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Summary record of the 547th meeting

Topic:
Consular intercourse and immunities

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547th MEETING

Wednesday, 25 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 50 *(Breaking-off of consular relations) (continued)*

1. Mr. ŽOUREK, Special Rapporteur, referring to the discussion on article 50 at the previous meeting, said that he did not share the view of those members who considered that, in the present state of development of international law, it was not possible in the consular draft to refer to a state of war. A State which was the victim of an aggression was entitled to declare that a state of war existed between it and the aggressor State, for the purpose of exercising all the rights of a belligerent. Some countries which had been the victims of aggression by the Axis Powers during the Second World War had taken precisely that course. However, since the proviso relating to the state of war was not essential to article 50, he was prepared to withdraw it for the sake of securing agreement in the Commission.

2. Mr. Ago's suggestion (546th meeting, paragraph 27) for the inclusion of a provision concerning the right to break off consular relations by unilateral act raised a difficult question. When preparing the draft articles, he had given considerable thought to the question but had decided that such a provision was not necessary in a draft intended to regulate the conduct of consular relations after those relations had been established.

3. The severance of consular relations was an abnormal act which would only occur in very exceptional circumstances. For his part, he could not subscribe to the view that a State was entitled to break off those relations at any time without cause. There could be no doubt that such a unilateral act would be inconsistent with the Purposes of the United Nations, which included, under paragraphs 2 and 3 of Article 1 of the United Nations Charter, the development of friendly relations among nations and the achievement of international co-operation. Consular relations should therefore not be broken off except for very grave reasons. Unfortunately, it was very difficult to specify the cases in which so serious a step could be taken. The insertion in the draft of a provision dealing with circumstances implying the existence of a crisis in international relations would not be in the interest of consular intercourse. Perhaps the best course was to deal with the matter in a commentary.

4. Mr. AGO said that he fully understood the reasons for the Special Rapporteur's reluctance to include a provision concerning the circumstances in which consular relations could be broken off. Nevertheless, he did not think that the matter could be disposed of in a mere commentary.

5. The position at present was that a State was entitled to break off consular relations with another by unilateral act. The act might, of course, be the sanction for the commission by the other State of an act which was unlawful under international law. However, consular relations could also be broken off by reason of an unfriendly act not constituting any violation of international law.

6. He agreed, particularly in view of the terms of the Charter, that the right to break off consular relations should not be exercised lightly. It was necessary, however, to set forth that right explicitly in the draft; otherwise, if the draft was silent on that point, it would inevitably be inferred that the agreement of both the States concerned was necessary for the severance of consular relations and hence that the unilateral severance of those relations constituted a breach of the agreement between the two States regarding the establishment of those relations, a breach which would constitute an unlawful act giving rise to international responsibility. For those reasons, he suggested that the Commission should delimit the scope of the exercise of the right in question by means of a broad and purposely vague provision, which, if the Commission so preferred, could be drafted in a negative form along the following lines: "Consular relations once established shall not be broken off by one of the parties except for extremely serious reasons."

7. Mr. MATINE-DAFTARY said that article 50, if it was to deal only with the effect on consular relations of the rupture of diplomatic relations, would no longer correspond to its title. For his part, in the light of recent State practice, particularly since 1914, he did not believe that a State which decided to break off diplomatic relations with another would consent to the maintenance of consular relations, even if it were stated in article 50 that under international law the breaking-off of diplomatic relations did not necessarily involve that of consular relations.

8. He agreed with the view that the reference to the state of war should be dropped. He had no faith in the international law of war; war was an international crime, and the outbreak of hostilities meant virtually that the rule of law was in abeyance.

9. He agreed with Mr. Ago that the important question of the severance of consular relations could not be ignored in the draft. In that respect, a distinction would have to be drawn between the complete severance of consular relations and the closing of one or several specific consulates. The closing of a consulate could be the consequence of the sending State's deciding that the consulate was no longer necessary; on the other

hand, he pointed out that a particular consulate might be closed at the request of the receiving State, which considered that the consul in charge had no genuine consular business and was engaging in political activities. In connexion with the closing of a consulate, or several consulates, it was desirable to lay down in the draft the procedure for liquidating their affairs.

10. The CHAIRMAN, speaking as a member of the Commission, said that there were two questions involved. Firstly, the general problem whether it was appropriate to include in the draft a provision concerning the severance of consular relations, in view of the fact that the draft contained a provision on the establishment of those relations. Secondly, there was the concrete problem raised by the Special Rapporteur's draft provision to the effect that the breaking-off of diplomatic relations did not automatically entail the breaking-off of consular relations.

11. On the first, or general, question, he had serious doubts regarding the advisability of including an article concerning the breaking-off of consular relations. None of the bilateral or multilateral consular conventions which he had seen contained a provision dealing with the breaking-off of consular relations as such. The First Protocol of Signature of the Consular Convention of 1952 between the United Kingdom and Sweden, however, stated:

" In the event of war or of the rupture of [diplomatic] relations between two States, either State shall be entitled to demand the closure of all or any of the consulates of the other State in its territory. It shall also be entitled to close all or any such consulates of the latter State as are situated in other countries which come under its military occupation."[1]

12. The fact of the matter was that the maintenance or severance of consular relations was closely connected with the existence of a state of peace or of armed conflict between the two States concerned. According to the Honduran Act No. 109 of 14 March 1906 regarding foreign consular missions, any State at peace with Honduras might appoint consuls-general, consuls, vice-consuls and consular agents in Honduras even though their appointment was not the subject of a prior convention.[2]

13. It was clear from that clause that the severance of consular relations would be the result of the rupture of peaceful relations between the two States concerned and not of the severance of diplomatic relations. The position was rather that a state of war would involve the termination of all peaceful relations between the two States concerned and hence the severance of both diplomatic and consular relations.

14. In view of the distinction between the actual severance of consular relations and the closing of a consulate, and also because the severance of those relations was a rare occurrence in peacetime, the Commission should ask itself whether it was appropriate that a multilateral instrument such as that which it was drafting should indicate the circumstances in which such a rupture could occur. In other words, the question was whether the Commission's draft would state, as a treatise on international law might do, that the severance of consular relations could result from the act of the receiving State, from the act of the sending State, or from the act of both.

15. For his part, both from the point of view of codification and from that of the progressive development of international law, he did not consider that any useful purpose would be served by recording the regrettable fact that the cessation of peaceful relations between two States led to the breaking-off of consular relations between them. Accordingly, he would prefer the question not to be mentioned in the consular draft, as indeed it was not mentioned in the diplomatic draft.

16. Moreover, even though it was true to say that either of the States concerned had the right to break off consular relations by unilateral act, it would be undesirable in the draft to give undue emphasis to that right. It would not serve the interests of the progressive development of international law or those of peaceful relations between States to mention that possibility in a multilateral convention.

17. As to the second question, he believed that all members agreed that the statement in the concluding phrase of article 50 did not correspond to the title of the article; the phrase contemplated not so much the severance of consular relations as the maintenance of those relations despite the occurrence of certain events. He recalle dthat at its eleventh session the Commission had reserved its decision on paragraph 2 of article 2,[3] he would suggest that it should consider incorporating the relevant provision of article 50 into the said paragraph 2, if it finally accepted that paragraph as a rule *de lege ferenda*. The whole provision would, in that event, be drafted along the following lines : " The establishment of diplomatic relations includes the establishment of consular relations, but the breaking-off of diplomatic relations shall not automatically entail the breaking-off of consular relations."

18. Mr. YOKOTA pointed out that the main purpose of article 50 as drafted by the Special Rapporteur was to regulate the effect on consular relations of the outbreak of an armed conflict. Therefore, the deletion of the reference to the state of war, a deletion which had now been accepted in principle by the Special Rapporteur, would greatly diminish the significance of article 50. Accordingly, he suggested that the provision be

[1] United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, p. 204.

[2] *Ibid.*, p. 153.

[3] See *Official Records of the General Assembly, Fourteenth Session, Supplement No. 9*, p. 25.

amended to read: "The breaking-off of diplomatic relations shall not automatically entail the breaking-off of consular relations, even in case of armed conflict."

19. Commenting on Mr. Ago's suggestion that the draft should set forth the right of a State to break off consular relations uniterally for serious reasons, he thought that such a provision would serve little purpose. In practice, consular relations were usually based on bilateral consular conventions. So long as a consular convention was in force, the parties thereto were bound to maintain consular relations; either of them could, of course, denounce the convention by reason of the outbreak of an armed conflict, or by reason of a breach of the terms of the convention committed by the other party. Outside those cases, however, the parties could not, in accordance with the rules of international law, denounce the convention.

20. Actually, even if it were true to say that under general international law a State was free to break off at any time its consular relations with another State, it would be dangerous to formulate such a principle in the draft. A provision along those lines might give the impression that consular relations could be broken off at any time regardless of existing consular conventions.

21. Of course, he did not suggest that, where two States maintained consular relations, those relations could never be broken off without the consent of both parties. He did say, however, that the question of principle involved was an extremely complex one and should preferably not be mentioned in the draft.

22. Mr. PAL pointed out that the passage quoted by the Chairman (see paragraph 11 above) from the First Protocol of the 1952 Consular Convention between the United Kingdom and Sweden, relating to the effects of war or of the rupture of diplomatic relations, was preceded by a paragraph in the following terms:

"The high contracting parties wish to put on record that in their view the following principles are applicable to consulates and consular officers under the general law of nations in the event of war or of the rupture of diplomatic relations." [4]

23. Thus statement that war or the rupture of diplomatic relations gave either of the two States concerned the right to demand the closing of all or any of the consulates of the other State was intended not as a clause of the Convention itself but as an expression of a rule of general international law. It would, therefore, not have been irrelevant for the Commission to include a proviso dealing with the effect of hostilities on consular relations. He agreed with Dr. Hsu (546th meeting, paragraph 57) that the Commission should not hesitate to use the term "war". In any attempt to achieve a genuinely rational order in the political side of human culture, the minimum moral requirement was to have the courage and sincerity, however unpleasant reality might be, to look it in the face and not to essay to evade it by indulging in any wishful thinking. The task which now confronted the Commission was, however, a somewhat different one; the Commission was required to formulate a provision covering a specific matter and, if the term "war" had in fact been excluded where that matter was concerned it would have been quite justifiable to omit any reference to that term. But, as he had just pointed out, as late as 1952 two States had referred to the "event of war" as being relevant to that very matter. Nevertheless, he concurred with the delie tion of the proviso in question since the Specal-Rapporteur had himself agreed to that course. It was not, of course, essential to the Commission's present purpose to deal with the question of the effects of the state of war.

24. With reference to the Chairman's suggestion that the last part of article 50 be incorporated into paragraph 2 of article 2, he recalled that the Commission had reserved its decision on article 2, paragraph 2. If the Commission eventually decided to maintain that paragraph, it might be quite logically inferred from the statement therein that the establishment of diplomatic relations included the establishment of consular relations, that the severance of diplomatic relations would similarly include that of consular relations; it would therefore then be appropriate to specify that that was not necessarily the case. As a matter of drafting, he suggested that the word "automatically" should be replaced by the words "by itself". However, since article 2, paragraph 2, had not yet been adopted, the question of incorporating the relevant phrase of article 50 into the said paragraph 2 should be postponed until the Commission had taken a decision on the latter paragraph.

25. Lastly, with regard to Mr. Ago's suggestion, he agreed that if the right to break off consular relations unilaterally existed, the Commission should not hesitate to mention that right; but he could not concur in the view that the absence of such a provision would inevitably mean that severance of relations would always require the agreement of both the States concerned.

26. Mr. BARTOŠ considered that the obligation under the Charter to maintain friendly and good neighbourly relations among nations did not constitute an obligation to maintain diplomatic or consular relations. Accordingly, although the severance of consular relations might have some practical value, it could not be regarded as a violation of a rule of law. If there was no obligation to establish consular relations, there could also be no obligation to maintain them. Moreover, the right to break off diplomatic relations was understood to exist, although those relations, like consular relations, were based on mutual consent between the countries concerned. In an armed conflict, the nationals of foreign countries might need consular protection, but it was an uncontested rule that a third State could undertake to provide such protection. If the right to

[4] *Ibid.*

break off diplomatic relations was recognized, the same right must be recognized in respect of consular relations also; the maxim that the greater covered the less, although not always applicable, applied in the case at issue, in the absence of a concrete rule.

27. Some members had doubted the advisability of including an article concerning the severance of consular relations in the draft, but they had not queried the existence of the right to break off those relations. As yet, there was no established rule of international law obliging States to maintain consular relations, and from the absence of a clause giving either party to a consular convention the right to break off consular relations with the other party it could not be inferred that the right did not exist. For example, if the case of a State wishing to break off consular relations with another State were brought before the International Court of Justice, the Court could not oblige that State to maintain its consular relations with the other, since there was at present no rule of international law on which such a judgement could be based.

28. It was most important that the Commission should settle the questions of principle involved in article 50 and not leave them to the Drafting Committee, which was not competent to create a rule of international law. Nor could the Commission state that consular relations, once established, should be maintained even when diplomatic relations had been broken off.

29. With regard to the first phrase of article 50, he said that the United Nations Charter had rendered the state of war an unlawful state of affaires, which should not be mentioned in the draft. Moreover, a State which had been attacked was not obliged to allow consulates to remain in its territory.

30. In conclusion, he thought that only the second part of article 50 should stand and that the commentary should explain that there was as yet no legal obligation for States to establish or to maintain consular relations. Mr. Ago's suggestion should also be taken into account in the commentary.

31. Mr. TUNKIN observed that the majority of the Commission wished to retain the second phrase of article 50 as drafted by the Special Rapporteur. He believed that an article consisting of that phrase would be useful and should be referred to the Drafting Committee. Nevertheless, since some members seemed to feel strongly on the matter, the Commission might instruct the Drafting Committee to prepare an article on the lines indicated by Mr. Ago and submit it to the Commission for a final decision.

32. Mr. LIANG, Secretary to the Commission, said that some of the observations made on article 50 seemed to raise doubts as to the nature of the act of establishing and breaking off consular relations. It was recognized in international law that certain acts could be performed by a State without committing a breach of international law; for example, it was quite proper for a State to refuse to enter into diplomatic relations with another State, and the Commission's draft on diplomatic intercourse confirmed that view. It was equally proper to break off diplomatic or consular relations by unilateral act. The question of violation of a treaty establishing consular relations did not arise, since mutual consent was required only for the establishment of such relations. The purpose of the treaty concerned was achieved upon the establishment of relations. If States were held to have a duty to maintain consular relations, Mr. Ago would be justified in saying that the unilateral severance of those relations constituted a breach of international law; in his (Mr. Liang's) opinion, however, the unilateral severance of consular relations, though possibly an unfriendly act, was not an illegal one. The provisions of the consular conventions would be suspended if relations were broken off. Moreover, he did not believe that any consular conventions contained even an implicit clause to the effect that consular relations must be maintained; only if such a clause existed could it be argued that the severance of consular relations by unilateral act would constitute a breach of the convention.

33. The question before the Commission was whether a provision concerning the severance of consular relations should be inserted in the draft. He would submit that, since the draft was based on the assumption that consular relations had been established, the severance of those relations fell outside the scope of the draft. Moreover, it would be contrary to precedents in consular conventions to include an article referring to the unilateral severance of consular relations.

34. Sir Gerald FITZMAURICE agreed with Mr. Tunkin that the problem raised by article 50 had been largely reduced to one of drafting. It was entirely because the Special Rapporteur's wording raised doubts concerning the existence of the right to break off consular relations that he (Sir Gerald) had difficulty in deciding on the advisability of including a clause concerning the severance of consular relations. Mr. Yokota's suggested wording (see paragraph 18 above) would also cause the inexperienced reader to wonder whether there were any circumstances at all in which consular relations could be broken off. It should be made clear that the right existed, but such a provision would have to be drafted in terms which did not seem to invite the breaking-off of relations. The Chairman's suggestion that the provision should be inserted in article 2, paragraph 2, seemed to be sound, even though article 2 had not yet been finally agreed upon. That text might state that the establishment of diplomatic relations included the establishment of consular relations, but that the severance of diplomatic relations should not automatically entail the severance of consular relations. There would then be no special article concerning the severance of consular relations and the provision would be less conspicuous.

35. With regard to the issue of consular conventions raised by Mr. Yokota, he believed that the

draft would contain a provision to the effect that nothing in the draft affected existing bilateral arrangements. It was obvious that such a provision should be inserted, since otherwise no State would be able to accept the text which the Commission was preparing.

36. Finally, he said he had refrained from discussing any of the implications of the first phrase of the Special Rapporteur's draft article 50, because the whole question of the legitimacy of a state of war was totally irrelevant to the debate. Whether a state of war was regarded as legitimate or not, the truth was that, if it existed, the maintenance of both diplomatic and consular relations was impracticable.

37. Mr. SCELLE said he had been greatly surprised by some of the statements that he had heard on article 50. It had been said that under international law a State was free to maintain or not to maintain diplomatic and consular relations with other States. He believed that the contrary was true. In his opinion, a government had the right to recognize or not to recognize a particular State, but having recognized that State, it was under an obligation to maintain diplomatic and consular relations with it. The international dealings of States *inter se* constituted an essential feature of the law of nations; a State which refused to maintain such dealings with another committed a violation of international law. Many wars had been waged in Europe in order to oblige certain States to enter into dealings with others; thus, conflicts had been based on the principle that a State which refused to maintain certain relations with another placed itself outside international law and no longer had any grounds for claiming protection under that law. If there were any doubts concerning the existence of such an absolute and customary rule, the Commission itself would lose its raison d'être. Such doubts conflicted with the conception of the international community and in effect questioned the reality of international law, for an international law not based on international relations was inconceivable. There could be no discussion on the point, particularly in a meeting of the International Law Commission.

38. He had previously expressed the opinion that it might be better to omit article 50 altogether, and he still believed that that would be the wisest course. Nevertheless, some members had indicated that the article would be acceptable if the first phrase were deleted, and he would have no objection to following Mr. Tunkin's suggestion, but he was afraid that the Drafting Committee would meet with the same difficulties as the Commission had done.

39. Mr. ŽOUREK, Special Rapporteur, observed that in conformity with the consensus in the Commission the first phrase of article 50 would obviously be deleted; in that case, the title would have to be amended. He thought the text should be referred to the Drafting Committee, which would also decide upon the best place for the provision. The Chairman's suggestion that it should be included in article 2, paragraph 2, might be followed.

40. Commenting on the views expressed by earlier speakers, he said that an agreement to establish consular relations was an international treaty in the broad sense and could be modified in accordance with international law. For example, it could be amended or extinguished by agreement between the parties and also by unilateral acts recognized by international law. Accordingly, he could not agree that the abrogation of an agreement establishing consular relations was always a breach of international law. The fundamental object of such an agreement was the establishment of consular relations, and also, as Mr. Matine-Daftary had pointed out, the establishment of individual consulates; the Commission had decided to deal in the commentary with cases where an agreement to establish a consulate could be rescinded if it was not possible to agree on the delimitation of the consular district. So far as the more general problem of the severance of consular relations was concerned, he said that consular conventions, and hence also their termination, would continue to be governed by general international law, even if no explicit mention was made of the severance of those relations.

41. Mr. Bartoš had said that if the faculty of breaking off diplomatic relations was recognized, the faculty of breaking off consular relations must, *a fortiori*, be recognized also. Surely, however, the severance of consular relations, like that of diplomatic relations, was an abnormal, emergency measure, which should not be taken in peace-time. Accordingly, it would be better not to deal with the contingency in a separate article. Inasmuch as the operation of consular conventions was governed by general international law, it was impossible to create a rule on the subject of the severance of consular relations, since agreements were terminable by notice.

42. He could not agree with the Secretary that the draft convention which the Commission was preparing was concerned only with the establishment of consular relations and hence should not deal with the termination of those relations. Furthermore, the unilateral severance of consular relations should invariably be regarded not as an unfriendly but as an illegal act: any unilateral modification of an agreement on consular matters must be made in accordance with international law.

43. Sir Gerald Fitzmaurice had rightly pointed out that the article as it stood might mislead the reader into thinking that no right to break off consular relations existed. Finally, the commentary should contain references to the regrettable cases which sometimes arose from the breaking-off of consular relations.

44. Mr. AMADO did not consider it advisable to refer the article to the Drafting Committee in its present form, since the Committee would be faced with the same difficulties as the Commission. He was convinced that the best course would be to omit the provision altogether.

45. The CHAIRMAN observed that the consensus of the Commission was to retain the last phrase of the Special Rapporteur's draft and to leave it to the Drafting Committee to decide where the provision should be placed. Sir Gerald Fitzmaurice had pointed out that the article as it stood might give the impression that the right to break off consular relations did not exist; that point might be met by treating the whole concept more incidentally in article 2, paragraph 2.

46. Mr. AMADO, supported by Mr. SCELLE, proposed that the Commission should vote on whether or not an article on the breaking-off of consular relations should be included in the draft.

47. Sir Gerald FITZMAURICE thought that a vote would be premature because the Commission had not yet decided on the text of article 2, paragraph 2, which might even be omitted. If so, a separate article on the severance of consular relations might still be needed.

48. Mr. ŽOUREK, Special Rapporteur, agreed with Sir Gerald Fitzmaurice and pointed out that the text now before the Commission related to the maintenance, rather than to the severance, of consular relations.

49. The CHAIRMAN said that he was reluctant to put the question to the vote at that stage. The Drafting Committee's task would be to find the best place and title for the clause and to word it so as to allay Sir Gerald Fitzmaurice's doubts.

50. Mr. AMADO could not see why the Drafting Committee should be given a task which was so imprecise. Many doubts had been expressed by members and several seemed to agree with him that the article should not be forwarded to the Drafting Committee. Nevertheless, he withdrew his proposal.

51. The CHAIRMAN observed, with reference to the Special Rapporteur's remarks, that cases of severance of diplomatic relations could occur which were not connected with the suspension of peaceful relations. There had been instances where diplomatic relations between two States had been severed but consular relations had been maintained. The aspect of the question exemplified by those cases was the only one with which the Commission should be concerned.

52. Mr. AMADO pointed out that international law did not prevent States from committing certain political acts. He did not think that the Commission could draft rules governing the behaviour of States. The provision added nothing of value to the draft.

53. Mr. YOKOTA, speaking as Chairman of the Drafting Committee, said that a repetition of the Commission's discussion in the Drafting Committee would place a heavy additional burden on the Committee. He suggested that the Committee might consider only the placing and the title of the article.

54. The CHAIRMAN, supported by Sir Gerald FITZMAURICE, did not think that the Drafting Committee should limit its task to the placing and title of the article, since its wording was bound to differ according to whether it was attached to article 2, paragraph 2, or left as a separate article.

55. He suggested that article 50 should be forwarded to the Drafting Committee with those comments.

It was so agreed.

56. Mr. EDMONDS expressed concern at the procedure followed by the Commission at the present and at the eleventh sessions. Before the eleventh session, the Commission had always taken a vote on the principle embodied in each article and had then referred the text to the Drafting Committee with directions simply to review the language. In 1959 the Commission had departed from that procedure and had begun to refer all articles to the Drafting Committee without taking a decision on the substance. At the present session only one vote had been taken on a matter of principle, with the result that a number of articles on which sharp divergences of opinion subsisted had been referred to the Drafting Committee, which must therefore take decisions on matters of principle not settled by the Commission itself. The result was necessarily a considerable waste of time and effort. A comparison with the records of earlier sessions would show that, quantitatively at least, the Commission had produced much less in the current year and the previous year than it formerly had. The Commission would very likely be confronted in the closing weeks of the session with draft articles on which opinions would still be sharply divided. That being the situation, either the Commission would have no time to consider them again thoroughly or else its members would vote, in a spirit of conciliation, in favour of the Commission's report. Such a report would not constitute a report based upon the considered opinions of a majority of the members.

57. The CHAIRMAN replied that he was always willing to submit a matter to the vote if members so requested. Naturally the Commission wished to avoid a repetition of the discussions when the Drafting Committee reported back, but the situation would be difficult if every matter was put to the vote at the initial discussion and a final draft emerged accompanied by a large number of minority opinions. If such a draft was submitted to the General Assembly, the Commission would run into trouble later.

58. Mr. EDMONDS assured the Chairman that he had not intended to cast any reflection on his conduct of the proceedings. It was the Commission as a whole which had drifted into a procedure which prevented it from producing as much work as it might.

ARTICLE 51 *(Right to leave the territory of the receiving State and facilitation of departure)*

59. Mr. ŽOUREK, Special Rapporteur, introduced his revised text of article 51 :

" 1. Upon the termination of the functions of members of the consular staff, the receiving State shall, save as otherwise provided in the present articles, allow the said persons, the members of their families and the private staff in their employ, to leave its territory, even in case of armed conflict, provided that they are not nationals of the receiving State.

" 2. The receiving State shall grant to the persons referred to in paragraph 1 above the necessary time and facilities for preparing their departure. It shall treat the said persons with respect and protect them up to the moment when they leave its territory. If need be, the receiving State shall place at their disposal the necessary means of transport for themselves and their personal effects."

60. The revised text differed from the original (A/CN.4/L.86) only in drafting, by the elimination of some unnecessary detail. In the main, it corresponded to article 42 of the draft articles on diplomatic intercourse and immunities, but with certain differences.

61. The draft article laid down the principle that the State of residence was bound to allow all members of the consular staff, members of their families and their private staff to leave its territory upon the termination of their functions. The objection might be raised that the principle was self-evident. Although it was self-evident in the case of diplomatic agents, who enjoyed inviolability and immunity, it was not so for members of the consular staff, especially in the case of armed conflict. At the beginning of the First World War many British consuls had been held by the German Government in order to force the British Government to repatriate German nationals. Some of them had been held for as long as six months while negotiations were carried on by a neutral government. Similar events had also happened during the Second World War. Because some doubt had been expressed concerning the principle even in the literature, notably in the Harvard Draft, he had concluded that it should be expressly stated in the draft before the Commission. Those were the considerations underlying the terms of paragraph 1, for which there was no equivalent in the corresponding diplomatic article.

62. Since consular staff did not enjoy inviolability or complete immunity, and were accordingly liable to restraint on their personal liberty, he had included in paragraph 1 a proviso : " save as otherwise provided in the present articles ". The proviso would cover cases such as that of a consular employee who was serving a term of imprisonment at the time when the functions of the consular staff were terminated.

63. Paragraph 2 reproduced a provision found in many consular conventions and dealt with a situation which often arose in practice. The last sentence in paragraph 2 was taken from article 42 of the diplomatic draft, except that the term " property ", which was too broad, had been replaced by the expression " personal effects ", which should certainly be sufficient to cover the needs of consular service staff.

64. Mr. VERDROSS observed that the principle embodied in article 51 was quite correct and corresponded to practice; it would be salutary to stress it, especially in connexion with armed conflict.

65. One case, however, was apparently not covered — that of a consular official dismissed locally by the sending State for some offence. It was obviously not the duty of the receiving State to facilitate the departure of such a person; on the contrary, it would probably wish to hold him in prison. The situation might be covered by the phrase in paragraph 1 " save as otherwise provided in the present articles ". It certainly would be, if draft article 47 were retained in the wording originally proposed by the Special Rapporteur, but that article had been referred to the Drafting Committee. Furthermore, would article 51 cover such a person after his release? Certainly it could not do so, since once a consular official had been dismissed, his privileges and immunities were immediately extinguished and could not be revived. An additional paragraph in the following terms might be added to cover that particular case :

" 3. The provisions of paragraph 2 [paragraphs 1 and 2] of this article shall not apply in a case in which a consular official is discharged locally by the sending State."

66. Mr. YOKOTA supported the principle of the article and had no objection to paragraph 1. He had no objection of principle to paragraph 2, but thought that the second sentence was not appropriate and should be deleted. That sentence was incompatible with draft article 32 which had already been adopted. Article 32 accorded special protection only to " foreign consuls ", which expression meant, in accordance with the definition in article 1, heads of consular posts. Under article 51 protection would be accorded not only to consuls, but also to members of their families and the private staff in their employ.

67. It was going rather too far to prescribe that even private servants of members of the consular staff must, on departure, be treated with respect and receive protection. They did not enjoy such privileges while they were actually in service, and by the time they left the country their service would have terminated. If they were to enjoy respect and protection when their service had been terminated, why should they not equally enjoy them while they were in service?

68. The sentence was also redundant in the light of article 43, paragraph 2, which stated that consular privileges and immunities would normally

cease when the person enjoying them left the country, but should subsist until that time. The right to treatment with due respect was one of those privileges. Furthermore, no similar provision was to be found in article 42 of the diplomatic draft, which made no reference to respect and protection.

69. Mr. FRANÇOIS thought that the phrase " save as otherwise provided in the present articles " should be carefully examined by the Drafting Committee. The Special Rapporteur had explained that he had had in mind former consular officials serving a term of imprisonment. The text of the article as it stood might not exclude such persons from the privileges stated in it.

70. The Special Rapporteur had rightly recalled the cases which had occurred in the Second World War, when consular staff had been detained by the receiving State for long periods. The stipulation was therefore necessary, but was not perhaps quite effectively stated. The main cause of the delay had been the tendency of governments to wait until they were assured that their own consular staff in the hostile country had been released. The principle of reciprocity had thus applied. He hoped that the Special Rapporteur might find some way of excluding the operation of the reciprocity rule in article 51, which should lay down the obligation to allow consular officials and their service staff to leave the country and provide that they must not be detained on the pretext that another State was not fulfilling, or might not fulfil, its similar obligations.

71. Mr. LIANG, Secretary to the Commission, wondered whether two paragraphs were required in article 51, since the principle had been stated in one paragraph in article 42 of the diplomatic articles.

72. The Special Rapporteur had had good reason for introducing the notion of respect and protection up to the moment of departure. The term " protection " was not used in article 51 in the same sense as in article 32. The term " special protection " in article 32 presumably had a technical meaning, to cover instances where States had laws and regulations which imposed heavier penalties on persons who violated the inviolability of foreign consuls, whereas in article 51 it would seem to mean protection against mobs in times of stress. Article 51 was not therefore incompatible with article 32.

73. The termination of the functions of members of a consular staff could not be equated with the case where a consular officer was recalled or resigned and thus lost his status. The termination of functions was within the determination of the sending State. The point made in article 51 was that when a consular official was recalled, he no longer enjoyed consular status and therefore left the country. Article 42 of the diplomatic articles simply covered the case where diplomatic agents left the receiving State, without any reference to the functions having been terminated.

74. Mr. BARTOŠ pointed out that the principle embodied in draft article 51 had been very important during the Second World War and the rules had not changed. It must be stated very firmly and precisely that States were bound to protect and facilitate the departure not only of consuls, but of all their dependants. He disagreed with Mr. Yokota's view. The terms of the article should be as broad as possible, in order to guarantee all the staff of a consulate, even the private service staff of its members.

75. The application of the reciprocity rule had sometimes been very difficult and dangerous. United Kingdom consuls in Yugoslavia had been detained by the Italians for a very long time, until the Portuguese mediating government had been able to guarantee the departure of certain Italian consuls from territories held by United Kingdom forces. The Drafting Committee should stress that a State was under an obligation to allow consular officers, their families and service staff to remain at freedom and to provide them with facilities to leave the country as soon as possible. If the government of the receiving State should have the power to delay their departure for as much as six months and even then to create very unfavourable conditions, the rule of international law would be sadly impaired.

76. Some provision should also be made to cover the property of consular officials which they could not carry with them and which was placed in storage. Yugoslav consuls had had considerable difficulties when their property had been withdrawn from storage warehouses by the German secret police on the alleged grounds that it was the property of enemy aliens.

77. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Yokota that there was no contradiction whatever between article 32 and article 51, for the simple reason that article 32 dealt with consuls who were exercising their functions whereas article 51 was expressly concerned with members of the consular staff " upon the termination of their functions." Article 51 dealt with the interval between the time when they had been exercising their functions and the time when they left the country, which might be an extremely critical time for consular staff.

78. Mr. Yokota had complained that private staff of consular officers would, under article 51, receive greater protection than they had received during their service. There was a very good reason for that. There might be great tension between States on the occasion of the termination of a consular mission and the staff would naturally need greater protection than they had enjoyed while the consular functions were being exercised, when such danger had not existed.

79. Mr. Yokota had also drawn attention to the fact that no such provision existed in article 42

of the diplomatic articles. That was quite true; but the situation was quite different, since it had been recognized for centuries that diplomatic staff enjoyed inviolability there had been no need to emphasize the rule in the diplomatic draft, whereas consular staff did not enjoy such inviolability and therefore needed a special provision enjoining respect and protection for them. He entirely agreed with the Secretary that the situations contemplated in article 32 and in article 51 were quite different.

80. Mr. Verdross had rightly raised the special case of a member of the consular staff who had been dismissed in the country of residence. He had been quite correct in maintaining that such a person no longer enjoyed consular privileges and immunities, since he no longer was a member of the consulate, nor could those immunities be revived. It might not, however, be necessary to draft a special paragraph to cover that situation; it might be referred to in the commentary.

81. The point raised by Mr. Bartoš about consular property left behind in storage might also be dealt with in the commentary.

82. Mr. AMADO strongly disagreed with Mr. Yokota. Service staff of consulates had left their native country with full faith in the guarantee that they should enjoy respect and protection; that must be secured for them.

83. The CHAIRMAN suggested that draft article 51 might be referred to the Drafting Committee.

84. Mr. BARTOŠ observed that Mr. Yokota was still in disagreement with several other members of the Commission on the point in question; the Drafting Committee could hardly reconcile two radically conflicting views. The question was whether the receiving State was bound to recognize the right of members of the service staff of a consulate to leave its territory upon the termination of the consular functions.

85. Mr. YOKOTA replied that he did not object to the clause affording such persons the right to leave the territory of the receiving State, but simply felt that it was going too far to prescribe that private servants of consular officials must be treated with special respect.

86. Mr. ERIM suggested that further discussion of draft article 51 be deferred until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

548th MEETING

Friday, 27 May 1960, at 9.40 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/L86) *(continued)*

ARTICLE 51 *(Right to leave the territory of the receiving State and facilitation of departure) (continued)*

1. The CHAIRMAN asked the Commission to continue its consideration of the revised text of article 51 proposed by the Special Rapporteur (547th meeting, paragraph 59).

2. Mr. SANDSTRÖM said that he agreed with Mr. François that the phrase " save as otherwise provided in the present articles" should be redrafted. The phrase " at the earliest possible moment ", from article 42 of the diplomatic draft should be added in the first sentence of draft article 51, paragraph 2.

3. It was not entirely clear whom the phrase " provided that they are not nationals of the receiving State " in paragraph 1 qualified. It should not exclude wives of members of consular staffs who were nationals of the receiving State or any of their children who were nationals of that State. The principle applicable to the facilitation of their departure was implicit in article 42 of the diplomatic draft read in conjunction with article 37 of that draft *(Diplomatic agents who are nationals of the receiving State)*.

4. After hearing the Special Rapporteur's reply (*ibid.*, paragraph 77) to the question raised by Mr. Yokota (paragraphs 66-68) with regard to the second sentence in paragraph 2, he had concluded that the Special Rapporteur had been right to include it. The situation might perhaps be made clearer by adding the phrase : " even if they do not enjoy the privileges set forth in article 32 " at the end of the paragraph.

5. Sir Gerald FITZMAURICE agreed with the principle stated in article 51, but also with the drafting points made by Mr. Sandström.

6. The case, mentioned by Mr. Verdross, in which a consular official had been discharged locally by the sending State might easily be included by careful drafting.

7. Mr. Sandström had been perfectly right in arguing that the wives and children who were nationals of the State of residence should not be excluded from the application of the article. The provisions should be as broad as possible and should cover both those who enjoyed privileges and immunities and those who did not.