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Summary record of the 546th meeting

Topic:
Consular intercourse and immunities

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the article as drafted by the Special Rapporteur was difficult to accept owing to the fact that the obligation to provide information was made automatic.

68. The CHAIRMAN, summing up the debate, noted that Mr. Verdross's first amendment had been accepted by the Special Rapporteur. The consensus seemed to be that Mr. Verdross's second amendment tended to weaken the article and that Mr. Erim's suggestion would be preferable in that respect. Mr. Amado's reference to the Consular Convention between the United Kingdom and Sweden might find a place in the commentary, as a further explanation of the meaning of the article. The Drafting Committee might be asked to take into account the suggestions that had been made concerning the proper place of the article. He suggested that the article should be referred to the Committee with those comments.

It was so agreed.

ARTICLE 49 *(Termination of consular functions)*

69. Mr. ŽOUREK, Special Rapporteur, introducing article 49, drew attention to the fact that the termination of consular functions was treated separately from the severance of consular relations (which was the subject of article 50), for the termination of a consul's functions would not *per se* affect the consular relations between the countries concerned. The main reasons for the termination of a consul's functions were itemized in many consular conventions; for example, article 23 of the 1928 Havana Convention referred to the suspension of functions because of illness or leave of absence and to the termination of office by death, by retirement, resignation or dismissal and by the cancellation of the exequatur, and article 10 of the Harvard Draft added the rare cause of the extinction of the sending or the receiving State. The Commission might consider adding to article 49 a paragraph explaining that the causes of termination of functions mentioned, with the exception of item 4, applied to members of the consular staff as well as to consuls; alternatively, it might prefer to explain that point in the commentary.

70. Mr. VERDROSS observed that, if the article covered all the members of the consular staff, item 1 should begin with the words " Suspension or ". While 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.

The meeting rose at 6 p.m.

546th MEETING

Tuesday, 24 May 1960, at 9.30 a.m.

Chairman: Mr. Luis PADILLA NERVO

Consular intercourse and immunities (A/CN.4/131, A/CN.4/L.86) [*continued*]

[Agenda item 2]

PROVISIONAL DRAFT ARTICLES (A/CN.4/L.86) *(continued)*

ARTICLE 49 *(Termination of consular functions) (continued)*

1. Mr. EDMONDS said that the wording and the title of the article were not sufficiently precise. In practice, it was not so much the consul's function as his status that might be terminated for the causes mentioned in article 49. Furthermore, item 1 should be clarified by specifying that the consul's status would be terminated on the date of recall. The same applied to item 2, since many national legislations provided that a consul's resignation did not become effective until accepted by the sending State. The difficulty had been avoided in the Harvard Draft, article 10 of which provided that a person ceased to be a consul under three distinct circumstances. That provision seemed much more explicit than article 49 and far more in keeping with reality. With regard to item 4, he said that in many cases a formal exequatur was not issued; it would be more appropriate to redraft the item to read: " withdrawal of consent by the receiving State to the person's acting as consul ". The purpose of his suggested amendments was to state more exactly when a consul's duties terminated; the utmost precision was necessary in view of the commercial activities in which consuls were engaged, and the difficulties which might arise if the date on which a consul had certified a document were to be called in question.

2. Mr. YOKOTA observed that in article 1 a consul was defined as the head of post. Accordingly, article 49 dealt only with the termination of the functions of a head of post; by contrast, the article dealing with the termination of diplomatic functions in the draft concerning diplomatic intercourse (article 41) spoke of " diplomatic agents ", an expression defined as meaning not only the head of mission but also the members of the diplomatic staff. He thought that article 49 of the consular draft should be brought into line with the provision in the diplomatic draft and that it should cover other members of the consular staff, or at least consular officials.

3. Moreover, there seemed to be a serious gap in the article. Under article 20, the receiving State could request the sending State to recall a member of the consular staff who was unacceptable or to terminate his functions, and if the

sending State refused to comply with that request or failed to fulfil its obligations withina reasonable time, the receiving State might refuse to recognize the person concerned as a member of the consular staff. Accordingly, such refusal constituted an additional method whereby functions could be terminated. Although such cases did not occur often, they nevertheless has a considerable effect on the diplomatic and political relations between the States concerned, and should be referred to explicitly, as had been done in article 41 (*c*) of the diplomatic draft.

4. Finally, although the causes stated in items 2 and 3 were the most common reasons of termination, they were so self-evident that they hardly needed to be mentioned, particularly since the words " *inter alia* " appeared in the introductory part of the article and since the two causes were not mentioned in article 41 of the diplomatic draft.

5. Sir Gerald FITZMAURICE said he shared Mr. Yokota's misgivings concerning the difference between the form of article 49 and that of article 41 of the diplomatic draft. He recalled that the latter article had originally been drafted in the way in which article 49 was formulated, but had been altered considerably at the final reading. The question whether death should be mentioned in that article as one of the causes had been discussed at some length, and it had been explicitly decided to omit it as being self-evident. He would suggest that item 5 — the breaking-off of consular relations — should also be omitted, since that occurrence transcended consular functions and, *a fortiori*, functions personal to the consul himself. Moreover, the severance of diplomatic relations was not mentioned expressly in article 41 of the diplomatic draft as a cause for the termination of a diplomat's functions, and in the consular draft now before the Commission the severance of consular relations was in any case dealt with in article 50. Finally, he agreed that the article should extend to all members of the consular staff and suggested that the Drafting Committee should consider whether the article could not be worded along the same general lines as article 41 of the diplomatic draft.

6. Mr. TUNKIN agreed with Mr. Edmonds that article 49 was concerned with the termination of a consul's functions, and not with that of consular functions generally.

7. With regard to item 2, he said that resignation was an internal matter between the consular official and the sending State. If the sending State accepted his resignation, he was recalled, but if it did not, the receiving State was in no way concerned. It would therefore be wise to delete item 2.

8. Finally, he agreed with Mr. Yokota that the article should cover all members of the consular staff, whose position would remain undefined if the article related only to the head of post. He therefore supported Sir Gerald Fitzmaurice's suggestion that the Drafting Committee should endeavour to bring the article as far as possible into line with article 41 of the diplomatic draft.

9. Mr. AMADO supported Mr. Yokota's view that death as a cause of termination of a consul's function was too self-evident for mention in the article. It was regrettable that the Havana Convention of 1928 had included that provision, which verged upon the absurd.

10. Mr. MATINE-DAFTARY drew attention to the contradiction between the title of the article and its introductory phrase. Consular functions properly so-called ended only when consular relations were broken off. If a consul was recalled, resigned or died, or if his exequatur was withdrawn, his mission was terminated, but the consular functions persisted. It might therefore be better to substitute the word " mission " for " functions ". He also agreed with Mr. Tunkin that the scope of the article should not be limited to the head of post, but should cover all consular officials.

11. Mr. BARTOŠ agreed with previous speakers that there was a theoretical distinction between consular functions and a consul's functions. Nevertheless, the Special Rapporteur had some grounds for drafting the article as he had done. With regard to item 1, he said the sending State was obliged to notify the receiving State of a consul's recall, but in practice the consul continued to perform his functions until the receiving State had been notified. Furthermore, he could not agree that resignation was always an internal matter. For example, if a country's regime changed suddenly or gradually, consuls appointed by the former regime might resign without recognizing the new one, or request the new regime to accept their resignation : it would be, so to speak, a " resignation of protest ". The resignation would then be tantamount to an abandoning of functions and, since consular privileges and immunities would no longer attach to such a person, a number of problems of law and of principle would arise. The Special Rapporteur might consider providing for such cases or mentioning them in the commentary.

12. Another detail, connected with item 4, which might be mentioned either in the text or in the commentary was the case of a consul whose exequatur was in order, but whose consular district was changed either by the sending or by the receiving State. That consul's functions would not be terminated in the district where he remained in office, but they might end in respect of a district which had been transferred to another official for administrative reasons.

13. Turning to item 5, he observed that, although it was self-evident that a consul's functions would be terminated by the severance of consular relations, there might be cases where the receiving State would revoke its permission for the sending State to maintain a consulate in a certain town or port. In that case, a consul's functions would

come to an end because the post would cease to exist. Similarly, the sending State might decide to abolish a particular post. The Drafting Committee might decide whether such cases should be mentioned in the commentary, or whether the cessation of the existence of a consulate should form the subject of a separate article.

14. Mr. ŽOUREK, Special Rapporteur, said he could not agree with Mr. Edmonds that it was the legal status of a consul that was terminated, and not his functions, in consequence of the events itemised in article 49. The trend of the whole project was to dissociate functions from privileges, as was apparent, for example, in article 43 on the duration of consular privileges and immunities. He agreed however that the expression " functions of a consul " should also be used in the title of the article.

15. With regard to the causes of termination, he had said when introducing the article (545th meeting, paragraph 69) that the enumeration was not exhaustive. To those who had criticized some of the causes as being self-evident, however, he would point out that the Commission was in the process of codifying international law on the subject and that statements which were absolutely self-evident were found in all codes. Mr. Amado himself had said that the Havana Convention had included death as one of the causes of termination. A similar provision appeared in many other texts. The same arguments applied to item 5, the breaking-off of consular relations. If, however, the Commission preferred to relegate the self-evident causes to the commentary, he would have no fundamental objection.

16. He had also pointed out in his introduction to the article that the provisions referred only to consuls, or heads of posts. While it was true that article 41 of the diplomatic draft covered a wider category, it should be borne in mind that " diplomatic agents " did not comprise all the staff of a diplomatic mission. He had further suggested adding a paragraph to the effect that all the causes except the one in item 4 applied to all members of the consular staff. Mr. Yokota had observed that in comparison with article 41 of the diplomatic draft, article 49 had the serious shortcoming of not covering cases where the receiving State might refuse to recognize a person as a member of the consular staff if the sending State refused to comply with a request for his recall or for the termination of his functions or failed to do so within a reasonable time. It should be borne in mind, however, that article 20, in which that provision appeared, did not concern heads of post, but only other members of the consular staff.

17. He believed that Mr. Bartoš's points concerning items 4 and 5 would be best dealt with in the commentary, since they referred to exceptional cases which did not warrant the drafting of a special article. Finally, the case cited by Mr. Verdross—that of the dismissal of a member of the consular staff—though rare, might be mentioned in the draft as a cause of termination; the dismissal of a diplomatic agent was not, however, provided for in the diplomatic draft. The Drafting Committee would undoubtedly consider the advisability of adding such a clause.

18. Mr. LIANG, Secretary to the Commission, supported the Special Rapporteur's formulation of article 49. In drafting an international convention on consular privileges and immunities, the important point was to study the causes of the termination of the functions of the head of post; the termination of those of subordinate officials was a relatively secondary matter. In that connexion, he would submit that article 41 (*c*) of the diplomatic draft was not quite accurate, since article 8 (2) of that draft merely provided that the receiving State might refuse to recognize the person concerned as a member of the mission. It was not for the receiving State to decide that the functions of subordinate members of the staff should be terminated, for that was an internal matter between the diplomatic agent, the head of mission and the Ministry of Foreign Affairs of the sending State. All that the receiving State could do was to refuse to recognize the person concerned as a member of the mission. The position of the head of a consular post, however, was different, since the relations between the sending and the receiving States were obviously involved. The receiving State was concerned with acts emanating from the consulate, as represented by the head of post, who was responsible to the receiving State for the functions of subordinate officials. In his opinion, it would be wiser to emphasize that point of view, rather than to broaden the scope of article 49 to cover members of the consular staff.

19. Mr. PAL said he could not share the Secretary's views. In its present context, article 49 had two purposes: to determine the validity of a consul's activities and to specify the duration of that official's privileges and immunities, which depended upon the termination of his functions. Consular privileges and immunities were enjoyed by heads of post and members of the consular staff alike, and the scope of article 49 should be drafted in broader terms, as was article 41 of the diplomatic draft.

20. He recalled that the original draft of article 41 [1] had mentioned four causes of termination, which had not been objected to by twenty of the twenty-one governments which had sent observations (A/CN.4/114 and Add.1-6). At the second reading of the draft in Commission, however, it had been pointed out that the fourth cause was superfluous and a reference to article 8 in paragraph (*c*) had been proposed. Since those changes had been adopted unanimously, the Commission's best course would be to ask the Drafting Committee to adjust article 49 of the

[1] See *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), article 34, p. 143.

consular draft to article 41 of the diplomatic draft, both in scope and in form.

21. Mr. ŽOUREK, Special Rapporteur, replied that Mr. Pal seemed to be confusing the duration of privileges and immunities with the duration of the exercise of consular functions. In his (the Special Rapporteur's) draft he had purposely dissociated the two because consular officials began to enjoy their privileges and immunities as sonn as they entered the territory of the receiving State and continued to enjoy them until they had left it even after they and actually ceased to exercise consular functions or to belong to the consulate. Article 49 was concerned only with the termination of consular functions.

22. Mr. AMADO confirmed the view that a consular officer was afforded privileges and immunities precisely because it was his duty to exercise consular functions. That was why the enjoyed immunities as soon as he entered the receiving country and until he left it, regardless whether he was actually exercising the functions at the time.

23. Mr. ERIM thought that if the Drafting Committee was to bring article 49 of the consular articles into line with article 41 of the diplomatic articles, it might well bear in mind the fact that paragraphs (*b*) and (*c*) of the latter were, to all intents and purposes, already covered by articles 18 and 21 of the consular articles.

24. The CHAIRMAN proposed that draft article 49 be referred to the Drafting Committee with the suggestions made during the discussion. It had been agreed that the article should refer in general to the termination of the consular mission, rather than to that of consular functions. The majority of members, the Special Rapporteur concurring, had agreed that the article should relate not only to the head of consular post but also to all the consular officials, although the Drafting Committee might bear in mind the point made by the Secretary. The majority would also prefer the Drafting Committee to follow the wording and structure of article 41 of the diplomatic articles as far as possible. If the Drafting Committee retained the enumeration in the Special Rapporteur's draft, it should take into consideration the amendments and additions accepted by the Special Rapporteur, including a reference to the suspension of functions in item 1. The Drafting Committee might also consider the desirability of drafting a special article, or of placing a reference in the commentary, dealing with the abolition of a consular post.

It was so agreed.

ARTICLE 50 *(Breaking-off of consular relations)*

25. Mr. ŽOUREK, Special Rapporteur, introducing article 50, said that it stated a principle universally recognized in all treaties, both ancient and modern.

26. Referring to the proviso at the beginning of the article (" Except where a state of war . . . ") he said that in the past, consular relations had not been affected by the existence of a state of war and the maintenance of consuls at their post had been justified, especially as the military risk had been negligible. Since the end of the nineteenth century, however, the existence of a state of war had always led to the severance of both diplomatic and consular relations, or at any rate to the withdrawal of consuls. An express provision to that effect occured in certain recent consular conventions concluded by the United Kingdom, notably that with Norway of 22 February 1951. The "except" clause was in conformity not only with treaty law but also with current practice. He had purposely used the term " state of war " to avoid using " war ", which had no meaning from the legal point of view since the prohibition of the use of force in international relations. He had avoided the expression " armed conflict ", since every armed conflict did not lead to the breaking-off of consular relations. He had not thought it necessary to deal with the question of what the rules of international law were concerning a declaration of a state of war. While the expression " state of war " might seem inappropriate at the present time, it was employed both in State practice and in the literature. It was necessary to distinguish between a state of war and armed conflict. In certain cases consular relations had not been broken off automatically on the declaration of a state of war and such a declaration might be regarded as an act separate from that of withdrawing consuls. From the theoretical point of view, however, there could be no doubt that the existence of a state of war entailed breaking off both diplomatic and consular relations.

27. Mr. AGO said that the Special Rapporteur had quite rightly inserted an article on the breaking-off of consular relations, but the text was inadequate. The absence of an article on the breaking-off of diplomatic relations in the draft on diplomatic intercourse and immunities was a serious and almost inexplicable gap. However, the provision in the consular draft should not simply be formulated negatively; in other words, the article should not confine itself to providing that, if no state of war existed but diplomatic relations had been broken off, consular relations would not automatically be broken off. A clause should first of all be inserted dealing in a positive way with the possibility of breaking off consular relations in certain cases, and the procedure for doing so. The Commission had adopted article 2, paragraph 1, on the establishment of consular relations by mutual consent. It should now lay down that consular relations might be broken off — for very serious reasons, of course — by unilateral decision and that such a decision would be perfectly legitimate in international law. If no such provision was inserted in the draft, it might be possible to infer that the breaking-off of consular relations y unila-

teral act was a violation of the original agreement to establish such relations and was therefore a wrongful act in international law.

28. With regard to the " except " clause, the Special Rapporteur had probably meant [a state of war] " within the meaning of " rather than " in conformity with " international law; but such an expression would be open to a different interpretation. He thought that it would be best simply to delete the words " in conformity with international law ".

29. Mr. YOKOTA said he had no objection to draft article 50 in principle, but thought the wording was not satisfactory. The expression " state of war " was anything but clear; did its meaning differ from that of the term " war"? The term " war " was well-defined and familiar to students of international law, whereas the expression " state of war " was recent and not so well defined or understood. He therefore preferred the term " war ".

30. He agreed with Mr. Ago that the phrase " in conformity with international law " was undesirable. It was not at all clear what that phrase meant. It might mean war in the technical sense used in international law; but it could also mean that war was lawful in the eyes of international law. After the First World War many treaties had been prepared that outlawed war. The Special Rapporteur himself had said that he was unwilling to go into the question how war might be declared in conformity with international law, so that he seemed to have had in mind a war that was lawful in international law. If so, the inclusion of such a phrase would have the most serious consequences, since it would seem to follow that if a war was not in conformity with international law — or in other words if it was a violation of that law — the severance of consular relations would not follow automatically. Surely if a war broke out, both diplomatic and consular relations between the belligerents would be automatically broken off, whether the war was lawful or not.

31. Mr. VERDROSS agreed that the phrase " in conformity with international law " should be deleted. Naturally, consular relations would be broken off just the same if the war was contrary to international law. Besides, who could decide whether a war was or was not in conformity with international law? The attempts to define aggression had come to naught. Under Article 39 of the United Nations Charter, the Security Council would determine the existence of any breach of the peace or act of aggression, but if it failed to agree owing to the unanimity rule, each party to the dispute might give a different interpretation. The phrase should be deleted even if it was interpreted as the Special Rapporteur had explained, since the expression " a state of war " was unknown to the United Nations Charter, which employed only the words " threat or use of force ".

32. He suggested that the more modern expression " armed conflict " should be used in article 50; the term " war " was extremely vague in law.

33. Mr. ŽOUREK, Special Rapporteur, could not agree with Mr. Yokota that the term " war " was more precisely defined than the expression " state of war ". Since war had been outlawed, the term had lost its legal meaning. In modern doctrine distinctions were drawn between aggression, self-defence and international preventive or enforcement measures. A state of war could not be declared by an aggressor and at the present time aggression was a crime under international law; the Commission had pronounced it to be such at its sixth session, held in 1954, in the draft code of offences against the peace and security of mankind.[2] It was inadmissible that an aggressor, as a result of his crime, should be able to produce any effects in law capable of affecting the international position of the victim of an aggression. When an armed conflict broke out, the State which was the victim of aggression was fully empowered to close down the consulates of the aggressor State, a right which the aggressor did not possess. The latter might of course close consulates by force, but that would merely be another act forming part of the crime of aggression. Such a distinction did not perhaps have much practical importance, but it was legally decisive. If a State which was the victim of aggression declared a state of war, that declaration would produce all the corresponding legal effects under international law. That might be explained in the commentary: the phrase " within the meaning of " might be accepted in lieu of " in conformity with ".

34. Mr. Verdross's suggestion that the term " armed conflict " should be used was unacceptable. Armed conflicts might break out which were not of such dimensions as to cause the victim of aggression to declare a state of war. They might be settled within a few days without such serious consequences as the severance of consular relations.

35. Thus the term " war " and the expression " armed conflict " were equally undesirable. War, although the term was used a great deal in the literature and in common parlance, was indeed a social phenomenon, but had little legal significance. Mr. Verdross's objection that it was not clear who should decide whether a state of war existed in conformity with international law was not very convincing, though it was true that a definition of aggression had not yet been worked out. If, for example, the question of who was responsible for an armed conflict was brought before some international tribunal, the tribunal would have to determine whether a state of war existed; one of the deciding features would be precisely the question whether consular relations had been broken off. Admittedly, the decision would not be easy to arrive at.

[2] See *Official Records of the General Assembly, Ninth Session*, Supplement No. 9, p. 10.

36. Mr. SCELLE urged that draft article 50 should be deleted. It was precisely in a state of war that consulates should be maintained. The Special Rapporteur had intimated that the rule expressed in article 50 was new; it was not only new, it was in flagrant contradiction with the universality of international law. War should be defined as a relation between States; but, if one article were adopted, the result would be a retrogression from international law which might go so far as to imply that war was a struggle between individuals or peoples. Only one kind of war was lawful, and that was a war waged in legitimate self-defence by the victim of an aggression. There might be other cases of violence, such as reprisals and raids, which might or might not be war in the legal sense. Surely in such cases it would be precisely the wrong time to withdraw consuls, when they were so badly needed to protect their nationals. Again, the rupture of trade relations automatically occurred in the case of hostilities; but it was then all the more necessary that consuls should be on the spot to see to it that the break did not lead to disputes among individuals. It was therefore quite impossible to vote for draft article 50 as it stood, since the text was incompatible with the true role of consuls and normal relations between nations. The idea expressed in that article was retrograde and even shameful.

37. Mr. EDMONDS said that the Commission should be wary of accepting an article concerning the severance of consular relations. He for one did not know what " a state of war in conformity with international law " meant. It seemed to be a contradiction in terms, given the provisions of the United Nations Charter. It was not clear whether by " a state of war " the Special Rapporteur meant a declaration of war or armed conflict. The Special Rapporteur himself had recognized the difficulty when he had said that the question whether a state of war existed would have to be referred to an international tribunal, which would find it difficult to reach a decision. In the United States of America after the Second World War many cases had come before the courts owing to use of similar language, dealing mainly with the suspension of rights and obligations in contracts in the event of a state of war. In the courts of last resort in the individual States of the Union and even in the United States Supreme Court varying interpretations had been given. The Commission should therefore refrain from using a term so indefinite as to give rise to great difficulties of interpretation. Mr. Scelle had rightly advocated the deletion of the entire draft article, which served no useful purpose and merely gave rise to confusion.

38. Mr. AMADO observed that the Commission had not disregarded the possibility of including an article similar to draft article 50 in the articles on diplomatic intercourse and immunities, but had deliberately omitted it. Mr. Scelle had raised the discussion to a very high level of idealism, which did the Commission honour. He (Mr. Amado) objected to the phrase impugned on more modest grounds, namely those of ambiguity. The Special Rapporteur probably meant the phrase to refer to circumstances in which a state of war so manifestly existed that an international organization would be bound to take note of the fact. Article 50 probably did not really belong in a draft convention on consular intercourse and immunities at all, even if the ambiguous phrase were deleted. The breaking-off of consular relations was really an exceptional situation, and Mr. Edmonds and Mr. Scelle were therefore probably right in urging the article's deletion. On the other hand, Mr. Ago might be right in suggesting the addition of a preliminary clause which would give the whole article greater precision. In any case, the " except " clause should be deleted.

39. Mr. TUNKIN said that he did not think that Mr. Ago's proposal for a separate paragraph stating how and in what cases it would be legitimate to break off consular relations was necessary. Mr. Ago had, however, been right in drawing attention to article 2, paragraph 1, stating that the establishment of consular relations took place by the mutual consent of the States concerned. As the Commission had not laid down an obligation to maintain or even to enter into consular relations, the severance of such relations might in some cases be simply a legitimate act or a sanction. The discussion of such a situation was, however, more pertinent to the topic of the international responsibility of States.

40. The Special Rapporteur's text and explanations were quite sound. His reasons for using the phrase " in conformity with international law " were valid enough but the phrase should preferably be eliminated, since it might be ambiguous, might give rise to differing interpretations and was not essential for the purposes of the draft.

41. With regard to the general problem of war, he said that Article 2, paragraph 4, of the United Nations Charter prohibited the threat or use of force in international relations. A State might resort to the use of force only under Article 51 of the Charter, laying down the right of self-defence.

42. With regard to the choice between the terms " war " or " state of war " he said the latter might apply to certain cases which had occurred after the Second World War, when the war had not been officially terminated, but consular relations had been established with certain former enemies. The phrase " state of war " was therefore not adequate.

43. He thought it would be preferable to delete the whole phrase " except where a state of war has arisen in conformity with international law between the sending State and the receiving State " and to retain the remainder of the draft article.

44. Mr. BARTOŠ said that he was opposed to the use of the term " war " in the draft. It was generally agreed that the Charter of the United Nations had abolished the old concept of war;

indeed, it was significant that the term itself was not used in the Charter except in references to certain consequences of the Second World War, as in Article 107. The modern trend was to speak of an armed conflict, or of an armed conflict of an international character; examples of the use of that expression occurred in the four Geneva conventions of 1949, which dealt precisely with the treatment of the victims of war. He also objected to the expression " a state of war ", which was used in the draft and the meaning of which was not absolutely clear.

45. However, he felt strongly that the whole phrase " except where a state of war . . . the receiving State " should be deleted. If the reference to war were retained, he would be obliged to vote against the whole draft.

46. Lastly, he agreed with Mr. Ago that it was perfectly lawful for a State to break off consular relations with another State. There was no obligation under the Charter to maintain consular relations that had been established. A State was free at any time to discontinue consular relations which it had established with another.

47. Sir Gerald FITZMAURICE said it would be useful to have in the draft an article stating that the breaking-off of diplomatic relations did not automatically entail the breaking-off of consular relations, in view of one fact that the opposite view had sometimes been expressed. Like Mr. Ago, however, he thought that the provision should be supplemented by some indication of the circumstances in which consular relations could be broken off. It was desirable that there should be somewhere in the draft an express provision to the effect that consular relations could be broken at any time both by the receiving State and by the sending State.

48. If a reference to war were to be retained in article 50, the words " in conformity with international law " should in any case be deleted because of the controversy to which they might give rise. Also, as suggested by Mr. Verdross, the words " a state of war " should be replaced by " an armed conflict " for the reasons given by Mr. Bartoš. The Special Rapporteur's objection that the expression " armed conflict " was much too general could be met by drafting the article more or less along the following lines : " Except where an armed conflict involving a breach of diplomatic relations has occurred, the breach of such relations shall not automatically entail. . . "

49. On balance, however, in view of all the difficulties and complications to which the reference to armed conflict had given rise, he was inclined to agree with Mr. Tunkin's suggestion that the first phrase of draft article 50 should be omitted altogether.

50. Mr. ERIM said the contents of article 50 did not correspond to the title of the article. The title was " Breaking-off of consular relations ", but the provision contained in the article stated only that the breaking-off of diplomatic relations did not automatically entail that of consular relations.

51. It was clear from the terms of article 2, paragraph 1, and article 3, paragraph 1, which the Commission had already adopted, that the maintenance of consular relations was subject to the consent of the two States concerned. At any moment, either of the two States could revoke that consent and break off consular relations; that fact should be stated. A clause might be added to the effect that a State was entitled to break off consular relations with another which had committed some violation of international law.

52. A separate provision might then stipulate that the severance of consular relations had to be effected by explicit act and, in particular, was not implied in the rupture of diplomatic relations.

53. Lastly, he agreed to the deletion of the provision relating to the state of war. Apart from the reasons given by other speakers, he thought that the term was too restrictive : the case could occur of a grave conflict which did not altogether amount to a state of war but which did involve the severance of diplomatic and consular relations.

54. Mr. FRANÇOIS said that he could not subscribe to Mr. Verdross's view that the idea conveyded by the word " war " could be dispensed with. When the Netherlands had been invaded in 1940, the aggressors had claimed that no state of war existed; it had become necessary for the Netherlands Government to proclaim the existence of a state of war in order to exercise its rights as a belligerent. The existing position in international law was that a state of war existed whenever one of the parties to an armed conflict so declared. In the event of war, however, the maintenance of consular relations would serve no practical purpose and he could not agree with Mr. Scelle's suggestion that in such an eventuality consular relations should subsist. The only protection possible for enemy nationals was that afforded by the protecting Power. That protection was more effective than the illusory protection which would be provided by the consulate of a sending State which was at war with the receiving State.

55. Nevertheless, he favoured the deletion of the proviso relating to the state of war, mainly for the reason that the Commission had always maintained that questions regarding the state of war were outside its competence. Although a few incidental references to armed conflict, such as that in article 43 (*a*), appeared in the diplomatic draft, the Commission had prepared that draft in contemplation of the time of peace only. Accordingly, it would be consistent with the Commission's practice to delete the proviso in question from article 50 of the consular draft.

56. Mr. HSU said that in view of Mr. Scelle's desire that consular relations should not be affected by the vicissitudes of international relations, he had been surprised at his suggestion for the

deletion of article 50. The best solution was, of course, to draft an improved provision.

57. For his part, he had no objection to a reference being made to war, since he felt that the Commission should face realities. War had been outlawed, but unfortunately it had not been eradicated. However, he preferred the term " state of war " both to " war " and to " armed conflict ". He also agreed with the suggestion that the words " in conformity with international law " should be deleted, for they could give rise to difficulties of interpretation. Nevertheless, he did not insist on the proviso under discussion being retained and felt that, if the Commission could not agree on a formula, the best course was to delete the proviso, as had been suggested by Mr. Tunkin.

58. Mr. SANDSTRÖM also considered that the contents of article 50 did not correspond to its title. To bring the article into line with its title it should contain a provision regarding the circumstances in which the severance of consular relations was possible.

59. He agreed with the suggestion by Mr. Tunkin for the deletion of the reference to the state of war and suggested that the rest of the article could then perhaps be incorporated into article 49 as a special sub-paragraph.

60. Mr. YASSEEN supported Mr. Ago's suggestion that a general provision should be included concerning the severance of consular relations. The inclusion of an initial paragraph along those lines would make the contents of article 50 concord with its title. The paragraph would state that either of the two States concerned could by unilateral action break off consular relations. A proviso might perhaps be added limiting the exercise of that right to cases in which serious grounds or plausible reasons for the rupture existed.

61. Lastly, he concurred with Mr. Tunkin's suggestion for the deletion of the proviso relating to the state of war. Until the end of the nineteenth century, it had not been the general practice for consular relations to be broken off as a result of the outbreak of hostilities. The more recent concept of total war had led to the adoption of a different practice but he did not think that the proviso in question expressed an established principle of international law. He therefore agreed that the Commission should not insert such a proviso in an international convention and thus make it a rule of law. The best course would be that the draft should be silent on the subject; the future would decide along what lines international law would develop in that regard.

62. Mr. SCELLE said that, in view of the suggestion for the deletion of the proviso relating to the state of war, he would not press his suggestion for the deletion of the whole article. He urged, however, that the word " automatically " be dropped from the text, and suggested that it be replaced by the words " in principle ".

63. He had objected to the use of the term " war " because that term could be taken to refer to what had been regarded in the past as the inherent right of the State, in other words the right of a government to take the law into its own hands if it considered that a violation of international law had been committed. The United Nations Charter had clearly abolished that right: and it did not even allow the use of force for the purpose of asserting a legitimate right; he recalled that such had been the interpretation placed by the United States of America on the terms of the Charter at the time of the Suez affair in 1956. No jurist, no teacher of international law, could hold any other view. Accordingly, he had been glad to note the unanimous approval in the Commission of the suggestion for the deletion of the reference to war in the draft.

64. Under the Charter, the use of force was legitimate in two cases only. Firstly, in the case of measures under chapter VII of the Charter to deal with threats to the peace, breaches of the peace and acts of aggression; as yet, the United Nations had taken only very limited police action of that type. Secondly, recourse to force was permissible in the exercise of the right of individual or collective self-defence against armed attack under Article 51 of the Charter. Just as action in self-defence was permissible internally in those cases only in which the public authorities failed to act, so internationally individual or collective self-defence was possible in the absence of international action, or until such action materialized.

65. Notwithstanding the objections put forward by Mr. François, he considered that the role of consuls should not end with the outbreak of hostilities; indeed, in that event, the role of consuls became, if anything, more important. Or course the action of consuls would not be the same as in time of peace; they would be called upon, for example, to restrain their own nationals from carrying out activities objectionable to the receiving State. A consul who was himself a national of the receiving State might have a useful role to play in that connexion. Action by their own consul was more effective where nationals were concerned than any that could be undertaken by a protecting power, or even by the Red Cross authorities. He felt very strongly that such action could mitigate the evil consequences of war and that the international role of consuls should therefore not be confined to peace time.

The meeting rose at 1.10 p.m.