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Summary record of the 592nd meeting

Topic:
Consular intercourse and immunities

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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.
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> " 2. The receiving State shall not, however, be obliged by virtue of paragraph 1 of this article:
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> " (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.