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Summary record of the 589th meeting

Topic:
Consular intercourse and immunities

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Appointment of a drafting committee

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

It was so agreed.

The meeting rose at 12.55 p.m.

589th MEETING

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

Chairman: Mr. Grigory I. TUNKIN

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

[Agenda item 2]
(*continued*)

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

ARTICLE 9 (Acquisition of consular status)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

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

ARTICLE 10 (Competence to appoint and recognize consuls)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

63. Lastly, with regard to drafting, he suggested that the Drafting Committee should take into consideration the wording of article 6 of the Havana Convention of 1928.[3]

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

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

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

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

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

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

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

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

It was so agreed.

ARTICLE 11 (Appointment of nationals of the receiving State)

72. Mr. ŽOUREK, Special Rapporteur, said that there had been no objection by governments to the rule set forth in article 11. However, the Netherlands (A/CN.4/136/Add.4) and Belgium (A/CN.4/136/Add.6) had proposed a more elastic formula to express the idea underlying the article. The Chilean Government (A/CN.4/136/Add.7) had proposed some drafting changes which might be referred to the Drafting Committee.

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

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

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

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

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

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

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

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

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

82. The Commission should take that tendency into

[3] *Ibid.*, p. 423.

[4] See article 21, commentary (3).

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

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

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

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

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

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

The meeting rose at 6 p.m.

590th MEETING

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

Chairman: Mr. Grigory I. TUNKIN

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

[Agenda item 2]
(continued)

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

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

1. The CHAIRMAN invited the Commission to continue its discussion of article 11 of the draft on consular intercourse and immunities (A/4425). The only specific proposal submitted (589th meeting, para. 83) concerning the article was Mr. Ago's proposal that article 11 should be revised along the lines of article 8 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

42. He proposed that the Commission should take two separate votes on the introduction into article 11 of the ideas contained in paragraphs 1 and 3 respectively of article 8 of the Vienna Convention.

43. The CHAIRMAN said that the Commission would vote on the understanding that article 11 dealt only with career consuls and not with honorary consuls. Also, that it dealt not only with the head of the consular post, but also with consular officials.

44. He would put to the vote first the question of maintaining article 11 as it stood. Since the article did not differ materially from article 8, paragraph 2, of the Vienna Convention, its adoption would not preclude a

decision on whether to include or not the ideas contained in paragraphs 1 and 3 of article 8 of the Vienna Convention.

Article 11 was adopted unanimously.

45. The CHAIRMAN put to the vote the proposal that the idea contained in article 8, paragraph 1, of the Vienna Convention should be introduced into article 11.

The proposal was adopted by 11 votes to 4, with 1 abstention.

46. The CHAIRMAN put to the vote the proposal that the idea contained in article 8, paragraph 3, of the Vienna Convention should be introduced into article 11.

The proposal was adopted by 14 votes to 2.

47. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to entrust the Drafting Committee with the drafting of article 11 so as to include: (1) the idea contained in article 8, paragraph 1, of the Vienna Convention; (2) the text of article 11 of the consular draft; and (3) the idea contained in article 8, paragraph 3, of the Vienna Convention.

It was so agreed.

ARTICLE 12 (The consular commission)

48. Mr. ŽOUREK, Special Rapporteur, said that the substance of article 12 had not given rise to any objection; the comments of the Governments of Belgium, the Netherlands, Spain and the United States on the article were mainly of a drafting character.

49. Both the Belgian and the Spanish Governments (A/CN.4/136/Add.6 and Add.8) had pointed out that the expression " full powers " was too wide, since consular functions were clearly limited. The expression had indeed provoked lengthy debate in the Commission, but no better alternative had been found.

50. The Belgian Government had proposed that paragraph 2 should provide for the communication to the government of the receiving State not only of the consular commission, but also of the " similar instrument ".

51. The Netherlands Government (A/CN.4/136/Add.4) had expressed the view that paragraph 2 should apply to heads of post only.

52. The United States Government (A/CN.4/136/Add.3) had made a suggestion concerning the notification of the limits of consular districts; but that suggestion related to article 3, paragraph 2, of the draft rather than to article 12.

53. The Governments of Belgium, Norway, Sweden and the United States had replied in the affirmative to the question posed in paragraph (3) of the commentary whether the general practice was to require the issue of a new commission when a consul was appointed to another post within the territory of the same State. The Belgian Government had added that under Belgian law the head of post was furnished with a new commission on promotion or when the boundaries of his district were changed.

54. Mr. MATINE-DAFTARY said that the expression " full powers " was too broad in the context and should be deleted. The opening passage of paragraph 1 might be redrafted to read: " The head of a consular post shall be furnished by the State appointing him with a commission or similar instrument."

55. Mr. VERDROSS suggested for consideration by the Drafting Committee the following wording: " The head of a consular post shall be furnished by the State appointing him with a document stating his powers."

56. Mr. AGO said that he preferred the wording suggested by Mr. Matine-Daftary to that of Mr. Verdross because it was not for a consular commission to indicate what were the consul's powers. Those powers were determined by rules of international law, bilateral agreements or a multilateral convention of the kind under discussion.

57. Sir Humphrey WALDOCK endorsed Mr. Ago's view.

58. Mr. AMADO suggested that in the interests of uniformity the words " the sending State " should be substituted for the words " the State appointing " throughout the article.

59. The CHAIRMAN observed that, as there appeared to be general agreement that article 12 should be retained, it could be referred to the Drafting Committee together with the comments of governments and those made in the course of the discussion.

It was so agreed.

ARTICLE 13 (The exequatur)

60. Mr. ŽOUREK, Special Rapporteur, explaining the fundamental purpose of article 13, recalled that after lengthy discussion (508th meeting, paras. 55-63, and 509th meeting, paras. 7-27) the Commission had decided, as explained in paragraph (7) of the commentary to article 13, that only the head of post had to obtain an exequatur, and the exequatur automatically covered the members of the consular staff working under him. However, as stated at the end of that comment, there was nothing to prevent the sending State from applying for an exequatur for other officials with the rank of consul.

61. No objection of principle had been raised to the substance of article 13, but the United States Government had proposed that the words " officers of consular posts " be substituted for the words " heads of consular posts "; the amendment would mean that an exequatur would be necessary for each official who exercised consular functions. The Commission should therefore decide whether it wished to retain the basic concept of the rule as set forth in the text as it stood. In his opinion article 13 should stand and its application should be limited to heads of post. The case where, for internal reasons depending on the laws of the sending State, an exequatur had to be obtained for consular officials who were not heads of post could be dealt with by a suitable provision in article 21, though it should be made clear

that such a provision was permissive. That solution would accord with the concept of the consulate as a unit and would be consistent with the law and practice of most countries, e.g. Poland (A/CN.4/136/Add.5), under which the exequatur could be granted only to a head of post.

62. He could accept the Czechoslovak Government's proposal (A/CN.4/136) that the first sentence in paragraph (7) of the commentary should be embodied in the article itself, since that change would make the meaning clearer.

63. In answer to the Finnish Government's question whether, in cases where the sending State asked for an exequatur for officials other than the head of post, those officials could enter upon their duties before the exequatur had been given, he had stated in his third report (A/CN.4/137) that they could do so provided that the head of post had already obtained his exequatur, for the request for an exequatur for consular officials working under a head of post who had already obtained one was an optional and supplementary measure.

64. He would draw attention to the redraft of article 13 which he proposed in his third report.

65. Mr. BARTOŠ said that he agreed with the Special Rapporteur that the exequatur should be granted only to the head of the consular post. Nevertheless, some States took a different view; in unifying international law in the matter, the Commission should consider whether it should insert a supplementary provision to cover the case where the exequatur was required for other consular officials as well. From the practical point of view, if a receiving State required all consular officials who had dealings with the local authorities to obtain the exequatur, that requirement affected consular relations between States, and was not merely a matter of internal law. For example, Yugoslavia had a consul-general in New York who held the internal rank of minister plenipotentiary and had several consuls and vice-consuls working under him; each subordinate consular official who entered into contact with local authorities was obliged to produce evidence of his capacity to act. The Government of Finland had therefore asked a pertinent question, which in fact related to the date on which such officials began to exercise purely consular functions. If the exequatur were required for all consular officials, they might begin to perform their functions at the consulate, which might be regarded as purely internal, upon their arrival, but if they were to act on behalf of the head of post *vis-à-vis* the authorities of the receiving State, the date from which their acts might produce their effects in the receiving State would be that of the grant of the exequatur. The United Kingdom was a case in point; it allowed subordinate consular officials to exercise purely internal functions without an exequatur, but required an exequatur for functions involving contact with the local authorities. In that connexion, some purely practical difficulties might arise. Thus, on one occasion, when the Yugoslav consul in a British possession had died, the vice-consul in the territory had not been in possession of an exequatur. A special application had had to be made to the Foreign Office and a Yugoslav official to whom an exequatur had been granted had been sent from London to perform consular functions, because an exequatur in the United Kingdom was given by the Sovereign, who had been absent at the time.

66. The Special Rapporteur's new text took into account the Czechoslovak Government's suggestion that the first sentence of paragraph (7) of the commentary should be inserted in the body of the article, thus laying down one of the possible systems as a general rule of international law. The Special Rapporteur had said that the practice of requiring the exequatur for subordinate consular officials was optional; in fact, however, the practice was one followed by a number of sovereign States. Accordingly, while he was in favour of unifying parallel systems wherever possible in the draft, he would point out that in the Vienna Convention the form of submitting letters of credence was left to the choice of the Contracting Parties. While that question might be regarded as one of protocol, the relevant rule had certain practical consequences, since it determined the date of the beginning of the functions of a diplomatic agent. In view of the widespread tradition of requiring subordinate consular officials to obtain the exequatur and of the number of States which followed that system, article 13 of the draft under discussion should be recast so as not to imply that one system was compulsory and the other optional.

67. The CHAIRMAN, speaking as a member of the Commission, said that, just as article 12 spoke of the consular commission " or similar instrument ", so a reference to the exequatur " or similar instrument " might be inserted in paragraph 1 of the Special Rapporteur's new draft article 13. Such an addition would, moreover, be more in conformity with existing practice. With regard to the word " recognition ", he agreed with Mr. Gros's remarks on the subject in connexion with article 9 (589th meeting, para. 29). The word was not used in the Vienna Convention and had the disadvantage of being used rather loosely by some jurists. The Drafting Committee should be asked to find a different term.

68. With regard to the Special Rapporteur's proposed paragraph 2, the expression " members of the consular staff " was hardly accurate in article 13, since it was defined in article 1 (k) as meaning the consular officials (other than the head of post) and the employees of the consulate. The employees of the consulate carried out no consular functions and did not require authorization to do their work; those functions might be regarded as covered by the exequatur of the head of post.

69. Finally, he agreed with Mr. Bartos that, although, generally speaking, uniform rules were desirable, in the case under consideration some wording should be found to cover the two existing practices. The Special Rapporteur's paragraph 2 might be redrafted along the following lines:

> " The grant of the exequatur to the head of consular post covers *ipso jure* the consular officials working under his orders and responsibility, unless the legislation of the receiving State requires separate exequaturs for subordinate consular officials."

70. Mr. AGO said that the Chairman's praiseworthy attempt at a compromise solution ran counter to the basic theory, agreed upon by the Commission, that the consent of the receiving State was a condition of the appointment of the head of post himself, and not of that of other consular officials. Article 21 (Appointment of the consular staff) stated quite clearly that the sending State could freely appoint members of the consular staff and for such persons the receiving States had only the possibility of declaring them " not acceptable " under article 23. Under the Vienna Convention also the *agrément* was required as a condition of appointment in respect of the head of the diplomatic mission, and in that Convention, as in the draft under consideration, the receiving State had the option of declaring subordinate officials not acceptable. The express provision that the exequatur, which was a form of consent, could be previously required for the appointment of all officials would upset the structure of the draft. In any case, a choice was necessary. If it offered two different rules, the draft convention would no longer answer the description of a treaty.

71. The comment of the Government of Finland might have been provoked by some looseness in the wording of paragraph (7) of the commentary. The last sentence of that paragraph referred to the sending State's option of obtaining an exequatur for one or more consular officials with the rank of consul, but said nothing about the possibility that the receiving State might require such officials to obtain the exequatur. The Commission should choose which of two rules it would insert in article 13, and that choice should be consistent with the general context of the draft convention.

72. Finally, he doubted the wisdom of inserting in paragraph 2 a provision stating that the grant of the exequatur to the head of post automatically covered the consular officials working under him, for such a provision would obscure the fact that the exequatur was required for the head of post only.

73. Sir Humphrey WALDOCK said that the Chairman's points concerning the word " recognition " and the form of the exequatur were to some extent taken account of in article 1 (d), under which the term exequatur meant the final authorization granted by the receiving State to a foreign consul, whatever the form of such authorization.

74. From the substantive point of view, the Commission was faced with a serious problem, since there was a considerable body of practice requiring the exequatur for subordinate consular officials. He had found such requirements in ten consular conventions signed by the United Kingdom, and no doubt it occurred in a number of others. He was therefore in favour of stating the general rule with the qualifying " unless " clause suggested by the Chairman.

75. Furthermore, if the Commission were to adopt the Special Rapporteur's wording of paragraph 2 without any reference to the municipal law of the receiving State, it would be departing from the principle accepted by it in article 10 that the conditions for granting an authorization for the discharge of consular functions were laid down by municipal law. The Commission ought not therefore to impose on the receiving State the rule proposed by the Special Rapporteur.

76. Mr. LIANG, Secretary of the Commission, drew attention to the difference between consular and diplomatic practice. While the accreditation of the head of a diplomatic mission meant that all the subordinate staff of the mission would have the authority to act under that accreditation, a consul-general was often in charge of a large district, and consuls and vice-consuls who were not heads of post might have to perform consular functions in their own name in order that they should be valid under the law of the receiving State. Some States therefore required exequaturs for subordinate personnel in such situations.

77. Mr. YASSEEN expressed his appreciation of the Chairman's attempt to provide a compromise solution, but thought that it did not quite meet Mr. Ago's objections. He therefore suggested that paragraph 2 be redrafted along the following lines:

> " If the receiving State requires the recognition of consular officials other than the head of post, the recognition of the head of post shall extend automatically to these consular officials, unless this extension conflicts with the law of the receiving State."

78. Sir Humphrey WALDOCK said that in practice the difficulties might not be as great as they seemed, in view of the terms of article 14 (Provisional recognition), under which the head of consular post could begin to exercise his functions pending the granting of the exequatur. Under some consular conventions also consular officials were allowed to exercise functions pending recognition.

79. The CHAIRMAN, summing up the debate on article 13, suggested that the Special Rapporteur's paragraph 1 might be adopted as drafted, subject to the replacement of the word " recognition " by some alternative to be found by the Drafting Committee.

It was so agreed.

80. The CHAIRMAN said that the consensus of the Commission seemed to be that article 13 should contain a formula covering both the existing practices in the matter of the grant of the exequatur. He proposed that the Drafting Committee be instructed to find appropriate wording to cover those situations in the light of the suggestions made during the meeting.

It was so agreed.

The meeting rose at 1 p.m.

591st MEETING

Wednesday, 17 May 1961, at 10.15 a.m.

Chairman: Mr. Grigory I. TUNKIN

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

[Agenda item 2]
(continued)

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

ARTICLE 14 (Provisional recognition)

1. The CHAIRMAN invited the Commission to discuss article 14 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, drew attention to the comments of the Government of the United States (A/CN.4/136/Add.3), which made it clear that the United States required specific recognition of all consular officials. That was confirmed by the same Government's comments on article 16. Nevertheless, the wording of both observations gave grounds for the hope that the position of the United States on that point did not completely exclude that country's agreement with the Commission's position, based on the principle that only the head of consular post should be granted the exequatur and that the sending State was free to appoint other consular officials, in accordance with the rules of the draft. That view seemed to be substantiated by the last two sentences of the United States Government's comments on article 16.

3. Accordingly, it did not seem that article 14 needed any radical change, for it stated a rule frequently found in consular conventions and had not been criticized by governments.

4. Mr. BARTOŠ said that it would be in keeping with the position adopted by the Commission in connexion with earlier articles if article 14 were made applicable, according to the practice of certain States, to consular officials other than the head of post.

5. The CHAIRMAN, speaking as a member of the Commission, observed that article 14 would have to be brought into line with article 13. The Drafting Committee should be instructed to find some wording which would cover cases where subordinate consular officials were granted the exequatur.

6. Speaking as the Chairman, he suggested that article 14 be referred to the Drafting Committee for revision in the light of the observations made.

It was so agreed.

ARTICLE 15 (Obligation to notify the authorities of the consular district)

7. Mr. ŽOUREK, Special Rapporteur, referring to his proposal in his third report (A/CN.4/137) and to the comments of governments, said that the Yugoslav Government (A/CN.4/136) had suggested that the text of paragraph (2) of the commentary to article 15 should be incorporated in the article itself. He had drafted a new paragraph in compliance with that proposal, in the event of the Commission being willing to complete the article in that respect. The United States Government had observed that publication in an official gazette was the only form of notification in respect of which governments could accept any obligation. The Netherlands Government (A/CN.4/136/Add.4) had proposed that the word " consul ", meaning the head of post, should be replaced by " consular officials "; and the Belgian Government (A/CN.4/136/Add.6) had proposed a clarification which applied to the French text only.

8. The main question to be decided in connexion with article 15 was whether the addition proposed by the Yugoslav Government should be approved.

9. Mr. PAL said that he failed to appreciate the need for paragraph (2), and further regarded the wording of that paragraph as not entirely clear. Article 12 required the sending State to communicate the commission of appointment to the receiving State. Article 15 imposed on the receiving State the obligation to notify the competent local authorities. For either purpose the default, if any, would be that of the States. It was therefore difficult to see who would be the " higher authorities " within the meaning of the suggested paragraph.

10. Sir Humphrey WALDOCK observed that the proposed additional paragraph in fact weakened the position of a head of post who had already obtained his exequatur. It implied that the government of the receiving State had to take some kind of action in order to make the powers of the head of post effective, whereas in article 13 the intention was clearly that, the exequatur once granted, the head of post was authorized to assume all his functions. Article 15 contained a useful provision, which would facilitate the exercise of consular functions, but it was unnecessary to add any clause implying that the commencement of the exercise of those functions depended in any way on the fulfilment of the obligation concerned.

11. Mr. SANDSTRÖM endorsed the views expressed by Mr. Pal and Sir Humphrey Waldock.

12. Mr. FRANÇOIS said that the proposed additional paragraph was useful, since it related to cases where the authorities of the receiving State had to enter into contact with the consul on their own initiative. It was obviously necessary for those authorities to know to whom they should apply in such cases.

13. Mr. BARTOŠ observed that, in practice, difficulties sometimes arose for consuls who had obtained the exequatur and wished to get in touch with the local authorities in cases where notification to those authorities had been unjustifiably delayed. He did not wish to advocate any particular form of notification with regard to the appointment of subordinate consular officials; nevertheless, a consul might be hampered in carrying out his functions if the local authorities disclaimed all knowledge of his appointment. It seemed important

to state that the consul could himself present his consular commission and his exequatur to the higher authorities of his district.

14. Sir Humphrey WALDOCK said that he had no substantive objections to the proposed addition, but, read together with article 15 as it stood, it practically suggested two stages of the commencement of consular functions, the first being notification by the government of the receiving State to the local authorities and the second the consul's assumption of his functions. If such a paragraph were to be added, the first sentence of paragraph (2) of the commentary, which expressly stated that the commencement of the consul's function did not depend on the fulfilment of the obligation to notify the local authorities should also be added.

15. Mr. YASSEEN expressed the view that the proposed new paragraph had much practical value, because administrative routine might result in unjustifiable delays in notification. Busy local authorities might regard the question as unimportant, but the consul's exercise of his functions might be seriously hampered by such delays.

16. The CHAIRMAN, speaking as a member of the Commission, said that he shared some of Sir Humphrey Waldock's doubts concerning the advisability of including the new paragraph. In any case, if it were decided to include such an explanatory clause, paragraph (2) of the commentary should be inserted *in toto*. Article 13 made it perfectly clear that a consul entered upon his duties as soon as he received the final authorization in the form of the exequatur; there were, and should be, no other express or implied conditions.

17. Article 15 merely stated the obligation of the receiving State to take steps to facilitate the assumption of consular functions. Indeed, the whole article was not strictly indispensable. It was for the receiving State to find ways and means of fulfilling the obligations clearly imposed on it by the provisions of the draft. Although the article might be regarded as redundant, it was not without some practical use; but an explanation of the consequences of failure to fulfil the obligation concerned went beyond those practical requirements and might weaken the text by laying it open to misinterpretation.

18. Mr. AMADO said that he shared Sir Humphrey Waldock's view that the additional paragraph would weaken the text. Moreover, so far from concerning himself with the minutiae to which paragraph (2) of the commentary related, the Chairman had even raised the question of the necessity of including article 15 in the draft. The second sentence of the article as it stood stated categorically that the government of the receiving State should ensure that the necessary measures were taken to enable the consul to carry out the duties of his office; it was the exequatur that endowed the consul with international status, and the receiving State must be trusted to take full responsibility for the granting of such an important document.

19. Mr. PADILLA NERVO said that he had serious doubts concerning the value of the additional paragraph. It was unquestionable that a consul could begin to discharge his functions as soon as the exequatur was granted to him. If, however, in dereliction of its duty, the government of the receiving State failed to inform the local authorities of the consul's recognition, then the consul himself could inform those authorities of his appointment and was fully entitled to exercise his functions on a provisional basis. In practice, most consuls entering upon their duties informed the local authorities of their arrival and produced the documents authorizing them to exercise their functions either provisionally or finally. The additional paragraph might provide at least a temporary excuse for the central government not to fulfil its obligations. Besides, it would enable the consul to do nothing more than present his exequatur to the higher authorities of his district; and conceivably the local authorities might plead the absence of notification from the central government as a pretext for hampering him in the exercise of his functions. He therefore agreed with Sir Humphrey Waldock and Mr. Amado that the addition would considerably reduce the flexibility of the article.

20. Mr. AGO observed that the additional paragraph might well have effects very different from those intended by its proponents, whose object was merely to avoid administrative delays. A consular official who was not the head of post might not have an exequatur or commission, in which event the additional clause might prevent him from exercising his functions even provisionally, for it said that the " consul may . . . present his . . . commission and his exequatur . . . ". Furthermore, the local authorities were bound by the directives of the central government; if the government failed to inform them, and a consul presented his exequatur or commission, the local authorities would be placed in an awkward position.

21. Mr. MATINE-DAFTARY pointed out that article 15 was not the only provision of the draft in which the obligations of the receiving State were involved. In all other cases, it was assumed that the States concerned would fulfil their obligations, and there seemed to be no reason to make an exception of that article. In practice, when a consul arrived at his post, he informed the local authorities that he had an exequatur or consular commission. If the authorities had not received notification from their government, they would certainly request instructions, but it was doubtful whether they could act solely on the basis of the exequatur. It would be wiser not to complicate matters by going into detail and not to provide for the contingency of the receiving State's failing to fulfil obligations.

22. Mr. GROS remarked that the debate had shown the logical need to retain article 15. While it was true that the receiving State's obligation to ensure that the necessary measures were taken to enable the consul to carry out his functions existed from the moment of the grant of the exequatur, that obligation should be repeated in such a complete set of rules as the Commission was drafting. Perhaps the difficulty could be eliminated by changing the wording of the second sentence: the expression " to enable the consul to carry out the duties of his office " implied that the consul would be prevented from exercising all his functions by a delay in the notification

to the local authorities, whereas in actual fact only part of those functions would be affected.

23. Sir Humphrey WALDOCK reiterated his view that the adverse effect of the additional paragraph proposed by the Special Rapporteur would be largely removed if it were expanded to include the first sentence of paragraph (2) of the commentary to article 15.

24. Mr. BARTOŠ said that the difficulty lay in the fact that there were two different systems of notification. Under the first, the central government notified the local authority of the appointment of a consul, and under the second the consul himself presented his consular commission or exequatur to the local authorities. At the Special Rapporteur's proposal,[1] the Commission had chosen to base article 15 on the former system. It was all the more important, therefore, to add the provisions of paragraph (2) of the commentary. In any case, whether or not the Commission decided to add that clause, it was essential to retain article 15 in order to lay down the obligation of the receiving State. The fundamental provision of the article was set forth in the first sentence, and the second sentence and the possible addition were consequential upon the basic rule that the receiving State which granted the exequatur should notify the competent authorities that the consul was authorized to assume his functions.

25. The CHAIRMAN, speaking as a member of the Commission, said that the proposal to include paragraph (2) of the commentary in the article, with or without the first sentence of that paragraph, proceeded from the assumption that the obligation set forth in article 15 would not be fulfilled by the receiving State. He strongly doubted the need of such an assumption. To state that the non-fulfilment of the obligation in question would not prevent the consul from exercising his functions implied the possibility of non-fulfilment, and even hinted at the intentional non-fulfilment of the obligation in order to prevent the exercise of consular functions. Moreover, the deviation from the accepted structure of the draft that such an addition would entail was unjustifiable. He would therefore prefer the article to be left unchanged.

26. Mr. GROS said that if article 15 were redrafted, it would be necessary to supplement article 13 by a sentence specifying that, from the moment when the exequatur was granted, the consul entered upon his duties. In that manner, the consul's position would be safeguarded; whether the local authorities had been notified by the government of the receiving State or not, he would be able to carry out his duties.

27. If the article were to be retained, on the other hand, a paragraph along the lines of commentary (2) should be included, but the new paragraph should contain both sentences of that commentary and not only the second one.

28. The CHAIRMAN explained that no proposal had been made to delete article 15. The only proposal made had been that of the Yugoslav Government to add to the article a second paragraph along the lines of commentary (2).

29. Mr. VERDROSS pointed out that, in accordance with the Commission's practice, the commentary was deemed to constitute an integral part of the draft. Those members who objected to the contents of the proposed new paragraph should logically also be opposed to commentary (2).

30. He took the view that it was nccessary to specify what would happen if the government of the receiving State failed to notify the competent authorities that the consul had been authorized to enter upon his duties. It would therefore be logical to insert the text of commentary (2) in the article itself.

31. Mr. AGO said that he could not accept the argument of Mr. Gros. The first sentence of article 13 made it clear that the head of a consular post was entitled to enter upon his duties upon obtaining the exequatur. Obviously, that right was not dependent upon the notification to the authorities of the consular district specified in article 15. It was quite normal to explain that fact in a commentary and there was no need to include a provision on the subject in the article itself.

32. Article 15 should therefore be retained as it stood, subject only to the redrafting of the second sentence as suggested by Mr. Gros.

33. Mr. PADILLA NERVO said that the problem which needed attention was not that of the possible failure on the part of the receiving State to carry out its obligations under article 15, but rather that of determining a consul's position during the time which might elapse between the grant of the exequatur and the receipt by the authorities of the consular district of a notification from the central government. Undoubtedly, the consul was entitled to carry out his duties during that intervening period. Many of those duties were of concern only to his own nationals and were intended to produce effects in the sending State only; there was therefore no reason why the consul should not be allowed to carry them out. Where the consul needed to deal with a local authority, he could of course exhibit the exequatur to attest his status. It could happen, however, that the local authority might not consider him as consul until it had been advised by the central government. In practice, it had occurred that, subsequently to the grant of the exequatur but prior to the notification to the local authorities, the boundaries of the consular district had been altered. The local authority might therefore be justified in awaiting the notification in order to grant full recognition to the consul in his consular district.

34. If it were felt necessary to clarify the matter by inserting an appropriate sentence in the article, the sentence should be drafted more or less along the following lines: " Pending such notification to the local authorities, the consul may (or 'shall be entitled to') carry out his duties."

35. Such an additional sentence did not seem to be

[1] For the text originally proposed by the Special Rapporteur, see his first report (A/CN.4/108), where the corresponding provision appears as article 10.

regarded because it would merely repeat the provision contained in the first sentence of article 13.

36. Mr. AMADO pointed out that article 15 was addressed to States, not to consuls. Its purpose was to set forth the duties of the receiving State, first to notify the competent authorities of the consular district that the consul had been authorized to enter upon his duties, and secondly to ensure that the necessary measures were taken to enable him to carry out those duties. When that article became part of a multilateral convention, each contracting party would undertake to carry out the duties in question in its capacity as a receiving State. It was unthinkable that a contracting party would fail to carry out those duties.

37. He agreed with Mr. Ago that it was not advisable to expand the provisions of the article by inserting a new paragraph along the lines of commentary (2). In that connexion, he could not agree with the approach of Mr. Verdross to the commentaries; those commentaries were not on the same footing as the articles themselves.

38. Mr. VERDROSS pointed out that some members had opposed the substance of the idea contained in commentary (2). Even if the commentary was not recognized as an integral part of the text, it could not be denied that it provided an accurate interpretation of it. Those members should therefore be opposed to the commentary.

39. Mr. YASSEEN supported the view put forward by the previous speaker. The commentaries adopted by the Commission were deemed to constitute, for the members of the Commission, the true interpretation of the articles to which they were appended.

40. The CHAIRMAN, speaking as a member of the Commission, said that the adoption of a commentary by the Commission did not mean that the members were ready to include its contents in the text of the articles. The commentaries constituted an interpretation, while the articles set forth the rules of law. Besides, because of the pressure of time, the commentaries could not receive the same thorough consideration as the text of the articles themselves. Hence, certain members who otherwise approved of a commentary would not be acting inconsistently in doubting the advisability of incorporating its contents into the text of an article of the draft.

41. Mr. ŽOUREK, Special Rapporteur, said that, in proposing the insertion as a second paragraph for article 15 of a passage from the commentary, his only concern had been the preparation of a text for the Commission's consideration. Since, however, the majority of the Commission did not appear to favour the proposed additional paragraph and Mr. Bartos himself had not pressed for its inclusion, he would withdraw the proposal.

42. He proposed that article 15 as it stood, together with the drafting suggestions made, should be referred to the Drafting Committee.

43. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to adopt article 15 and to refer to the Drafting Committee the various drafting points which had been raised.

It was so agreed.

ARTICLE 16 (Acting head of post)

44. Mr. ŽOUREK, Special Rapporteur, said that the comments on article 16 dealt with three questions. First, who could be appointed acting head of post? Second, should the receiving State have the right to refuse to accept a particular person as acting head of post? Third, what was the legal status of the acting head of post?

45. On the first question, it had been maintained by Indonesia (A/CN.4/137, *ad* article 16) that only consular officials, and not all members of the consular staff, should be eligible for appointment as acting head of post. As explained in his third report (*ibid.*), he did not concur with that suggestion and thought that the possibility should be left open of selecting the acting head from among the employees of the consulate as provided for in article 9 of the Havana Convention of 1928 [2] regarding consular agents. There was a considerable difference between a diplomatic mission and a consulate: consular functions were less important than diplomatic functions and could therefore be performed by an employee in case of necessity; in addition, many of them were connected with day-to-day business, such as the legalization of documents, which it was both inconvenient and unnecessary to delay. Lastly, the staff of a consulate was often small; not uncommonly, it consisted only of one consul and one employee.

46. Also on the first question, it had been proposed by the Netherlands Government that the words " shall be temporarily assumed " should be amended to read " may be temporarily assumed ". The reason for that proposal was that the sending State might prefer to close the consulate temporarily because of the lack of personnel.

47. On the second question, Finland (A/CN.4/136) has suggested that the receiving State should be given the right to refuse to accept as acting head of post a person considered unacceptable and the Yugoslav Government (*ibid.*) thought that the Commission should consider whether, and in what cases, provisional recognition would be required even for the acting head of post, especially in cases where the acting head of a consular post was called upon to serve in that capacity for a long period. As he had said in his third report, he could not agree with those suggestions; it would defeat the whole purpose of the article to stipulate recognition for an acting head of post. If the acting head were to be placed in the same position as the titular head of a consular post and be unable to discharge his duties in the absence of recognition, there would be little purpose in appointing him as an acting head. It was for that reason that none of the bilateral consular conventions which had come to his knowledge specified the need for

[2] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), p. 423.

recognition in the case of an acting head of post. Of course, the receiving State had, in respect of the acting head of post, the same rights as in respect of any consular officer. If his conduct constituted serious grounds for complaint, that State could avail itself of its rights under the various articles of the draft.

48. On the third question, the Belgian Government (A/CN.4/136/Add.6), in addition to suggesting some drafting changes in paragraph 1, had pointed out that, under Belgian law, the acting head of post was not entitled to the tax privileges mentioned in articles 45, 46 and 47 if he did not himself fulfil the conditions laid down in those articles. The Belgian Government had therefore expressed reservations regarding paragraph 2. It was possible that there were other countries in the same position as Belgium, but his view was that article 16, paragraph 2, should nevertheless be retained because it would serve to unify the practice of States in the matter. The acting head of post had all the duties of a titular head of post, including the social duties connected with his office, and it would be unjust to deny him the corresponding privileges.

49. To sum up, except for some drafting changes, article 16 should be retained as it stood. The Drafting Committee could take into account the language used in article 19 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13) in addition to the drafting amendments proposed by the Belgian and Netherlands Governments.

50. Mr. VERDROSS said that the system proposed in paragraph (3) of the commentary, whereby a consular official or one of the employees of the consulate could be designated acting head of post, was acceptable.

51. The second problem raised by article 16 — whether the receiving State's consent was necessary to the designation of an employee as acting head of post — was more difficult. Unlike the Special Rapporteur, he considered that article 19, paragraph 2, of the Vienna Convention should be followed because it was essential that the person acting as head of post should enjoy the confidence of the receiving State.

52. The third problem — whether an acting head of post was entitled to privileges and immunities — should be dealt with when the Commission came to discuss chapter II of the draft articles.

53. The CHAIRMAN, speaking as a member of the Commission, pointed out that article 19, paragraph 2, in the Vienna Convention had drawn a distinction between a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission designated to take charge of the current administrative affairs of the mission: in the latter case the receiving State's consent was required. Hence there was an essential difference between that article and article 16 of the present draft.

54. It would be wrong, in the case of the acting head of a consular post, to prescribe a more stringent rule than that laid down for the acting head of a diplomatic mission in article 19, paragraph 1, of the Vienna Convention, under which the consent of the receiving State was not required. Of course, inasmuch as the receiving State could declare any member of a diplomatic mission or of a consulate *non grata,* its consent might be said to be an implied condition.

55. Mr. YASSEEN said that article 16 was an important one since it was imperative to ensure that there were no interruptions in the exercise of consular functions. Therefore, on practical grounds, it was preferable not to impose excessively strict conditions. Most consulates had a small staff and the sending State should not be too restricted in its choice for an acting head of post. In case of need he could be chosen from among the employees of the consulate, though not from among the service staff. The functions of employees acting as heads of post should be strictly limited to the conduct of the consulate's administrative affairs as they could certainly not perform consular functions in the proper sense of the term. The distinction in article 19 of the Vienna Convention should be maintained in the present article as between consular officials and consular employees.

56. Mr. VERDROSS considered that article 19 of the Vienna Convention provided a perfect analogy. He agreed with the Chairman that the consent of the receiving State was not necessary for the designation of a consular official as acting head of post, but it did seem necessary in the case of the designation of an employee of the consulate because the exequatur of the head of post covered only consular officials and not employees.

57. Mr. AGO said that he was in general agreement with the Special Rapporteur that the conditions laid down in the article should not be too stringent; the system proposed was on the whole acceptable. His only doubts had arisen as a result of the discussion (590th meeting, paras. 60-80) in connexion with article 13 on the question whether the express " recognition " of the receiving State was needed for consular officials other than heads of post. If the Commission decided that recognition had to be given to heads of post only, then article 16 as it stood would be a logical consequence of such a decision. The consent of the receiving State for other categories of consular officials would then result from the mere fact of having raised no objection.

58. However, it was the practice in a number of countries, and the practice was reflected in numerous consular conventions, to require separate exequaturs for officials who were not heads of post. He would like to know whether such countries would accept a provision allowing a consular official to act as head of post, even provisionally, without the explicit consent of the receiving State. That issue was likely to come up in connexion with other articles and must be considered.

59. As far as paragraph 1 of article 16 was concerned, it would be desirable to follow paragraph 1 in article 19 of the Vienna Convention as faithfully as possible, indicating who was responsible for making the notification.

60. In the presumably rare cases where an employee of the consulate was to be designated acting head, it might be wiser to be a little more strict and follow the

Vienna Convention in stipulating that in those instances the consent of the receiving State had to be obtained.

61. Mr. ŽOUREK, Special Rapporteur, said that the Chairman had clearly expounded the difference between the case envisaged in article 19, paragraph 2, of the Vienna Convention and that dealt with in article 16 of the draft. In view of the different nature of diplomatic and consular activities, it did not seem that the distinction drawn between a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission designated to take charge of its current administrative affairs was relevant to article 16. The division of work as between heads of post and consular staff had never been as rigid as that applied in a diplomatic mission. Moreover, for practical reasons it was undesirable to adopt in the draft the rule laid down in article 19, paragraph 2 of the Vienna Convention, because of the interruption that might result in the functioning of the consulate while the consent of the receiving State was being obtained. A further delay might occur if the consent were not granted and another person had to be brought in from the sending State or from elsewhere to act as head of post. After all, it was also in the interests of the receiving State that no such interruption should occur.

62. For those reasons and in line with a number of consular conventions, including the Havana Convention of 1928, it should be open to the sending State to select acting heads of post from among employees as well as from consular officials. Of course, the Drafting Committee could be asked to devise suitable wording which would make it clear that a member of the service staff could not be designated acting head of post.

63. Mr. SANDSTRÖM associated himself with the Special Rapporteur's views.

64. He asked whether the reference to " competent authorities " in the plural in paragraph 1 of article 16 was appropriate.

65. Mr. BARTOŠ expressed strong disagreement with the Special Rapporteur. In the classical theory of consular relations there were two institutions corresponding to a *chargé d'affaires ad interim* and a member of the administrative and technical staff of a diplomatic mission in charge of its current administrative affairs. They were the acting head of post and the person known as pro-consul. The first was given recognition by the receiving State either in the form of an exequatur or by virtue of appearing on the consular list. The second was not empowered to perform certain important functions and did not enjoy consular privileges, not being of consular rank. Under the internal law of a number of countries certain notarial and other functions could only be performed by officials of consular rank. An acting head of post could be a subordinate official of the consulate or an official sent from another consulate or a member of a diplomatic mission. A pro-consul was a member of the administrative or technical staff of a consulate and could not be chosen from among the service staff. The distinction between those two categories had been made in a number of bilateral conventions concluded by Yugoslavia with other States.

66. He urged the Commission and the Special Rapporteur, who had made no mention of the institution of pro-consuls in his draft, to give the matter careful consideration, particularly in view of the new provision that had been added in article 19 of the Vienna Convention in its paragraph 2. Though in the course of his researches he had found frequent mention of the institution of pro-consuls, he had not come across any general rule of international law governing their status.

67. Presumably the requirement contained in article 19, paragraph 2 of the Vienna Convention had been inserted on the grounds that the consent of the receiving State had to be obtained before the persons there mentioned could exercise functions different from those they normally performed. The Special Rapporteur, in defence of his thesis, had argued that to require the consent of the receiving State to the designation of an acting head of post might involve delay and frustrate the performance of consular functions. Surely, however, the answer was that an official from the sending State's diplomatic mission could be assigned to the consular post.

68. The Special Rapporteur had always sought jealously to protect the interests of the sending State, sometimes overlooking those of the receiving State. Article 16 would have to be drafted with great care in view of the danger of acting heads of post remaining in that capacity on a more or less permanent basis. Legal advisers with wide practical experience had informed him that acting heads of post chosen from the administrative and technical staff of consulates had on a number of occasions made exaggerated claims for consular privileges and caused other difficulties to a far greater extent than acting heads chosen from consular officials. In common law countries that could not happen, since persons not holding an exequatur could not perform consular functions.

The meeting rose at 1 p.m.

592nd MEETING

Thursday, 18 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities

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

[Agenda item 2]

(continued)

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

ARTICLE 16 (Acting head of post) *(continued)*

1. The CHAIRMAN invited the Commission to continue its consideration of article 16 of the draft on consular intercourse and immunities (A/4425).

2. Sir Humphrey WALDOCK, referring to a question raised by Mr. Ago about the practice of States which normally required an exequatur to be obtained for subordinate staff (591st meeting, para. 58), said that, in general, the conventions concluded by those States treated the death of a consul or his absence for some other reason as a special situation calling for a special solution. On the whole, the conventions were very liberal in allowing another officer to act temporarily. He cited the terms of article 7 of the Consular Convention between the United Kingdom and Italy,[1] which recognized, on condition that the government of the receiving State were notified, the general right to assign temporarily another consular official or even an employee for the discharge of consular duties.

3. As to privileges, that convention was less generous than a number of others which he had examined and which extended to employees acting as heads of post the same privileges as those enjoyed by the person they were replacing.

4. The most recent of the Conventions he had consulted was that between Austria and the United Kingdom of 24 June 1960,[2] which was a little less liberal. Article 6 of that convention read:

> " 1. If a consular officer dies, is absent or is otherwise prevented from fulfilling his duties, the sending State shall be entitled to appoint a temporary successor and the person so appointed shall be recognized in this capacity upon notification to the appropriate authority of the receiving State. Any such person shall during the period of his appointment be accorded the same treatment as would be accorded to the consular officer in whose place he is acting or as he would himself receive if the appointment were a permanent one, whichever is the more favourable.
>
> " 2. The receiving State shall not, however, be obliged by virtue of paragraph 1 of this article:
>
> " (a) To regard as authorized to perform consular functions in the territory any person whom it does not already recognize in a diplomatic or consular capacity; or
>
> " (b) To extend to any person temporarily acting as a consular officer any right, privilege, exemption or immunity the exercise or enjoyment of which is under this Convention subject to compliance with a specified condition unless he himself complies with that condition."

5. Under that Convention, the receiving State was not obliged to recognize an employee temporarily appointed to carry out the duties of the consulate as qualified to perform consular functions.

6. Mr. VERDROSS proposed that a new sub-paragraph in the following terms should be added in article 16, paragraph 1:

> " In cases where no consular or diplomatic official is present, an administrative and technical employee of the consulate may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the consulate."

7. The purpose of the additional clause was to remove the contradiction between the statement in paragraph (7) of the commentary to article 13 that the exequatur granted to the head of post covered consular staff only and the statement in paragraph (3) of the commentary to article 16 according to which, if no consular official was available, a consular employee could be chosen as acting head of post. In his opinion, an employee could only be put in charge of the current administrative affairs of the consulate and could certainly not perform all consular functions.

8. Mr. ERIM said that article 16, paragraph 1 would be acceptable if redrafted in such a way as to stipulate that an acting head of post must be chosen from amongst the consular officials of the post concerned or of another post or from the staff of the diplomatic mission.

9. The amendment proposed by Mr. Verdross would be too restrictive and would not allow for the appointment of a consular official from another post or of a diplomatic official.

10. Mr. PADILLA NERVO said that the effect of Mr. Verdross's amendment would be retrograde. A number of bilateral consular conventions required the sending State to notify the receiving State in advance of the names of all members of the consular staff, whether officials or employees. They also allowed for the direction of the consulate to be temporarily assumed by a consular employee in the event of the death, absence or inability to act of the head of post. The receiving State's recognition of such acting heads of post was provisional.

11. As an illustration of current practice which did not bear out the thesis propounded by Mr. Verdross he cited article 7 of the Consular Convention of 1954 between the United Kingdom and Mexico.[3] A similar provision was contained in article 1, paragraph 4 of the Consular Convention of 1942 between the United States and Mexico.[4]

12. Another objection to Mr. Verdross's amendment was that, by contrast with the case of a diplomatic mission, it would be difficult in the case of a consulate to draw the dividing line between strictly consular functions and current administrative affairs.

13. The Commission should not impose detailed restrictions regarding the category of persons from amongst whom the acting head must be chosen, for

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[1] The terms of article 7 of that convention are identical with those of article 7 of the Consular Convention between the United Kingdom and Sweden, for which see *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No.: 58.V.3), p. 470. The Anglo-Swedish Convention is also reprinted in United Nations *Treaty Series*, vol. 202 (1954-1955), No. 2731, pp. 158 *et seq.*

[2] *Cmd.* 1300.

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

[4] United Nations *Treaty Series*, vol. 125 (1952), No. 431, pp. 302 *et seq.*

such a regulation might constitute undue interference in the sending State's sovereign power to determine how the consulate's work should be carried on when for one reason or another the head of post could not exercise his functions. The Commission should be guided by the latitude allowed under existing conventions.

14. For all those reasons he could not accept Mr. Verdross's amendment.

15. Mr. ŽOUREK, Special Rapporteur, replying to a question asked by Mr. Sandström concerning the " competent authorities " mentioned in article 16, paragraph 1 (591st meeting, para. 64), said that it would not be possible to be more specific because practice varied widely. The question to whom the notification had to be addressed was answered by the internal law. For instance, in a federal State the notification might have to be sent to the authorities of the constituent state in which the consular district was established. If the consular district was confined to the area of a port, it might have to be addressed to the city authority.

16. With regard to the interesting question whether a distinction should be drawn between the direction of the consulate and the conduct of its current administrative affairs, particularly in cases where a consular official was not available for appointment as acting head of post, he maintained his view that it was undesirable to be too stringent since the situation was purely temporary. The examples of current practice mentioned by Mr. Padilla Nervo supported such an approach and showed that States allowed considerable latitude in the choice of persons to act as heads of post. The distinction should not therefore be made in the draft, especially since he could not recall a single instance of that being done in recent conventions. Nor had he met it in doctrine.

17. Mr. AMADO said that the examples cited by Sir Humphrey Waldock and Mr. Padilla Nervo were very illuminating and indicated that the sending State could appoint consular employees to assume the temporary direction of a consulate.

18. He might be guilty of heresy, but he felt bold enough to ask whether there was any point in introducing into the present draft the institution of " acting head of post ", which so far as he knew did not exist in the theory of consular relations. He recognized of course that provision should be made for the temporary exercise of consular functions when they could not be performed by the head of post himself.

19. The CHAIRMAN, speaking as a member of the Commission, said that as practice varied considerably the Commission would have to make a choice between a more restrictive and a less restrictive system. After hearing the arguments on either side he was inclined to favour a liberal approach and saw no advantage in adhering too closely to article 19 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

20. There seemed to be no need to create a new institution on the lines of that provided for in article 19, paragraph 2 of the Convention. Moreover, as Mr. Padilla Nervo had rightly pointed out, it would not be easy to differentiate between consular business proper and the current administrative affairs of the consulate. Of course, in a diplomatic mission a *chargé d'affaires ad interim* could discharge any functions normally performed by an ambassador, such as the conduct of important political negotiations, but since a consul was not concerned with such political matters there would be no danger in allowing the acting head of a consular post to be chosen from a wider category of persons.

21. Paragraph 1 of article 16 might be accepted on the understanding that the wording were modified so as to meet the concern expressed by Mr. Erim, who feared that the present text was open to misconstruction as allowing service staff to assume the temporary direction of a consulate. It should also be made clear that an official from another consulate or from a diplomatic mission or a person sent specially from the sending State could be designated acting head of post. Presumably, in the case of a person specially sent out the usual formalities would have to be complied with, but in that of the others nothing more than notification to the receiving State would be necessary. If the Commission could agree that the Drafting Committee should revise the text on those lines, he would also suggest that the wording of the first sentence in article 19, paragraph 1 of the Vienna Convention should be followed as far as possible, for it made specific reference to the provisional character of such an arrangement, for the duration of which the acting head would be able to exercise all the functions of the regular head of post and could benefit from the same rights.

22. Mr. AGO said that the examples of present practice mentioned by Sir Humphrey Waldock seemed to indicate that the consent of the receiving State was not usually required for the appointment of an acting head of post.

23. As to whether a distinction should be made between the appointment of a consular or diplomatic official and that of a member of the administrative or technical staff of a consulate to act as head of post, at first sight Mr. Verdross's amendment seemed a reasonable one, but Mr. Padilla Nervo had convincingly pointed out its flaws. For instance, were the issue of passports, the guardianship of minors, the drawing-up of wills, or investigations on board ship to be regarded as current administrative affairs of a consulate or not? Clearly, it would be extremely difficult to make such a distinction and perhaps the Commission should not attempt to do so.

24. He was inclined to agree with the Chairman's suggestion that the provision should emphasise the provisional nature of the institution of acting head of post. In addition, it was desirable to state that members of the administrative and technical staff of a consulate could also be appointed acting heads of post in exceptional circumstances. It should also be specified who was responsible for notifying the receiving State of the appointment of an acting head of post.

25. If the provisional character of the institution were clearly stressed, the interests of the receiving State should not be endangered, since in cases where an acting

head remained too long in that position it would still be open to that State to indicate that the person concerned was no longer acceptable in that capacity.

26. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Amado that the title " acting head of post " occurred in a number of consular conventions and was no innovation. Article 16 dealt with a situation that did occur in practice.

27. Mr. AMADO said that he remained to be convinced that there was a real need to introduce such a title in the draft.

28. Mr. VERDROSS said that he would not press his amendment in the face of strong opposition, but was bound to point out that temporary appointments sometimes lasted far too long. The Commission had decided that an exequatur was unnecessary for the consular officials of a consulate and it would be wholly at variance with that decision to allow a consular employee, even in a temporary capacity, to exercise consular functions and, for example, to intervene on behalf of nationals of the sending State in the courts of the receiving State.

29. Mr. BARTOŠ said he was quite unable to subscribe to the general view which seemed to be emerging from the discussion. Mindful of his duty as a member of the Commission to the public and to legal experts conversant with the actual state of affairs in the modern world, he felt bound to state what was present practice.

30. Some States provided in the consular commission itself for a consular official to take charge of a post should the head of post, for one reason or another, be unable to discharge his functions. An exequatur was obtained for the official in question. Other States appointed an acting head of post in a specific instance to conduct the affairs of a consulate prior to the titular head entering into his functions.

31. In the United States of America a consul whose commission had been communicated to the appropriate authority but who had not yet received his exequatur was termed an " acting " consul. Indeed, there had been a case of a consul in New York who had waited for his exequatur for six years, and during that whole period had been deemed to be an acting consul. The term " acting " in United States usage would seem to be more or less equivalent to the *gérant* in European legal parlance. Both designations were to be found in consular lists.

32. There was also the practice, which the Commission had already discussed, of appointing provisionally a consular official to act in place of the head of post during his absence.

33. Finally, there was the practice which he had described (591st meeting, para. 65) (though he would not insist on the term " pro-consul ") of appointing members of the administrative or technical staff who were not consular officials to be acting head of post.

34. As a matter of the progressive development of law, he was willing to support the thesis that a distinction should not be made between consular officials and employees when appointed to act in a temporary capacity as head of post, but emphasised that there was an important problem of precedence that would have to be resolved. He was emphatically opposed to the idea of extending all the rights and privileges of a head of post to acting heads of post not having consular rank, but that should certainly be done in the case of officials with consular rank authorized to act as head of post in order to safeguard the interests and prestige of the sending State.

35. As far as immunities were concerned, employees who were acting heads of post should benefit from them, since it was important that they be afforded protection for the discharge even of minor functions.

36. Clearly, it was for the sending State to decide in the wide sense what should be the scope of the powers of an acting head of post, and the receiving State could object only if the normal scope of consular functions as determined by general conventions, customary law or special agreements were exceeded.

37. The CHAIRMAN observed that the Commission was not dealing with the precedence of acting heads of post, since that problem was dealt with in article 17, paragraph 5. Furthermore, article 16 related only to the temporary conduct of the consulate's affairs by an acting head of post. The possibility of the exercise of other *ad interim* functions was a matter for agreement between the two States concerned.

38. Mr. SANDSTRÖM expressed agreement with the modification suggested by the Chairman and Mr. Ago. It would be wise, however, to prescribe notification by the government of the receiving State, along the lines of the first sentence of article 15.

39. He would ask the Special Rapporteur whether an acting head of post who was an employee of the consulate would enjoy exemption from taxation and customs duties. He would doubt the wisdom of any such arrangement.

40. Mr. ŽOUREK, Special Rapporteur, replied that acting heads of posts chosen from among the employees of the consulate would enjoy the same exemptions as other acting heads of posts. The Commission's task was to unify international practice in the matter; a head of post could not be denied certain privileges and immunities merely because his functions were being exercised temporarily.

41. Mr. AMADO said that, while some of his more serious doubts had been dispelled by Mr. Bartos's statement, he still believed that the French title *gérant intérimaire* implied that some officials acting *ad interim* did not exercise their functions on a temporary basis.

42. Mr. YASSEEN observed that there were two possible ways of resolving the question. If the person to be designated acting head of post of a consulate was a member of the technical or administrative staff, then, either his functions should be confined to the despatch of current administrative business — however difficult it might be to distinguish such functions from the normal consular functions — or else the authorization of the receiving State should be obtained if the sending State

wished him to exercise normal consular functions. For the validity of the acts performed by consular officials presupposed their competence, and that competence depended not only on the sending State, but on the receiving State as well. The members of the administrative and technical staff were admitted to the receiving State for the purpose of performing strictly administrative and technical functions. Although it might be said that consular officials, other than heads of post, were at least tacitly authorized by the receiving State to perform *ad interim* the normal functions of a consulate, it could not be claimed that the members of the administrative and technical staff were similarly authorized.

43. Sir Humphrey WALDOCK said that certain doubts might be dispelled if the title of article 16 were more specific. The title " Temporary performance of the duties of head of post in the case of the vacancy of the position or temporary inability of the head of post to act ", or some similar wording, would limit the article to temporary situations only.

44. With regard to the substance of the article, he agreed with the Chairman and Mr. Ago that it would be difficult to make a valid distinction between administrative and other consular functions. If administrative functions were restricted to work within the consulate itself, the question would become an internal matter for the sending State. If, on the other hand, administrative functions included certain consular functions proper, it would be essential to allow the acting head of post to perform all the essential day-to-day work of the consulate; that was, in effect, the whole object of the article.

45. From the point of view of drafting, the provision should not be made too imperative, particularly in its application to cases where an employee of the consulate might be called upon to act as head of post. It would therefore be better to follow the wording of a number of bilateral conventions, and to state that the direction of the consulate " may " be temporarily assumed by an acting head of post. Moreover, that wording would be more in conformity with the fact that the sending State alone was in a position to decide on the appointment.

46. Mr. ŽOUREK, Special Rapporteur, pointed out to Mr. Yasseen that an employee of the consulate was a person who had already been admitted to the sending State, but that the exequatur was normally required only for the head of post. Moreover, article 21 clearly stated, that, subject to the provisions of articles 11, 22 and 23, the sending State could freely appoint the members of the consular staff. With regard to the capacity of the persons concerned to act, he had been told on a number of occasions by consular officials that administrative employees with many years in the consular service often had wider knowledge and experience of the work of the consulate than a career officer who had recently received his first posting to a consulate. Responsibility in the matter in any case lay with the sending State, which might, in certain cases, limit the functions of the acting head of post; the decision must, however, be left to that State.

47. Mr. ERIM said it had been suggested that the name of an acting head of post might be notified before the position fell vacant or before the head of post became unable to carry out his functions. In view of the urgent circumstances in which an acting head of post might be called upon to assume his position, it seemed advisable to insert a provision concerning such prior notification in paragraph 1.

48. The debate had shown a certain discrepancy between existing international practice in the matter and the solution dictated by logic. An exequatur in due form or on a temporary basis was required for a head of the consular post. That meant that the consent of the receiving State was sought for such an appointment, but not in the case of an acting head of post, although he would exercise the same functions. Logically, the receiving State should be given an opportunity to reject or accept the acting head of post; but the more liberal system was that consecrated by international practice, and it seemed advisable for the Commission to codify that system.

49. The CHAIRMAN observed that the prevailing opinion in the Commission seemed to be to treat the situation of acting heads of post as exceptional and temporary, and to accept the more liberal formulation. It would also be useful to amend the title of the article along the lines suggested by Sir Humphrey Waldock in order to stress the temporary nature of the situation. The Drafting Committee might be instructed to find suitable wording. It also seemed to be the consensus of the Commission that paragraph 2 should be adopted as it stood and paragraph 1 with a few modifications. It should be indicated that consular officials and employees of the consulate might be designated to act temporarily as heads of post, and the exceptional nature of the appointment of employees of the consulate should be stressed. With regard to notification, the Drafting Committee might be asked to take article 19, paragraph 1 of the Vienna Convention into account and to incorporate Mr. Erim's suggestion that, wherever possible, such notification should be given in advance.

50. He suggested that the Drafting Committee be instructed to recast the article along those lines.

It was so agreed.

ARTICLE 17 (Precedence)

51. Mr. ŽOUREK, Special Rapporteur, said that article 17 had been generally accepted by most governments. Only the United States Government (A/CN.4/136/Add.3) had stated that it would be agreeable either to inclusion of an article along those lines, or to its deletion, thereby leaving the precedence of consular officers to be determined in accordance with local custom. The Netherlands Government (A/CN.4/136/Add.4) had proposed that the word " consuls " should be replaced by " consular officials "; his view was that it would be more in conformity with the structure of the draft to replace the word " consuls " by " heads of post ". Finally, the Belgian Government (A/CN.4/136/Add.6) had made a few observations relating to detail,

and had proposed that the end of paragraph 3 should be amended, in order to take into account the position of consuls who were not heads of post. That government had also considered that the rule laid down in paragraph 4 should be applicable even where there was a difference of class.

52. The two questions to be settled by the Commission were whether or not the article should be limited to heads of post and, in the event of an affirmative decision, how the position of consular officials who were not heads of post should be dealt with.

53. Mr. BARTOŠ said that he approved of the existing text of the article. The United States Government's observation had obviously been prompted by the different rules which governed precedence in different towns in that country; in some of them, foreign consuls-general held a meeting to choose the dean of the consular corps. The Commission's best course, however, would be to lay down a universal procedure based on seniority, even though it might be less democratic than the election of a dean.

54. Mr. AGO agreed with the Special Rapporteur that paragraphs 1, 2 and 3 should refer to the head of post, and proposed that paragraph 4 should be deleted. In paragraph 5, it might be wiser to refer to " acting heads of post " instead of " consular officials in charge of a consulate *ad interim* ", in order to avoid reopening the debate on article 16.

55. Mr. FRANÇOIS suggested that, if Mr. Ago's suggestions were adopted, it might be useful to substitute for paragraph 4 a provision along the lines of article 17 of the Vienna Convention in order to ensure that the names of subordinate officials were known to the competent authorities of the receiving State.

56. Mr. YASSEEN observed that paragraph 4 might be useful especially with the addition of the Belgian Government's suggestion that the rule laid down in that paragraph should be applicable even where there was a difference of class.

57. Mr. ERIM remarked, in connexion with paragraph 5, that the employees of the consulate might act as temporary heads of post. In that case, if a wireless operator became acting head of post, he might take precedence over career consuls — and in Turkish practice, career consuls had diplomatic status — i.e., over diplomats. Several other countries were in the same situation. The Commission should consider that matter very carefully.

58. Mr. AGO said that what mattered was not the antecedents of the acting head of post, but the fact that he had been appointed to perform certain functions on a temporary basis. It would be stressed in article 16 that the cases concerned were exceptional, extraordinary and temporary; but once the person concerned had been appointed acting head of post, precedence would be linked to the functions he was performing.

59. He endorsed Mr. François's suggestion that a provision relating to precedence within the consulate should be added, but preferably in a separate article, in order that a distinction should be made between external and internal precedence.

60. The CHAIRMAN, speaking as a member of the Commission, said that he, too, had at first been inclined to favour the deletion of paragraph 4, but he had since felt some doubts on that point. For practical reasons, it was perhaps advisable to maintain the provisions of that paragraph in order to cover a situation which arose in the case of consulates, but not in that of diplomatic missions. Where the head of post was a vice-consul, he would have precedence not only over other vice-consuls, but also over a consul who was a subordinate officer in the consulate-general of another country in the same city.

61. Sir Humphrey WALDOCK, while agreeing with Mr. Yasseen that paragraph 4 contained a useful provision, proposed, however, that it should be placed after paragraph 5 since, unlike the other four paragraphs, it did not deal with the precedence of heads of post *inter se,* but with the precedence of a head of post over other consular officials.

62. Mr. ŽOUREK, Special Rapporteur, said that he could accept the amendment proposed by Belgium which would make paragraph 4 read: " Heads of post, whatever their class, have precedence over consular officials not holding such rank." The question arose, however, whether that clarification did not go too far and whether on the contrary in consular law it would not be better to apply the rule that heads of post had precedence only over officials of the same class.

63. He also supported Mr. François's proposal for including a provision along the lines of article 17 of the Vienna Convention.

64. Mr. BARTOŠ said that there was a certain ambiguity in the language of article 17 of the draft because it had been influenced by two different systems: first, the system under which all consuls, and not only heads of post, required an exequatur and ranked according to the date of the grant of the exequatur, and, second, that under which only heads of post needed an exequatur.

65. He agreed with the proposal that the article should deal only with the precedence of heads of post, for that approach would eliminate the ambiguity to which he had referred. Also, he supported the proposal by Mr. François for including a separate provision dealing with the precedence of subordinate consuls, regardless of whether they required an exequatur or not.

66. Lastly, he would mention a separate question, which the Commission would be well advised to examine in due course. It was not uncommon for a member of a diplomatic mission to act as consul in his capacity as head of the consular section of that mission. His embassy would then sometimes ask that he should remain in the diplomatic list, while at the same time being recognized as a consular officer. That had been the case, for example, with the embassies of the United States of America and the United Kingdom at Belgrade. The question arose in such cases whether

the head of the consular section of an embassy ranked as a head of consular post and in what class.

67. The CHAIRMAN, summing up the position in regard to article 17, said that there appeared to be agreement on the following points:

(i) In paragraphs 1, 2 and 3, the references to consuls should be replaced by references to heads of post;

(ii) The Drafting Committee should take into account, in drafting paragraph 5, the changes adopted by the Commission in article 16;

(iii) The provision in paragraph 5 should precede that in paragraph 4;

(iv) The Belgian redraft of the former paragraph 4 (now para. 5 of the draft) should be adopted; and

(v) The Drafting Committee should prepare a new provision — to become either a new paragraph of the article or else a separate article — modelled on article 17 of the Vienna Convention, as proposed by Mr. François.

68. If there were no objection, he would take it that the Commission agreed to all the foregoing.

It was so agreed.

ARTICLE 18 (Occasional performance of diplomatic acts)

69. Mr. ŽOUREK, Special Rapporteur, said that, during the discussion of the Commission's report in the Sixth Committee of the General Assembly (659th meeting, para. 42), the delegation of Venezuela had pointed out that, under Venezuelan law, it was forbidden to combine diplomatic and consular functions.

70. In its comments, the Netherlands Government had proposed that the term " consul " be replaced by " head of post ". The Norwegian Government (A/CN.4/136) had found article 18 wholly unnecessary and that view was shared by the United States Government. The Yugoslav Government (A/CN.4/136) had also considered that the article should be omitted, on the grounds that the occasional performance of diplomatic acts by a consul should be governed by the articles on diplomatic relations and not those on consular intercourse.

71. As indicated in commentary (1), the Commission had included article 18 in order to reflect an existing practice. He stressed that the article was concerned only with the occasional performance of diplomatic acts. Article 19 dealt with the case where a consul was entrusted with diplomatic functions on a continuing basis. He would propose the retention of article 18.

72. Mr. JIMÉNEZ de ARÉCHAGA expressed the view that article 18 did not express a rule of international law that was capable of codification. The occasional performance of diplomatic acts by a consul might or might not be permitted by the law of the sending State and might or might not be authorized by the law or practice of the receiving State. It was the *ad hoc* agreement between those two States which made such performance possible.

73. However, there did not appear to be any rule of general or customary international law, taking precedence over internal law, to the effect that consuls were occasionally authorized to perform diplomatic acts. From the point of view of legal theory, it was therefore unsound to include in a convention which purported to codify existing international law a provision along the lines of article 18.

74. From the practical point of view, the provisions of article 18 were also open to objection. They would have the effect of creating a border zone between diplomatic and consular functions which could give rise to serious difficulties, especially when a policy of non-recognition or rupture of diplomatic relations had been adopted as a form of international sanction. For example, in the case of the State of Manchukuo, a Committee of the Assembly of the League of Nations [5] had advised that the continuance or maintenance of consular relations (as distinct from the grant or request of an exequatur for new consuls) did not constitute a departure from a policy of non-recognition or interruption of diplomatic relations.

75. A provision such as that contained in article 18 could affect that well-established principle. There might be a strong temptation for a government to which a policy such as that referred to had been applied to induce foreign consular officers to perform diplomatic functions and then claim that there had been an act of implied recognition, or that diplomatic relations had been restored.

76. For those reasons, the provision should be omitted.

77. Mr. VERDROSS said that article 18, although it might not embody a universal practice, nevertheless reflected an existing trend. The provision was therefore acceptable as a matter of progressive development of international law.

78. However, as it stood, article 18 was not complete. It should expressly contemplate the case where the sending State neither had a diplomatic mission of its own in the receiving State nor was represented in that State by the diplomatic mission of a third State. He would like to know the opinion of the Special Rapporteur on that point.

79. Mr. AMADO observed that, notwithstanding the qualifying words " on an occasional basis ", the provision contained in article 18 went beyond the existing practice. A consul was an official who performed certain specific functions within the limits of his consular district; he usually resided in a seaport. To his mind, it would be going too far to suggest that a consul could perform diplomatic acts, in other words could represent the sending State throughout the territory of the receiving State.

80. Mr. ERIM said that he shared the views of Mr. Verdross. It was a well-known practice for two

[5] Advisory Committee set up by the Assembly of the League of Nations on 24 February 1933 in connexion with the non-recognition of Manchukuo (League of Nations, *Official Journal, Special Supplement No. 113*, p. 3); on this point, see also L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht (ed.) (London, Longmans Green & Co., 1955), vol. I, sections 75 d footnote 3) and 428.

States, particularly when renewing relations after a conflict, to begin by re-establishing consular relations. In those cases, the consular officers concerned would take the first steps in the direction of the re-establishment of diplomatic relations. Of course, such cases were few in number because, fortunately, countries did not often break off relations. Notwithstanding that fact, the practice in the matter was quite consistent; in any event, no instance of a contrary practice could be cited. Lastly, it should be remembered that the provision had been submitted to governments and had not met with any real opposition. Only a few governments had suggested the deletion of the article, not because they objected to its substance, but because they felt the provision was unnecessary.

81. As a matter of form, the Commission might consider whether articles 18 and 19 should not be combined.

82. The CHAIRMAN said that that question could be left to the Drafting Committee. His own view was that the two articles dealt with two different situations. Unlike the case mentioned in article 18, that covered by article 19 implied the granting of diplomatic status to the consul.

The meeting rose at 1 p.m.

593rd MEETING

Friday, 19 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/CN.4/136 and Add.1-10; A/CN./4137)

[Agenda item 2]
(continued)

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

ARTICLE 18 (Occasional performance of diplomatic acts) *(continued)* and ARTICLE 19 (Grant of diplomatic status to consuls) *

1. The CHAIRMAN invited the Commission to continue its discussion of article 18 of the draft on consular intercourse and immunities (A/4425). In view of the close connexion between the provisions of articles 18 and 19, it would be convenient to consider both articles at the same time.

2. Mr. BARTOŠ, with regard to taking both articles together, recalled the Yugoslav Government's comment (A/CN.4/136) that the occasional performance of diplomatic acts by consuls should be dealt with in the articles concerning diplomatic relations rather than in those concerning consular relations.

3. He would oppose the inclusion of both articles, but felt stronger objections to article 19. It was true that a consul might, occasionally, be asked to perform diplomatic acts with the concurrence of the receiving State, but it would be inaccurate to suggest that there was any State practice or rule of customary international law authorizing a consul to perform such occasional diplomatic acts.

4. As to article 19, which created a new class of diplomatic officer, he had not in his experience heard of any existing cases of a consul being entrusted with diplomatic functions and granted diplomatic status. Under the capitulations system consuls in certain countries had possessed diplomatic status, but as far as he knew that had never been the case in a fully sovereign State. In modern state practice, cases were of course known of a diplomatic representative being entrusted with consular functions, but the reverse did not occur.

5. For those reasons, he urged the Commission to reject both article 18 and article 19.

6. Mr. AGO pointed out, in connexion with article 18, that, if the receiving State consented, the sending State could ask any person to perform a diplomatic act on an occasional basis. The situation was not peculiar to a consul and there was therefore no real reason to specify the possibility of such occasional performance of diplomatic acts by non-diplomats in a consular convention.

7. The position was even more evident with regard to article 19. Whether a person was a consul or not, upon his being entrusted with diplomatic functions, he was appointed a diplomatic officer.

8. For that reason, he did not consider it advisable to include, at least in the form of separate articles, provisions of the type of article 18 and, in particular, article 19.

9. The CHAIRMAN, speaking as a member of the Commission, emphasized that both articles dealt with career consuls only. The Commission would consider, at a later stage, whether the articles, if adopted, applied to honorary consuls.

10. From the strictly legal point of view, it was perhaps true to say that article 18 added nothing to the draft. By mutual agreement, States could always provide for any specific acts being performed by a consul. The provisions of the article, however, were useful in practice because they indicated the possibility of a consulate performing occasional diplomatic functions. Such provisions would open the way to mutual agreement on the subject. In that connexion, there was the example of the USSR Consulate-General in the Union of South Africa, which, with the tacit consent of the Government of the Union, had often been called upon to perform diplomatic acts as no diplomatic mission of the Soviet Union at Pretoria had existed.

11. With regard to article 19, he did not agree with Mr. Ago that it would be simpler to meet the case

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* For debate concerning more specifically article 19, see paras. 70 *et seq.* of this record.

contemplated by appointing the person concerned as a diplomatic representative. In practice, there could be delay in reaching an agreement on the exchange of diplomatic missions and, in the meantime, it was useful to entrust a consul-general with diplomatic functions.

12. However, he agreed with the Belgian comment (A/CN.4/136/Add.6) that the reference to the title of consul-general-*chargé d'affaires* should be omitted. A receiving State might not be prepared to agree to that particular title, and it was therefore better to leave the States concerned free on that point.

13. Mr. YASSEEN said that he would speak only on article 18. The powers contemplated in article 19 were so much wider in scope than those envisaged in article 18 that the two provisions could be regarded as different in nature.

14. Article 18 referred to the performance of diplomatic acts and it would have been preferable for the question to have been settled by the Vienna Convention on Diplomatic Relations (A/CONF.20/13). The emphasis should always be placed on the functions rather than on the person performing them. However, the question had not been settled at the Vienna Conference and that argument of form should not therefore prevent the Commission from dealing with it at the present stage.

15. He agreed with those members who considered that article 18 served a practical purpose. It stipulated that the consent of the receiving State was necessary and was therefore consistent with the general principles of international law applicable in the matter.

16. Mr. ŽOUREK, Special Rapporteur, said that he could accept the suggestion made by Mr. Verdross (592nd meeting, para. 78) that article 18 should specify that it covered the case where the sending State had neither a diplomatic mission of its own in the receiving State nor was represented therein by the diplomatic mission of a third State.

17. In his first report (A/CN.4/108) he had mentioned the State practice in the matter in connexion with the corresponding article 14 of his first draft. In particular, he had drawn attention to the reply of 11 January 1928 of the Government of the Commonwealth of Australia to the questionnaire of the Committee of Experts for the Progressive Development of International Law which showed that foreign consuls in Australia had often been instructed to perform diplomatic acts at that time.

18. The provisions of article 18 filled a practical need and contained the necessary safeguards for the receiving State. He therefore urged the Commission to retain the article in the draft.

19. With regard to article 19, it was universally admitted that diplomatic and consular functions could be performed by the same official. It was true that nearly always it was a diplomatic officer who was entrusted with consular functions, but there was no reason why the reverse should not be permitted. There were cases where two States maintained only consular relations between them and where, for financial or even political reasons, the establishment of diplomatic relations was delayed.

20. Mr. MATINE-DAFTARY said that the contents of article 18 were not sufficiently important to justify their inclusion in a separate article. States were free, of course, to agree that the performance of diplomatic acts would be entrusted to a consul, but there seemed no reason for singling out that particular case for mention in a separate article.

21. In reality, both article 18 and article 19 dealt with the functions performed by a consul, and their contents should be included in article 4. Accordingly, he proposed that both articles be omitted and that the function referred to therein be mentioned in article 4 as being of an exceptional nature.

22. Mr. VERDROSS thanked Mr. Zourek for accepting his proposal concerning article 18.

23. He recalled that the Vienna Convention specified in its article 4, paragraph 1, that the sending State must make certain that the *agrément* of the receiving State had been given for the person it proposed to accredit as head of its diplomatic mission to that State. In addition, article 10, paragraph 1 (a) of the same Convention required the notification of the appointment of a diplomatic officer so as to enable the receiving State to reach an early decision on whether the person concerned was acceptable. If, therefore, a consul were to perform diplomatic functions, the consent of the receiving State to his acting in a diplomatic capacity would have to be obtained. For that reason, he could not understand why article 18 did not contain the phrase " with the consent of the receiving State " which appeared in article 19. He therefore proposed that those words should also be included in article 18.

24. Lastly, he agreed with those members who considered that articles 18 and 19 should be maintained, since they corresponded to an existing practice and therefore filled a genuine need.

25. Mr. AGO explained that it had not been his intention to suggest that in the case mentioned in article 19 it was simpler to appoint the person concerned as a diplomatic agent. He had merely meant to stress that, in the case under reference, the consul was transformed into a diplomatic agent. It was precisely for that reason that the Special Rapporteur had specified the title which a consul-general would bear in such a case. Article 19 should therefore be deleted.

26. Article 18 stated a self-evident fact and was therefore perhaps not harmful, but it was unnecessary. Besides, it could be interpreted — wrongly — as meaning that a person other than a consul could not be entrusted with the task of performing diplomatic acts on an occasional basis.

27. The proposal of Mr. Matine-Daftary that the provisions of articles 18 and 19 should be incorporated into article 4 had, *prima facie*, some logic. Articles 18 and 19 did in fact deal with functions to be performed by the consul. Unfortunately, a provision of that kind added to article 4 might convey the mistaken impression that the performance of diplomatic acts by a consul,

either on an occasional or on a continuing basis, was a normal instead of an exceptional occurrence.

28. Mr. ERIM mentioned the case of the Greek and Turkish consuls in Cyprus, who had conducted lengthy negotiations with the Governor of the island and with a British Minister of State. If the strict diplomatic procedure had been followed, the Greek and Turkish embassies in London should have negotiated with the British Foreign Office. The countries concerned had, however, found it useful to carry on the negotiations on the spot through the Greek and Turkish consuls. That example showed how varied were the possibilities envisaged in articles 18 and 19.

29. It was true that, even in the absence of provisions such as articles 18 and 19, the sending State and the receiving State could agree to authorize the consul to perform diplomatic acts, either on an occasional or on a continuing basis. There were, however, many provisions in the draft which referred specifically to the consent of the States concerned, and it had not been suggested that all those provisions should be omitted from the draft.

30. For those reasons, since articles 18 and 19 were not open to any serious objection, but offered the prospect of useful facilities, they should be retained. He agreed with Mr. Ago that the provisions of the two articles should not be transferred to article 4, for that might give the impression that the cases envisaged were normal rather than exceptional occurrences.

31. Mr. GROS said that the case where, at the instruction of his government, the consul should engage in trade negotiations with the receiving State was already amply covered by the provisions of article 4, paragraph 1 (e), which specified that the functions exercised by consuls included that of furthering trade and the development of commercial relations between the sending and the receiving State. Such an activity constituted a consular function, and there was no need to provide for the occasional performance of diplomatic acts in order to cover that point, the receiving State's consent being of course required for such, as for any other' negotiations.

32. There was one important diplomatic function which a consul could not fulfil: that of representing the sending State in the receiving State. With the consent of the receiving State, however, any person, and not only a consul, could be entrusted with an occasional function of diplomatic representation. While, therefore, he would have no objection to a provision to the effect that a consul could be entrusted with diplomatic functions with the consent of the receiving State, he proposed that the provision should be modelled on the terms of article 3, paragraph 2, of the Vienna Convention, on the following lines: " Nothing in the present Convention shall be construed as preventing the performance, on an occasional basis, of diplomatic functions by a consul."

33. Such a formulation would indicate that, in exceptional cases, such a course was possible, but it would not encourage the mingling of diplomatic and consular functions.

34. As to article 19, it provided for the combination of diplomatic with consular status and therefore in its last part encroached upon the Vienna Convention on Diplomatic Relations.

35. Mr. SANDSTRÖM said that he agreed with Mr. Ago that, in the absence of diplomatic relations, any person could, by agreement between the two States concerned, be entrusted with the occasional performance of diplomatic functions.

36. As he had understood it, the purpose of having two separate provisions in the form of articles 18 and 19 had been to make it clear that the occasional performance of diplomatic acts did not involve the creation of the title of consul-general-*chargé d'affaires*. Since it seemed that the reference to that title would be deleted in article 19, there seemed to be no reason for two separate provisions such as articles 18 and 19.

37. A single provision along the lines suggested by Mr. Gros would satisfactorily cover both situations envisaged in articles 18 and 19.

38. Sir Humphrey WALDOCK said that, while he had no great enthusiasm for either article, his objection to article 19, was however, much stronger. Its provisions involved a genuine risk of confusion with the Vienna Convention.

39. Commentary (3) on article 19 specified that the consul-general-*chargé d'affaires* must, in addition to having the exequatur, at the same time be accredited by means of letters of credence. The Vienna Convention, however, specified the need for *agrément*. Was it intended that the *agrément* was necessary in the case envisaged in article 19?

40. Admittedly article 18 might have a certain usefulness and he would have no objection to the adoption of a provision such as that proposed by Mr. Gros, which could, however, be couched either in a negative or in a positive form.

41. Mr. AMADO agreed with the argument advanced by Mr. Jiménez de Aréchaga (592nd meeting, paras. 72-74) that article 18 was not justified since it was not in keeping with general practice. The article, in his opinion, was an innovation that struck a discordant note in the draft. He certainly was unable to subscribe to the somewhat inconvincing arguments of the Chairman and had found even the Special Rapporteur's defence of the article half-hearted.

42. If the article should be adopted, what immunities, if any, would be enjoyed by a consul during the performance of diplomatic acts?

43. Mr. ŽOUREK, Special Rapporteur, answering Mr. Amado's question, referred to paragraph (2) of the commentary, which also showed that there was good reason for distinguishing between the consul's occasional performance of diplomatic acts and the grant of diplomatic status to consuls. In the former case a consul would not enjoy diplomatic immunities, whereas in the latter he would. That point could be clarified by an additional sentence in article 18.

44. As to the doubts expressed about the utility of the article, Mr. Ago was quite right in pointing out that