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Summary record of the 593rd meeting

Topic:
Consular intercourse and immunities

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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

a sending State could request any private person to perform some particular diplomatic act, but such a person would be sent in a purely unofficial capacity and the case was very different from that where a consul holding an official position and known to the government of the receiving State was instructed to perform some diplomatic act, which would commit the sending State.

45. In reply to Mr. Gros's criticism that preliminary negotiations concerning trade for example were in any case part of the consul's normal functions, he drew attention to the limitations imposed in article 37 on communication by the consul with the authorities of the receiving State. Many States did not allow consuls to communicate directly with the Ministry of Foreign Affairs, and consequently the exception provided for in article 18 was necessary.

46. Nor did he agree that article 19 might involve some contradiction with the provisions of the Vienna Convention, because if article 19 came into effect, the provisions of the Vienna Convention would apply fully and the *agrément* or the consent in some other form of the receiving State would have to be obtained if a head of consular post were to be entrusted with diplomatic functions.

47. Because many States did not have diplomatic missions in every country, article 19 filled a real practical need and, in answer to Mr. Amado's affirmation that it was uncalled for, he would point out that the Commission had the dual task not only of codifying, but also of promoting the progressive development of international law. In any event a conference of plenipotentiaries could always delete article 19 if in the view of the majority it was unnecessary.

48. Mr. PAL said that he had little personal knowledge of practice in respect to the matters under consideration, but would refer the Commission to article 8 in the Consular Convention between the United Kingdom and Sweden [1] which indicated that States recognized the exercise of dual functions. That article seemed to provide the answer to the question raised concerning privileges, and the provision being only in relation to a temporary situation, its appropriate place in the draft Convention was also indicated clearly by the above-mentioned Convention. Establishment of diplomatic relations, as of a diplomatic mission being both mere matters of agreement, there was nothing inherently wrong or objectionable in the provisions as drafted, with the safeguarding requirement of the receiving State's consent.

49. His view was that article 18 should be retained in its place.

50. Mr. JIMÉNEZ de ARÉCHAGA said that if the majority view was in favour of retaining article 18 he would not press his objection, but urged that the Drafting Committee give careful thought to the fact that the Havana Convention of 1928 [2], on which the Special Rapporteur had claimed to have based the provision, only dealt in article 12 with the case where the head of a diplomatic mission was absent; in other words the existence of diplomatic relations was presupposed. The Special Rapporteur's text, however, also covered the case where there were no diplomatic relations between the two States in question. In addition, the Special Rapporteur's text left it to the recciving State to specify which diplomatic functions could be performed by a consul on an occasional basis. In certain instances a receiving State might like a consul to perform a number of functions in the hope that that would lead to its recognition and to the establishment of diplomatic relations. In his opinion, the article should expressly state that a consul could perform only such occasional diplomatic acts as were authorized by the sending State.

51. Mr. PADILLA NERVO said that the Commission had always sought to take account of existing practice. The theory of the exercise of dual functions was no innovation and had been recognized in practice, for example, by the Foreign Office and the State Department. It was quite common for diplomatic officials to exercise consular functions. Examples of current practice were found in article 8 of the Consular Convention of 1954 between the United Kingdom and Mexico,[3] and in article 1, paragraph 5 of the Consular Convention of 1942 between the United States of America and Mexico,[4] which was even more explicit.

52. Clearly, the practice filled a genuine need and should therefore be reflected in the draft under consideration. The precise wording could be left to the Drafting Committee.

53. Mr. MATINE-DAFTARY said that he found the attitude of members who criticized an article but had no objection to its retention quite inexplicable. It was not the role of jurists to accommodate all points of view.

54. In reply to Mr. Ago's criticism of his proposal, he explained that he had not meant to state a general rule concerning the exercise of diplomatic functions by a consul, but to propose a provision in the form of an exception which, as such, should be placed immediately after the general rules concerning consular functions. He would also draw the attention of Mr. Gros to the fact that article 3, paragraph 2 of the Vienna Convention, which he proposed as a model in place of articles 18 and 19, was drafted in very much the same form as the amendment that he had in mind; paragraph 2 constituted an exception to the general rule enunciated in paragraph 1 of article 3. He was at a loss to understand Mr. Gros's objection to his proposal. If the Commission decided to take paragraph 2 as a model, express mention must be made of the fact that the consent of the receiving State was required for the exercise of diplomatic functions by a consul.

55. In view of the fact that a consul-general-*chargé d'affaires* automatically had diplomatic status, the last part of article 19 was surely unnecessary.

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[1] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58, v. 3), p. 470.

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

[3] United Nations *Treaty Series*, vol. 331 (1959), No. 4750, p. 30.

[4] *Ibid.*, vol. 125 (1952), No. 431, p. 302.

56. Sir Humphrey WALDOCK observed that, although the provisions mentioned by Mr. Pal and Mr. Padilla Nervo in the Consular Conventions between the United Kingdom and Sweden and the United Kingdom and Mexico provided evidence that the exercise of dual functions was to be found in practice, they would do little to assist the Commission in its discussion, since the articles in question dealt with the reverse situation when diplomatic relations existed and diplomatic staff were assigned to perform consular functions.

57. His own view was that article 18 could be retained and that its position in the draft was a matter that could be left to the Drafting Committee. On the other hand, there seemed to be no useful purpose in including article 19.

58. Mr. BARTOŠ agreed with Mr. Ago and Mr. Gros that the performance of diplomatic functions on an occasional basis was not part of a consul's normal functions and hence had no place in article 4. Article 18 dealt with a special case and its proper place was at the end of the general section in the draft.

59. In his opinion, article 19 was concerned with *ad hoc* diplomacy, which had not been dealt with at the Vienna Conference. The trend since the First World War had not been towards adding diplomatic to consular functions, but the reverse. A formula based on the wording of article 3, paragraph 2 of the Vienna Convention would not be adequate and the provision would have to be stated in affirmative form.

60. It should be borne in mind that diplomatic acts performed by a consul on an occasional basis were usually of such a nature that he was little more than a channel for the transmission of instructions from the sending State, but some States did not even allow a consul to make direct contact with the Ministry of Foreign Affairs, whether he had the status of *chargé d'affaires* or not. Even persons performing *ad hoc* diplomatic functions were not able to communicate direct with the Ministry of Foreign Affairs unless that had been specifically agreed to by the receiving State.

61. He was prepared to tolerate the inclusion of article 18, but doubted very much whether it served any useful purpose. Even in the absence of such an article, a consul or any other individual designated by the sending State could perform occasional diplomatic acts if the receiving State so permitted.

62. The references to article 19 made during the debate had confirmed his conviction that the article as it stood should not be inserted in the draft convention. Formerly, States having no diplomatic mission in the receiving State had used their consuls-general as diplomatic agents; but the case of the Commonwealth of Australia, to which the Special Rapporteur had referred, was no longer relevant, since it related to the use of the Foreign Office of the United Kingdom as an intermediary at a time when the Commonwealth of Australia had not yet had full and independent capacity in foreign policy and international law. It was quite natural for the Australian Government to have changed its opinion since the time of the League of Nations inquiry. After the Imperial Conference, when the Dominions had been recognized as possessing the full right of legation, Australia had modified its attitude and no longer regarded the consuls-general of other States resident in Australia as being authorized to perform diplomatic acts.

63. It had been argued that governments had not opposed article 19 in their comments; but had any governments expressed support for article 19 and, if so, for what reasons? The absence of objections could not be construed as an expression of support for any provision of the draft; such an assumption would be tantamount to ignoring the laws of numerical statistics. Governments' comments were certainly valuable, but in fact relatively few States had commented on the draft. Some had shown genuine interest in the draft; others had commented on it more cursorily, and yet others had sent in replies prepared by interested individuals; most governments, however, considered themselves overburdened with questionnaires from international bodies.

64. As to the substance of article 19, the real purpose of the sending State concerned was to establish diplomatic relations where there were none. A consul-general-*chargé d'affaires,* a title devised by the Special Rapporteur, was a diplomatic agent, and a person endowed with both diplomatic and consular capacity and with both diplomatic and consular competence in fact had diplomatic capacity and competence. If a State was prepared to establish a diplomatic mission, that mission should be headed by a standing *chargé d'affaires,* rather than by a person having semi-consular and semi-diplomatic status, enjoying diplomatic privileges and immunities. Accordingly, article 19 was unacceptable because it involved a kind of a degeneration of the diplomatic status.

65. With regard to the privileges and immunities of consuls who occasionally performed diplomatic acts under article 18, under modern international law privileges and immunities attached to the functions performed. Under the rules of *ad hoc* diplomacy, therefore, the consular officials concerned should enjoy diplomatic privileges and immunities for so long as they performed diplomatic functions.

66. Mr. AMADO pointed out that the countries which had concluded the bilateral conventions to which Mr. Padilla Nervo had referred had full consular and diplomatic relations with each other. Accordingly, the need for the occasional performance of diplomatic acts or for the grant of diplomatic status to consuls did not arise. The modern tendency in international law was to allow diplomatic agents to perform consular functions, but to regard cases where consuls performed diplomatic functions as abnormal and exceptional.

67. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Bartos, said that it was unusual for governments to refer in their comments to articles with which they were in agreement. On the contrary, they confined their comments to articles to which they had objections. He had therefore assumed — in the case of

article 18, at any rate — that, since there had been few negative observations, the majority of governments wished the article to be included. The second reading of the draft must be based on the comments of governments, although they had no final value and although the plenipotentiary conference might reveal quite a different body of opinion. In the circumstances, however, since article 18 had been opposed by three governments only, he had been led to the logical conclusion that there were no serious objections on the part of others.

68. The CHAIRMAN, summing up the debate on article 18, said that a number of amendments had been suggested. Mr. Verdross had proposed (592nd meeting, para. 78) introducing the idea that the article would be applicable only in cases where the sending State was not represented in the receiving State either by a diplomatic mission of its own or by that of a third state. There had, however, been very little support for the amendment and the majority seemed to be in favour of the wording as it stood. Mr. Verdross had further proposed including the provision that a consul might perform diplomatic acts with the consent of the receiving State; while he (the Chairman) doubted the need for such a provision, the Drafting Committee might be instructed to decide on its inclusion. Mr. Matine-Daftary's proposal that the provision should be inserted in article 4 had not been supported and would not therefore be referred to the Drafting Committee. With regard to Mr. Padilla Nervo's suggestion that the article should be modelled on analogous provisions in bilateral conventions, since the problem related purely to the question of dual functions, it would be taken up in connexion with other articles of the draft. Finally, Mr. Bartos's suggestion concerning the privileges and immunities should be considered by the Drafting Committee.

69. He suggested that article 18 be referred to the Drafting Committee for revision in the light of the debate.

It was so agreed.

70. The CHAIRMAN invited debate more particularly on article 19 of the draft.

71. Mr. ŽOUREK, Special Rapporteur, drew attention to the proposal of the Netherlands Government (A/CN.4/136/Add.4) that the words " a consul " should be replaced by " the head of a consular post ". He did not think that the Commission would object to that amendment. The Governments of Norway (A/CN.4/136) and Belgium (A/CN.4/136/Add.6) had both opposed the inclusion of the article. The Government of the United States (A/CN.4/136/Add.3) had observed that a consular officer performing functions of a diplomatic character owing to the non-existence of diplomatic relations between his government and the government of the receiving State remained a consular officer, was not entitled to enjoy diplomatic privileges and immunities and needed no special title. The latter observation proved the value of article 19: at least one government had taken the view that a consul entrusted with diplomatic functions was not entitled to diplomatic privileges and immunities. He had concluded, however, that the other governments which had commented had no objections of principle to the article.

72. Some speakers earlier in the meeting, particularly Mr. Padilla Nervo and Mr. Pal, had expressed the view that cumulative functions were being increasingly admitted in modern international practice; strictly speaking, when a member of the diplomatic staff performed consular functions in the context of a diplomatic mission, he was not a consul, because he was exercising the normal functions of a diplomatic mission, there was all the more reason to recognize the dual function in cases where the sending State had no diplomatic mission in the receiving State. A head of consular post exercising diplomatic functions should therefore be endowed with diplomatic status, particularly since the national law of some States compelled the Commission to provide for such cases in its draft. Although the clause might not operate very often, it would prove useful in special cases; in a multilateral convention such as the Commission was drafting, provision should be made for such situations in order to avoid lengthy negotiations when practical cases arose.

73. Mr. YASSEEN expressed the view that article 19 was quite unnecessary, because the situation it contemplated was perfectly normal and was in keeping with the requirements of the Vienna Convention. The case was that of a State which had no diplomatic mission in another State and directed a person to perform diplomatic functions in that other State. That was in fact the manner of establishing a diplomatic mission. If the receiving State accepted such a *chargé d'affaires,* the fact that he was already a consul in no way changed the situation.

74. There was a contradiction in the wording of the article. In the opening phrase, reference was made to " a consul ", but the title he was to assume was " consul-general-*chargé d'affaires* "; it was very questionable whether a consul could become a consul-general by virtue of performing diplomatic functions.

75. Although he was still in favour of retaining article 18, for practical reasons, that position did not commit him to acceptance of article 19.

76. Mr. AGO suggested that article 19 might refer to two distinct hypothetical cases. In the first, the consul remained a consul, although he carried out diplomatic acts on a less occasional basis than that contemplated by article 18; that hypothesis was already covered by article 18, which might, however, be slightly recast to meet that situation more completely. In the second hypothesis, however, a consul was invested with diplomatic status and became a diplomatic agent; in that case, the provision no longer fell within the scope of the draft on consular intercourse, but was covered by the Vienna Convention. He therefore proposed that the Drafting Committee be asked to reword article 18 to cover the special cases concerned and that article 19 should be deleted.

77. Mr. ERIM agreed that articles 18 and 19 should be merged and suggested that the Drafting Committee should not confine the provision to States where the sending State had no diplomatic mission. The main

point was that the government of the receiving State should permit the performance of the diplomatic acts concerned.

78. The CHAIRMAN, speaking as a member of the Commission, said that he knew of no cases where consuls had been elevated to diplomatic rank in the manner suggested in article 19. He endorsed Mr. Ago's proposal and suggested that the merger of the two articles might be effected simply by deleting the words " on an occasional basis " from article 18.

79. Speaking as Chairman, he suggested that the Drafting Committee be instructed to merge articles 18 and 19 in the light of the remarks made during the debate.

It was so agreed.

80. Mr. BARTOŠ stressed that his approval of the inclusion of article 18 depended on the way in which it would be drafted by the Drafting Committee.

The meeting rose at 1 p.m.

594th MEETING

Tuesday, 23 May 1961, at 3 p.m.

Chairman : Mr. Grigory I. TUNKIN

Welcome to new member

1. The CHAIRMAN welcomed Mr. Tsuruoka, whose very great experience of diplomacy and international law would, he was sure, make a valuable contribution to the Commission's work.

2. Mr. TSURUOKA thanked the Chairman for his generous words. It was a great honour and responsibility for him to succeed Mr. Yokota, who had asked him to convey to the Chairman and members his appreciation for all that they had done for him while he was a member of the Commission.

Consular intercourse and immunities

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

[Agenda item 2]

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 20 (Withdrawal of exequatur)*

3. The CHAIRMAN called for comments on article 20 of the draft on consular intercourse and immunities (A/4425).

4. Mr. ŽOUREK, Special Rapporteur, said that the provisions of article 20 applied only to persons holding an exequatur. Consequently it concerned heads of consular posts and also other consular officials in countries which required an exequatur for those officials as well. In view, however, of the decisions taken by the Commission in regard to earlier articles of the draft, it was perhaps desirable to limit the scope of article 20 to heads of post only.

5. The Netherlands Government (A/CN.4/136/Add.4) had proposed a new text for article 20. That text differed from the Commission's text on four points:

(1) It replaced the reference to the case where " the conduct of a consul gives serious grounds for complaint " by the condition " if for grave reasons a consular official ceases to be an acceptable person ", thereby involving a drafting change which could be referred to the Drafting Committee;

(2) it covered not only persons holding an exequatur, but other consular officials in addition;

(3) it implied that in the case of members of the consular staff other than consular officials the receiving State's acceptance was necessary;

(4) it omitted paragraph 3, which set forth the effects of the withdrawal of the exequatur.

6. The Spanish Government (A/CN.4/136/Add.8) had suggested that article 20 might include a reference to article 51, which guaranteed that the consul's rights and privileges would be respected until he left the country, a question which, so far as article 20 was concerned, was dealt with only in the commentary.

7. The United States Government (A/CN.4/136/Add.3) had expressed the opinion that the withdrawal of an exequatur should be effective immediately and that a request for recall was not necessarily effective immediately. He recalled that the Commission had discussed that point at its eleventh session (516th meeting, paras. 25-52) where discussed as article 17) and had decided that the withdrawal of an exequatur was a grave act, not to be resorted to until the receiving State had first requested the consul's recall and that request had not been complied with (commentary (2) on the article).

8. Finland (A/CN.4/136) had suggested that the provision concerning the circumstances in which the receiving State could request the consul's recall should be broadened so as to give wider discretion to that State.

9. The other governments which had commented appeared to be satisfied with the Commission's text and, except for questions of drafting and the point mentioned by the Spanish Government, the text as it stood might well be retained. The discussion could profitably centre on whether there were any good reasons for making changes in the existing draft.

10. Mr. SANDSTRÖM said that the remark of the Government of Finland suggested that the passage refering to " serious grounds for complaint " could be interpreted to mean that the sending State might enter into a discussion with the receiving State on the consul's conduct. Such a discussion was as undesirable in the case of consuls as it was in the case of diplomats. He recalled,

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* In the course of this debate the Commission also considered article 23 (Persons deemed unacceptable) (paras. 15 *et seq.* below).