it would be demanding too much of the Special Rapporteur to ask him to make his own suggestions. On the basis of the five reports by Sir Gerald Fitzmaurice and the earlier reports by the other two Special Rapporteurs the Commission should be able to decide between a draft convention and a codification. The previous reports had been drafted as if the Commission had had a code in mind. The Commission had already acted upon Sir Gerald's first, second and third reports and had discussed and accepted (A/4169, para. 20) the first chapter (The validity of treaties) of the first report (A/CN.4/101). If it was decided that a code was desirable, the Special Rapporteur would have no immediate work to do on the first chapter and could proceed to deal with Sir Gerald's fourth and fifth reports, with such modifications as might occur to him. If, however, the Commission decided that a draft convention was preferable, Sir Gerald's first chapter might be referred to a drafting committee to recast it in that form, and the Special Rapporteur should be instructed to draft the remainder in conventional form. He should be allowed to choose his own method.

11. Mr. AGO said that the Commission should endeavour to settle the approach to the law of treaties as that was essential for its future work. If it wished to speed up its procedure and if its work was to be effective, it must at all costs make its intentions abundantly clear, especially when giving instructions to the Special Rapporteur. Some clear-cut decision was therefore indispensable, so that the debate would not be reopened at the next session on

the form to be adopted and the parts of the law of treaties to be codified. It would be unfair to ask the Special Rapporteur to work in the dark.

12. The law of treaties was one of the key topics in the codification of international law. It was probably the most arduous task as yet undertaken by the Commission, and tremendous progress would have been made in the codification of international law if it could be carried entirely to a successful conclusion.

13. He referred to the Commission's past work on the topic. The Commission's ideas had tended in the direction of drafting, not a convention, but a set of standard rules. Sir Gerald Fitzmaurice, as Special Rapporteur, had submitted five reports, consisting of an introduction on scope and general principles, a first chapter on the validity of treaties, divided into three parts, which had given rise to very lengthy discussions, and a second chapter, divided into two parts, part I dealing with the effects of treaties as between the parties (operation, execution and enforcement) (A/CN.4/120) and part II with the effects of treaties in relation to third States (A/CN.4/130). Sir Gerald Fitzmaurice's draft had not been completed, since he had not produced any articles on the termination of treaties. The Commission had examined the introduction and part of the section in the first chapter on formal validity and had adopted a number of draft articles. The decision to be taken by the Commission at the current session would be important, because it was essential that the General Assembly should receive a clear picture of the Commission's opinion on the question whether the law of treaties should be a topic for a mere set of standard rules or for a draft convention.

14. In the early years of his membership of the Commission, he had held the idea that, in a matter like the law of treaties, a restatement of existing rules of international law would be preferable to codification in the form of a convention. He had, however, changed his mind after observing the attitudes of the newly-independent States, which comprised almost half the membership of the international community, and noting their desire to participate in the formulation of rules of international law. He had come to the conclusion that the Commission should be much bolder and should, in the case of the law of treaties, draft a convention. If a draft convention could be worked out that was acceptable to all States, and if they had participated in drafting it, a really practical result would have been achieved and it would then be possible to attain certainty in the law on the subject. The Commission should therefore aim at codification in the most technical sense, in other words prepare a draft convention to be submitted to a plenipotentiary conference, as in the case of the codification of the law of the sea. That meant also that the Commission would have to start with the intention of codifying the whole of the law of treaties, not merely the one or other of its aspects. If it subsequently found that some aspects could not be codified satisfactorily, it might have to abandon them, but there was no reason to despair of success.

15. Naturally, the Special Rapporteur could not be asked to submit a complete report to the Commission's next session, but he should not select certain aspects

at random. The Commission should accept its responsibility and work in logical order, dealing successively with the conclusion, the validity, the effects and the termination of treaties. The Special Rapporteur should therefore begin by studying the conclusion of treaties. He would, of course, be free to draw on the reports of his predecessors and also to base his work on principles accepted by the Commission, but he could not go too far in that direction, because all Sir Gerald Fitzmaurice's work had been directed towards scientific codification, not the drafting of a convention. If the Commission decided that a draft convention was needed, it must be realistic and eliminate undue theoretical discussion in order to obtain articles which would be acceptable to all the States. The previous reports should therefore be used rather as scientific background, but could not be followed article by article.

16. He could not agree with Mr. Jiménez de Aréchaga's suggestion that the Commission should defer its decision on the form of the draft. The decision should be made immediately because it would have a bearing on the planning of the Special Rapporteur's work. If he were left in uncertainty, he would not know what direction to take and might well prepare a code, after which the Commission might express a preference for a draft convention, and all his work would have been in vain.

17. It was true that the term of office of the Commission's members was drawing to an end, but the Commission as such remained. The Commission as such was perfectly competent to decide at the current session whether the law of treaties should take the form of a draft convention or of a code.

18. Mr. AMADO noted with satisfaction that Mr. Ago had now adopted the view which he (Mr. Amado) and certain other members of the Commission had long maintained.

19. It was not the role of the Commission to embark on a detailed restatement of international law. That type of work was more suitable to an academic body; the Commission should sift those rules which were of importance to inter-State relations.

20. The Commission's task in that regard had greatly increased in importance as a result of the emergence of a large number of new States unfamiliar with the Western practice of international law. Those States were anxious to participate in the formulation and acceptance of the rules of international law by which they would be bound.

21. In regard to the law of treaties, the Commission should commence with the consideration of the rules governing the conclusion of treaties. No attempt should be made to deal with theoretical questions relating, for example, to the validity of treaties. When that first stage of the Commission's work had been completed, it could then proceed to deal successively with other aspects of the law of treaties.

22. From the outset, attention would have to be focused on certain important changes which had occurred in the State practice connected with the treaty-making process. Procedural innovations in the matter had a

more or less marked influence on substance. The French author, Mr. Rousseau, had drawn attention to those changes which were increasingly weakening the contractual element in the making of multilateral treaties:

"... ces innovations procédurales ne sont pas sans influence sur le fond même du droit, car elles tendent à accentuer la position individuelle des signataires et à affaiblir le caractère contractuel des engagements internationaux. Le traité multilatéral contemporain se présente en définitive non comme la résultante d'un échange de volontés, mais comme l'expression d'un régime légal offert à l'acceptation simultanée (signature) ou successive (adhésion, signature différée) des états . . ."¹

23. The development thus described had become particularly marked in the United Nations practice in the matter of multilateral treaties.

24. He agreed that the Special Rapporteur should be given definite instructions by the Commission. He would appeal to the Special Rapporteur to extract what was essential from the wealth of material at his disposal, to leave aside all baroque elements of decoration and to give to the Commission a structure having the sober purity of lines of a Greek temple, preferably of the Doric rather than the Corinthian order, which was too elaborate for his taste.

25. Mr. LIANG, Secretary to the Commission, said that the Secretariat would distribute at the next session a note containing a list of the subjects of the law of treaties dealt with by the three special rapporteurs in their reports since 1950. It was more owing to the vast scope of the subject of the law of treaties than to the Commission's preoccupation with other topics deemed more urgent that it had only been able to devote a very small portion of its time to the subject.

26. The Commission had not been able to deal with the reports of the first two Special Rapporteurs on the law of treaties. In 1959 it had given sustained consideration to part of Sir Gerald Fitzmaurice's first report. Its efforts had been rewarded, and it would be a serious pity if the results of the Commission's work in the matter were to be discarded; every attempt should be made to preserve the Commission's work on the subject of the conclusion of treaties.

27. It was necessary also to bear in mind attempts in recent decades to codify the law of treaties. He recalled, in the first place, the 1928 Havana Codifying Convention on Treaties, adopted by a number of Latin American countries.² In the second place, note should be taken of the Harvard Draft Convention on Treaties. That draft, though a private project, went into the subject more thoroughly than the Havana Convention.

28. In 1935, a second Harvard draft,³ much broader in scope than the Havana Convention, had been pre-

pared. In particular, the comments appended to that draft constituted a valuable contribution to international law. However, many important changes had taken place during the period 1936-50. The whole network of multilateral treaties had acquired a more complex character.

29. He doubted whether a single convention could cover the whole vast field of the law of treaties. In fact, ever since the International Law Commission had been established, it had been clearly understood that the topic would be dealt with by stages.

30. Professor Brierly's draft, which the Commission had discussed at its second and third sessions in 1950 and 1951 respectively, was an example of conciseness. After Mr. Brierly's resignation, Professor Lauterpacht had then taken up the work and written profound and challenging reports dealing with many controversial aspects of the law of treaties. Sir Gerald Fitzmaurice had adopted a completely different approach. His report constituted a manual of reference for the use of governments and scholars and of future codifiers of the subject in another form. Considerable attention had been devoted by Sir Gerald to such questions as the "formal validity," the "essential validity" and the "temporal validity" of treaties, matters which were of great interest to the science of international law.

31. The Commission would be well advised to concentrate on that part of the subject which had been dealt with at its eleventh session in 1959. The Commission could, at its fourteenth session in 1962, complete that part, dealing with the conclusion of treaties. Upon finishing that task, the Commission could proceed to the next stage of the work.

32. The question arose whether the new Special Rapporteur was prepared to sponsor that part of the codification which had already been dealt with by the Commission. Perhaps the Commission might consider Mr. Pal's suggestion of appointing a committee to examine the articles already approved by the Commission and put them in a form appropriate for submission to the General Assembly.

33. He warmly agreed with Mr. Ago's views. The experience of the model rules on arbitral procedure (A/3859) had not been very encouraging. In 1958, the General Assembly had invited States to make use of those model rules in such cases and to such extent as they considered it appropriate and to report to the Secretary-General on the use they were making of the rules (resolution 1262(XIII)). It was significant that no reply from governments on that point had yet been received.

34. States did not seem sufficiently academically minded to use models of that type; what they required was an adequate presentation of the material of international law in the form of draft conventions. Particularly in recent years, there had been a marked tendency on the part of States to prefer the convention form for the purpose of codifying international law.

35. It would naturally be more difficult to present in that form the material of the law of treaties than that

¹ Charles Rousseau, *Droit international public*, Paris, Sirey, 1953, para. 45, p. 42.

² *International Legislation*, ed. Manley O. Hudson and Louis B. Sohn, vol. IV, p. 2378.

³ Harvard Law School, *Research in International Law, III, Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29 (1935), pp. 707-710.

of diplomatic and consular relations. The Commission could, however, prepare a draft convention on the conclusion of treaties. From the point of view of feasibility it would no doubt derive encouragement from the compilation drawn up by the Secretariat of the laws and practices on the subject.⁴ An examination of the national laws in the matter showed that there was a very large area of agreement regarding the technical rules on the subject of the conclusion of treaties.

36. If the Commission were to spell out more precisely the rules governing the conclusion of treaties, its work would probably appeal to States and receive the same good reception which had been accorded to the draft on diplomatic intercourse and which, he was sure, awaited the draft on consular intercourse.

37. Mr. BARTOŠ said that, although the question was a very difficult one, the Commission should take a decision on it; he personally agreed with the remarks of Mr. Ago. The Commission had been faced from the outset with the problem of the choice between restatement and a draft convention. Like Mr. Ago, he had at first had some hesitation, but had since become fully convinced that the draft should be prepared in such a form that it could serve as a basis for a multilateral convention.

38. He also agreed with Mr. Ago regarding the method of treating the subject, and in particular with the suggestion that the Commission should start its work by dealing with the rules governing the conclusion of treaties. However, he hoped that those rules would be preceded by an introduction setting forth some general principles and the conditions to be satisfied for the coming into being of an international treaty.

39. After the Commission had completed its work on the rules governing the conclusion of treaties, it could then proceed to consider the other aspects of the law of treaties. In doing so, the Commission would fill an existing gap in codified positive international law.

40. Mr. FRANÇOIS said that he could not share the optimism expressed by some members regarding the ratification of multilateral conventions. The fate of the 1958 Geneva Conventions on the Law of the Sea (A/CONF.13/L.52 and L.53) showed that the hopes entertained were largely illusory.

41. Another serious disadvantage of formulating a draft in the form of a convention was that an unratified convention was often worse than no convention at all. The experience of the two Peace Conferences had shown that an unratified convention could lead to a repression in international law. In the first place, many rules of customary international law were discarded in the hope of making the draft multilateral convention more acceptable to States. In the second place even those customary rules which were embodied in the draft convention were placed in jeopardy. It was not uncommon for a State to dispute the validity of a rule of customary

international law because it had failed to ratify a convention embodying it. It was very difficult to persuade States that they were still bound by such a rule, even if they did not ratify the convention.

42. While thus overestimating the prospects of ratification of a draft convention, the members to whom he had referred had underestimated the influence of a codification of the rules of customary international law by the International Law Commission. A codification of that type had always a considerable influence on the development of international law. The will of States as expressed by their signatures to international agreements was not the only source of international law. A codification of the rules of customary international law by the Commission had an effect on judicial and arbitral decisions and on the teachings of publicists of all nations, which also constituted sources of international law.

43. He recalled that the Commission had earlier taken the view that the rules of international law on the subject of the law of treaties did not lend themselves to formulation in an international convention (see e.g. A/4169, chapter II, para. 18).

44. Lastly, he urged the Commission to await the fate of the conventions concluded on the basis of the Commission's work before attempting to adopt that form for the subject of the law of treaties.

45. The CHAIRMAN, speaking as a member of the Commission, said that it was both necessary and feasible for the Commission to take a decision on the important question of the form of the draft on the law of treaties. The topic had been before the Commission for ten years and had been treated in a number of reports of varying form. The Special Rapporteur needed definite instructions on the question whether the Commission wished him to prepare a code or a draft convention. Unless those instructions were given, the Commission's work would be largely frustrated.

46. Much valuable material had been collected on the subject of the law of treaties and, although he did not agree with all the statements contained in the reports of Sir Gerald Fitzmaurice, he admired those reports as an outstanding contribution to the study of the subject. He recalled that, while the Commission had not taken any definite decision, there had been no objection to Sir Gerald's suggestion that work should proceed on the assumption that the draft on the law of treaties would constitute a code rather than a draft convention.

47. As a result, the Commission had before it a sort of manual on the law of treaties. In that form, the results of the Commission's work could not — indeed, were not intended to be — submitted to governments for acceptance.

48. He believed that the Commission should, wherever possible, attempt to prepare draft conventions. He agreed with Mr. François in regretting that so few nations had ratified the 1958 Conventions on the law of the sea. More States could, however, be expected to ratify those Conventions, and the matter might be

⁴ Laws and Practices concerning the Conclusion of Treaties, United Nations Legislative Series (United Nations publication, Sales No. 1952.V.4).

raised soon in the Sixth Committee of the General Assembly with a view to making an appeal to States to ratify them.

49. If the Commission should decide that the draft on the law of treaties was to serve as a basis for an international convention, and if experience then showed that such a convention could not be concluded, the draft articles would still remain as a guide. The Commission should, however, endeavour to produce the draft of an international convention, for such a draft would be of much greater value for the codification and progressive development of international law than a mere set of model rules. The draft should not be excessively elaborate, nor should it be a bald statement of a few general rules. The draft should state certain generally accepted rules of international law and also contain some elements *de lege ferenda*. The Special Rapporteur should be instructed to review all the material prepared by his predecessors and consult the Commission's own discussions on the subject, and the whole structure of his draft should be determined by the practical requirements of modern international relations.

50. The first aspect of the subject to be taken up should be the conclusion of treaties; the others (e.g. validity and termination of treaties) would then follow in their logical order. He agreed with Mr. Ago that the ultimate aim should be to cover the whole field of the law of treaties and to undertake its comprehensive codification, but of course the draft could be submitted in parts to the General Assembly.

51. Mr. JIMÉNEZ de ARÉCHAGA said that, although understanding why some members strongly favoured a draft convention, he feared that a hasty decision in that sense might prejudice the issue. Surely, if the Commission gave clear instructions to the Special Rapporteur to submit draft articles stating the rules of international law in regard to treaties the Commission would then be in a far better position to judge whether those draft articles went no further than enunciating existing law and therefore needed no action by governments, or whether they contained new rules which would have to be submitted to a diplomatic conference. He urged therefore that the decision should be held over until the following session.

52. Mr. GROS associated himself entirely with Mr. Ago's view which had been supported by Mr. Bartoš and the Chairman. Though he appreciated the reasons for Mr. François' warning, he believed that the great value of the Conventions on the Law of the Sea should not be underestimated. Of course from the legal point of view it was regrettable that they had not yet been ratified by many States; but the non-ratification did not weaken their authority as international instruments adopted by a two-thirds majority in a conference of plenipotentiaries. The importance of the Conventions had not been contested even by those States which had not ratified, and there had been a clear trend since the Conferences of 1958 and 1960 to recognize the validity of the rules laid down in the Conventions.

53. Mr. François' argument that international tribunals

and arbitrators would give due weight to a code of model rules held good also for a draft convention drawn up by the Commission.

54. He was convinced that the course advocated by Mr. Ago would best advance the Commission's work in the law of treaties.

55. Sir Humphrey WALDOCK said in reply to Mr. Matine-Daftary that he had not yet had time to study all the material on the law of treaties and form a final conclusion but he had had some opportunity during the session of refreshing his memory and in particular of reading Sir Gerald Fitzmaurice's fifth report (A/CN.4/130). In general he subscribed to Mr. Ago's view that, as so many new States were joining the international community, the advantage of model rules was diminishing and that the Commission's object should be, where possible, to frame articles suitable for incorporation in draft conventions.

56. In the particular case of the law of treaties there was an additional argument in favour of a draft convention inasmuch as the topic was patently one of the most important on the Commission's agenda. If it tried to embark on the preparation of model rules he doubted very much whether it would be allowed adequate time by the General Assembly, which was likely to give priority to other work. It should try to bring to fruition the extensive work already begun by previous Special Rapporteurs on the subject.

57. He appreciated the reasons which had prompted Mr. François' remarks. He and others probably had in mind the failure of the Codification Conference of 1930 which was held by some to have been actually harmful in certain respects. But the situation had changed a great deal since then. A draft convention prepared by so large and representative a body as the Commission possessed an authority of its own even if the General Assembly decided against submitting it to a conference of plenipotentiaries. Real harm would only be done if a draft of the Commission were submitted to a diplomatic conference which failed to produce any text at all. He fully agreed with Mr. Gros as to the standing of a text which had gone through the various stages of discussion in the Commission, the General Assembly and finally in a diplomatic conference, and it was certainly true, as Mr. Gros had pointed out, that States were taking into account the changes in law introduced by the Geneva Conventions on the Law of the Sea.

58. For those reasons he did not believe that the objections of Mr. François outweighed the strong case made by Mr. Ago in favour of a draft convention.

59. Turning to the question of method, he agreed with the Chairman that the Special Rapporteur, who would have the advantage of previous reports as well as the Commission's discussion during its eleventh session (1959), should start with the subject of the conclusion of treaties. He hoped it would not appear presumptuous of him to express the view that it would be preferable for the Special Rapporteur himself rather than a drafting committee, as suggested by Mr. Pal, to revise the draft articles adopted by the Commission in 1959 and that

he should be given considerable latitude in that regard. Sir Gerald Fitzmaurice in his introduction to his fifth report had recognized that the language and form of the articles might require considerable modification if they were to be incorporated in a multilateral convention. Apart from the time factor another reason for assigning that task to the Special Rapporteur was that the draft articles adopted in 1959 were by no means complete.

60. The Chairman had rightly said that in preparing a draft convention the Commission was in fact also producing a model code and that, if for one reason or another, the General Assembly decided not to submit the draft to a diplomatic conference the articles would still remain. To that extent, he agreed with Mr. Jiménez de Aréchaga that the Commission would not need to commit itself finally until a later stage as to whether it should ultimately call its work a convention or a model code.

61. He doubted whether it would prove possible to complete more than one section of the draft in any one session, and the Commission would probably have to decide later whether to submit the draft to governments for comments section by section; but that was a matter which should not affect the more immediate decision to formulate with speed and all the necessary care a draft convention for consideration by the next session, which would be a particularly propitious moment to accomplish a substantial piece of work since there were no other topics envisaged as yet for discussion.

62. The CHAIRMAN, speaking as a member of the Commission, could not agree with Mr. Jiménez de Aréchaga and thought it essential to take a decision at the current session. Numerous draft articles on the law of treaties had been submitted to the Commission, but they were only suitable for incorporation in a model code. An international convention might need articles of quite a different character.

63. Mr. MATINE-DAFTARY said that, after listening to the preceding speakers, he had formed the considered view that under prevailing conditions in world affairs the Commission's task should be to prepare draft conventions; the codification of doctrine should be the work of learned writers on international law. Any topic that was unsuitable for incorporation in a draft convention should be set aside. He was certain that Sir Humphrey Waldock would take from the work of the previous Special Rapporteurs on the law of treaties whatever could be used in a draft convention and would drop a large part, which was more concerned with doctrine and might also be used in the commentary.

64. Mr. AGO entirely agreed with the Chairman that the Commission should take a decision forthwith because draft articles intended for a draft convention would have to be framed in an entirely different way to draft articles intended for a model code of rules.

65. He would not go so far as the previous speaker in maintaining that the Commission's sole task was to frame draft conventions, for under the Statute it had other tasks as well. His argument had related purely to the topic of the law of treaties where the Commission

was not likely to encounter greater difficulties than in the case of the law of the sea.

66. Even if a convention on the law of treaties did not secure many ratifications, its authority would be far greater — because approved by a large majority of States — than that of a model code of rules.

67. A secondary consideration but one to be borne in mind was that the psychological effect of informing the General Assembly, which was a political body, that the Commission intended only to draw up a model code of rules, could be disastrous. The General Assembly's support could only be obtained if the Commission clearly stated that the law of treaties was one of the major topics for codification and that the Commission's intention was that the topic should form the subject of an international convention.

68. Mr. JIMÉNEZ de ARÉCHAGA said that he had no objection to the course suggested by the Chairman, namely that the Special Rapporteur should be asked to prepare draft articles intended for inclusion in a draft convention.

69. Mr. AMADO emphasized that the Special Rapporteur should limit his first draft strictly to the conclusion of treaties, in which connexion the novel processes of treaty-making should be taken into account, so that the Commission would have something very definite to work on.

70. He had listened with keen interest to the warning sounded by Mr. François, as the problem of non-ratification of treaties was of special concern to Latin American countries. The danger was, of course, that international instruments might not be ratified precisely because they enunciated well established rules of law.

71. The CHAIRMAN announced that as he had some more speakers on his list, further discussion would be deferred until the following meeting. When the discussion had been completed, the Commission would resume debate on the draft articles on consular intercourse and immunities on second reading.

72. Mr. GARCÍA AMADOR, speaking on a point of order, referred to his report on the fourth session of the Asian-African Legal Consultative Committee (A/CN.4/139). As he would leave Geneva at the end of the week, he would be grateful if the Chairman could arrange for him to present that report at the following meeting, after the Commission had completed its discussion on the law of treaties.

73. The CHAIRMAN said that the Commission would have to discuss the question of sending an observer to the next session of the Asian-African Legal Consultative Committee, from whose observer he had received a letter expressing the hope that the Commission would reconsider its decision (597th meeting, para. 10) not to send an observer to that session. That question could be taken up once the discussion on the law treaties had been concluded.

74. So far as the discussion of Mr. García Amador's report was concerned, he referred to his statement at

the 605th meeting that the report would be discussed if the Commission so desired.

The meeting rose at 1.5 p.m.

621st MEETING

Thursday, 29 June 1961, at 10 a.m.

Chairman : Mr. Grigory I. TUNKIN

Law of treaties

(continued)

[Agenda item 4]

1. The CHAIRMAN invited the Commission to continue its debate on item 4 of the agenda.
2. Mr. HSU said that he was able to support the view that the draft articles on the law of treaties should be so framed as to form part of a draft convention, particularly as the Special Rapporteur was of the same opinion. Sir Humphrey Waldock should be given all possible latitude for the accomplishment of his task.
3. Fundamentally there was little difference between a draft convention and a model code of rules, since the Commission seemed generally to have agreed that academic theories should have no place in either text.
4. Two schools of thought had emerged in the Committee established by General Assembly resolution 94 (1). One, starting with the idea that all rules of international law must receive the consent of States, held that they had to be embodied in international conventions. The second, starting with another idea, held that codification being a process of systematising customary rules of international law, it did not have to take the form of a draft convention and could rest on the authority of a piece of work emanating from the Commission. He did not entirely agree with either view. Referring to the second view, he said that codification was not always a mere restatement of existing rules; it might include the formulation of certain new rules in order to fill gaps, and then there might be a need for an international instrument.
5. It was recognized in article 23 of the Commission's Statute that not all its drafts would have to take the form of a convention. It had to be admitted, however, that at a time when so many new States were coming into existence there would be a greater need for the preparation of draft conventions than of model codes.
6. Mr. BARTOŠ, reiterating his support for Mr. Ago's view, said that he also wished to associate himself with the opinion voiced by several members of the Commission that a convention adopted by a large number of States, whether ratified or not, constituted evidence of the existing international law. If learned authors were able to state what were customary rules of law, *a fortiori* a decision by a large number of States had even greater

authority. The world had moved beyond the nineteenth-century ideal of codification by scientific bodies; in modern times the process was taking place in the name of the international community, and even when States did not assume treaty obligations, as members of that community they were bound to respect the rules confirmed by it. Such was his interpretation of the meaning of the General Assembly's resolution 95 (1) affirming the principles of international law recognized by the Charter and Judgment of the Nürnberg International Military Tribunal. Those principles reflected the conscience of mankind and created obligations even for States which had not subscribed to the resolution.

7. He considered that a convention which had been adopted by a conference but which had not entered into force because not ratified by a sufficient number of States had greater validity than a General Assembly recommendation that States should use as a guide certain model rules codified by the Commission and approved by the Assembly.

8. Mr. ERIM, referring to the list of the successive reports on the law of treaties (A/CN.4/L.96), asked for an explanation of the apparent change in the approach to the subject adopted by the Commission. As far as he could judge from the list, at the outset the Commission had discussed draft articles of a draft convention prepared by Mr. Brierly and later draft articles prepared by Mr. Lauterpacht, but at its eighth session Sir Gerald Fitzmaurice had submitted draft articles for a code on the law of treaties.

9. Personally, he favoured the former approach because a convention possessed all the advantages of a model code together with far greater authority, even if at first ratified by relatively few States. The Special Rapporteur should be given very precise instructions so as to ensure that the Commission had a definite text to work on at the next session.

10. Mr. LIANG, Secretary to the Commission, replying to Mr. Erim, confirmed that the reports submitted by Mr. Brierly had contained draft articles. That method had been followed by Mr. Scelle in the case of arbitral procedure. That was in conformity with the requirement laid down in article 20 of the Statute according to which the Commission had to prepare its drafts in the form of articles. Mr. Lauterpacht's reports on the law of treaties had also contained draft articles.

11. On the election of Professor Lauterpacht to the International Court of Justice, Sir Gerald Fitzmaurice had been appointed Special Rapporteur, but, like Mr. Lauterpacht, had not been given specific instruction concerning the form of his report, though there had been some discussion on the matter. Afterwards, Sir Gerald Fitzmaurice had been firmly of the opinion that the draft articles should in substance be suitable for a model code. It was stated in paragraph 18 of the Commission's report on its eleventh session (A/4169) that on the recommendation of the Special Rapporteur and of course without prejudice to any eventual decision to be taken by the Commission or by the General Assembly, the Commission had not envisaged its work on the law of treaties as taking the form of a treaty but rather as a

code of a general character. It was pointed out later in the same paragraph that if the code or any part of it were ever to be cast in the form of an international convention considerable drafting changes would be required.

12. The Commission had indeed left considerable discretion to Sir Gerald in not prescribing the form which his draft articles were to take, but its final decision had not been thereby prejudged.

13. Mr. TSURUOKA said that he would be brief as the essential points had been covered by previous speakers. He considered that the draft on the law of treaties should be in the form of a convention, which both from the theoretical and practical point of view would carry greater weight than a model code of rules. He was confident that the Special Rapporteur would draft the articles in a clear and lapidary style and thus lay a solid foundation for the work to be done.

14. Mr. YASSEEN said that the law of treaties was of the greatest importance for the development of international law, for as one of the formal sources of international law the treaty was becoming increasingly prominent. It was therefore very desirable to bring together the rules on that topic in a draft convention and he believed it would be possible to find common ground that would meet with the approval of States. Such a procedure had the added advantage of providing an opportunity for new States to take part in the elaboration of a convention so important for the progressive development of international law. Even if it were not ratified the draft would still provide a firm basis for general and uniform rules of customary law in that particular domain.

15. Mr. SANDSTRÖM shared the view expressed by Mr. Ago and other members of the Commission and emphasized that it would take less time to prepare a draft convention than a model code for which more ground would have to be covered.

16. It was no criticism of the valuable work done by Sir Gerald Fitzmaurice that the Commission should decide to tackle the topic from a different angle. Clearly it must be considerably influenced by the view of the new Special Rapporteur for the law of treaties.

17. The CHAIRMAN, speaking as a member of the Commission, said that at least a provisional timetable should be established for the work on the law of treaties, in order to forestall any possible criticism of dilatoriness.

18. He wished to make two observations of a theoretical nature in order to obviate any possible misunderstanding. Firstly, although a convention which had not received enough ratifications to enter into force had a certain importance and marked a stage in the process of creating rules of international law, it could not impose binding obligations on States. However, if to some degree such a document was declaratory of existing law it could be cited as an auxiliary source of law.

19. Secondly, he repudiated the entirely unfounded assertion that a convention ratified by a majority of States enunciated existing law and was binding on all States. Such an instrument was only binding universally if it formulated general rules of customary law, and in

that case its binding nature was not based on the fact that the rules had been incorporated in a convention. In other words, a majority of States was not in a position to dictate to the minority.

20. Mr. ERIM, thanking the Secretary for his explanation, observed that he had not indicated what procedure was to be followed with regard to the draft articles on the law of treaties already adopted, however tentatively, by the Commission. Some specific decision on that point would have to be taken since the Commission was a permanent body even though its membership changed.

21. Mr. PAL pointed out that the Commission's Statute drew a sharp distinction between "progressive development" and "codification" of international law, as also between the procedure to be followed in the case of drafts concerned with the progressive development of international law and that to be followed for the purpose of codification. Article 15 of the Statute defined the expressions and section A, comprising articles 16 and 17, gave the procedure to be followed for progressive development, while section B, comprising articles 18 to 24, gave the procedure to be followed in cases of codification. By the very definition given in article 15 "progressive development" would require the draft to be intended for a convention. Therefore article 16, which was the only relevant article if the present were a case of progressive development, in its clause (j) did not give different forms of recommendation as in article 23 of section B governing only the cases of codification. The present case, it might be pointed out, did not strictly come under article 16 as it had not been referred to the Commission by the General Assembly. The Statute did not specify any special procedure for drafts which were intended both to codify and to develop the international law. The Commission, however, in such mixed cases had always followed the procedure given in section B. According to the provisions contained in that section, the question of the form in which the draft would be presented would arise only when the stage of article 23 was reached. The recommendation to be made to the General Assembly under article 23 could surely not be decided upon until the draft articles had been drawn up. As far as he could see, it would be somewhat premature for the Commission to take a decision at the outset about the ultimate form of the draft on the law of treaties which at the outset was eminently a fit subject for codification though in the form of a convention in view of the recently developed constitution of the international community.

22. The CHAIRMAN said that although it was true that the Commission in the past had considered the recommendation to be made to the General Assembly towards the end of its works on a particular topic, experience had demonstrated how desirable it was to decide at an early stage what form the draft articles should take. As far as one could judge from the reports on the law of treaties it would be safe to assume that the future draft would contain some elements *de lege ferenda*. The final decision, however, could be taken later.

23. Mr. GARCÍA AMADOR thought that the Commission was over-emphasizing the importance of the

form of the draft on the law of treaties. Until the Commission actually had some draft articles before it, it would be premature to decide whether a draft convention would be preferable to a codification. It was true, as the Chairman had correctly stated, that the Commission's general intention seemed to be to draft a convention, but he (Mr. García Amador) doubted whether the text would differ in any essential respect, so far as drafting was concerned, from a code, unless there was some specific definition of the term "code." In his view, a code did not differ essentially from a constitution or from ordinary laws in municipal law. The same held good in international law in the view of most publicists, especially Rousseau, who held that whatever their form, all those international instruments were in effect of a contractual character. For example, the Pan-American Sanitary Code was, in fact, a treaty, although it was called a code.

24. He had noted a tendency to give the Special Rapporteur unduly precise instructions. He had found from his own experience that when a special rapporteur was appointed, he was given a subject, but was left almost completely free to present his own views, and it was only after he had submitted his first report that he received instructions on presentation. That had been true in the particular case of the law of treaties. Professor Lauterpacht's approach had been wholly different from Professor Brierly's; the Commission had not objected. Sir Gerald Fitzmaurice in turn had handled the subject in an entirely different way. Why, therefore, should the new Special Rapporteur be denied the latitude accorded to his predecessors? He should rather present his own views, probably many of them would coincide with those held by the former Special Rapporteurs, but he might well have new ideas.

25. One problem had not been touched on during the discussion. In the past, when considering Professor Brierly's reports, the Commission had debated whether his drafts were applicable, *mutatis mutandis*, to agreements made between international organizations and to those made between international organizations and States. A decision had been deferred, but the new Special Rapporteur might well submit his own views on the subject, and also on the subject of international instruments concluded between States and private persons. He was using the term "international" advisedly. It was a controversial question whether a person could be a subject of international law, but if a treaty or agreement provided that his relations with a State would be governed by international law, it would be interesting to know whether those relations were still also governed by municipal law, as they had been in the past. Such situations existed and some international jurisprudence had grown up around them.

26. The theoretical point had been raised whether treaties could bind States which were not parties to them. Some treaties were valid *erga omnes*. One obvious case was the United Nations Charter, which contained provisions declaratory of international law, in particular Article 2, paragraph 6, which certainly affected States not Members of the United Nations. In addition, some treaties which gave certain rights to non-parties (which

consequently became subject to the corresponding duties) had been upheld in practice.

27. Mr. AMADO could not agree with Mr. García Amador's suggestion that the Special Rapporteur should not be given precise instructions. If the Commission told the Special Rapporteur exactly what it wanted, it would not be making his task more complicated but would, in fact, simplify it.

28. In reply to Mr. Pal, he drew attention to article 15 of the Statute which stated that the expressions "progressive development of international law" and "codification of international law" were used for convenience. The Committee which had prepared the Statute, though composed of qualified lawyers, had found it almost impossible to draw a clear distinction. Under articles 16 and 17 the General Assembly referred to the Commission proposal for the progressive development of international law, whereas under article 18 the Commission took the initiative in codifying the law. It was for the Commission to survey the whole field of international law with a view to selecting topics for codification and to submit its recommendations to the General Assembly when it considered that the codification of a particular topic was necessary or desirable. That was an important recognition of the Commission's standing as a body of experts in international law.

29. Mr. PADILLA NERVO said it seemed to have been generally agreed that the Special Rapporteur should begin his work by preparing articles for a draft convention on the conclusion of treaties. The final decision whether the form should be that of a draft convention or of a code should, however, be taken after the draft articles had been submitted to the General Assembly, which could not make a decision until it had considered the draft and the government comments on it. The only specific decision called for at the moment was that the Special Rapporteur's task for the next year would be to study the conclusion of treaties. The decision on form would be provisional and subject to confirmation, and would not be binding for all aspects of the law of treaties. The Commission itself might find that other aspects of the law of treaties, where the element of progressive development might be more prominent, were more suited to codification.

30. Under article 18, paragraph 3, of its Statute, the Commission was bound to give priority to any specific request from the General Assembly. The Assembly might think it more useful to governments that the Commission should study other aspects of the law of treaties, such as their validity, interpretation and effect on third States, and might not wish to wait for several years before the Commission tackled those aspects. The Commission itself might find that those aspects would be better handled in some other way. Equally, the Assembly might take the view that the subject of State responsibility was of more immediate importance than the law of treaties.

31. A draft convention might not always be the best method of exerting the Commission's moral and political influence. The very broad Universal Declaration of Human Rights had had a great impact on the General

Assembly and even on national policies, but the much more specific draft Covenant on Human Rights had been much less successful because it appeared to be restricting the scope of the Declaration.

32. The distinction between a draft convention and a code was not always entirely clear-cut. It was probable that the new Special Rapporteur would come to conclusions not differing greatly from those reached by Sir Gerald Fitzmaurice. The instructions given to the Special Rapporteur should not be unduly precise and he should be allowed to decide for himself what subjects were more suitable for a draft convention or for a code. It would be sufficient if he were permitted to interpret the opinions expressed during the discussion, and the Commission should preferably defer its final decision on the form until it had seen his texts.

33. Mr. ŽOUREK maintained that a draft convention was the only form appropriate for the treatment of the law of treaties. Its considerable advantages had been mentioned during the discussion. The prospects of success were appreciable, since many practices had already gained general acceptance and there was a real need for an instrument setting out the essential principles governing the law of treaties. The Special Rapporteur should begin work on the conclusion of treaties. As the topic had been on the Commission's agenda since its establishment, the form of a draft convention would enable it to submit a first part to the General Assembly in the near future.

34. With regard to the instructions to be given to the Special Rapporteur, he supported the members who had said that precise instructions would not fetter his freedom of action, but would actually help him. He (Mr. Žourek) knew from his own experience that it was useful for a special rapporteur to know in advance the purpose for which his work was intended, for that determined the form of the draft. A special rapporteur who prepared his draft in a form unacceptable to the majority of the Commission would be unable to alter it during the session in which the draft was discussed. In the particular case of the law of treaties, and no less in the future, the Commission should decide the form in advance. Besides, in that respect the Commission was bound by its Statute. The Special Rapporteur would not be bound with regard to the substance, unless certain decisions by the Commission already existed. Subject to that qualification, he would be entirely free to express his opinions as to substance and as to the method of submitting his work to the Commission.

35. It had been said in debate that in certain circumstances a treaty could bind non-party States. Under the fundamental principles of international law, such a proposition was untenable, for a State could not be bound without its consent. In so far as an international instrument codified customary law, the binding effect of those rules for non-party States was based not on the instrument but on the fact that it enunciated customary law. Many treaties made provision for accession. With regard to the United Nations Charter, several States which were not yet Members of the United Nations had declared their readiness to accept the obligations flowing

from the Charter when requesting admission to the Organization. Accordingly, the Charter should be regarded as forming part of general international law.

36. Sir Humphrey WALDOCK thanked the members for their helpful statements. He had carefully noted all the valuable comments made, although, owing to pressure of time, he would be unable to refer to them in detail.

37. He noted that the Commission wished him to work on the understanding that the draft on the law of treaties would be intended to serve as a basis for a convention. He also noted that the Commission expected him to deal first with the conclusion of treaties and then to proceed as far as he could with the remainder of the topic of the law of treaties.

38. He was grateful to the many colleagues who had expressed the wish that he should not be unduly restricted in his approach to the new draft but he felt there would be no difficulty in the matter. He would have to begin the work again on a new basis but would, of course, take into account the work done by previous special rapporteurs. He would especially have to note those points on which there had been clear-cut expressions of opinion on the part of the Commission itself. That approach still left him a certain freedom in the formulation of the draft articles in the light of the previous work.

39. It would be his aim to prepare a text likely to meet as broad a measure of general approval as possible. In doing so, he would avoid entering into theoretical questions or into issues of detail and reduce the draft articles to those points which could be submitted to States with the expectation of their approval.

40. Since his appointment as Special Rapporteur, several colleagues had indicated to him their preference for a draft convention; he had had occasion to discuss the question with Sir Gerald Fitzmaurice, who had intimated no dissent from that new approach which reflected the general feeling of the Commission.

41. The time factor was not an easy question in regard to the law of treaties. In that respect, he agreed with the Chairman that the Commission should give the General Assembly a clear indication that it was determined to proceed expeditiously with its work on treaties, with a view to completing it in the lifetime of the next Commission. For his part, he would do his utmost to prepare a full draft on the whole subject of the law of treaties within two years. At the same time he pointed out that, owing to the preliminary spade work he would have to do in the first year, probably a larger part of his draft would be produced in the second year than in the first.

42. Mr. BARTOŠ emphasized that custom was a living source of international law. The emergence of sovereign States did not mean that custom had dried up as a source of international law. He could not accept the view that States were only bound by those rules which they had accepted by treaty or which went back to centuries-old international custom.

43. It was true that a convention which had not been ratified did not commit States as such, but it could nevertheless contribute to the formation of a new international custom. Quasi-unanimous approval by States in con-

nexion with the formulation of the text of such a treaty could constitute a process whereby an international custom was established.

44. He had mentioned before the principle, accepted by both the Nürnberg and the Tokyo International Military Tribunals, that certain rules embodied in humanitarian conventions were binding on States which had not ratified those conventions. They were binding as an expression of the legal conscience of mankind.

45. He could mention another way in which treaties could contribute to create rules of customary international law binding on non-party States: certain rules embodied in bilateral treaties had, by reason of their repetition in many similar treaties, come to be regarded as the expression of rules of customary international law.

46. The CHAIRMAN, speaking as a member of the Commission, stressed that neither he nor any other members of the Commission had asserted that there were no rules of international law binding on all States. He had himself spoken of *jus cogens* rules and in his writings had mentioned the fact that the principles of the United Nations Charter were binding on non-member States as an expression of customary international law.

47. Speaking as Chairman, he suggested that, on the basis of the opinions expressed by members, the Commission should take the following decisions:

(i) That the draft articles on the law of treaties would be intended to serve as a basis for a draft convention; that decision was not, of course, a final one;

(ii) To ask the Special Rapporteur to re-examine the articles on the same topic previously discussed by the International Law Commission;

(iii) To ask the Special Rapporteur to begin with the question of the conclusion of treaties and then to proceed with the remainder of the subject of the law of treaties with a view to covering the whole subject in two years if possible.

It was so agreed.

Co-operation with other bodies

(A/CN.4/139)

(Resumed from the 605th meeting, and concluded)

[Agenda item 5]

48. The CHAIRMAN referred to his statement at the end of the previous meeting and invited the Commission to resume its discussion on co-operation with other bodies.

49. Mr. GARCÍA AMADOR introduced his report on the fourth session of the Asian-African Legal Consultative Committee held at Tokyo in February 1961 (A/CN.4/139) and expressed his gratitude to the Commission for having appointed him as its observer to that session.

50. The majority of the topics discussed at the Tokyo session had not been dealt with in the past by the International Law Commission nor did they appear on the Commission's programme of future work. There were, however, a few subjects which had come before both bodies.

51. The Asian-African Legal Consultative Committee had included in its agenda of the fifth session, to be held at Rangoon in February 1962, the subject of the law of treaties and the Committee would probably work on that subject concurrently with the International Law Commission. It had requested its Secretariat to collect background material in order that the subject might be included in the agenda for the fifth or sixth session. So far as the subject of consular immunities and privileges was concerned, the intention was to prepare material for submission to the conference of plenipotentiaries which would examine the International Law Commission's draft on the subject.

52. On the question of State responsibility, the Committee had decided that the subject should be considered within the context of the topic of the status of aliens. In doing so, the Committee had adopted a wise course, because the subject of State responsibility could not be divorced from the circumstances in which the international responsibility of States arose; the examination of the acts or omissions which gave rise to that responsibility necessarily involved questions relating to the substantive law in the matter, in other words questions relating to the status of aliens. It was for that reason that all past codifications had treated State responsibility and the status of aliens as inseparable and even as two aspects of one and the same question.

53. The question of the status of aliens had now come to be identified with that of the essential human rights. It was on the basis of those rights that the concepts of the international standard of justice and that of the equality of treatment of nationals and aliens could possibly be reconciled.

54. The Committee had adopted eighteen articles on the principles concerning the admission and treatment of aliens (*ibid.*, annex 1). Most of those articles dealt explicitly with the status of aliens, but some touched on other aspects of State responsibility as well. For example, article 12 dealt with the question of the compensation payable to aliens in respect of the expropriation or nationalization of their property.

55. Another subject which the Committee had discussed at the Tokyo session and which was connected with the international responsibility of States was that of the legality of nuclear tests. Although no formal decision had been taken apart from that giving the topic priority at the next session, the Committee was manifestly in favour of condemning those tests as illegal in all cases where they were liable to harm health or property.

56. As to its methods of work, the Committee had followed the same practice as the International Law Commission of not limiting its work to the study of purely official or government sources. That approach had produced good results in the past and the Committee had adhered to it, in particular, in regard to the subject of State responsibility; it had decided that the Harvard Draft of 1960 on that subject would be referred to the Committee at its next session for consideration together with any draft articles adopted by the International Law Commission and his own draft.

57. Lastly, he drew attention to that part of his report which explained the importance of the Asian-African Committee, a body called upon to make a valuable contribution to the codification and development of international law. That contribution would be similar in character to that made by the American republics and it would be of special value inasmuch as it constituted the free contribution of the countries of the region concerned and the expression of their own regional system, without outside interference.

58. In view of the importance of the Committee, he urged the Commission to reconsider its decision (597th meeting, para. 10) not to send an observer to the Committee's next session, to be held at Rangoon in February 1962. He had suggested in his report a formula which he believed would permit the Commission to be represented by an observer, notwithstanding the difficulties created by the impending renewal of the Commission's membership. He was not, however, wedded to that formula and would be glad to support any other proposal which would make it possible for the Commission to be represented by an observer at the Rangoon session and would so avoid breaking the continuity of the co-operative relationship established between the two bodies. In that connexion, he recalled that delegations in the Sixth Committee of the General Assembly had urged that co-operation with the Asian-African Committee be maintained in the same manner as with the inter-American bodies, to whose sessions the Commission had always sent observers.

59. The CHAIRMAN read out a letter from Mr. Sabeq, observer for the Asian-African Legal Consultative Committee (AC/N.4/140).

60. Mr. MATINE-DAFTARY thanked Mr. García Amador for his report and for his statement.

61. He agreed that the Commission should reconsider its decision not to send an observer to the Rangoon sessions.

62. The problem raised by the impending change in the Commission's membership could probably be solved by empowering the Chairman to appoint an observer from among the members who would be elected at the General Assembly or to designate the Commission's Secretary as observer, a capacity in which he had acted in the past on several occasions.

63. The CHAIRMAN, speaking as a member of the Commission, said that in view of the letters which he had received from the Secretary of the Asian-African Legal Consultative Committee and from that Committee's observer, he was in favour of the reconsideration of the Commission's decision not to send an observer to the Rangoon session. The Commission should take into consideration the warm invitations addressed to it by the Committee and find some way of being represented by an observer at the Rangoon session.

64. Mr. JIMÉNEZ de ARÉCHAGA also expressed appreciation for the report and statement by Mr. García Amador and agreed that it was important to maintain the continuity of co-operation with regional bodies engaged in similar work.

65. He recalled the suggestion by Mr. Edmonds (597th meeting, para. 9) that the Commission should authorize the Chairman to designate an observer after the elections of members of the Commission had been held. Since the Chairman was a permanent organ of the Commission, it would be wise to adopt that suggestion but he proposed a slight modification, the purpose of which was: (1) not to exclude the Chairman himself from representing the Commission; and (2) not to restrict the choice of an observer, in the event of the Chairman's inability to attend himself, to members from Asian and African countries: the experience of the Tokyo session had shown how valuable it could be for the Commission to be represented by an observer drawn from another region.

66. He therefore proposed that the Commission should ask the Chairman to act as its representative at the Rangoon session, with the indication that, if the Chairman was unable to attend himself, he should ask another member of the Commission or its Secretary to act as observer.

67. Mr. MATINE-DAFTARY supported that proposal, which coincided with his own.

68. Mr. GARCÍA AMADOR referred to the passages in the letter from the observer for the Asian-African Legal Consultative Committee which dealt with the question of the status of aliens.

69. He wished to clarify that it was not his role to interpret the Committee's decisions, nor had he attempted in any way to do so. He had merely reproduced in his report the actual decisions adopted by that Committee, and the text of the articles approved by it. The interpretation of those decisions and of those articles was a matter for the Committee itself; the views by one of its members would represent an interpretation by that member.

70. Mr. BARTOŠ supported the proposal of Mr. Jiménez de Aréchaga.

71. The CHAIRMAN said that since it seemed that the Commission was unanimous in supporting the proposal of Mr. Jiménez de Aréchaga, there was no need for a formal decision on the reconsideration of the earlier decision on the subject of the Rangoon meeting. He would therefore take it that the Commission agreed to that proposal.

It was so agreed.

The meeting rose at 1.15 p.m.

622nd MEETING

Friday, 30 June 1961, at 10 a.m.

Chairman : Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-11; A/CN.4/317)
(resumed from the 619th meeting)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING (*continued*)

ARTICLE 13 (formerly article 17) (Precedence)

1. The CHAIRMAN invited the Commission to continue its consideration of the text of the draft articles prepared by the Drafting Committee.

2. The Drafting Committee proposed the insertion of the following paragraph 5 after paragraph 4 of article 13 as adopted at the 618th meeting (para. 14):

"5. Honorary consuls who are heads of post shall rank in each class after career heads of post, in the order and according to the rules laid down in the foregoing paragraphs."

3. The last paragraph of the article would then be renumbered as paragraph 6.

The proposal was adopted.

ARTICLE 42 (formerly article 43) (Exemption from obligations in the matter of registration of aliens and residence and work permits)

4. The CHAIRMAN pointed out that the language of the articles proposed by the Drafting Committee occasionally departed from that of the corresponding provision of the Vienna Convention on Diplomatic Relations. Sometimes the English text coincided with the Vienna text but the French did not; in other places, the reverse was the case.

5. He proposed that the Commission should instruct the Drafting Committee to compare the English and French texts and ensure that they both corresponded to the Vienna text.

The proposal was adopted.

6. The CHAIRMAN said that the Drafting Committee proposed the following text for article 42:

"1. Members of the consulate, members of their families forming part of their households and their private staff shall be exempt from all obligations under the laws and regulations of the receiving State in regard to the registration of aliens and residence permits.

"2. The persons referred to in paragraph 1 of this article shall be exempt from any obligations in regard to work permits imposed either on employers or on employees by the laws and regulations of the receiving State concerning the employment of foreign labour."

Article 42 was adopted.

ARTICLE 43 (formerly article 44)
(Social security exemption)

7. The CHAIRMAN said that the Drafting Committee

proposed the following text for article 43:

"1. Subject to the provisions of paragraph 3 of this article, the members of the consulate shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the receiving State.

"2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consulate, on condition.

"(a) That they are not nationals of or permanently resident in the receiving State; and

"(b) That they are covered by the social security provisions which are in force in the sending State or a third State.

"3. Members of the consulate who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall be subject to the obligations which the social security provisions of the receiving State impose upon employers.

"4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving State, provided that such participation is permitted by that State."

8. Mr. EDMONDS said that he could not understand the purpose of paragraph 2 (b). Surely, it was immaterial to the receiving State whether members of the private staff were covered by the social security provisions in force in the sending State or in a third State.

9. The CHAIRMAN explained that the provision in question was similar to the corresponding one in article 33 of the Vienna Convention.

Article 43 was adopted.

ARTICLE 44 (formerly article 45)
(Exemption from taxation)

10. The CHAIRMAN said that the Drafting Committee proposed the following text for article 44:

"1. Members of the consulate, with the exception of the service staff, and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, save

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

"(b) Dues and taxes on private immovable property situated in the territory of the receiving State, unless held by a member of the consulate on behalf of the sending State for the purposes of the consulate;

"(c) Estate, succession or inheritance duties, and duties on transfers, levied by the receiving State, subject, however, to the provisions of article 46 concerning the succession of a member of the consulate or of a member of his family;

"(d) Dues and taxes on private income having its source in the receiving State and capital taxes relating to investments made by them in commercial or financial undertakings in the receiving State;

"(e) Charges levied for specific services rendered;

"(f) Registration, court or record fees, mortgage due;

and stamp duty, subject to the provisions of article 28.

"2. Members of the service staff and members of the private staff who are in the sole employ of members of the consulate shall be exempt from dues and taxes on the wages which they receive for their services."

Article 44 was adopted.

ARTICLE 45 (formerly article 46)
(Exemption from customs duties)

11. The CHAIRMAN said that the Drafting Committee proposed the following text for article 45:

"1. The receiving State shall, under the conditions laid down by its laws and regulations, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

"(a) Articles for the official use of a consulate of the sending State;

"(b) Articles for the personal use of consular officials and of members of their families forming part of their households, including articles intended for their establishment.

"2. Members of the administrative and technical staff shall enjoy the immunities specified in paragraph 1 of this article in respect of articles imported at the time of first installation."

12. The CHAIRMAN, speaking as a member of the Commission, proposed that paragraph 1 be brought into line with the corresponding paragraph of article 36 of the Vienna Convention. He saw no reason for replacing the words "The receiving State shall, in accordance with such laws and regulations as it may adopt" by the somewhat broader language: "The receiving State shall, under the conditions laid down by its laws and regulations." The change actually affected the substance of the provision.

13. He was also concerned with the absence of a provision on the subject of articles the import or export of which was prohibited by the law or controlled by the quarantine regulations of the receiving State. A reference to that question had been included in article 36 of the Vienna Convention in the form of an exception to the rule set forth in paragraph 2 that the personal baggage of a diplomatic agent was exempt from customs inspection. The main provision did not, of course, occur in the draft under study because the personal baggage of consuls enjoyed no such exemption. Unfortunately, in dropping the main provision, the Drafting Committee had also dropped the reference to prohibited imports or exports.

14. Mr. PAL pointed out that if the Chairman's proposal for the amendment of paragraph 1 were adopted, the words "in accordance with such laws and regulations as it may adopt" would cover the question of prohibited exports or imports. The receiving State could adopt laws and regulations prohibiting certain imports or exports.

15. Mr. AGO, speaking as the Chairman of the Drafting Committee, explained that the Committee had found

the language of article 36, paragraph 1, of the Vienna Convention unsatisfactory, particularly in French, and had therefore tried to improve upon it. He suggested that the improved language be retained and that, in order to meet the point raised by the Chairman, the words "and subject to the limitations" be inserted between the words "the conditions" and "laid down by its laws".

16. Mr. BARTOŠ explained that the purpose of the provisions of paragraph 1 of article 36 of the Vienna Convention was to draw a distinction between customs duties and taxes proper, from which the diplomatic agent was exempt, and charges for, e.g., storage and cartage from which the diplomatic agent was not exempt.

17. Article 36, paragraph 2, of the Vienna Convention had been introduced at the request of the delegations of the United States of America and of a number of countries of Asia and Africa interested in the suppression of the illicit traffic of drugs and works of art.

18. He agreed with the Chairman that there was no valid reason for departing from the text adopted at Vienna.

The Chairman's proposal was adopted.

19. Mr. ŽOUREK, Special Rapporteur, said that the expression "members of the administrative and technical staff" which occurred in paragraph 2 was not used anywhere else in the draft. Since that expression was not defined in article 1, he proposed that it should be replaced by a reference to "consular employees other than members of the service staff".

20. The CHAIRMAN suggested that article 45 should be referred back to the Drafting Committee with instructions to bring paragraph 1 into line with the corresponding provision of the Vienna Convention and to amend paragraph 2 as proposed by the Special Rapporteur.

It was so agreed.

ARTICLE 46 (formerly article 47) (Estate of a member of the consulate or of a member of his family)

21. The CHAIRMAN said that the Drafting Committee proposed the following text for article 46:

"In the event of the death of a member of the consulate or of a member of his family, the receiving State

"(a) Shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the country the export of which was prohibited at the time of his death;

"(b) Shall not levy estate, succession or inheritance duties on movable property the presence of which in the receiving State was due solely to the presence in that State of the deceased as a member of the consulate or as a member of the family of a member of the consulate."

Article 46 was adopted.

ARTICLE 47 (formerly article 48)
(Exemption from personal services and contributions)

22. The CHAIRMAN said that the Drafting Committee proposed the following text for article 47:

"The receiving State shall exempt members of the consulate, other than the service staff, and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting."

23. Mr. ŽOUREK, Special Rapporteur, said that the expression "public service," the meaning of which was clear in English, had been rendered in the French text of the draft as *service d'intérêt général* in preference to the term *service public* used in article 35 of the Vienna Convention. The reason for the change was that the term *service public* had a very definite meaning in French public law, quite different from that in which it was used in the article. It could not be used to denote for example the services required of citizens in cases of fire and other disasters.

24. Mr. AMADO said that the words *intérêt général* did not convey the required meaning.

25. The CHAIRMAN said that, since the words *service public* were used in the French text of the Vienna Convention, known to be a translation of the original English text on which the Drafting Committee of the Vienna Conference had worked, there was no reason to depart from that text.

26. Sir Humphrey WALDOCK suggested that the French text of article 47 should be brought into line with the corresponding provision of the Vienna Convention; it would be explained in the commentary that the Commission would have preferred to use another French expression but had decided to adhere to the Vienna text. For the purpose of the interpretation of the draft both the French and the English texts could be consulted, and the English would make the intention clear.

27. The CHAIRMAN said that, if there were no objection, he would consider that the Commission wished to adopt article 47, amended in the French text as suggested by Sir Humphrey Waldock.

Article 47, as amended, was adopted.

ARTICLE 48 (formerly article 49) (Question of the acquisition of the nationality of the receiving State)

28. The CHAIRMAN said that the Drafting Committee proposed the following text for article 48.

"Members of the consulate and members of their families forming part of their households shall not, solely by the operation of the law of the receiving State acquire the nationality of that State."

Article 48 was adopted.

ARTICLE 49 (formerly article 51)
(Beginning and end of consular privileges and immunities)

29. The CHAIRMAN said that the Drafting Committee proposed the following text for article 49:

"1. Every member of the consulate shall enjoy the privileges and immunities provided in the present articles from the moment he enters the territory of the receiving State on proceeding to take up his

post, or if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry.

"2. Persons who are members of the family forming part of the household or of the private staff of a member of the consulate shall enjoy the privileges and immunities provided in the present articles from the moment they enter the territory of the receiving State. If they are in the territory of the receiving State at the time of joining the household or entering the service of a member of the consulate, privileges and immunities shall be enjoyed from the moment when the name of the person concerned is notified to the Ministry for Foreign Affairs or to the authority designated by that Ministry.

"3. When the functions of a member of the consulate have come to an end, his privileges and immunities together with those of the persons referred to in paragraph 2 of this article shall normally cease at the moment when the persons in question leave the country, or on the expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. The same provision shall apply to the persons referred to in paragraph 2 above, if they cease to belong to the household or to be in the service of a member of the consulate.

"4. However, with respect to acts performed by a member of the consulate in the exercise of his functions, his personal inviolability and immunity from jurisdiction shall continue to subsist without limitation of time.

"5. In the event of the death of a member of the consulate, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them, until the expiry of a reasonable period enabling them to leave the territory of the receiving State."

30. After a discussion concerning the use of the term *foyer* in the draft (rather than *ménage*, which was used in the Vienna Convention), the CHAIRMAN suggested that article 49 should be adopted as drafted and that the commentary should explain why the Commission's draft differed from the Vienna Convention in that respect.

It was so agreed.

ARTICLE 50 (formerly article 52)
(Obligations of third State)

31. The CHAIRMAN said that the Drafting Committee proposed the following text for article 50:

"1. If a consular official passes through or is in the territory of a third State, which has granted him a visa if a visa was required, while proceeding to take up or return to his post or when returning to his own country, the third State shall accord to him the personal inviolability and such other immunities provided for by these articles as may be required to ensure his transit or return. The third State shall accord like treatment to the members of his family enjoying privileges and immunities who are accom-

panying the consular official or travelling separately to join him or to return to their country.

"2. In circumstances similar to those specified in paragraph 1 of this article, third States shall not hinder the transit through their territory of other members of the consulate or of members of their families.

"3. Third States shall accord to correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as are accorded by the receiving State. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving State is bound to accord.

"4. The obligations of third States under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third State is due to *force majeure*."

32. Mr. ŽOUREK, Special Rapporteur, said that he had some doubts about the wisdom of combining in paragraph 1 what had been two separate paragraphs in the 1960 text, for the second sentence might be misinterpreted to mean that members of a consular official's family were entitled to personal inviolability while in transit through a third State. Some drafting changes were probably needed.

Article 50 was adopted, subject to drafting changes.

ARTICLE 51 (formerly article 53) (Respect for the laws and regulations of the receiving State)

33. The CHAIRMAN said that the Drafting Committee proposed the following text for article 51:

"1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

"2. The consular premises shall be used exclusively for the exercise of consular functions as specified in the present articles or in other rules of international law. In particular, they shall not be used as asylum for persons convicted or prosecuted by the authorities of the receiving State.

"3. The rule laid down in paragraph 2 of this article shall not exclude the possibility of the offices of an official mission of the sending State to an international intergovernmental organization being installed in the consular premises.

"4. Similarly, the rule laid down in paragraph 2 above shall not exclude the possibility of offices of other institutions or agencies being installed in the consular building or premises, provided that the premises assigned to such offices are separate from those used by the consulate. In that event, the said offices shall not, for the purposes of these articles be deemed to form part of the consular premises."

34. Mr. JIMÉNEZ de ARÉCHAGA said that he could

only agree to the second sentence in paragraph 2 on the understanding that it would not prejudice the use of consular premises for the purpose of lodging persons who had been duly accorded diplomatic asylum.

35. Mr. ŽOUREK, Special Rapporteur, suggested that it might not be advisable to include the second sentence in paragraph 2, which could raise serious objections and also lead to misinterpretation, since the matter of asylum was not dealt with in the Vienna Convention.

36. The CHAIRMAN, speaking as a member of the Commission, said that he had voted in favour of the inclusion of that sentence (604th meeting, para. 94) and as to substance he continued to support it. But it would be preferable not to depart from the Vienna Convention and not to deal with the question of asylum in the convention, in order to avoid possible misinterpretation.

37. Mr. PADILLA NERVO agreed with the Chairman. The language of the first sentence was strong enough and it was not necessary to single out one of the possible misuses of consular premises for special mention.

38. Mr. AGO considered that the second sentence in paragraph 2 had become redundant in consequence of the amendment of the first: it should therefore be deleted.

39. Mr. BARTOŠ disagreed. He was convinced that the omission of the sentence in question would constitute a serious obstacle for some States to ratification. He would prefer the Commission not to pronounce on the question and either to include the sentence in square brackets in the article itself or to specify in the commentary that opinion on the matter had been divided.

40. Mr. AMADO said that he was unable to agree with Mr. Bartoš's suggestion as he fully shared the views expressed by the speakers who had preceded him.

41. In Latin American countries, when there was no room in the premises of a diplomatic mission to provide asylum for victims of political persecution, consular premises were sometimes used for the purpose.

42. Mr. YASSEEN agreed with the reasons given by the Chairman for the deletion of the sentence but thought there would be no harm in mentioning the problem in the commentary.

43. Mr. MATINE-DAFTARY asked whether there existed any provision in Latin American regional conventions allowing consular premises to be used for purposes of giving asylum.

44. Mr. PAL said it would be preferable not to mention the question of asylum and to frame the first sentence of paragraph 1 in the negative form on the model of article 41, paragraph 3, of the Vienna Convention.

45. Mr. AGO said that the wording of article 41, paragraph 3, was by no means satisfactory and the prohibition of improper use should be expressed in far stronger language in the case of consular premises because the possibility of abuse was greater than in that of the diplomatic mission's premises.

46. Mr. GARCÍA AMADOR said, in reply to Mr. Matine-Daftary, that the judgments of the International Court of Justice in the Asylum case (Colombia v. Peru),¹ had been severely criticised on the ground that the Court had relied too much on conventional law. The rules of asylum were governed by several conventions, some of a general character, between Latin American countries, and by practice which for humanitarian reasons tended to be very liberal. Different places were used to provide asylum for victims of persecution, and he would be opposed to any provision incompatible with a liberal practice which was becoming more and more universal in the continent where even European embassies and legations were providing asylum. The need for asylum would continue as long as régimes of terror existed.

47. Mr. SANDSTRÖM thought it preferable to make no mention of the problem of asylum which, in any event, had been chosen by the General Assembly as a topic for codification and would presumably, at some stage, be considered by the Commission (A/4425, chapter IV, para. 39).

48. The CHAIRMAN, speaking as a member of the Commission, suggested that the second sentence in paragraph 2 should be deleted for the sake of conformity with the Vienna Convention. An explanation could be inserted in the commentary as to the two opposing views voiced in the Commission.

49. Mr. JIMÉNEZ de ARÉCHAGA supported the deletion of the second sentence in paragraph 2.

50. In reply to the question of Mr. Matine-Daftary, he stated that under existing conventions political asylum could be given in the premises of diplomatic missions, sometimes in warships and in military establishments. The inference was, therefore, that political refugees could not be given asylum in consular premises. The Havana Convention regarding consular agents² precluded any form of asylum in consulates.

51. There was however, a body of opinion which favoured an extension of the right of asylum so that it could be granted by consuls and that view was not only held by Latin American lawyers but had also been put forward in the Institute of International Law by Sir Eric Beckett in 1950. It had not as yet found expression in any international instrument.

52. The reason for his objection to the second sentence of paragraph 2 was that consular premises were quite frequently used to accommodate political refugees who had been granted asylum by a diplomatic agent. That was particularly true in cases where there was a large number of such refugees, not necessarily in the capital of the country. For example, during the Spanish Civil War asylum had been granted on the authority of heads of diplomatic missions but provided in consular premises at Barcelona. As drafted, the second sentence in para-

graph 2 would rule out that perfectly legitimate application of the principle of diplomatic asylum, and since the Commission had decided not to deal with the problem it would be preferable to make no mention of it.

53. Sir Humphrey WALDOCK, Mr. BARTOŠ and Mr. ERIM agreed with the course suggested by the Chairman (para. 48 above).

The second sentence of article 51, paragraph 2 was deleted, on the understanding that the commentary would explain that opinion in the Commission had been divided.

54. Mr. FRANÇOIS observed that the substance of paragraph 3 had not appeared in the original draft of article 53 in the 1960 text. It might perhaps be included in paragraph 4. To give the offices of an official mission of the sending State to an international intergovernmental organization a form of inviolability might prejudice the future regulation of the subject.

55. Mr. ŽOUREK, Special Rapporteur, explained that the addition had seemed necessary because the Drafting Committee — despite his objection — had altered the text of article 53, paragraph 2, of the 1960 draft. The text of article 41, paragraph 3, of the Vienna Convention had reproduced the 1960 text, with the addition of the phrase “or by any special agreements in force between the sending and receiving State”. The new paragraph was required because, especially in New York and Geneva, consuls might be appointed to represent the sending State vis-à-vis international organizations. That was not, however, strictly a consular function, and in the absence of an express provision, it might appear that the consular premises could not be used for that purpose, in view of the stipulation that they were to be used exclusively for the exercise of consular functions (new article 51, paragraph 2).

56. Mr. FRANÇOIS replied that it seemed unnecessary to make special provisions for such circumstances. The provision in paragraph 4 might well apply to them.

57. Sir HUMPHREY WALDOCK observed that he had understood that the provision concerning representation in an international intergovernmental organization was to be inserted in article 14 (Performance of diplomatic acts by the head of a consular post).

58. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had indeed suggested an additional paragraph for draft article 14, reading:

“A head of consular post or other consular official may act as representative of the sending State to any international organization.”

59. The reason why the same restriction (“provided that...”) was not stipulated in paragraph 3 as in paragraph 4 was that, whereas the activity referred to in paragraph 3 was not strictly part of the consular function, it would be unreasonable to demand that a separate room be reserved for it; by contrast, the activities described in paragraph 4 were not activities of the consulate but of other institutions or agencies, such as travel agencies, which were quite distinct from the consulate. The legal situation was therefore quite different

¹ ICJ Reports 1950, pp. 266 *et seq.* and 1951, pp. 71 *et seq.*

² *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 422.

in the two cases. It might, however, be better to defer further consideration of paragraph 3 for the moment and to consider it in connexion with the additional paragraph for draft article 14.

60. The CHAIRMAN, speaking as a member of the Commission, complained that the Drafting Committee had unnecessarily complicated the matter. It had not been fully discussed by the Commission, which had merely suggested that the Drafting Committee should consider how the draft article might be brought into line with article 41, paragraph 3, of the Vienna Convention. If that idea were accepted, paragraph 3 would be unnecessary because representation in an international intergovernmental organization was not incompatible with the exercise of consular functions. If, however, paragraph 2 stated that the consular premises should be used exclusively for the exercise of consular functions, further provisions would be required. It would, therefore, be preferable to delete paragraphs 2 and 3 and substitute for them an adaptation of article 41, paragraph 3, of the Vienna Convention.

61. Mr. AMADO also thought that the expression "must not be used in any manner incompatible" should be used in paragraph 2. The provision in paragraph 3 was of doubtful value, if not actually dangerous.

62. Sir Humphrey WALDOCK observed that paragraph 3 had been prepared by the Drafting Committee before it had considered the additional paragraph for draft article 14. The Drafting Committee had decided that representation in an international intergovernmental organization should be dealt with at that place as a function analogous to the performance of diplomatic acts by the head of a post. If the additional paragraph for draft article 14 was adopted, draft article 51, paragraph 3, would be unnecessary. The Special Rapporteur might reconsider the matter when the Commission had considered the new proposal for draft article 14. There had, in fact, been a lengthy discussion on the question of the word "incompatible" and some dismay had been expressed because it had been found to lend itself to varying interpretations. Mr. Ago had tried to remove the ambiguity. That was the more necessary because the opportunities for abuse were far greater in the case of consulates than in the case of diplomatic missions.

63. The CHAIRMAN, speaking as a member of the Commission, said that he doubted the advisability of deferring consideration of paragraph 3, since the Commission had still a great deal of work before it. There seemed to be no good reason for departing from the formulation in article 41, paragraph 3, of the Vienna Convention, unless there were additional points to be covered; but that was not so. Any departure from the Vienna Convention might be dangerous.

64. Mr. JIMÉNEZ de ARÉCHAGA supported the proposal to return to the language used in the Vienna Convention. Although paragraph 2 was now unambiguously worded, it might be too restrictive. It even raised the question whether a consul might sleep on the consular premises.

65. Mr. FRANÇOIS supported Mr. Ago's objection to the term "incompatible". A consulate might have several functions. It would be best to defer a decision until the Commission had discussed the additional paragraph proposed for article 14.

66. Mr. PAL considered that the wording of the Vienna Convention should be used, which was in any case very close to that of article 53, paragraph 2, of the 1960 text. He did not remember that the wording of that article had given rise to any particular comment and could not, therefore, see why the question was being raised at that stage.

67. Sir Humphrey WALDOCK observed that there had been considerable discussion on the word "incompatible" in connexion with article 54 (formerly article 53), paragraph 2, on a point raised by Mr. Ago (606th meeting, paras. 28 *et seq.*). It had been only at the end of that discussion that he had suggested (*ibid.*, para. 39) that the Drafting Committee should be asked to make the text of article 53, paragraph 2, more explicit.

68. Mr. AGO said that the question had been raised and discussed at length and the whole system had now been based on a much stricter rule, which stated that the consular premises should be used for the exercise of consular functions exclusively, not merely in any manner incompatible with consular functions. If that notion were abandoned, much more serious difficulties would arise in connexion with the clauses relating to honorary consuls. In that case, it would have to be stipulated that the consular office must be completely separate from all the other offices on the premises and inviolability would apply solely to the room used exclusively for the exercise of consular functions. It would be wrong to introduce differences between ordinary and honorary consuls. There were many activities that were not incompatible with consular functions: "incompatible" did not simply mean "other". The case of embassies covered by the Vienna Convention was quite different from that of consulates.

69. The CHAIRMAN, speaking as a member of the Commission, said that it might be possible to accept the term "exclusively" in connexion with honorary consuls, whose position differed in many ways from that of career consuls. He did not see the need to cover any points not covered by the wording of the Vienna Convention. "Incompatible" might not be the best possible word, but if members of the Commission were asked what other points had been covered by the departure from the wording of the Vienna Convention, they would be hard put to it to answer. It was not clear whether the intention was to impose greater restrictions on consulates. If so, special provisions would be required to cover representation in international organizations or at conferences, or even sleeping on the premises.

70. Mr. AMADO said that the Chairman had expressed his own firm view that the word "incompatible" was the appropriate one. A diplomatic mission might come, for instance, to a city where there was a consulate and meet on the premises. It could not do so, however, if those premises had to be used exclusively for the exercise

of consular functions. The text of article 41, paragraph 3, of the Vienna Convention provided an excellent model.

71. Mr. BARTOŠ supported the Drafting Committee's text. Consulates should be given more freedom than diplomatic missions, since the latter enjoyed complete inviolability as representing States. A consulate, however, might be engaged in many activities which were not strictly part of the consular function, so long as they were not incompatible with it. The Drafting Committee had correctly stated the existing practice. It would therefore be impossible to retain the language of the Vienna Convention, for a diplomatic mission was not at all in the same position as a consulate, and the other institutions or agencies installed in the consular premises had a legal status differing from that of the consulate, as stated in paragraph 4.

72. Mr. AMADO said that, in any case, he could not accept paragraph 4 because it was quite impossible to dictate to the owners of a large block of offices how they should use it. Paragraph 4 would apply only if the building was owned by the consulate.

73. The CHAIRMAN drew Mr. Amado's attention to the definition of consular premises in article 1(j) (616th meeting, para. 50), which referred to the buildings or parts of buildings used for the purposes of the consulate. Paragraph 4 might indeed be deleted, as the point was covered in the definition.

74. Mr. AGO said that if paragraph 2 stipulated that the consular premises should be used exclusively for the exercise of consular functions, paragraph 4 would be needed; but if paragraph 2 were modelled on article 41, paragraph 3, of the Vienna Convention, paragraph 4 would not be needed.

75. Mr. SANDSTRÖM asked what would be the effect on the inviolability of the consulate in either case and whether it would disappear if the provisions of article 51 were infringed.

76. Mr. ŽOUREK, Special Rapporteur, replied that the point was dealt with in commentary (3) on article 53 of the 1960 draft, and the Commission had accepted that commentary.

77. Paragraph 4 should be retained owing to the definition of consular premises. If consular premises were used by an agency which was not the consulate, express provision must be made.

78. He had from the outset had doubts about the advisability of changing the wording of the 1960 text, which was also used in the Vienna Convention. If paragraph 2 was to be unduly restrictive, another paragraph would then be required allowing exceptions, e.g. allowing office space to be used by an official mission of the sending State to an international intergovernmental organization or by an *ad hoc* diplomatic mission. In his opinion, the wording of the 1960 text and the Vienna Convention was, therefore, preferable by far.

79. Mr. JIMÉNEZ de ARÉCHAGA said that the discussion of paragraph 2 had been complicated by references to paragraph 4. Paragraph 4 should be retained, whatever the formulation used in paragraph 2, since

it served a different purpose. If Mr. Ago's formula (para. 74 above) was adopted, it would be necessary to define what was meant by "consular premises" as used in paragraph 2. If the 1960 text was retained, it would have to be explained that the premises used by the other agencies referred to in paragraph 4 did not enjoy inviolability. The word "exclusively" in paragraph 2 was unduly restrictive and would require a long list of exceptions, which the Commission had not the time to compile. The wording of the Vienna Convention should therefore be retained in paragraph 2 and the 1960 text for paragraph 4.

80. The CHAIRMAN said that the decision on article 51 would be deferred until the following meeting.

Message to Mr. Gros

81. Mr. AGO said that he had paid a visit in hospital to Mr. Gros, who had been hurt in a motoring accident that morning. Mr. Gros had not been badly hurt, but had preferred to go to Paris for hospitalization and had expressed his regret that he would be unable to attend during the remainder of the session.

82. The CHAIRMAN suggested that he should be authorized to convey the Commission's sympathy to Mr. Gros and its best wishes for his speedy recovery.

It was so agreed.

The meeting rose at 1.5 p.m.

623rd MEETING

Monday, 3 July 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137) (continued)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING (continued)

1. The CHAIRMAN invited the Commission to continue its second reading of the draft articles prepared by the Drafting Committee.

ARTICLE 51 (formerly article 53) (Respect for the laws and regulations of the receiving State) (continued)

2. The CHAIRMAN, referring to the discussion at the previous meeting, said that as some doubts had been expressed about the advisability of redrafting paragraph 2 on the lines of articles 41, paragraph 3, of the Vienna Convention on Diplomatic Relations and of omitting paragraph 3 he would put the proposal for such amendment to the vote.

The proposal was adopted by 6 votes to 2, with 5 abstentions.

Paragraph 4 was adopted.

3. Mr. PADILLA NERVO asked whether he was right in thinking that the institutions or agencies referred to in paragraph 4 must be those of the sending State.

4. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had not wished to mention the sending State in paragraph 4 because to mention that State might imply that it referred to institutions and agencies of the State, whereas in fact in most cases they would be private ones. However, it was true that in most cases they would be bodies constituted according to the law and having the nationality of the sending State, and hence subject to its law.

5. Mr. SANDSTRÖM said that that interpretation was borne out by the proviso at the end of the first sentence of the paragraph.

6. Mr. BARTOŠ said that the Special Rapporteur's statement did not correspond to practice. The institutions or agencies in question had to be registered in the receiving State and were subject to its legislation. It would be undesirable to enter into the thorny problem of their nationality, but it was clear from the text that they would be bodies such as travel agencies or cultural organizations, concerned to promote the interests of the sending State. The important point was that they could not enjoy immunity from the jurisdiction of the receiving State.

7. Mr. ŽOUREK, Special Rapporteur, emphasized that the sole link of the bodies in question with the sending State might be that the parent body was constituted according to the law of that State. A subsidiary situated in the receiving State was, of course, subject to that State's laws and regulations. But contrary to what Mr. Bartoš thought, the bodies in question were not necessarily formed as subsidiaries. They might well be undertakings of the sending State itself. He doubted very much whether it would be possible to render the text more specific.

8. Mr. PADILLA NERVO observed that the point should be clarified at least in the summary record because paragraph 4 contained an exception to the rule stated in paragraph 2. As it stood, paragraph 4 did not necessarily exclude offices of institutions or agencies of a third State being installed in a consular building or premises.

9. The CHAIRMAN considered that all members who had taken part in the discussion were agreed that such institutions or agencies should have some connexion with the sending State but in any case the premises assigned to the offices in question would not be entitled to the benefit of any privileges or immunities.

Article 51, as amended, was adopted, subject to drafting changes.

ARTICLE 51 *bis* (formerly article 63) (Optional character of the institution of honorary consular officials)

10. The CHAIRMAN said that the Drafting Committee proposed the following text for article 51 *bis*:

" Each State is free to decide whether it will appoint or receive honorary consular officials."

11. Sir Humphrey WALDOCK suggested that the question where the important general provision contained in article 51 *bis* should be placed in the draft might be left to the Drafting Committee.

It was so agreed.

Subject to the settlement of the question of its position in the draft, article 51 bis was adopted.

ARTICLE 52 (formerly article 54)

(Provisions applicable to honorary consular officials)

12. The CHAIRMAN said that the Drafting Committee proposed the following text for article 52:

" 1. Articles 25, 26, 30, 31, 32, 33, 34, 35, 36, 38, paragraph 3, articles 39, 40, 41, paragraph 3, article 45 (with the exception of paragraph 1 (b)) and article 49 of chapter II concerning the facilities, privileges and immunities of career consular officials and consular employees shall likewise apply to honorary consular officials.

" 2. In addition, the facilities, privileges and immunities of honorary consular officials shall be governed by the subsequent articles of this chapter."

13. Mr. MATINE-DAFTARY said that he would prefer the word *statut* to the word *régime* in the French text of the title.

14. Sir Humphrey WALDOCK said that the article dealt with the general régime governing consulates directed by honorary consuls rather than with the status of such officials.

15. Mr. ŽOUREK, Special Rapporteur, explained that the title had been chosen by the Drafting Committee because paragraph 1 of the former article 54 of the 1960 draft had been dropped.

16. Sir Humphrey WALDOCK suggested that nevertheless the Drafting Committee might be requested to review the title of the article.

It was so agreed.

Subject to reconsideration of the title, article 52 was adopted.

ARTICLE 53 (formerly article 54 *ter*)

(Inviolability of the consular premises)

17. The CHAIRMAN said that the Drafting Committee proposed the following text for article 53:

" The premises of a consulate headed by an honorary consul shall be inviolable, provided that they are used exclusively for the exercise of consular functions. In this case, the agents of the receiving State may not enter the premises except with the consent of the head of post."

Article 53 was adopted.

ARTICLE 54 (formerly article 54 *quatuor*)

(Exemption from taxation of consular premises)

18. The CHAIRMAN said that the Drafting Committee proposed the following text for article 54:

" 1. The sending State and the head of post shall be

exempt from all national, regional and communal dues and taxes of any kind in respect of consular premises used exclusively for the exercise of consular functions, whether the premises are owned or leased by them, except in the case of dues or taxes representing payment for specific services rendered.

"2. The exemption from taxation provided for in paragraph 1 of this article shall not apply to such dues and taxes payable under the law of the receiving State by the person who has contracted with the sending State or with the head of the consular post."

19. Mr. EDMONDS said that as he had stated before (596th meeting, para. 10) it was the property of the sending State that was exempt from taxation, not the sending State or the head of post. The wording of paragraph 1 did not conform to the practice of the United States of America.

Article 54 was adopted.

ARTICLE 55 (Inviolability of consular archives and documents)

20. The CHAIRMAN said that the Drafting Committee proposed the following text for article 55:

"The consular archives and documents of a consulate headed by an honorary consul shall be inviolable at any time and wherever they may be, provided that they are kept separate from the private correspondence of the head of post and of any person working with him, and also from the materials, books or documents relating to their profession or trade."

Article 55 was adopted.

ARTICLE 56 (Special protection)

21. The CHAIRMAN said that the Drafting Committee proposed the following text for article 56:

"The receiving State is under a duty to accord to an honorary consular official special protection by reason of his official position."

22. Mr. EDMONDS criticized the expression "special protection" as excessively vague.

23. Mr. ŽOUREK, Special Rapporteur, explained that, as in the case of career consuls, the special protection in question was greater than that normally accorded by the receiving State to all residents. In particular, the article meant the protection accorded during times of tension or civil disturbance, when the life or dignity of an honorary consul might be threatened by the mere fact of his official position. He had suggested to the Drafting Committee that the article should be amplified in that sense, but the Committee had decided against any special mention of emergency situations, in order that the provision should not convey the impression that such cases were normal occurrences in the course of the exercise of consular functions.

24. Mr. AMADO deplored the use of such vague language which was bound to provoke controversy and doubt. The protection in question was due to the honorary consul by virtue of his official position, and that should be made clear in the text.

25. Mr. ŽOUREK, Special Rapporteur, said that he had sought to explain what was meant by special protection in paragraph (2) of the commentary to the 1960 text of article 39 which dealt with the same matter but in regard to career consuls. It was not easy to be more precise, as the kind of situation in which special protection would be needed could not be foreseen.

26. Mr. SANDSTRÖM observed that diplomatic agents and consular officials were entitled to such additional protection as having guards posted in front of their premises; besides, heavier penalties were imposed on persons who disturbed the peace outside such buildings. The point had been discussed at length in connexion with the draft on diplomatic intercourse.

27. The CHAIRMAN suggested that the Drafting Committee be requested to review the text of article 56 for purposes of rendering it more specific.

It was so agreed.

ARTICLE 57 (Exemption from obligations in the matter of registration of aliens and residence permits)

28. The CHAIRMAN said that the Drafting Committee proposed the following text for article 57:

"Honorary consular officials, with the exception of those who carry on a gainful private activity, shall be exempt from all obligations imposed by the laws and regulations of the receiving State in the matter of registration of aliens and residence permits."

Article 57 was adopted.

ARTICLE 58 (Exemption from taxation)

29. The CHAIRMAN said that the Drafting Committee proposed the following text for article 58:

"An honorary consular official shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending State in respect of the exercise of consular functions."

Article 58 was adopted.

ARTICLE 59 (Exemption from personal services and contributions)

30. The CHAIRMAN said that the Drafting Committee proposed the following text for article 59:

"The receiving State shall exempt honorary consular officials from all personal services and from all public service of any kind whatever and also from military obligations such as those connected with requisitioning, military contributions and billeting."

Article 59 was adopted.

ARTICLE 60 (formerly article 60 *bis*) (Obligation of third States)

31. The CHAIRMAN said that the Drafting Committee proposed the following text for article 60:

"Third States shall accord to the correspondence and other official communications of honorary consular officials the same freedom and protection as are accorded to them by the receiving State."

32. The CHAIRMAN, speaking as a member of the Commission, observed that article 60 might be interpreted as going further than article 32 (the corresponding article concerning career consuls) and accordingly proposed the substitution of the words "of consulates headed by honorary consular officials" for the words "of honorary consular officials".

That amendment was adopted.

Article 60 as amended was adopted.

ARTICLE 61 (formerly article 61) (Respect for the laws and regulations of the receiving State)

33. The CHAIRMAN said that the Drafting Committee proposed the following text for article 61:

"Without prejudice to their privileges and immunities, it is the duty of honorary consular officials to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State and not to abuse their official position for the purpose of securing advantages in any private activity in which they may engage."

34. Mr. YASSEEN observed that the duty to respect the laws and regulations of the receiving State and not to interfere in its internal affairs was the same as that imposed on career consuls. The special obligation of honorary consuls laid down at the end of the article applied equally to career consuls who engaged in a private gainful activity, and that should be clearly brought out.

35. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Yasseen that since career consuls who carried on a private gainful activity were assimilated to honorary consuls, the obligation laid down in article 61 accordingly applied to them.

36. Mr. YASSEEN observed that it would nevertheless be desirable to make that point clear in the commentary at least, since the assimilation affected privileges and immunities. Article 61 referred not to privileges and immunities but to duties.

37. Mr. ŽOUREK, Special Rapporteur, said that such a statement should even be made in the text itself.

38. Mr. EDMONDS suggested that the word "use" would be better than "abuse" in the second sentence.

39. Mr. ŽOUREK, Special Rapporteur, explained that the word "abuse" had been inserted partly in deference to the Netherlands Government's comment (A/CN.4/136/Add.4) that an honorary consul might not always be able to avoid using his official position to his private advantage.

40. The CHAIRMAN suggested that Mr. Edmonds' point might be referred to the Drafting Committee.

41. Mr. PADILLA NERVO said that more than a drafting point was involved. It would be difficult to judge whether or not an honorary consul was using his official position improperly for private purposes.

42. Sir Humphrey WALDOCK said that in some cases it would be very difficult to draw the line. For example, an honorary consul who was also a shipping agent might

obtain some additional private business thanks to his consular activities. Was he really to be prohibited from doing so?

43. After further discussion, the CHAIRMAN suggested that in the English text the word "abuse" be replaced by the word "misuse".

It was so agreed.

Article 61, as amended, was adopted.

ARTICLE 62 (formerly article 54bis) (Special provisions applicable to career consular officials who carry on a private gainful activity)

44. The CHAIRMAN said that the Drafting Committee proposed the following text for article 62:

"The provisions applicable to career consular officials who carry on a private gainful activity in the receiving State shall, so far as facilities, privileges and immunities are concerned, be the same as those applicable to honorary consular officials."

45. Mr. EDMONDS said that the article was unobjectionable but should be transferred to chapter II (Facilities, privileges and immunities of career consular officials). A provision would then have to be inserted in chapter III (Facilities, etc. of honorary consular officials) indicating that the article was also applicable to honorary consuls.

46. Mr. ŽOUREK, Special Rapporteur, suggested that Mr. Edmond's point would be met if the title of chapter III were modified so as to mention also career consuls who carried on a gainful private activity, since the Commission had decided to assimilate that category to that of honorary consuls (610th meeting, para. 48).

47. Mr. MATINE-DAFTARY urged that the commentary should explain what was meant by private gainful activity: not all forms of lucrative work should be regarded as a ground for withholding privileges and immunities.

48. Mr. ŽOUREK, Special Rapporteur, said that he would endeavour to provide some explanation on the point in the commentary. Clearly, such activities as giving paid courses at a university or editing a learned publication would not be regarded as a private gainful occupation.

49. Mr. PADILLA NERVO drew attention to the provisions of article 51, paragraph 4, under which the offices of other institutions or agencies (such as a travel agency) could be installed in the consular building or premises. Article 51 was placed in chapter II and therefore applied to consulates in the charge of career consular officials.

50. Article 51 was not applicable to honorary consuls. Moreover, article 53 specified that the premises of a consulate headed by an honorary consul would be inviolable provided that they were "used exclusively for the exercise of consular functions".

51. It would therefore seem that if a consulate was in the charge of an honorary consul, an office such as a travel agency could not be installed in the consular building or premises. By virtue of article 62, the same would be true if the consulate was in the charge of a career consul carrying on a private gainful occupation.

52. Mr. ŽOUREK, Special Rapporteur, said that it was clear from the provisions of article 53 that the premises of a consulate headed by an honorary consul enjoyed inviolability only if used exclusively for the exercise of consular functions. That condition would not be fulfilled if the offices of a travel agency were installed in the consulate's premises and were not separated from the premises used by the consulate. If they were separate, those offices did not form part of the consular premises. All the provisions of chapter I, including those of article 51, applied equally to honorary consuls.

53. The CHAIRMAN, speaking as a member of the Commission, said that, as he understood it, article 62 referred only to the privileges and immunities enjoyed by the consular officials themselves.

54. Mr. PADILLA NERVO said that he could not understand why the whole status of a consulate should be affected because a member of the consulate was permitted to engage in an outside gainful occupation. In particular, there appeared to be no reason why part of the premises should not be assigned to an institution such as a travel agency, particularly since, by virtue of article 51, paragraph 4, inviolability did not apply to that part of the premises.

55. Sir Humphrey WALDOCK said that inevitably the status of the consular officials would affect the status of the consulate. Otherwise there might be a strong temptation to give an honorary consul the nominal title of career consul, while allowing him to engage in private activities, with the aim of ensuring that the consulate entrusted to him would enjoy the full measure of facilities, privileges and immunities.

56. The rule should be that the status of the consulate was governed by that of the head of post. If the head of post engaged in a private gainful occupation, the consulate should be given the same treatment as a consulate in the charge of an honorary consul.

57. The CHAIRMAN suggested that the Drafting Committee be asked to re-draft article 62 so as to state:

(i) That, where the head of post carried on a private gainful occupation in the receiving State, the facilities and privileges of the consulate would be governed by chapter III; and

(ii) That career consular officials who carried on a private gainful occupation in the receiving State would enjoy the facilities, privileges and immunities of honorary consular officials.

It was so agreed.

ARTICLE 63 (formerly article 50) (Members of the consulate, members of their families and members of the private staff who are nationals of the receiving State)

58. The CHAIRMAN said that the Drafting Committee proposed the following text for article 63:

"1. Unless additional privileges and immunities have been accorded by the receiving State, consular officials who are nationals of the receiving State shall enjoy only personal inviolability and immunity from jurisdiction in respect of official acts performed in the

exercise of their functions and the privilege provided for in article 41, paragraph 3, of these articles. So far as these persons are concerned, the receiving State shall likewise be bound by the obligation laid down in article 39.

"2. Other members of the consulate, members of their families and members of the private staff who are nationals of the receiving State shall enjoy privileges and immunities only in so far as these are granted to them by the receiving State. The receiving State shall, however, exercise its jurisdiction over these persons in such a way as not to hinder unduly the performance of the functions of the consulate."

59. Mr. SANDSTRÖM questioned whether the Commission had in fact intended to extend wider privileges in the article than those conferred in article 38, paragraph 1, of the Vienna Convention according to which inviolability was only enjoyed in respect of official acts performed in the exercise of diplomatic functions.

60. Mr. ŽOUREK, Special Rapporteur, pointed out that the privilege provided for in article 41, paragraph 3, of the draft under discussion, did not arise in the case of diplomatic agents, for they were exempt from the duty to give evidence. Article 63 of the draft in fact diverged from article 38 of the Vienna Convention only in respect of the matter dealt with in the second sentence of paragraph 1. That provision had been introduced because the Drafting Committee thought that the sending State should be notified when a consular official who was a national of the receiving State was arrested or detained, since such measures would directly affect the functioning of the consulate.

61. Mr. YASSEEN considered that the wording of article 38, paragraph 1, in the Vienna Convention brought out more clearly that the inviolability was granted only in respect of official acts.

62. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee's intention had been to stipulate that both the personal inviolability and the immunity from jurisdiction were accorded only in respect of official acts; that was why, of course, there was no objection to transposing the order of the sentence and bringing it into line with the Vienna text.

63. Sir Humphrey WALDOCK said that he would have no objection to that change and suggested the substitution of the word "including" for the word "and" after the word "functions" in paragraph 1, which would remove any impression that the text conferred greater privileges than those of article 38 in the Vienna Convention.

64. The CHAIRMAN suggested that the Drafting Committee be requested to revise paragraph 1 so as to make it concord exactly with paragraph 1 in article 30 of the Vienna Convention and to incorporate the amendment suggested by Sir Humphrey Waldock.

It was so agreed.

Article 63 as a whole was adopted, subject to drafting changes.

ARTICLE 64 (Non-discrimination)

65. The CHAIRMAN said that the Drafting Committee proposed the following text for article 64:

“ 1. In the application of the present articles, the receiving State shall not discriminate as between the States parties to this convention.

“ 2. However, discrimination shall not be regarded as taking place where the receiving State, on a basis of reciprocity, grants privileges and immunities more extensive than those provided for in the present articles.”

Article 64 was adopted.

ARTICLE 65 (Relationship between the present articles and conventions or other international agreements)

66. The CHAIRMAN said that the Drafting Committee proposed the following text for article 65:

“ The provisions of the present articles shall not affect conventions or other international agreements in force as between States parties to them.”

Article 65 was adopted.

ARTICLE 66 (formerly article 52 *bis*)

(Exercise of consular functions by diplomatic missions)

67. The CHAIRMAN said that the Drafting Committee proposed the following text for article 66:

“ 1. The provisions of articles 4, 4 *ter*, 33, 34 and 36 of the present articles apply also to the exercise of consular functions by a diplomatic mission.

“ 2. The names of members of a diplomatic mission entrusted with the exercise of consular functions shall be notified to the Ministry for Foreign Affairs of the receiving State.

“ 3. In the exercise of consular functions members of a diplomatic mission may address the Ministry for Foreign Affairs and, if the local law and usages so permit, other authorities in the receiving State.

“ 4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 shall continue to be governed by the rules of international law concerning diplomatic relations.”

68. He recalled the decision of the Commission (617th meeting, para. 20) to defer further consideration of article 2 *bis* (Exercise of consular functions) until the Commission had before it the text of article 66 (formerly article 52 *bis*) in the Special Rapporteur's third report (A/CN.4/137). The Commission would therefore deal with both articles, and he wished to know whether the Drafting Committee still considered that article 2 *bis* was necessary, in view of the text of article 66.

69. Mr. ŽOUREK, Special Rapporteur, said that article 2 *bis* was necessary because it was the general practice for diplomatic missions to exercise consular functions. Also, article 2, paragraph 2, as adopted by the Commission (616th meeting, para. 70) stated that the consent given to the establishment of diplomatic relations between two States implied, unless otherwise stated, consent to the establishment of consular relations. It

was therefore appropriate to state that diplomatic missions exercised consular functions within the limits of their normal competence.

70. Mr. BARTOŠ said that, particularly since 1919, it had become fairly general practice to set up consular sections in embassies. However, he could not accept the suggestion that such a consular section could exercise consular functions throughout the territory of the receiving State, notwithstanding the grant of an exequatur to a consul for a particular consular district.

71. In that connexion, he cited the example of Switzerland, which did not admit the exercise of consular functions by the Yugoslav Embassy at Berne in respect of the city of Basle because an exequatur had already been granted to an honorary consul for that city.

72. Mr. ŽOUREK, Special Rapporteur, said that the consular district of a diplomatic mission — if one could call it that — covered the whole territory of the receiving State. As a general rule, diplomatic missions did not exercise their consular functions in the consular districts assigned to consulates of the sending State. But it was very rare for the sending State to have so many consulates in the receiving State that their districts covered that State's entire territory. It was not possible to formulate a rule on the basis of an exceptional case.

73. Mr. FRANÇOIS shared the doubts of Mr. Bartoš and expressed regret at the mingling of diplomatic and consular functions.

74. He objected particularly to paragraph 3, under the provisions of which it would be possible for a First Secretary in charge of the consular section of his embassy to address the Ministry of Foreign Affairs. As First Secretary of an embassy, the diplomatic agent concerned was not entitled to address the Ministry; as a consul, he was not entitled to do so either. It was hard to see how, because he combined the two functions, he would be able to address the Ministry.

75. The CHAIRMAN, speaking as a member of the Commission, said that in practice, the members of a diplomatic mission would deal with officials of the appropriate rank in the Ministry of Foreign Affairs of the receiving State.

76. He proposed, in order to overcome the difficulty mentioned by Mr. François, the deletion from paragraph 3 of the words: “ members of ”; the provision would thus state that, in the exercise of consular functions, a diplomatic mission could address the Ministry of Foreign Affairs.

77. Mr. ŽOUREK, Special Rapporteur, accepted the Chairman's amendment.

78. He pointed out that the diplomatic mission's communication with the Ministry of Foreign Affairs in consular matters raised no problem; he drew attention to article 41 of the Vienna Convention, which specified that diplomatic missions must conduct their business with the Ministry of Foreign Affairs of the receiving State. That was therefore also the normal channel for the consular section of an embassy. In the practice of many States, the consular section dealt with the more important consular

matters concerning the entire territory of the receiving State, even if the sending State had one or more consulates in that State. The article did not lay down a rule concerning that question.

79. Mr. PADILLA NERVO placed on record his opposition to article 2*bis* for the reasons he had given before (616th meeting, para. 79 and 617th meeting, paras. 9 to 13).

80. As to article 66, he recalled the answer given to him by the Chairman (611th meeting, para. 67) that the intention was that the article should deal only with the consular section of a diplomatic mission and that, accordingly, consular functions could not be carried out by diplomatic agents elsewhere than at the seat of the mission, unless the receiving State agreed otherwise.

81. The wording of article 66 did not make that intention clear and he suggested that it should be adjusted in order to do so.

82. It would be correct to state in paragraph 3, as suggested by the Chairman, that the embassy could address the Ministry of Foreign Affairs. In fact, that provision, in order to be consistent with article 41, paragraph 2, of the Vienna Convention, should be supplemented by the words "or such other Ministry as may be agreed". The paragraph should not, however, make my reference to "other authorities in the receiving State" as was done in the proposed text. A general statement of that type would suggest that the consular section of the embassy was entitled to approach the local authorities throughout the territory of the receiving State — something which was not allowed in a great many countries.

83. Mr. AMADO recalled his objections to the text of article 2*bis* (616th meeting, para. 78).

84. He found article 66 unsatisfactory, particularly paragraph 3. The provisions of that paragraph would imply, for example, that whereas the consul-general of a foreign Power at the very busy city of São Paulo could not address the Ministry of Foreign Affairs of Brazil, it would be possible for the Third Secretary of an embassy to address that Ministry on some minor question relating to consular affairs in a small town.

85. Another point which puzzled him was the fact that a consul-general who was permanently entrusted with consular functions would not have the right to address the Ministry of Foreign Affairs, but a diplomatic agent who was only occasionally in charge of consular affairs would be free to do so under the draft.

86. Mr. AGO, speaking as Chairman of the Drafting Committee, said that article 66 dealt only with the case where consular functions were exercised by the diplomatic mission itself at the seat of the central government of the receiving State. If a diplomatic agent were to be assigned to a consulate situated outside the capital, he would become a consular official and lose his diplomatic capacity.

87. In view of the general practice of setting up consular sections in embassies, article 66 was necessary. The provisions of paragraph 3 were useful particularly because they constituted a limitation. A diplomatic mission did

not need an exequatur in order to exercise consular functions; it was therefore appropriate to specify that it should deal with the Ministry of Foreign Affairs. It should not deal with other authorities of the receiving State unless the law and usage of that State so permitted.

88. Mr. AMADO pointed out that the text of article 66 did not make it clear that its provisions were limited to the case where the consular functions were exercised by the diplomatic mission itself in the capital.

89. Mr. BARTOŠ accepted paragraph 3 with the amendment proposed by the Chairman. He also accepted the explanation given by Mr. Ago. He could not, however, accept the interpretation given by the Special Rapporteur that it might be possible for the consular section of an embassy to deal with important consular matters relating to consular districts outside the capital.

90. He was opposed to the idea that consular functions could be exercised in respect of one and the same area both by the consul competent for the consular district concerned and by the consular section of the embassy of the sending State. Claims which had been made in that regard by certain States had invariably been rejected.

91. The existing practice was to admit that a diplomatic mission could exercise consular functions for the whole territory of the receiving State, except for those districts which were already covered by the letters patent and exequatur of the competent consuls.

92. Of course, a diplomatic mission could make diplomatic representations in a case where a consul had been unsuccessful. In a case of that type, however, the diplomatic mission was fulfilling its normal diplomatic functions and not exercising supervision over the consular functions exercised by the consulates of the sending State.

93. Mr. PADILLA NERVO proposed that paragraph 2 be amended so as to state that the name of the member of a diplomatic mission in charge of the consular section of the mission should be notified to the Ministry of Foreign Affairs of the receiving State. In that manner, paragraph 2 would make it clear that the provisions of the article referred exclusively to the consular section of an embassy and not to a diplomatic agent assigned to consular functions outside the capital.

94. He further proposed the deletion of paragraph 3. There was no need to state that a diplomatic mission could address the Ministry of Foreign Affairs. That Ministry had always been the channel of communication for diplomatic missions and would remain so regardless of the provisions of the draft.

The meeting rose at 6.15 p.m.

624th MEETING

Tuesday, 4 July 1961, at 9.30 a.m.

Chairman ; Mr. Grigory I. TUNKIN

Consular intercourse and immunities

(A/4425; A/CN.4/136 and Add. 1 to 11; A/CN.4/137)

(concluded)

[Agenda item 2]

DRAFT ARTICLES (A/4425): SECOND READING (concluded)

ARTICLE 66 (formerly article 52 *bis*) (Exercise of consular functions by diplomatic missions) (continued)

1. The CHAIRMAN, referring to the discussion at the end of the 623rd meeting, invited the Commission to continue its discussion of article 66, taken in conjunction with article 2 *bis* (Exercise of consular functions.)

2. Mr. ŽOUREK, Special Rapporteur, said that the discussion at the previous meeting had clarified a number of points. In particular, he stressed that article 66 was not concerned with the case of a diplomatic agent who was assigned to perform consular functions away from the seat of the diplomatic mission.

3. It had been asked what was meant by the "other authorities in the receiving State" to which a diplomatic mission could apply in the exercise of consular functions. The expression meant the authorities competent under the law of the receiving State.

4. The essential provision, however, was embodied in the phrase "if the local law and usages so permit," which left it open to the receiving State not to permit contacts at the local level and to oblige the diplomatic mission to deal exclusively with the Ministry of Foreign Affairs.

5. The provisions of article 66 did not therefore involve any risk to the receiving State and gave expression to an existing practice. His research had shown that a great many States allowed the consular sections of diplomatic missions to address authorities other than the Ministry of Foreign Affairs, notably local authorities.

6. Mr. PADILLA NERVO had suggested that paragraph 2 should specify that the members of the diplomatic mission concerned were those employed in the consular section. That would be the case very often, but some diplomatic missions were so small that one staff member had to combine the exercise of consular functions with duties of a diplomatic character. The rule embodied in paragraph 2 should cover all cases and it was therefore not advisable to amend it in the manner suggested by Mr. Padilla Nervo.

7. Lastly, in reply to Mr. Bartoš, he wished to make it clear that he had not expressed any approval of the

practice of certain States of reserving to the consular section of the embassy the final decision in certain important matters arising out of the work of the consulates of the sending State throughout the receiving State. He had merely referred to that practice, but article 66 did not mention it and there was no suggestion in the article that it should be encouraged. As an example of that practice, he mentioned the fact that certain countries did not authorize their consulates to issue visas on diplomatic passports and insisted that applications for such visas should be made to their diplomatic missions.

8. Mr. BARTOŠ expressed satisfaction at the explanation given by the Special Rapporteur that the text as amended was not intended to give any sanction to the practice to which he (Mr. Bartoš) had objected at the previous meeting.

9. Actually, the example given by the Special Rapporteur was a doubtful one. It was true that diplomatic visas were not issued by the consulates of many countries, but most writers were of the opinion that the issuance of a diplomatic visa constituted a diplomatic rather than a consular function.

10. It was the consistent practice not only of Yugoslavia but of a large number of countries to reject any diplomatic note dealing with a specifically consular matter.

11. In view of the amendments made and of the explanations given, he would be prepared to support article 66.

12. The CHAIRMAN said that the Commission would have to decide whether it wished in principle to retain article 2 *bis*. A decision on that point might perhaps affect the wording of article 66.

13. Sir Humphrey WALDOCK proposed that the Commission should deal first with article 66. Many of the difficulties experienced by various members of the Commission in regard to article 2 *bis* had arisen out of the fact that the exact terms of article 66 had not been known at the time.

14. Once the questions of substance had been disposed of in article 66, the provisions of article 2 *bis* might assume a merely formal character and the article could perhaps then be retained.

15. The CHAIRMAN said that, if there were no objection, he would proceed in the manner suggested by Sir Humphrey Waldock.

16. He put to the vote paragraph 1 of article 66.

Paragraph 1 was adopted.

17. The CHAIRMAN invited discussion on paragraph 2 and recalled the proposal made by Mr. Padilla Nervo at the 623rd meeting (para. 93) that the paragraph be reworded so as to state that the names of the members of a diplomatic mission who were in charge of the consular section should be notified to the Ministry of Foreign Affairs of the receiving State.

18. Mr. AGO said that, if Mr. Padilla Nervo's amendment were adopted, perhaps paragraph 1 should also be amended.

19. Mr. PADILLA NERVO said that it was sufficient for his purposes to introduce the amendment in paragraph 2. Paragraph 1 mentioned the provisions of the draft which applied to the exercise of consular functions by the diplomatic mission itself. Paragraph 2 referred to the practice of communicating to the Ministry of Foreign Affairs the name of the diplomatic agent in charge of the consular section.

20. The existing practice was that the diplomatic agent whose name had been notified would address the consular division of the Ministry of Foreign Affairs in consular matters for the purpose of oral communications. In the case of a written note, however, it was the embassy itself which addressed it to the Ministry.

21. His intention was to make it perfectly clear that a diplomatic mission could not exercise consular functions by assigning one of its officers to a consulate away from the seat of the diplomatic mission itself (the capital of the receiving State).

22. Sir Humphrey WALDOCK said that perhaps the views of Mr. Padilla Nervo and the Special Rapporteur could be reconciled by adopting a wording along the following lines: "The names of members of a diplomatic mission assigned to the consular section or otherwise entrusted with the exercise . . ."

23. The CHAIRMAN, speaking as a member of the Commission, suggested, in order to meet more fully Mr. Padilla Nervo's point, the insertion of the words "of the mission" after the words "consular functions". That amendment would exclude the case of an assignment of a diplomatic agent to consular functions outside the seat of the mission.

24. Mr. PADILLA NERVO agreed to Sir Humphrey Waldock's amendment as further amended by the Chairman.

25. Mr. YASSEEN said that he fully understood Mr. Padilla Nervo's preoccupations and supported the useful suggestions made by Sir Humphrey Waldock and the Chairman.

26. He stressed, however, that the expression "consular section" should not be construed in a purely formal sense, for it referred to the distribution of duties among the members of the diplomatic mission. Even in a mission consisting of only one diplomatic agent, there might be a consular section, because the same person could perform different duties.

27. The CHAIRMAN put to the vote paragraph 2, amended to read:

"The names of the members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving State."

Paragraph 2, as amended, was adopted by 13 votes to none, with 2 abstentions.

28. The CHAIRMAN invited the Commission to consider paragraph 3.

29. Speaking as a member of the Commission, he

recalled his amendment (623rd meeting, para. 76) deleting the words "members of".

The amendment was adopted.

30. Mr. AGO said that the wording of paragraph 3 was unsatisfactory. In particular, the words "may address" gave the impression that the right of a diplomatic mission to address the Ministry of Foreign Affairs was derived from article 66. In fact, of course, the right and duty of a diplomatic mission to deal with that Ministry was laid down by general international law and by the Vienna Convention on Diplomatic Relations.

31. Accordingly, he proposed that paragraph 3 should be amended to read:

"3. In the exercise of consular functions a diplomatic mission may address authorities in the receiving State other than the Ministry for Foreign Affairs only if the local law or usages so permit."

32. Mr. PADILLA NERVO urged that paragraph 3 should be brought into line with that of article 41, paragraph 2, of the Vienna Convention, which specified that a diplomatic mission dealt with the Ministry of Foreign Affairs "or such other Ministry as may be agreed". That language was preferable because it showed that in no case could a diplomatic mission deal with local authorities: it could only deal with the central government.

33. Mr. MATINE-DAFTARY explained that the reference to "such other Ministry as may be agreed" had been introduced into the Vienna Convention simply to allow for the fact that Commonwealth High Commissioners in London dealt with the Commonwealth Relations Office and not with the Foreign Office.

34. Mr. ŽOUREK, Special Rapporteur, urged that paragraph 3 be retained as drafted. It was necessary to refer to the existing practice in many countries, which allowed the consular sections of embassies to deal with local authorities.

35. Mr. PADILLA NERVO said that the practice of his country and of all those of which he had knowledge precluded any contact by a diplomatic mission at the local level, even in the exercise of consular functions. Permission was sometimes given to address a Ministry other than the Ministry of Foreign Affairs, but the mission was always obliged to deal with the departments of the central government. A diplomatic agent could not divest himself of his representative character and diplomatic rank; it would therefore be improper for him to contact local authorities.

36. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Padilla Nervo's point was in fact met by the words "if the local laws and usages so permit". If the receiving State wished to preclude the mission from addressing local authorities, it could always do so under the provisions of paragraph 3.

37. Speaking as Chairman, he put to the vote paragraph 3 in the amended form proposed by Mr. Ago (see above, para. 31).

Paragraph 3, as amended, was adopted by 15 votes to none, with 1 abstention.

38. The CHAIRMAN invited the Commission to consider paragraph 4.

39. Mr. PADILLA NERVO said that the status of diplomatic agents would not be affected by the draft on consular intercourse. He therefore doubted the advisability of including paragraph 4, which seemed to grant to diplomatic agents privileges to which they were in any case entitled.

40. Sir Humphrey WALDOCK said that it was useful to clarify that, even where a diplomatic agent was permanently assigned to consular duties, he retained his diplomatic status.

41. The CHAIRMAN said that although Mr. Padilla Nervo was probably right in saying that diplomatic status would subsist regardless of the retention or deletion of paragraph 4, the provisions of that paragraph contained a useful indication; they should be retained in order to avoid any possible misunderstanding.

42. Mr. SANDSTRÖM said that the words "shall continue to be governed" made it clear that paragraph 4 did not purport to grant the privileges under reference; it merely confirmed their continued existence.

Paragraph 4 was adopted.

Article 66, as amended, was adopted as a whole by 16 votes to none, with 1 abstention.

ARTICLE 2 *bis* (Exercise of consular functions)

43. The CHAIRMAN invited the Commission to consider article 2 *bis*, the text of which had been submitted at the 616th meeting (para. 71).

44. Mr. ERIM said that the discussion had convinced him of the need to include a provision of the type of article 2 *bis*. The wording of the second sentence, however, stood in need of improvement: the concluding phrase "within the limits of their competence" was too ambiguous.

45. Mr. PADILLA NERVO proposed the deletion of article 2 *bis*. If its provisions covered the same ground as those of article 66, they were unnecessary. If they were intended, or could be construed as being intended, to have a wider scope than article 66, they were dangerous.

46. Mr. ŽOUREK, Special Rapporteur, urged the retention of article 2 *bis*.

47. He recalled that, in the course of the previous discussion of the article (616th meeting, paras. 71 to 84), his amendment deleting the word "normally" from the first sentence had been accepted. As to the second sentence, he suggested, in order to allay the doubts expressed by some members, that the word "competence" be replaced by "functions."

48. Mr. PADILLA NERVO suggested that, if his proposal to delete article 2 *bis* were rejected and the article retained, it should be amended so as to refer specifically to the provisions of article 66 and be governed by those provisions. The article would then read:

"Consular functions are exercised by consulates. They may also be exercised by diplomatic missions

within the limits of their functions and in accordance with article 66."

49. The whole question of the exercise of consular functions by diplomatic missions was regulated in detail by the provisions of article 66, in particular its paragraph 1, specifying which articles of the consular draft applied in the matter. The reference to article 66 was therefore essential if the article were to be retained.

50. Mr. JIMÉNEZ de ARÉCHAGA said that article 2 *bis* covered a somewhat wider field than article 66. It concerned not only the exercise of consular functions by the consular section of a diplomatic mission, but also the performance of such functions as that of protecting the nationals of the sending State, which formed part of the general functions of a diplomatic mission by virtue of article 3, paragraph 1 (b), of the Vienna Convention.

51. Accordingly, he suggested that the second sentence of article 2 *bis* should be amended to read: "They are also exercised by diplomatic missions in accordance with the provisions of article 66 or within the limits of their functions."

52. Mr. PAL favoured the retention of article 2 *bis*. The article was fully consistent with the provisions of article 3, paragraph 2, of the Vienna Convention, which was only a kind of saving clause. Article 2 *bis* would be useful in that it stated affirmatively that the diplomatic mission would have as part of its functions also consular functions.

53. The CHAIRMAN, speaking as a member of the Commission, said that, despite the undoubted link between the two articles, he would prefer not to include in article 2 *bis* a reference to article 66.

54. The provisions of article 2 *bis* were very general, and any reference to a specific article might lead to a misunderstanding.

55. Sir Humphrey WALDOCK, with reference to the remarks by Mr. Jiménez de Aréchaga, stressed that the function of protection mentioned in the Vienna Convention was a diplomatic function and not a consular function.

56. Article 2 *bis* was intended to deal with the exercise of specifically consular functions and, in that context, it was not at all clear what was the intended meaning of the phrase "within the limits of their functions."

57. The Vienna Convention merely stated that nothing in its provisions should be construed as preventing the performance of consular functions by a diplomatic mission. That statement gave no indication of how those functions would be carried out, and the only clarification was given in that respect by article 66 of the draft under discussion.

58. For those reasons, he favoured the inclusion in article 2 *bis* of a reference to article 66.

59. Mr. MATINE-DAFTARY said that he still believed that article 2 *bis* was unnecessary, and reiterated his suggestion made at the 617th meeting (paras. 16 and 17).

60. Mr. ŽOUREK, Special Rapporteur, said that the phrase "within the limits of their functions" was neces-

sary because it had been claimed on occasion that consular functions were completely separate from diplomatic functions, and that the latter could not include the former. For those reasons, it was appropriate to state that, where a diplomatic mission exercised consular functions, it was acting within the scope of its normal duties.

61. Mr. AGO said that the discussion had convinced him of the desirability of dropping article 2 *bis*.

62. He could not accept a provision containing the vague reference to "the limits of their functions." That expression was obviously open to the most diverse interpretations. The Special Rapporteur appeared to interpret it as meaning that all consular functions were comprised in the diplomatic function. He (Mr. Ago) had originally understood the phrase as limiting the scope of the second sentence of article 2 *bis* to those consular functions which could be performed within the framework of the diplomatic function and hence as excluding all other consular functions which were not so exercisable.

63. It was unthinkable that the Commission should adopt an article on the basis of a general agreement upon its formal wording, while there remained a wide divergence of opinion with regard to its substance.

64. Mr. ŽOUREK, Special Rapporteur, said that article 2 *bis* did no more than reflect the existing practice of States, as was evident from official publications. For example, the official calendar of Switzerland showed that nearly all the diplomatic missions accredited to the Swiss Federal Council exercised consular functions in the Canton of Berne and, in most cases, in other Swiss cantons as well.

65. Lastly, he pointed out that, in cases where the receiving State did not permit direct communication with the local authorities, a diplomatic mission could not perform those of the consular functions which required contact with the said authorities.

66. Mr. ERIM agreed with the Special Rapporteur; the Turkish consulate at Zurich had recently been abolished and its functions vested in the Turkish Embassy at Berne.

67. Mr. YASSEEN said that the principle set forth in article 2 *bis* was implied in article 66. By regulating the exercise of certain consular functions, it recognized the right to exercise those functions.

68. Article 2 *bis* was not only superfluous; the phrase "within the limits of their functions" could give rise to problems of interpretation regarding the scope of the consular functions performed by a diplomatic mission, as shown by Mr. Ago. He therefore favoured the deletion of article 2 *bis*.

69. Lastly, he did not share the view expressed by the Special Rapporteur that a diplomatic mission would be unable to perform certain consular functions because it could not address local authorities. In fact, the mission could address those local authorities through the Ministry of Foreign Affairs of the receiving State.

70. Sir Humphrey WALDOCK said that it would be extremely difficult to devise a satisfactory formula for article 2 *bis*. He was therefore inclined to drop the

article, since article 3, paragraph 2, of the Vienna Convention, and article 66 of the draft under discussion already covered all the necessary ground.

71. Mr. BARTOŠ said that he could not agree with Sir Humphrey Waldo on his last point. The provisions of article 3, paragraph 2, of the Vienna Convention did not solve the question. Those provisions merely stated that a diplomatic mission was not prevented from performing consular functions; they did not give the mission the right to perform those functions.

72. In fact, the practice of States showed that diplomatic missions did exercise consular functions, and article 2 *bis* was therefore necessary in the draft under discussion. The wording proposed, however, was defective because it did not make it clear that the diplomatic mission only exercised consular functions in respect of those areas of the territory of the receiving State which were not already covered by a consular district.

73. Mr. TSURUOKA favoured the retention of article 2 *bis*, which was fully consistent with article 3, paragraph 2 of the Vienna Convention. Since the proposed consular convention would be independent of the Vienna Convention, article 2 *bis* should be retained in the draft. However, he favoured the inclusion in the second sentence of the article of a reference to article 66.

74. Mr. JIMÉNEZ de ARÉCHAGA pointed out that article 3, paragraph 2, of the Vienna Convention was drafted in a negative form. In his opinion a positive provision was necessary in the draft, for otherwise it might be contended that consular functions could only be performed by a diplomatic mission if it had a special consular section, an argument which was manifestly not supported by practice.

75. Mr. HSU considered that article 2 *bis* would only serve a useful purpose if the ambiguous phrase "within the limits of their functions" were reworded. He would have thought the difficulty could be overcome by deleting the second sentence and adding at the end of the first the words "being part of diplomatic functions they may also be exercised by diplomatic missions".

76. Mr. AMADO said the article was deplorably vague; he would have no part in the presentation of so ambiguous a text and proposed the deletion of the words "within the limits of their functions".

77. The CHAIRMAN put to the vote Mr. Padilla Nervo's proposal that article 2 *bis* should be deleted.

There were 8 votes in favour and 8 against, with 1 abstention. The proposal was rejected.

78. The CHAIRMAN put to the vote Mr. Padilla Nervo's amendment adding at the end of the article the words "in accordance with the provisions of article 66".

The amendment was adopted by 10 votes to none, with 6 abstentions.

Mr. Amado's amendment to delete the words "within the limits of their functions" was adopted by 12 votes to 1, with 3 abstentions.

ARTICLE 2 bis, as a whole, as amended,
was adopted by 15 votes to none, with 2 abstentions.

79. Mr. ŽOUREK, Special Rapporteur, explained that he had voted for the article in its amended form. The deletion of the words "within the limits of their functions" would not alter either the international law in force or the existing practice of States.

80. The CHAIRMAN invited the Commission to consider a number of modifications and additions proposed by the Drafting Committee.

ARTICLE 1 (Definitions), paragraphs 2 and 3 (*continued*)¹

81. The CHAIRMAN said that the Drafting Committee proposed the following amended text for paragraphs 2 and 3 of article 1:

"2. Consular officials may be career officials or honorary. The provisions of chapter II of this draft apply to career officials and to consular employees; the provisions of chapter III apply to honorary consular officials, and to career officials who are assimilated to them under article 62.

"3. The particular status of members of the consulate who are nationals of the receiving State is governed by article 63 of this draft."

82. Mr. SANDSTRÖM thought that the second sentence in paragraph 2 was unnecessary.

83. Mr. ŽOUREK, Special Rapporteur, said the sentence served a useful purpose in providing a general indication of the structure of the draft in which the Commission had been at pains to differentiate between career and honorary consuls and between consular officials who were nationals of the receiving State and those who were not. Such a provision was particularly necessary for readers who were not lawyers in order to indicate that the various categories of persons mentioned in paragraphs 2 and 3 enjoyed different treatment in the matter of consular privileges and immunities.

84. Mr. AMADO strongly opposed the inclusion of the second sentence in paragraph 2 which he found quite inappropriate in a general definitions article.

85. The CHAIRMAN, speaking as a member of the Commission, said that although the drafting of the second sentence was not particularly elegant it served a useful purpose; moreover the Commission had already decided in principle to insert such a statement.

86. Mr. BARTOŠ observed that it should be borne in mind that chapter III indicated which provisions in chapter II were applicable to honorary consuls. Although the second sentence in paragraph 2 was not well drafted it was useful and should be adopted.

The amended text of paragraphs 2 and 3 of article 1, as proposed by the Drafting Committee, were adopted.

ARTICLE 3 (Establishment of a consulate)
paragraphs 4 and 5 (*continued*)²

87. The CHAIRMAN said that the Drafting Committee

proposed the following amended text for paragraph 4 of article 3:

"4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or an agency in a locality other than that in which the consulate itself is established."

88. The CHAIRMAN said that the Drafting Committee also proposed an additional paragraph 5 reading:

"5. The sending State may not, without the prior express consent of the receiving State, establish offices forming part of the consulate in localities other than those in which the consulate itself is established."

Paragraphs 4 and 5 as proposed by the Drafting Committee were adopted.

ARTICLE 4 (Consular functions) (*continued*)³

89. The CHAIRMAN said that the Drafting Committee proposed that the following sub-paragraph should be inserted after sub-paragraph (h) of article 4:

"Representing nationals of the sending State before the tribunals and other authorities of the receiving State, where, because of absence or any other reason, these nationals are unable at the proper time to assume the defence of their rights and interests, for the purpose of obtaining, in accordance with the law of the receiving State, preliminary measures for the protection of these rights and interests."

90. Mr. MATINE-DAFTARY strongly criticized the use of the expression "preliminary measures" which, being unknown in any procedural code, would be quite unfamiliar to any court of law.

91. Mr. ŽOUREK, Special Rapporteur, said that the expression had been deliberately chosen by the Drafting Committee instead of *mesures conservatoires*, which, because it had a very precise technical connotation, would be too restrictive in the context where not only judicial proceedings were envisaged. In paragraph (12) of the commentary to article 4 adopted at the previous session, he had sought to explain the kind of measures that might be necessary.

92. Mr. LIANG, Secretary to the Commission, referring to the point raised by Mr. Matine-Daftary, drew attention to the terms of article 41, paragraph 1, of the Statute of the International Court of Justice, which spoke of "provisional measures".

93. After further discussion, Mr. SANDSTRÖM proposed formally that the expression "preliminary measures" in the additional sub-paragraph should be replaced by "provisional measures".

Mr. Sandström's amendment was adopted by 9 votes to 2, with 5 abstentions.

94. Mr. ŽOUREK, Special Rapporteur, said that the word "provisional" should be interpreted as meaning

¹ Resumed from the 616th meeting.

² Resumed from the 617th meeting.

³ Resumed from the 617th meeting.

any preliminary measures necessary to protect the rights and interests of the individual concerned.

95. Although he did not wish to make any formal proposal, he submitted that the sub-paragraph should be interpreted as referring also to bodies corporate having the nationality of the sending State.

96. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that the measures in question were all those which were allowed under the law of the receiving State and which could be taken without the direct authorization of the person concerned.

97. Mr. PADILLA NERVO strongly opposed the Special Rapporteur's interpretation, under which the new sub-paragraph applied to bodies corporate, on the grounds that their nationality was not determined by uniform criteria. He was all the more opposed to that interpretation inasmuch as under article 66, paragraph 1, the provisions of article 4 had been made applicable also to the exercise of consular functions by a diplomatic mission.

98. Mr. JIMÉNEZ de ARÉCHAGA said there was no need to make express mention of bodies corporate in the context or in the commentary, for they were not necessarily excluded from the application of the sub-paragraph as drafted.

The new sub-paragraph for insertion in article 4 was adopted as amended.

ARTICLE 12 (formerly article 16) (Temporary exercise of the functions of head of a consular post) (*continued*)⁴

99. The CHAIRMAN said that the Drafting Committee proposed the following text for an additional paragraph 4 in article 12:

"4. If a member of the diplomatic staff is instructed by the sending State to assume temporarily the direction of a consulate, he shall continue to enjoy diplomatic privileges and immunities while exercising that function."

The additional paragraph 4 was adopted.

ARTICLE 14 (formerly article 18) (Performance of diplomatic acts by the head of a consular post) (*continued*)⁴

100. The CHAIRMAN said that the Drafting Committee proposed the addition of the following paragraph 2 in article 14:

"2. A head of consular post or other consular official may act as representative of the sending State to any international organization."

101. Mr. SANDSTRÖM suggested that there was no need for such an addition: the statement it contained was self-evident.

102. Mr. ŽOUREK, Special Rapporteur, pointed out that such a provision had been included in article 5,

paragraph 3, of the Vienna Convention and was all the more necessary in a draft concerning consular relations.

103. Mr. BARTOŠ said that the question was not a simple one. In theory a diplomatic agent was bound to abstain from criticizing the State to which he was accredited, but as a representative to an international organization he might do so.

104. Practice in regard to consuls acting as representatives to international organizations varied from country to country. That of the Swiss Government was extremely liberal and such persons enjoyed diplomatic immunities. On the other hand, the State Department of the United States of America had issued a memorandum debarring consular officials who acted for foreign countries in the United States from acting as permanent representatives or observers to any international organization. He was uncertain whether that prohibition was enforced in practice.

105. He supported the addition of such a clause and agreed with the Special Rapporteur that it was even more necessary in an instrument on consular relations than in one dealing with diplomatic relations.

106. Mr. SANDSTRÖM said that in view of the foregoing explanations he would withdraw his objection.

The additional paragraph 2 proposed by the Drafting Committee was adopted.

ARTICLE 21 (formerly article 24) (Notification of the appointment, arrival and departure of members of the consulate, members of their families, and members of the private staff) (*continued*)⁴

107. The CHAIRMAN said that the Drafting Committee proposed the following amended text for paragraph 1 (b) of article 21:

"(b) The arrival and final departure of a person belonging to the family of a member of the consulate forming part of his household and, where appropriate, the fact that the person becomes or ceases to be a member of the family of a member of the consulate;"

That text was adopted.

ARTICLE 22 (formerly article 25) (Modes of termination of the functions of a member of the consulate) (*continued*)⁴

108. The CHAIRMAN said that the Drafting Committee proposed the following amended text for article 22:

"The functions of a member of the consulate come to an end in particular:

"(a) On notification by the sending State to the receiving State that the functions of the member of the consulate have come to an end;

"(b) On the withdrawal of the exequatur or, as the case may be, the notification by the receiving State to the sending State that the receiving State refuses to recognize him as a member of the consular staff."

The amended text of article 22 was adopted.

⁴ Resumed from the 618th meeting.

ARTICLE 24 (formerly article 28) (Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances) (*continued*)⁵

109. The CHAIRMAN said that the Drafting Committee proposed the following amended text for article 24, paragraph 1:

“ 1. In the event of the severance of consular relations between two States:

“ (a) The receiving State shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consulate and its archives;

“ (b) The sending State may entrust the custody of the consular premises, together with the property it contains and its archives, to a third State acceptable to the receiving State;

“ (c) The sending State may entrust the protection of its interests and those of its nationals to a third State acceptable to the receiving State.”

110. Mr. BARTOŠ, referring to paragraph 1 (a), pointed out that, as the consular premises were not always the property of the sending State, the lease might have to be surrendered if consular relations were severed. He did not think, however, that a specific reference to that eventuality was necessary.

The amended text of paragraph 1 and article 24 as a whole were adopted.

ARTICLE 27 (formerly article 31) (Inviolability of the consular premises) (*continued*)⁶

111. The CHAIRMAN said that the Drafting Committee proposed the following amended text for article 27, paragraph 3:

“ 3. The consular premises, their furnishings, the property of the consulate and its means of transport shall be immune from any search, requisition, attachment or execution.”

The amended text of paragraph 3 was adopted.

ARTICLE 41*bis* (formerly article 50*bis*)
(Waiver of immunities) (*continued*)⁷

112. The CHAIRMAN said that the Drafting Committee proposed the following revised text for the article concerning the waiver of immunities:

“ 1. The sending State may waive, with regard to a member of the consulate, the immunities provided for in articles 38, 40 and 41.

“ 2. The waiver shall in all cases be express.

“ 3. The initiation of proceedings by a member of the consulate in a matter where he might enjoy immunity from jurisdiction under article 40, shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

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

The revised text was adopted.

113. The CHAIRMAN announced that the Commission had concluded its consideration of the draft articles on consular intercourse and immunities.

Recommendation to the General Assembly

114. The CHAIRMAN said that the general consensus appeared to be that the Commission should recommend, under article 23, paragraph 1 (d), of its Statute, that an international conference should be convened for the purpose of concluding a convention on the basis of the Commission's draft. He suggested accordingly that the Commission should address a recommendation in that sense to the General Assembly.

It was so agreed.

The meeting rose at 1.15 p.m.

625th MEETING

Wednesday, 5 July 1961, at 9.30 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consideration of the Commission's draft report covering the work of its thirteenth session

(A/CN.4/L.95 and Add. 1 and 2)

1. The CHAIRMAN invited the Commission to consider its draft report (A/CN.4/L.95 and Add.1 and 2).

CHAPTER I (Organization of the session)

Chapter I of the draft report (A/CN.4/L.95) was adopted, subject to drafting changes.

CHAPTER II (Consular intercourse and immunities) (A/CN.4/L.95/Add.1)

Section I (Introduction)

2. Mr. ERIM asked whether there was to be any further reference, other than that made in paragraph 27, to the Commission's recommendation that the General Assembly should convene an international conference to study its draft on consular intercourse and immunities.

3. The CHAIRMAN suggested that it would be desirable to devote a special subsection of the report to that recommendation so as to give it greater prominence.

4. Mr. ŽOUREK, Special Rapporteur, supported the Chairman's suggestion.

The suggestion was approved.

⁵ Resumed from the 618th meeting.

⁶ Resumed from the 619th meeting.

⁷ Resumed from the 612th meeting.

Section II (General considerations)

5. In answer to a question by the CHAIRMAN, Mr. ŽOUREK, Special Rapporteur, explained that the purpose of paragraph 34 (e) was to indicate that an additional chapter containing final clauses would need to be included in the draft to be formulated by the future international conference.

6. Sir Humphrey WALDOCK, referring to the second sentence in paragraph 35, said that the expression "absolutely indispensable" was too strong and should be toned down.

7. Mr. ŽOUREK, Special Rapporteur, said that he had wished to emphasize the value of titles in such a long and detailed draft.

8. The CHAIRMAN, speaking as a member of the Commission, said that titles were frequently dispensed with in draft conventions drawn up by an international conference because it was not always easy to draft titles in terms reflecting unambiguously the content of the article. Accordingly the Commission should not express so categorical a view and the last sentence in paragraph 35 should be deleted.

9. Mr. LIANG, Secretary to the Commission, agreed that the course advocated by the Chairman would be more in consonance with recent trends. Perhaps it might also be desirable to delete the third sentence which seemed to contain an implicit criticism of the practice followed by governments.

10. On the other hand, the Commission might usefully recommend the use of marginal titles.

11. Mr. ŽOUREK, Special Rapporteur, agreeing with the Secretary, said he still thought that marginal titles were of great assistance to the reader, particularly in long texts.

12. The CHAIRMAN suggested the substitution of the word "useful" for the words "absolutely indispensable" in the second sentence of paragraph 35, the deletion of the word "great" in the third sentence and the replacement of the last sentence by a passage recommending the use of titles for the chapters and marginal titles for the articles.

It was so agreed.

Section III (General character of the consular mission)

13. Mr. ERIM thought it undesirable to insert any statements of explanations concerning diplomatic missions and their functions in the report, particularly as they might give rise to differences of opinion, were liable to be incomplete or might be at variance with the Vienna Convention on Diplomatic Relations.

14. Mr. ŽOUREK, Special Rapporteur, explained that he had inserted that section in the belief that it would be helpful, particularly to the general reader, to indicate the characteristics which distinguished the consular from the diplomatic mission. He added that that purpose could only be achieved if the two institutions were compared. If the Commission did not wish the explanatory comments to contain any reference to diplomatic missions, then it would be better to omit the entire section.

15. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. ERIM that paragraphs 37 to 45 belonged more appropriately to a textbook on international law and proposed that they be omitted.

It was so agreed.

Draft articles on consular intercourse, and commentaries

Commentary to article 1 (Definitions)

16. Mr. ERIM asked that paragraph (7) should mention that some members of the Commission had been of the opinion that the definition of the members of the family of a member of the consulate should be expanded.

17. Mr. JIMÉNEZ de ARÉCHAGA, supporting Mr. ERIM, proposed that at the end of the third sentence the following passage should be added: "and also as to the scope of this definition, which several members found too narrow".

That amendment was adopted.

18. Mr. YASSEEN criticized the expression "small majority" in the last sentence of paragraph (7) and proposed that it be replaced by a statement of the vote which had taken place in the Commission.

19. Mr. ŽOUREK, Special Rapporteur, said he had no objection to the deletion of the expression in question, even though it was an accurate statement of fact.

20. Mr. LIANG, Secretary to the Commission, said that it would be out of line with the Commission's practice to give particulars of the vote in the report; usually, the decision was mentioned and, where necessary, reference was made to the relevant summary record. It would be hardly practicable to indicate throughout the report on what points opinion had been divided and to give particulars of the voting.

21. Sir Humphrey WALDOCK said that, since it was stated that opinion had been divided, it was essential in the interests of accuracy not to give the impression that the disagreement had ultimately been removed. It was therefore desirable to state that the Commission's decision had been reached by a majority, though the word "small" should be omitted.

It was so agreed.

The commentary to article 1 was adopted as amended.

Commentary to article 2 (Establishment of consular relations)

22. Mr. ERIM said he was unable to understand the precise purport of the last sentence of paragraph (4). He proposed that the sentence should be deleted.

It was so agreed.

23. Mr. AGO proposed that in the first sentence of paragraph (4) of the commentary to article 2 a reference to the "establishment" of diplomatic relations and of consular relations should be added and that the word "include" should be replaced by "imply," so as to bring the passage into line with the text of the article itself. The Special Rapporteur's personal view that diplomatic relations "included" consular relations was not shared by the Commission.

That amendment was adopted.

24. The CHAIRMAN suggested that paragraph (5) of the commentary should be deleted.

25. Mr. ŽOUREK, Special Rapporteur, said he had no objection.

It was agreed that paragraph (5) of the commentary to article 2 would be omitted.

26. Sir Humphrey WALDOCK said that the statement contained in the second sentence of paragraph (7) of the commentary went beyond the rule enunciated in the article itself. Nor did the third sentence reflect practice.

27. Mr. EDMONDS objected to the fourth and fifth sentences of the same paragraph, which carried a questionable argument yet further.

28. The CHAIRMAN, speaking as a member of the Commission, agreed with Sir Humphrey's criticism. He knew of no case of a consular section continuing to function after a diplomatic mission had been closed.

It was agreed to retain the first sentence in paragraph (7) and to delete the rest of the paragraph.

29. Mr. BARTOŠ criticized the second sentence in paragraph (8) as prejudging the decision as to whether consular relations would be maintained in the circumstances described. Furthermore, it was not appropriate in the context to discuss the question of the Security Council's competence.

30. Sir Humphrey WALDOCK said he would prefer the whole paragraph to be deleted as being too speculative.

It was agreed to delete paragraph (8).

The commentary to article 2 was adopted, as amended.

Commentary to article 2 bis (Exercise of consular functions)

31. Mr. AGO proposed the deletion of the second sentence in paragraph (1).

It was so agreed.

The commentary to article 2 bis was adopted, as amended.

Commentary to article 3 (Establishment of a consulate)

32. Mr. ERIM, referring to paragraph (4), which in the first sentence described the agreement for the establishment of a consulate as equivalent to an international treaty, questioned the statement in the last sentence that such an agreement could be denounced unilaterally.

33. The CHAIRMAN, speaking as a member of the Commission, expressed doubts about the accuracy of the whole paragraph. He very much doubted whether the agreement for the establishment of a consulate could be regarded as an international treaty; such an assertion was by no means confirmed by practice. He accordingly proposed that the whole paragraph be deleted.

34. Mr. ŽOUREK, Special Rapporteur, said that paragraph (4) had appeared in the commentary to article 3 in the draft adopted at the twelfth session (A/4425). Something should be said on the subject. He suggested that he should be authorized to modify and shorten the text.

It was so agreed.

35. Mr. JIMÉNEZ de ARÉCHAGA suggested that the order of paragraphs (5) and (6) should be reversed.

It was so agreed.

The commentary to article 3 was adopted as amended, subject to drafting changes.

Commentary to article 4 (Consular functions)

36. Mr. BARTOŠ, referring to paragraph (4), regretted the reference to "the majority" of governments which had sent in comments, for actually very few had commented.

37. Mr. ŽOUREK, Special Rapporteur, said that paragraph (4) contained a statement of fact which should be retained.

38. Mr. ERIM said that there was no need for the second sentence in paragraph (7). The third and fourth sentences could also be omitted.

39. Mr. ŽOUREK, Special Rapporteur, said that he had added the explanatory comment in order to forestall any misinterpretation of the expression "consular protection". There was some misconception about the nature and scope of the consular function of safeguarding the interests of the sending State and of its nationals; he had thought that some explanation was necessary.

40. Mr. AGO said that the Special Rapporteur appeared to have confused consular with diplomatic protection. Referring to the fourth sentence of paragraph (7), he said that, for example, a consul could take steps to protect interests even before they were prejudiced by violation of the municipal law of the receiving State or of international law. The whole subject was full of pitfalls and he suggested that only the first sentence in the paragraph should be retained.

41. Sir Humphrey WALDOCK agreed that the commentary was not the right context for a general disquisition on the law relating to the protection of interests. There was no need whatever to enter into such controversial matters.

42. Mr. BARTOŠ said that the statement in the fourth sentence of paragraph (7) was not consistent either with theory or with practice. Frequently consuls had to take measures to protect interests well before there was any prejudice.

43. Mr. AMADO found the second sentence of paragraph (7) wholly unacceptable: it was inconceivable that the authority of a consul could oust the jurisdiction of the receiving State, and there was no need to say so.

44. Mr. ŽOUREK, Special Rapporteur, contended that the second sentence ("It does not by any means imply that the authority of the consul can oust the jurisdiction of the receiving State") had some utility inasmuch as there had been cases where consuls had tried to encroach on functions vested in the receiving State. Nevertheless, he would agree to the deletion of the sentence.

45. The CHAIRMAN, speaking as a member of the Commission, suggested that the first sentence should be retained as well as the third sentence up to the words "the internal affairs of the receiving State" (subject to

drafting changes) and that the rest of paragraph (7) should be deleted.

46. Mr. PADILLA NERVO supported the Chairman's suggestion, and added that the commentary should be confined to matters dealt with in the articles themselves. The Commission would be ill-advised to broach controversial topics.

The Chairman's suggestion was adopted.

47. Mr. MATINE-DAFTARY said that paragraph (9) should mention that some members would have preferred the expression "legitimate interests".

48. Mr. AMADO considered that Mr. Matine-Daftary should be satisfied with the broad interpretation of the word "interests" given in the second sentence.

49. Mr. ŽOUREK, Special Rapporteur, suggested that he might redraft paragraph (9) so as to indicate that the Commission had chosen the word "interests" in order to conform with the language used in article 3 of the Vienna Convention, but that some members had preferred other expressions.

That suggestion was adopted.

50. Mr. JIMÉNEZ de ARÉCHAGA proposed that the opening phrase of paragraph (11) should be amended to read "The notarial functions are varied and may include, for example". Similarly the second sentence in paragraph (13) should read "They may include the following, for example".

51. Mr. ŽOUREK, Special Rapporteur, agreed to the proposal.

Those amendments were approved.

52. Mr. AGO doubted whether the functions referred to in paragraph (11)(e) were truly notarial.

53. Mr. BARTOŠ affirmed that they were notarial in some countries, e.g. Austria.

54. Mr. ŽOUREK, Special Rapporteur, explained that the examples mentioned in paragraph (11) did not necessarily reflect the practice of all countries; in order to speed up the discussion on the commentary, he suggested that sub-paragraph (e) be deleted.

It was so agreed.

55. Mr. JIMÉNEZ de ARÉCHAGA proposed that in paragraph (15) of the commentary the last four sentences should be omitted, for they seemed to add to the text of the article rather than comment upon it.

56. Mr. AGO supported that proposal. The passage in question entered into delicate questions of private international law which the Commission had not resolved.

57. The deletion of the last four sentences would necessitate a consequential drafting change in the third sentence of the paragraph, which would now become the final sentence (ending with the word "guardianship").

58. Mr. ŽOUREK, Special Rapporteur, accepted both proposals, though he regretted that as a consequence the essential explanation of the reason for giving the consul certain rights in the matter of the protection of minors and persons under a disability who were nationals of the

sending State would disappear from the commentary.

59. Mr. JIMÉNEZ de ARÉCHAGA proposed that in the second sentence of paragraph (17) the words: "it also means cases where a body corporate is exceptionally unable to find an agency to act on its behalf" should be omitted.

The proposal was adopted.

60. Mr. AGO proposed an amendment replacing in the first sentence of paragraph (18) the words: "by the Ministry of Foreign Affairs" by "by the authorities of the sending State". The documents under reference might be sent by another Ministry, e.g. the Ministry of Justice.

The amendment was adopted.

61. Mr. AGO requested an explanation of the use of the word *patron* in paragraph (23) of the commentary.

62. Mr. BARTOŠ explained that *patron* was an old-fashioned term meaning a person who was both the owner and captain of a small ship. Probably the intention had been to refer to the *armateur* (ship's manager).

63. He suggested that the Special Rapporteur should be asked to revise the passage in question and bring it into line with the language used in international conventions.

It was so agreed.

64. Mr. BARTOŠ proposed that, in paragraph (24) of the commentary, the word "arbitrator" be qualified by the words *ad hoc*.

It was so agreed.

The commentary to article 4 was adopted as amended, subject to drafting changes.

Commentary to article 5 (Exercise of consular functions in a third State)

65. Mr. JIMÉNEZ de ARÉCHAGA proposed that in the first sentence the words "for reasons of economy" should be omitted.

It was so agreed.

66. Mr. BARTOŠ proposed that the words "quite often" in the first sentence be replaced by "sometimes."

It was so agreed.

67. Mr. LIANG, Secretary to the Commission, said that the second sentence, to the effect that the consular district sometimes covered two or more States, needed clarification. The extent of a consular district was determined by the receiving State; in the case under reference a consulate exercised its functions in more than one receiving State.

68. Mr. ŽOUREK, Special Rapporteur, said that he would redraft that sentence along the following lines: "Sometimes the territory in which the consulate exercises its activities covers actually two or more States."

The commentary to article 5 was adopted as amended.

Commentary to article 6 (Exercise of consular functions on behalf of a third State)

69. Mr. AGO proposed that the expression "wishes to exercise consular functions" in the first sentence of

paragraph (1) of the commentary be replaced by "is also called upon to exercise".

70. Mr. ŽOUREK, Special Rapporteur, agreed to the amendment.

The amendment was approved.

The commentary to article 6 was adopted as amended.

Commentary to article 7 (Appointment and admission of heads of consular post)

71. In reply to a question by Sir Humphrey Waldoek, Mr. ŽOUREK, Special Rapporteur, said that paragraph (2) of the commentary — which, incidentally, had been approved at the twelfth session — referred to officials who had the title of consul but had not been appointed to serve abroad.

72. He thought that paragraph (2) was useful in order to explain the presence of article 7 in the draft.

73. Sir Humphrey WALDOCK proposed the deletion of paragraph (2). Article 7 dealt with the appointment and admission of heads of consular post; its provisions could not be said to be necessary merely in order to explain the exclusion from the scope of the draft articles of persons who were not consuls within the meaning of the draft.

74. Mr. LIANG, Secretary to the Commission, said that article 7 was fully supported by paragraph (1) of the commentary. That paragraph explained that, in order to have the status of head of consular post, a person must not only be appointed by the sending State as consul-general, consul, vice-consul or consular agent but must also be admitted to the exercise of his functions by the receiving State. A person who had not been admitted to the exercise of consular functions by a receiving State was certainly not a consul within the meaning of article 7.

75. Mr. YASSEEN agreed with the Secretary and supported the proposal to delete paragraph (2) as unnecessary.

76. The CHAIRMAN, speaking as a member of the Commission, supported the proposal to delete paragraph (2).

The proposal was adopted.

The commentary to article 7 was adopted as amended.

Commentary to article 8 (Classes of heads of consular post)

77. Mr. LIANG, Secretary to the Commission, suggested the deletion of the final words of paragraph (1) of the commentary: "thus doing for consular law what the Congress of Vienna did more than 140 years ago for diplomatic law". The analogy with the Congress of Vienna would be more with the future conference of plenipotentiaries which would examine the Commission's draft.

78. Mr. ŽOUREK, Special Rapporteur, agreed to delete the passage in question.

79. Mr. AGO proposed, in paragraph (5) of the commentary, that the expression "officials appointed *ad*

honorem, i.e. unpaid" be replaced by "honorary officials".

It was so agreed.

The commentary to article 8 was adopted as amended.
Commentary to article 9 (The consular commission)

The commentary to article 9 was adopted.

Commentary to article 10 (The exequatur)

80. Mr. AGO proposed that in paragraph (1) of the commentary the second sentence ("Accordingly, the exequatur invests the consulate with competence vis-a-vis the receiving State") should be omitted.

81. Mr. ŽOUREK, Special Rapporteur, accepted that amendment.

82. Sir Humphrey WALDOCK proposed that the next sentence of paragraph (1) be amended so as not to use the term "recognition". The sentence might be redrafted to read: "The same term also serves to describe the document by which the head of post is admitted to the exercise of his functions".

83. Mr. ŽOUREK, Special Rapporteur, accepted that amendment.

84. In reply to a question by Mr. ERIM, Mr. ŽOUREK, Special Rapporteur, explained that the "transcription" mentioned in paragraph (3) (c) referred to the practice of entering on the letters patent a statement to the effect that the exequatur had been granted.

85. Mr. PAL proposed that in the first sentence of paragraph (8) the adjective "foreign" should be omitted.

It was so agreed.

86. Mr. AGO said that paragraph (9) of the commentary had a connexion with the provision under which the receiving State could indicate that a person designated as consul was not acceptable even before he entered its territory. When the Commission came to consider the provision in question it would have to make it clear that, in the particular case, the receiving State did not have to communicate the reasons for its action. The position was similar to that envisaged in paragraph (9).

The commentary to article 10 was adopted as amended.

CHAPTER III (Other decisions and conclusions of the Commission) (A/CN.4/L.95/Add.2)

Section I (Law of treaties)

87. The CHAIRMAN, speaking as a member of the Commission, proposed that in paragraph 1 (ii) the words "on the understanding that he would have discretion as to the use of this work for his own proposals" should be omitted. Paragraph 1 (i) already implied that the Special Rapporteur on the law of treaties would have the necessary discretion in the matter.

The proposal was adopted.

88. Mr. LIANG, Secretary to the Commission, suggested that reference should be made to the Commission's decision to deal, at its next session, with the topic of the law of treaties.

89. The CHAIRMAN supported that suggestion and

proposed that a new sub-paragraph (i) should be added to cover the point, the existing sub-paragraphs being renumbered accordingly.

Section I, as so amended, was adopted.

Section II (Planning of the future work of the Commission)

90. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of paragraphs 5, 6 and 7. Those paragraphs attempted to give a summary of the discussion which had taken place in the Commission. A summary of that type, however well written, could not do justice to all the different views which had been expressed.

91. To his mind, it was quite sufficient to draw attention (as paragraph 3 in fact did) to the summary records of the Commission containing the full discussion on the question.

92. Mr. LIANG, Secretary to the Commission, said that, from the point of view of the Secretariat, the omission of paragraphs 5, 6 and 7 would be welcome. A summary of that type could never satisfy a meticulous reader and the best course was to draw attention to the summary records of the Commission's proceedings.

93. Mr. ŽOUREK, Special Rapporteur, supported the Chairman's proposal. It was very difficult to summarize briefly the discussion so as to reflect all the opinions expressed.

94. Mr. MATINE-DAFTARY and Mr. PAL supported the Chairman's proposal.

95. Mr. EDMONDS suggested that paragraph 7 might be retained. That paragraph referred to the manner in which the Commission worked and in view of what had been said in the Sixth Committee at the fifteenth session of the General Assembly, it was perhaps appropriate to point out that, in the codification and development of international law, the careful preparation of the drafts was more important than speed and that the experience of the Geneva Conferences on the Law of the Sea and of the Vienna Conference on Diplomatic Intercourse had shown that a thoroughly drafted basic text was indispensable to the successful outcome of a codification conference.

96. The CHAIRMAN said that a short paragraph of that type was inadequate for the purpose. The Commission had given a much fuller explanation on the subject in the report on its tenth session (A/3859, chapter V, paragraphs 68 and 69).

97. Mr. AGO accepted with regret the deletion of paragraphs 5, 6 and 7, which constituted a carefully prepared summary of the discussion in the Commission. The summary had brought out adequately the salient points calling for the attention of the Sixth Committee.

98. Sir Humphrey WALDOCK said that, though he would have preferred the inclusion of a summary of the Commission's discussion, he would accept the solution of drawing attention to the summary records of the Commission.

99. However, he suggested that the substance of paragraph 4 should be inserted before the last sentence of paragraph 3.

100. Mr. LIANG, Secretary to the Commission, said that the idea contained in paragraph 4 could conveniently be incorporated into the second sentence of paragraph 3.

101. The CHAIRMAN said that Sir Humphrey Waldock's suggestion, as formulated by the Secretary, would improve the text resulting from the deletion of paragraphs 5, 6 and 7. He therefore amended his proposal accordingly.

The Chairman's proposal was adopted.

102. Sir Humphrey WALDOCK suggested that reference be made to the Commission's understanding that the Chairman would present its views on the matter to the Sixth Committee (616th meeting, paras. 38 and 39).

103. The CHAIRMAN said that Sir Humphrey Waldock's point was implicit in the decision to appoint him (the Chairman) to represent the Commission at the next session of the General Assembly.

Section II, as amended, was adopted.

Section III (Co-operation with other bodies)

Section III was adopted.

Section IV (Date and place of the next session)

Section IV was adopted.

Section V (Representation at the sixteenth session of the General Assembly)

Section V was adopted.

The meeting rose at 1 p.m.

626th MEETING

Thursday, 6 July 1961, at 9.30 a.m.

Chairman; Mr. Grigory I. TUNKIN

Consideration of the Commission's draft report covering the work of its thirteenth session (A/CN.4/L. 95/Add. 1) (continued)

CHAPTER II (Consular intercourse and immunities) (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of the commentaries in chapter II of the draft report.

Commentary to article 11 (Modes of appointment and admission)

The commentary to article 11 was adopted.

Commentary to article 12 (Provisional recognition)

The commentary to article 12 was adopted.

Commentary to article 13 (Obligation to notify the authorities of the consular district)

2. Mr. JIMÉNEZ de ARÉCHAGA proposed that the second sentence of paragraph (2) of the commentary

be replaced by the second sentence of paragraph (2) of the 1960 commentary to article 15 (A/4425).

3. The CHAIRMAN, speaking as a member of the Commission, said that the idea expressed in the sentence under discussion was so obvious as to be hardly worth stating.

4. Mr. AGO proposed the deletion of the second sentence of paragraph (2).

It was so agreed.

The commentary to article 13 was adopted as amended.

Commentary to article 14 (Temporary exercise of

the functions of head of consular post)

5. Mr. AGO proposed that the last two sentences of paragraph (3) should be re-drafted so as to express more correctly the intended idea, along the following lines:

"Since the function of acting head of post is of necessity temporary, and in order that the work of the consulate should not suffer any interruption, the appointment of the acting head of post is not subject to the procedure governing admission. However, the sending State has the duty to notify the name of the acting head of post to the receiving State in advance in all cases where that is possible."

6. The CHAIRMAN suggested that the principle of Mr. Ago's proposal be adopted and the Special Rapporteur should be asked to redraft the sentences in question accordingly.

It was so agreed.

7. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the second sentence of paragraph (7), concerning the right of the consulate to fly the national flag on its vehicles.

8. Mr. ŽOUREK, Special Rapporteur, explained that he had added the sentence because one government had raised the question in its comments. Nevertheless, he did not object to its deletion.

It was agreed that the sentence in question should be omitted.

The commentary to article 14 was adopted as amended, subject to drafting changes.

Commentary to article 15 (Precedence)

9. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the second sentence of paragraph (2): "This question is dealt with in chapter III of the present draft."

10. Mr. ŽOUREK, Special Rapporteur, accepted the proposal.

It was agreed that the sentence in question should be omitted.

The commentary to article 15 was adopted as amended.

Commentary to article 16 (Performance of diplomatic acts by a head of consular post)

11. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of paragraph (7) which stated that the article codified existing practice and answered genuine needs of international life.

12. The CHAIRMAN, speaking as a member of the Commission, supported that proposal.

13. Mr. ŽOUREK, Special Rapporteur, agreed to the deletion of the sentence in question.

The proposal was adopted.

The commentary to article 16 was adopted as amended.

Commentary to article 17 (Appointment of the same person by two or more States as head of a consular post)

14. Mr. JIMÉNEZ de ARÉCHAGA proposed that, in paragraph (1), the words "the head of consular post is a representative" be replaced by "the head of consular post is an organ".

15. Mr. ŽOUREK, Special Rapporteur, accepted the proposal.

The amendment was approved.

16. Sir Humphrey WALDOCK said that the first sentence of paragraph (2) was too sweeping: he was not at all certain that the article represented an innovation and could therefore "be regarded as a proposal *de lege ferenda*".

17. Mr. AGO proposed that the sentence in question should be amended so as to state that the article represented something of an innovation in consular law, eliminating the reference to "*de lege ferenda*". He further proposed that, in the third sentence of paragraph (2), the words "diametrically opposed interests" be replaced by "different interests".

Mr. Ago's proposal was adopted.

The commentary to article 17 was adopted as amended.

Commentary to article 18 (Appointment of consular staff)

18. Mr. JIMÉNEZ de ARÉCHAGA proposed that the second sentence of paragraph (1) of the commentary should be revised. It was not quite correct to state that the consul could not discharge his many duties without the help of assistants. The sentence should be redrafted along the following lines: "In most cases, the consul cannot discharge the many tasks..." The words "The issue of the exequatur to the head of consular post is not enough to ensure the smooth operation of the consulate," which appeared at the beginning of the sentence, would be omitted.

19. Mr. ŽOUREK, Special Rapporteur, pointed out that the passage in question was taken from the commentary approved by the Commission at its twelfth session. In his opinion, the consul invariably needed the assistance of at least one other member of the consular staff.

It was agreed that the commentary should be amended in the manner proposed by Mr. Jiménez de Aréchaga.

20. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the last five sentences of paragraph (7) of the commentary, beginning with "This is an optional and supplementary measure, which is not required by international law". The explanations given in that passage were an unnecessary elaboration.

21. Sir Humphrey WALDOCK supported that proposal. He did not think that the outside reader would appreciate what was intended by the five sentences in question.

The proposal was adopted.

The commentary to article 18 was adopted as amended.

Commentary to article 19 (Size of the staff)

22. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the second sentence of paragraph (1) of the commentary. That sentence reproduced a passage of the commentary in the 1960 report and referred to a discussion at the twelfth session; its inclusion was not appropriate in the 1961 text.

23. Mr. ŽOUREK, Special Rapporteur, while pointing out that the passage in question was an accurate statement of fact, said he would agree to the proposed amendment.

The proposal was adopted.

24. Mr. AGO said that it was not quite correct to state, as did paragraph (2) of the commentary, that the receiving State was competent to settle the question of the size of the staff. He suggested that the particular passage should be replaced by a reference to the receiving State's right to raise the question of the size of the staff.

25. Mr. ŽOUREK, Special Rapporteur, said that the passage reproduced the interpretation placed on the provision at the twelfth session. Personally, he was not averse to Mr. Ago's proposal.

It was agreed to amend the passage in the manner proposed by Mr. Ago.

26. Mr. JIMÉNEZ de ARÉCHAGA proposed that in paragraph (3) of the commentary the words "in the opinion of most members of the Commission" should be replaced by "in the opinion of the majority of the Commission".

27. Mr. ŽOUREK, Special Rapporteur, accepted the proposal.

The proposal was adopted.

28. Mr. JIMÉNEZ de ARÉCHAGA proposed that the fourth sentence of paragraph (4) should be amended to read: "The Commission has preferred this formulation to that used in article 11, paragraph 1, of the Vienna Convention of 1961, considering that it would better provide objective criteria for settling possible divergences of views between the two States concerned."

It was so agreed.

The commentary to article 19, as amended, was adopted.

Commentary to article 20 (Order of precedence as between the officials of a consulate)

The commentary to article 20 was adopted.

Commentary to article 21 (Appointment of nationals of the receiving State)

29. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion, in paragraph (2), of the last part of the first sentence reading "for in such cases the duties of a

consular official towards the sending State may conflict with his duties as a citizen of the receiving State."

30. The receiving State might have other reasons for not wishing its national to take up such an appointment: for example, it might not wish to extend to him certain privileges.

31. Mr. ŽOUREK, Special Rapporteur, agreed to the deletion of the passage in question.

The proposal was adopted.

32. Mr. AGO proposed the deletion of the last sentence of paragraph (2) reading "The text did not require the receiving State's consent to the appointment to a consulate of nationals of a third State."

33. The question of nationals of a third State appointed to a consulate was fully explained in paragraph (3) of the commentary.

34. Mr. ŽOUREK, Special Rapporteur, agreed to the proposed deletion.

Mr. Ago's proposal was adopted.

35. Mr. JIMÉNEZ de ARÉCHAGA proposed that the last sentence of paragraph (3) should be revised.

36. The CHAIRMAN suggested that the Special Rapporteur be asked to reformulate that sentence.

It was so agreed.

The commentary to article 21 was adopted as amended.

Commentary to article 22 (Withdrawal of exequatur)

37. Sir Humphrey WALDOCK pointed out that paragraph (4) broke the continuity of the commentary. It referred to the possibility of discussions for the purpose of settling the question of the recall of the person concerned before resorting to the action mentioned in article 22. He proposed the deletion of paragraph (4); the Commission was concerned with the rights of States rather than with the possibility of certain diplomatic steps, which were always possible.

38. Mr. ŽOUREK, Special Rapporteur, explained that the object of paragraph (4) was to point out that governments had no need to go to the length of withdrawing the exequatur in the circumstances contemplated by article 22 but could simply ask the sending State to recall the consular official or employee concerned. The withdrawal of the exequatur was always a spectacular step which attracted public notice and which might worsen the relations between the two states.

39. Mr. AGO supported the proposal to delete paragraph (4) which referred to unofficial discussions — a matter with which it was unnecessary to deal in the commentary. Moreover, the placing of paragraph (4) created an ambiguity and was likely to lead to misinterpretation. At first sight, it appeared to be actually in conflict with the terms of article 22 until it was realized that it referred to the possibility of unofficial action in lieu of the exercise of the rights envisaged in the article itself.

40. Mr. ŽOUREK, Special Rapporteur, said that paragraph (4) if read in the context of the commentary, was hardly open to misconstruction. Nevertheless, he would not press for its retention.

The proposal for the deletion of paragraph (4) was adopted.

The commentary to article 22, as amended, was adopted.

Commentary to article 23 (Notification of the appointment, arrival and departure of members of the consulate, members of their families and members of the private staff)

41. Mr. ERIM said that throughout the text of the commentary the words "belonging to the household" should be added after the words "members of the families".

42. Mr. AGO proposed that, in paragraph (2), the words "the receiving State has, in effect an interest in knowing at all times what persons belong to the consulate of the sending State..." be replaced by a reference to the interest of both States in knowing what persons belonged to the consulate.

43. Mr. ŽOUREK, Special Rapporteur, concurred with these proposals.

The proposed amendments were approved.

44. Mr. AGO proposed the deletion of paragraph (5) of the commentary. He was not at all certain that the obligation stipulated in the article was a counterpart of the exemption from aliens registrations and residence permits.

45. Mr. ŽOUREK, Special Rapporteur, said that the obligation in question did in fact constitute a counterpart to the immunity under the later article which provided for the exemption of members of the consulate, members of their families and their private staff from the duty, under the law of the receiving state, to register as aliens and obtain residence permits. Nevertheless, he would not wish to reopen the debate at that stage and accordingly agreed to the deletion of the passage in question.

Mr. Ago's proposal was adopted.

The commentary to article 23 was adopted, as amended, subject to drafting changes.

Commentary to article 24 (Different modes of terminating the function of a member of the consulate)

The commentary to article 24 was adopted.

Commentary to article 25 (Facilitation of departure)

46. Mr. François criticized paragraph (2) of the commentary, which seemed to suggest that the main issue was that of giving the consul time to make arrangements for his departure. In fact, the real intention was that the consul's departure should not be unduly delayed.

47. Mr. AGO agreed and proposed that paragraphs (2) and (3) of the commentary be combined so as to state that article 25 corresponded to article 44 of the Vienna Convention and that the expression "at the earliest possible moment" meant that the departure should not be delayed and also that the receiving State should give the persons concerned the necessary time to make the arrangements for their departure.

48. Mr. ŽOUREK, Special Rapporteur, agreed to the amendment of the commentary in the manner proposed.

It was agreed that the commentary should be amended in the manner proposed.

The commentary to article 25 was adopted as amended, subject to drafting changes.

Commentary to article 26 (Protection of consular premises and archives and of the interests of the sending State in exceptional circumstances)

The commentary to article 26 was adopted.

Commentary to article 27 (Use of the national flag and of the state coat of arms)

49. The CHAIRMAN, speaking as a member of the Commission, proposed the deletion of the second sentence in paragraph (3) of the 1960 commentary (intended to be reproduced in the new commentary); that sentence was much too sweeping.

50. Mr. ŽOUREK, Special Rapporteur, said he had no objection to the deletion of the sentence in question.

The proposal was adopted.

51. Sir Humphrey WALDOCK proposed the deletion of paragraph (7) of the commentary (1960), which contained a lengthy explanation of the 1960 discussion.

52. Mr. ŽOUREK, the Special Rapporteur, agreed to the deletion of paragraph (7).

The commentary to article 27 was adopted, as amended.

Commentary to article 28 (Accommodation)

53. Mr. ŽOUREK, Special Rapporteur, said that in view of the decision taken on the article (618th meeting, paras. 109-119) the last sentence in paragraph (1) of the 1960 commentary should be deleted.

54. Mr. LIANG, Secretary to the Commission, referring to the amendment proposed by the Special Rapporteur in paragraph (1) suggested that the original expression "internal law" was more appropriate than "laws," as being limited in scope.

55. Mr. PAL said that the commentary would have to be consistent with the new text of article 28 which referred to the "laws" of the receiving State.

56. Mr. ŽOUREK, Special Rapporteur, said that in any event the word "laws" should be interpreted as meaning both statute law and regulations made pursuant thereto.

57. The CHAIRMAN observed that the Commission had followed the wording of article 21 of the Vienna Convention. He subscribed to the interpretation given by the Special Rapporteur.

58. Mr. AGO proposed that article 28, paragraph 1, should be amended by the replacement of the word "laws" by the words "municipal law". A corresponding amendment would then have to be made in paragraph (1) of the commentary.

It was so agreed.

59. Mr. TSURUOKA proposed the deletion of the words "in whose territory there are a large number of consulates" in paragraph (2); there could be other reasons for not imposing too heavy a burden on States.

60. Mr. ŽOUREK, Special Rapporteur, agreed to Mr. Tsuruoka's amendment.

The amendment was approved.

The commentary to article 28 was adopted as amended.

Commentary to article 29 (Inviolability of the consular premises)

61. Mr. AGO doubted whether it was necessary to retain paragraph (5) of the 1960 commentary, for measures of execution against a private owner of premises leased to the consulate did not concern the consulate.

62. Mr. ŽOUREK, Special Rapporteur, pointed out that if the premises had been leased to a consulate furnished, measures of execution might necessitate entry, and such entry would constitute a breach of the inviolability of the consular premises. He suggested that the paragraph in question might be redrafted so as to indicate that such entry would not be permissible.

It was so agreed.

63. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the words "in particular those concluded by Great Britain" in paragraph (6): there was no reason for making special mention of those conventions.

It was so agreed.

The commentary to article 29 was adopted as amended, subject to drafting changes.

Commentary to article 30 (Exemption from taxation of consular premises)

The commentary to article 30 was adopted.

Commentary to article 31 (Inviolability of the consular archives and documents)

The commentary to article 31 was adopted.

Commentary to article 32 (Facilities for the work of the consulate)

The commentary to article 32 was adopted.

Commentary to article 33 (Freedom of movement)

64. Mr. JIMÉNEZ de ARÉCHAGA said that in view of the decisions reached at the current session the first two sentences in the 1960 commentary were no longer appropriate and should be deleted.

65. The CHAIRMAN, speaking as a member of the Commission, proposed that the commentary should consist simply of a reference to the corresponding article in the Vienna Convention.

66. Mr. ŽOUREK, Special Rapporteur, endorsed the Chairman's proposal.

The proposal was approved.

The commentary to article 33 was adopted as amended.

Commentary to article 34 (Freedom of communication)

67. Mr. AGO proposed the insertion in the commentary of a separate paragraph concerning the inviolability of official correspondence.

It was so agreed.

68. Sir Humphrey WALDOCK proposed the deletion

of the last two sentences in paragraph (6) of the 1960 commentary, which was unnecessarily detailed.

69. Mr. ŽOUREK, Special Rapporteur, said he did not object to the proposal.

The proposal was approved.

The commentary to article 34 was adopted as amended.

Commentary to article 35 (Communication and contact with nationals of the sending State)

70. Mr. AGO said that there was no need for a special comment on the expression "without undue delay" since, under paragraph 1(b) of the article, even if a person was held *incomunicado* the authorities of the receiving State were still bound to notify the consulate of his detention.

71. Mr. ŽOUREK, Special Rapporteur, pointed out that paragraph 1(b) of the article was also concerned with cases where the authorities of the receiving State might be unwilling, so as not to put accomplices on guard, to disclose immediately the arrest of a person involved in a serious criminal case implicating a whole group of persons (e.g. a drug trafficking case). The words "without undue delay" were applicable to such cases and were fully justified.

72. Mr. BARTOŠ argued that an arrest must always be notified, even if the person was held *incomunicado*, so that the consulate could immediately take steps to arrange for his defence. If human rights meant anything, they meant that a person must be presumed innocent until he had been tried and convicted.

73. The CHAIRMAN, speaking as a member of the Commission, said that in the circumstances mentioned by the Special Rapporteur the authorities of the receiving State would certainly not wish to notify the consulate at once, for otherwise the task of the police would be made far more difficult.

The commentary to article 35 was adopted.

Commentary to article 36 (Obligations of the receiving State in certain special cases)

74. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion of the words "for example in a river or lake" in paragraph (3) as proposed by the Special Rapporteur.

It was so agreed.

The commentary to article 36 was adopted as amended.

Commentary to article 37 (Communication with the authorities of the receiving State)

75. Mr. LIANG, Secretary to the Commission, referring to paragraph (4), suggested that the word "domestic" might be omitted.

76. Mr. ŽOUREK, Special Rapporteur, explained that it was important to indicate that the sentence referred to the usage of the receiving State and not to international usage. He suggested that the language of the article itself should be used, viz. "the municipal law and usage".

It was so agreed.

The commentary to article 37 was adopted as amended, subject to drafting changes.

Commentary to article 38 (Levying of consular fees and charges and exemption of such fees and charges from taxes and dues)

77. Mr. JIMÉNEZ de ARÉCHAGA suggested that the fourth and fifth sentences in paragraph (1) of the 1960 commentary should be retained, the reference to article 4 being replaced by a reference to article 55 in conformity with the action taken at the current session.

It was so agreed.

78. Mr. JIMÉNEZ de ARÉCHAGA considered that the statement made in the first sentence of paragraph (2) of the 1960 commentary went too far and should be deleted.

It was so agreed.

The commentary to article 38 was adopted as amended.

Commentary to article 39 (Special protection and respect due to consular officials)

79. Mr. JIMÉNEZ de ARÉCHAGA proposed that paragraph (3) of the 1960 commentary should be amended to refer to "appropriate" instead of "reasonable" steps, in keeping with the wording of the article itself.

80. Mr. ŽOUREK, Special Rapporteur, accepted the proposed amendment.

The amendment was approved.

The commentary to article 39 was adopted as amended.

Commentary to article 40 (Personal inviolability of consular officials)

81. Sir Humphrey WALDOCK pointed out that the new text adopted for article 40 did not make it clear that the provision did not apply to nationals of the receiving State. It was therefore necessary to insert the appropriate explanation in the commentary.

82. Mr. ŽOUREK, Special Rapporteur, agreed to the addition of such an explanatory remark.

The commentary to article 40 was adopted, subject to the addition of that explanation.

Statement by the Secretary concerning the control and limitation of documentation

83. Mr. LIANG, Secretary to the Commission, said that he had been instructed by the Secretary-General to bring to the Commission's attention the General Assembly's injunction to exercise vigilance in regard to the volume of documentation. Members would be aware that it was customary for the Secretariat at each session to recall the terms of General Assembly resolution 1272 (XIII) on that subject. The matter did not present any particular problems for the Commission itself.

The Commission took note of the Secretary's statement.

The meeting rose at 1.15 p.m.

627th MEETING

Friday, 7 July 1961, at 9.30 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consideration of the Commission's draft report covering the work of its thirteenth session (A/CN.4/L. 95 and Add. 1, Add.1/Corr.1 and Add. 2)

(concluded)

CHAPTER II (Consular intercourse and immunities)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II of the draft report (A/CN.4/L.95/Add.1 and Add.1/Corr.1).

Commentary to article 41 (Duty to notify in the event of arrest, detention pending trial or the institution of criminal proceedings)

The commentary to article 41 was adopted subject to drafting changes.

Commentary to article 42 (Immunity from jurisdiction)

The commentary to article 42 was adopted.

Commentary to article 43 (Liability to give evidence)

2. Sir Humphrey WALDOCK, referring to paragraph (1) of the commentary, proposed that the words "or any other penalty" should be replaced by "and no penalty", for the expression "coercive measures" meant measures other than a penalty.

3. Mr. ŽOUREK, Special Rapporteur, agreed with the proposed amendment.

The amendment was adopted.

4. Sir Humphrey WALDOCK proposed that paragraph (4) should read: "...; the similar rules governing honorary consular officials are contained in articles 54 and 60 of the present draft".

5. Mr. ŽOUREK, Special Rapporteur, accepted the amendment.

The commentary to article 43 was adopted as so amended.

Commentary to article 44 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

6. Mr. JIMÉNEZ de ARÉCHAGA proposed that the last sentence in paragraph (2) of the 1960 commentary should be restored.

7. Mr. ŽOUREK, Special Rapporteur, supported the proposal for inasmuch as the Commission had not added a provision concerning special cards to be issued to members of the consulate and their families the 1960 comment had to be restored.

The proposal was approved.

8. Sir Humphrey WALDOCK said the drafting of the proposed new paragraph to follow paragraph (4) was unsatisfactory because the exemption it referred to was not contingent upon the clause contained in the opening phrase. It should be redrafted in simpler form.

It was so agreed.

The commentary to article 44 was adopted subject to drafting changes.

Commentary to article 45 (Social security exemption)

The commentary to article 45 was adopted, subject to drafting changes.

Commentary to article 46 (Exemption from taxation)

9. Mr. JIMÉNEZ de ARÉCHAGA said that the passage reading "Unlike the corresponding provision of the Vienna Convention..." at the end of paragraph (4) seemed to imply a criticism of a decision taken by the Vienna Conference; he thought that such a criticism was undesirable.

10. Mr. ERIM disagreed. The passage in question simply indicated what course had been taken by the Commission in the draft on consular intercourse.

11. Mr. ŽOUREK, Special Rapporteur, confirmed that the statement was not in any way a criticism. The very great differences which existed in certain respects between the consular and the diplomatic institution justified some departures from the Vienna Convention in the draft under discussion.

12. The CHAIRMAN suggested that the passage should be slightly modified so as to indicate that the Commission had adopted the provision in question by reason of the position of consuls, which differed from that of diplomatic agents.

It was so agreed.

The commentary to article 46 was adopted, subject to drafting changes.

Commentary to article 47 (Exemption from customs duties)

The commentary to article 47 was adopted, subject to drafting changes.

Commentary to article 48 (Estate of a member of a consulate or of a member of his family)

The commentary to article 48 was adopted.

Commentary to article 49 (Exemption from personal services and contributions)

The commentary to article 49 was adopted.

Commentary to article 50 (Question of the acquisition of the nationality of the receiving State)

13. Mr. AGO, referring to paragraph 1(c) of the commentary, said that the reinstatement in the nationality of origin was quite distinct from the acquisition of nationality.

14. Mr. BARTOŠ disagreed; it was generally held that reinstatement was a form of acquisition of nationality.

15. Mr. YASSEEN said that, in order to reflect the law of some countries, the passage should be amended by the addition of the words "more or less" before the word "prolonged".

16. Mr. BARTOŠ suggested that the word "prolonged" should be omitted, for a person who returned to his country of origin with the *animus manendi* might be reinstated in his nationality quickly.

17. Mr. YASSEEN agreed with Mr. Bartoš. The reinstatement in nationality might depend on the acquisition of domicile, and under the law of some countries a person became domiciled by the simple fact of entering with the *animus manendi*. Furthermore, under the law of some countries reinstatement in the nationality of origin might depend on arrival in the country of origin.

18. Mr. ŽOUREK, Special Rapporteur, said that for the sake of accuracy he would prefer to retain the word "prolonged", if necessary qualified by the words "more or less". Obviously, a very brief stay was not sufficient for reinstatement in the nationality of origin.

19. Sir Humphrey WALDOCK said it was hardly appropriate to deal in the commentary with a matter governed by the law of the receiving State.

20. Mr. BARTOŠ emphasized that the decisive factor was not the duration of residence but the *animus manendi*. Some explanation was necessary in order to indicate that reinstatement in the nationality of the receiving State was not automatic.

21. Mr. JIMÉNEZ de ARÉCHAGA proposed the insertion of the words "for example" after the words "in cases where".

22. Mr. ŽOUREK, Special Rapporteur, agreed to the amendment.

The amendment was adopted.

The commentary to article 50 was adopted, as amended, subject to drafting changes.

Commentary to article 51 (Beginning and end of consular privileges and immunities)

The commentary to article 51 was adopted.

Commentary to article 52 (Obligations of third States)

The commentary to article 52 was adopted.

Commentary to article 53 (Respect for the laws and regulations of the receiving State)

The commentary to article 53 was adopted.

Introduction to chapter III of the draft articles

23. Mr. AGO suggested that some modification was necessary in the introduction to chapter III so as to reflect the Commission's decision to place career consuls who carried on a private gainful occupation on a footing of equality with honorary consuls.

24. Mr. ŽOUREK, Special Rapporteur, said that it was necessary to indicate that the Commission had abandoned its efforts to formulate a definition of "honorary consuls". The statement was all the more indispensable because some governments had asked for such a definition. In

order to give a complete account of the course of discussion, he could add a paragraph explaining that at the current session it had defined the status of an intermediate category, that of career consular officials who carried on a private gainful occupation.

That suggestion was adopted.

Subject to that amendment, the commentary forming the introduction to chapter III was adopted.

Commentary to article 54 (Régime applicable to honorary consular officials)

The commentary to article 54 was adopted, subject to drafting changes.

Commentary to article 55 (Special provisions applicable to career consular officials who carry on a private gainful occupation)

The commentary to article 55 was adopted, subject to drafting changes.

Commentary to article 56 (Inviolability of consular premises)

25. Mr. AGO suggested that the commentary proposed by the Special Rapporteur might need some amplification so as to explain that, under the draft, an honorary consul engaged in some activity on behalf of the sending State which was not incompatible with but was not strictly part of the consular function was not thereby deprived of the benefit of article 56. He was anxious that the word "exclusively" in the second sentence of the commentary should not be interpreted too rigidly.

26. Mr. ŽOUREK, Special Rapporteur, pointed out that the Commission had deliberately introduced the proviso in the first sentence of article 56 because, since most honorary consuls engaged in a gainful private occupation, that condition was necessary if the article were to be acceptable to governments. A like condition was stipulated in article 60 in respect of the inviolability of the consular documents and archives.

27. The CHAIRMAN observed that it would be preferable to use the exact wording of the article itself in the second sentence of the commentary.

28. Mr. AMADO, disagreeing with Mr. Ago, said that the Commission had been excessively liberal in the provisions adopted for honorary consuls.

The commentary to article 56 was adopted, subject to drafting changes.

Commentary to article 57 (Exemption from taxation of consular premises)

29. Mr. AMADO said that the statement in paragraph (2) of the commentary was too candid. The Commission's decision would certainly come under fire in the Sixth Committee, and it was not advisable to advertise the fact that the exemption did not conform with general practice.

30. Mr. AGO suggested that paragraph (2) be deleted.

31. Mr. ŽOUREK, Special Rapporteur, said that, although he would not oppose the deletion of the paragraph, he had regarded it as his duty to insert the passage

for the sake of objectivity and in order to lay the fullest information before governments. The proposed rule certainly did not correspond to existing practice. The commentary had, however, some positive value, for it defended the Commission's decision. The deletion of the paragraph was unlikely to forestall objections to the article itself, particularly as some governments had already expressed the view that the Commission had been too liberal in regard to honorary consuls.

32. In any event, few consular premises used by an honorary consul fulfilled the conditions imposed in article 57, and consequently not many would qualify for the exemption which it conferred.

33. Mr. AMADO said it was surprising that the Commission should seek to introduce an innovation on a relatively secondary matter when its main task was to reflect practice. He suggested that the phrase "although it is not in conformity with general practice" be deleted.

It was so agreed.

34. Sir Humphrey WALDOCK proposed that it should be explained in the commentary that the exemption did not apply to nationals of the receiving State.

It was so agreed.

The commentary to article 57 was adopted as amended.

Commentary to article 58 (Inviolability of consular archives and documents)

The commentary to article 58 was adopted, subject to drafting changes.

Commentary to article 59 (Special protection)

The commentary to article 59 was adopted, subject to drafting changes.

Commentary to article 60 (Exemption from obligation in the matter of registration of aliens and work permits)

The commentary to article 60 was adopted, subject to drafting changes.

Commentary to article 61 (Exemption from taxation)

35. Mr. AGO drew attention to the statement in the commentary that the provision contained in the article was "not in accordance with the general practice of States". It was perhaps desirable to omit that statement, as had been done in the commentary to article 57.

36. Mr. AMADO said that, in the case of the commentary to article 61, unlike that of article 57, a full and adequate explanation was given in the commentary of the reasons for the innovation embodied in the article.

37. Sir Humphrey WALDOCK proposed that the passage under reference should be toned down, to read "although it goes beyond the existing general practice of States".

38. Mr. ŽOUREK, Special Rapporteur, accepted that amendment, which in no way changed the substance.

The proposal was adopted.

The commentary to article 61 was adopted as amended.

Commentary to article 62 (Exemption from personal services and contributions)

39. Mr. ŽOUREK, Special Rapporteur, said that, in the second sentence of paragraph (1) of the commentary, the words "the application of this article" should be replaced by "the scope of this article".

40. Mr. AGO said that a commentary along the lines of paragraph (2) should be attached either to all the articles or to none of them.

41. Mr. ŽOUREK, Special Rapporteur, said that the commentary in question was extremely useful in order to explain the scope of the articles on honorary consuls. He therefore proposed that in the commentaries on all the articles of chapter III the following sentence should be added: "It should be noted that, by virtue of article 66, this article does not apply to honorary consular officials who are nationals of the receiving State".

It was so agreed.

The commentary to article 62 was adopted as amended.

Commentary to article 63 (Obligation of third States)

42. Mr. JIMÉNEZ de ARÉCHAGA proposed that the words "As certain governments expressed doubt concerning the application of that article [Article 52] in full to honorary consular officials" should be replaced by a reference to the duty of third States to accord to the correspondence and other official communications of consulates headed by honorary consular officials the same freedom and protection as were accorded to them by the receiving State.

43. Mr. ŽOUREK, Special Rapporteur, accepted that proposal.

The commentary to article 63 was adopted as amended.

Commentary to article 64 (Respect for the laws and regulations of the receiving State)

44. Mr. JIMÉNEZ de ARÉCHAGA proposed the deletion from paragraph (2) of the commentary of the last two sentences, reading: "It may happen that an honorary consular official obtains certain advantages by reason of his official position. The prohibition laid down in this article is intended to prevent an honorary consular official from seeking advantages in his private occupation by making use of his official position".

45. The CHAIRMAN, speaking as a member of the Commission, supported that proposal.

The proposal was adopted.

The commentary to article 64 was adopted as amended.

Commentary to article 65 (Optional character of the institution of honorary consular officials)

46. Mr. FRANÇOIS said that the words "each State is free to decide whether it will make use of the institution of honorary consular officials" were ambiguous. They could be read to mean that the sending State was free to appoint honorary consuls without reference to the wishes of the receiving State.

47. The CHAIRMAN, speaking as a member of the Commission, agreed that the language used in the commentary was ambiguous.

48. Mr. ŽOUREK, Special Rapporteur, proposed that the passage in question be replaced by the words of the article itself: "each State is free to decide whether it will appoint or receive honorary consular officials".

It was so agreed.

The commentary to article 65 was adopted as amended.

Commentary to article 66 (Members of the consulate, members of their families, and members of the private staff who are nationals of the receiving State)

49. Mr. AGO noted that paragraph (3) of the commentary referred to article 38 of the Vienna Convention, which granted only a limited measure of immunity to diplomatic agents who were nationals of the receiving State. However, it was not correct to say that article 38 of that Convention granted to such officials "immunity from jurisdiction and inviolability solely in respect of official acts performed in the exercise of their functions". The correct statement was that such a diplomatic agent "shall enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions". The French text of the relevant clause of the Vienna Convention (originally drafted in English) was in that respect inaccurate. It should have read "ne bénéficie que de l'immunité de juridiction et de l'inviolabilité pour les actes officiels..." instead of "ne bénéficie de l'immunité de juridiction ou de l'inviolabilité que pour les actes officiels...".

50. He proposed accordingly that both the English and the French texts of paragraph (2) of the commentary should be rectified, to ensure that the conference of plenipotentiaries which would consider the draft would not repeat the error in the French text of the Vienna Convention.

51. Mr. ŽOUREK, Special Rapporteur, said that the English text of article 38 of the Vienna Convention was undoubtedly the correct one and that the French text should therefore be construed in the same way. He proposed that the commentary to the article under discussion should reflect that interpretation.

It was so agreed.

52. Mr. JIMÉNEZ de ARÉCHAGA expressed a preference for paragraph (3) of the 1960 commentary to article 50. The passage which the Special Rapporteur proposed to add contained a discussion of difficult theoretical issues which it would be better to avoid.

53. Mr. ŽOUREK, Special Rapporteur, replied that he had introduced the passage in question because a number of governments had noted the difference between articles 41 and 50 of the 1960 draft and had requested an explanation of the meaning of the term "official acts" in the expression "official acts performed in the exercise of their functions". Besides, during the debate at the current session, some members of the Commission, in particular Mr. Verdross, had asked him to explain the difference between the two provisions in the commentary.

54. Mr. FRANÇOIS proposed that only the first sentence of the proposed addition be included. That sentence explained that the expression "official acts" was more restricted in scope than that used in article 42. The remaining sentences should be dropped: they gave an interpretation of the expression "acts performed in the exercise of consular functions" which was not accepted by all States.

The proposal was adopted.

The commentary to article 66 was adopted as amended

Commentary to article 67 (Waiver of immunities)

55. Mr. JIMÉNEZ de ARÉCHAGA proposed that in the second sentence of paragraph (1) of the commentary the last words "and by international law in general" should be omitted. He further proposed the redrafting of the concluding portion of paragraph (3)

The proposal was adopted.

The commentary to article 67 was adopted as amended, subject to drafting changes.

Commentary to article 68 (Non-discrimination)

56. Mr. LIANG, Secretary to the Commission, suggested that a passage be included in the commentary indicating the reasons for not following the corresponding text of the Vienna Convention.

57. Mr. ŽOUREK, Special Rapporteur, agreed to that suggestion and said that he would include in the commentary a statement to the effect that in 1960 the Commission had adopted a text differing from the corresponding one in the draft on diplomatic intercourse and that the reasons which had led it to adopt that change were still valid.

The commentary to article 68 was adopted, subject to drafting changes.

Commentary to article 69 (Relationship between the present articles and international conventions or other agreements)

58. Mr. JIMÉNEZ de ARÉCHAGA proposed that the second part of the first sentence should be redrafted and that the sentence reading "This article does not prevent the conclusion of future conventions concerning consular relations" should be deleted.

59. Mr. YASSEEN supported that proposal. It was not necessary to reiterate in the commentary general principles of international law.

60. Mr. AMADO pointed out that it was inaccurate to say "The purpose of this article is to maintain in force international conventions...". The purpose, as expressed in the article itself, was to specify that the multilateral convention would not affect international conventions already in force.

61. Mr. AGO proposed that the first part of the first sentence be redrafted to read: "The purpose of this article is to specify that the provisions of the present articles do not affect conventions or other international agreements in force as between the States parties to them."

62. The second part of the sentence would be redrafted along the following lines: "Obviously, in that case, the multilateral convention will apply to those questions which are not governed by the pre-existing conventions."

63. As proposed by Mr. Jiménez de Aréchaga, the last sentence would be deleted.

64. Mr. ŽOUREK, Special Rapporteur, said that the second sentence contained the perfectly correct proposition that the article did not prevent the conclusion of future conventions concerning consular relations. He was surprised by the suggestion that the sentence should be dropped. Nevertheless, for the sake of agreement, he was prepared to omit the sentence.

The amendments proposed by Mr. Ago were approved.

The commentary to article 69 was adopted as amended.

Commentary to article 70 (Exercise of consular functions by a diplomatic mission)

The commentary to article 70 (A/CN.4/L.95/Add.1/Corr.1) was adopted, subject to drafting changes.

Preamble

65. The CHAIRMAN drew attention to the preamble proposed by the Drafting Committee.

66. Mr. JIMÉNEZ de ARÉCHAGA suggested that the Commission should not adopt a preamble, but should leave it to the future conference of plenipotentiaries to draft one.

67. Mr. YASSEEN said that a preamble would be appropriate in a convention on consular relations but that it was not for the Commission to adopt it. The preamble did not formulate any rules of international law and should be left to the future conference.

68. In reply to a question by Mr. PAL, Mr. LIANG, Secretary to the Commission, said that only in the case of its draft on the elimination and reduction of future statelessness had the Commission adopted a preamble (A/2693, chapter II). The 1959 Conference on the subject had not, however, adopted the preamble proposed by the Commission.

69. Mr. ŽOUREK, Special Rapporteur, said that the preamble in the short form proposed by the Drafting Committee was unlikely to meet with any objections, because it followed very closely the preamble adopted by the Vienna Conference. In his opinion it would be regrettable if the Commission left the draft without a preamble altogether. It was wrong to say that the preamble would not constitute a statement of international law and that it was not the Commission's responsibility to draft the preamble.

70. Mr. AGO proposed that the preamble should be included in an introductory commentary to the draft articles. In that manner, while not presented as part of the draft articles, it would still be made available to the future conference as a suggested text.

71. Mr. ŽOUREK, Special Rapporteur, supported the proposal.

The proposal was adopted.

Draft articles on consular relations

72. The CHAIRMAN invited the Commission to consider the adoption of the draft articles as a whole.

73. Mr. ŽOUREK, Special Rapporteur, drew attention to the need to correct article 7 concerning the exercise of consular functions on behalf of a third State, which made no reference to the sending State. The exercise of consular functions on behalf of a third State required the consent of the three States concerned.

74. Mr. AGO proposed that, in the article in question, the words "and by virtue of an agreement between the sending State and the receiving State" should be inserted.

The proposal was adopted.

75. Mr. AGO noted that article 45 (Waiver of immunities) had been placed in chapter II, dealing with career consular officials. In fact, immunities could be waived also in the case of honorary consular officials. The article should therefore be moved to chapter IV (General provisions).

76. Mr. JIMÉNEZ de ARÉCHAGA said that, without moving article 45, the desired result could be achieved by adding the article to the list, given in article 57, paragraph 1, of articles the provisions of which were applicable to honorary consular officials.

77. Mr. AGO supported that suggestion.

78. Mr. ŽOUREK, Special Rapporteur, accepted the suggestion of Mr. Jiménez de Aréchaga.

The amendment to article 57 was adopted.

The draft articles on consular relations, as a whole, as amended, were adopted unanimously.

Chapter II of the Commission's draft report, as a whole, as amended, was adopted unanimously, subject to drafting changes.

The Commission's report covering the work of its thirteenth session, as a whole, as amended, was adopted unanimously, subject to drafting changes.

Closure of the session

79. The CHAIRMAN thanked the Commission for the honour it had done him in electing him. He expressed his appreciation to all the members for the assistance and co-operation extended to him. He thanked the officers of the Commission for their co-operation and paid a special tribute to the work of the Special Rapporteurs and of the Chairman and members of the Drafting Committee. Lastly, he expressed his gratitude to the secretariat for the efficient services provided for the Commission.

80. Mr. PAL asked the Secretary of the Commission whether any action would be called for from the Commission in order to ensure the Special Rapporteur's presence at the future conference to prepare a convention on consular relations. He recalled that, at the two United Nations Conferences on the Law of the Sea, Mr. François, who had been the Commission's Special Rapporteur on that topic, had attended.

81. Mr. LIANG, Secretary to the Commission, said that Mr. François had attended the two Conferences

on the Law of the Sea as a consultant on the invitation of the Secretariat, and not as a member of the International Law Commission. In the case of those Conferences the budgetary allocations had made the invitation possible.

82. Mr. MATINE-DAFTARY paid a tribute to the authority and courtesy with which the Chairman had conducted the meetings of the Commission. It was largely owing to the Chairman's leadership that the Commission had been able to complete its work on the important topic of consular relations.

83. The codification of the law of the sea, of diplomatic relations and of consular relations would stand as a monument to the work of the Commission, which was greatly indebted to the Special Rapporteurs for those three subjects.

84. Mr. BARTOŠ, Mr. AGO, Mr. JIMÉNEZ de ARÉCHAGA, Mr. EDMONDS, Mr. FRANÇOIS, Mr. HSU, Mr. PAL, Mr. AMADO, Mr. SANDSTRÖM, Sir Humphrey WALDOCK, Mr. YASSEEN and Mr. TSURUOKA associated themselves with the tributes paid by the previous speaker.

85. Mr. JIMÉNEZ de ARÉCHAGA, Mr. EDMONDS, Mr. FRANÇOIS, Mr. PAL, Mr. AMADO, Mr. SANDSTRÖM, Sir Humphrey WALDOCK and Mr. YASSEEN paid a tribute to Mr. Žourek for his outstanding work as Special Rapporteur on the topic of consular intercourse and immunities.

86. Mr. ŽOUREK said that he likewise wished to thank the Chairman for so excellently guiding the Commission's proceedings. He was grateful to all the speakers who had expressed themselves in such kind terms concerning his contribution to the codification of the international law relating to consular intercourse and immunities. He thanked the officers of the Commission and the secretariat for their assistance, and extended his warm wishes to all the members of the Commission.

87. The CHAIRMAN said that the close of a session of the Commission always caused him some regrets. At the close of the current session, his sentiments were the more poignant because there were bound to be some changes in the membership of the Commission. He thanked the members of the Commission for their kind words and expressed the hope and confidence that the spirit of friendship and co-operation which was such a characteristic feature of the work of the Commission would endure and that the Commission would continue to make its contribution to the maintenance of peace and good international relations.

88. He declared the thirteenth session of the International Law Commission closed.

The meeting rose at 1.25 p.m.

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