

Document:-
A/CN.4/SR.594

Summary record of the 594th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1961 , vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

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 referring 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,

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

in that connexion, the terms of article 9 of the Vienna Convention on Diplomatic Relations (A/CON. 20/13), which stated that the receiving State could "at any time and without having to explain its decision" notify the sending State that the person concerned was *persona non grata* or not acceptable.

11. Mr. AGO, concurring, said that the words "where the conduct ... complaint" should be deleted.

12. Paragraph 1 of the article was applicable not only to heads of post, but also to other consular officials. It was therefore not appropriate to refer, in paragraphs 2 and 3, only to the case of the withdrawal of the exequatur. In many countries, consular officials who were not heads of post did not receive an exequatur and there could be no question of its being withdrawn.

13. For those reasons, he preferred a text along the lines of article 9 of the Vienna Convention.

14. The CHAIRMAN, speaking as a member of the Commission, proposed that, by analogy with article 9 of the Vienna Convention a single provision should be drafted covering all members of the consular staff.

15. Mr. YASSEEN expressed agreement, but pointed out that article 23 dealt with the case where a member of the consular staff was declared not acceptable. Perhaps, therefore, articles 20 and 23 should be merged into a single article.

16. The CHAIRMAN, speaking as a member of the Commission, said that had been precisely his intention.

17. Mr. ŽOUREK, Special Rapporteur, said that there were important reasons for establishing a difference of treatment between diplomatic and consular officials.

18. In the case of the head of a consular post, he could be declared not acceptable only after the withdrawal of his exequatur. The procedure was therefore different from that of the declaration of a diplomatic officer as *persona non grata*.

19. The staff of a consulate was often very small and the work highly specialized. It was not easy to replace a consular official who was recalled. Assurances must therefore be given that the day-to-day work of a consulate would not be interrupted without serious reasons.

20. Moreover, diplomatic officers enjoyed full immunity from jurisdiction in respect not only of acts performed in the exercise of their functions, but also of their private acts. It was therefore natural to give the receiving State a wide discretion regarding the circumstances in which that State could request the recall of a diplomat. The unrestricted right to declare a member of a mission *persona non grata* or unacceptable constituted for the receiving State an indispensable safeguard and a counter-balance to the very considerable inviolability and immunities enjoyed by members of diplomatic missions.

21. On the other hand, the position of members of a consulate was very different. Their inviolability was extremely restricted and their immunity from jurisdiction covered only acts performed in the exercise of their functions. Thus there were not the same reasons for giving the receiving State extensive rights to declare unacceptable a member of a consulate.

22. For those reasons, he thought that the reference to "serious grounds for complaint" should stand. That expression could, of course, be replaced by the one suggested by the Netherlands Government. In that connexion, however, in the French text, the sentence proposed by the Netherlands Government spoke of a consular officer ceasing to be *persona grata*; if the Netherlands text were to be used, the words "*persona grata*" would have to be replaced by "*personne acceptable*".

23. The proposal for merging articles 20 and 23 should be considered after the Commission had dealt with the two articles separately, since in the formulation which the Commission had adopted, they dealt separately with two categories of person.

24. Mr. VERDROSS drew attention to a lack of balance between the provisions of articles 20 and 23. For the head of post or other consular official holding an exequatur, article 20, paragraph 1, specified that his recall could be requested only where his conduct gave serious grounds for complaint. For the subordinate staff, on the other hand, article 23, paragraph 1, stated that the receiving State could "at any time notify the sending State that a member of the consular staff is not acceptable".

25. He saw no valid reason for such a discrepancy. Since he also supported the merger of articles 20 and 23, he therefore proposed that, in drafting a single article, the position of all members of the consular staff should be made uniform, in so far as the grounds for recall were concerned.

26. The CHAIRMAN said that the Commission had before it a proposal for merging articles 20 and 23, and in that connexion it had to decide whether there should be a reference to "serious grounds for complaint". It was probably advisable to follow the example of the Vienna Convention and not to specify the need for such grounds.

27. Mr. ERIM expressed doubts on that point. Diplomats enjoyed the full measure of immunity and it was therefore logical that the receiving State should have full latitude to request their recall. Consuls enjoyed no personal immunities and only an immunity in respect of their official acts. It was mainly because of that difference between the two categories of foreign service officer that the Commission had included in the draft a reference to "serious grounds for complaint".

28. Most of the governments seemed to favour the inclusion of the passage in question. Few had commented on article 20 and those which had done so had generally not opposed the passage. The Netherlands Government, for example, had proposed in effect the merging of articles 20 and 23, but had included a reference to "grave reasons" in connexion both with the withdrawal of an exequatur and with the revoking of the acceptance of members of the consular staff other than consular officials.

29. Mr. MATINE-DAFTARY said that the most important question at issue was whether the receiving State should be required to explain its reasons for requesting the recall. Clearly, it was for the receiving State to

decide whether it had serious reasons or not. The position was, therefore, that the receiving State could at any time inform the sending State that the person concerned no longer enjoyed its confidence. It would be logical for the Commission to adopt purely and simply a provision which, like the corresponding provision of the Vienna Convention, merely expressed that position.

30. The CHAIRMAN recalled that there had been considerable discussion at the Vienna Conference on the proposal, which had ultimately been carried, to include in article 9 the words "without having to explain its decision". It would be better to omit from the draft all reference to reasons. A provision omitting such a reference would make it clear that the receiving State was not under an obligation to give explanations.

31. Mr. GROS said that the request for the recall of an ambassador was a serious step. The Vienna Conference had decided that the Convention should not require in law an explanation in connexion with such a request, because an unofficial explanation was always given in those cases. In practice, a request for the recall of an ambassador did contain explanatory comments.

32. If, therefore, in the draft the Commission were to drop the words "where the conduct of a consul gives serious ground for complaint", it could be thought that the recall of a consul might be requested without any explanation. Such a recall could lead, as examples had shown, to complete severance of consular relations. It was therefore appropriate to provide that serious reasons should be given for the request.

33. Lastly, he supported the merger of articles 20 and 23. It would be logical to include in a single article the provisions of both articles.

34. Sir Humphrey WALDOCK said that he had at first been inclined to favour a provision along the lines of article 9 of the Vienna Convention. However, he had since felt some hesitation on that point because consular conventions very uniformly contained a provision similar in its effects to articles 20 and 23 of the Commission's draft. An examination of a typical clause in one of those conventions showed: (1) that for the purpose under discussion the head of the consular post and the subordinate staff of the consulate were treated in the same manner; (2) that there had to be serious reasons for the withdrawal of an exequatur or for the request for the recall of a subordinate member of the consular staff; and (3) that the receiving State could be required to furnish reasons through the diplomatic channel.

35. He did not think that the argument based on the immunity enjoyed by diplomatic officers carried much weight, but he had been impressed by the point mentioned by Mr. Gros.

36. Mr. AMADO said that he could not support an expression such as "serious grounds", which was open to subjective interpretation. A receiving State could have many reasons for requesting the recall of a consul and it would serve no useful purpose to specify that those grounds should be "serious".

37. There was an important difference between article 9

of the Vienna Convention and article 20 of the draft. The first dealt both with diplomatic officers, who could be declared *persona non grata*, and with other members of the staff of a diplomatic mission, who could be declared "not acceptable". He stressed that the term "*persona non grata*" could apply only to a diplomatic officer, in other words to a representative of the sending State. With regard to consuls and their staff, the appropriate expression was "not acceptable". A consul was not a representative of the sending State, but merely an official of that State entrusted with the performance of specific functions in his consular district.

38. Lastly, he supported the proposal for merging articles 20 and 23.

39. Mr. VERDROSS supported the retention of the reference to "serious grounds for complaint". A diplomatic officer performed functions of a political character and, in his case, a small incident could render him *persona non grata*. A consul's functions were chiefly of an administrative character and he should be declared not acceptable for grave reasons only. As the late Mr. Scelle had said, consuls were necessary to the everyday life of States and hence their work should not be interrupted except for serious reasons. The fact that bilateral conventions specified that there had to be serious reasons for the withdrawal of the exequatur or for the request for recall was an additional argument for retaining the passage under discussion.

40. Mr. AGO pointed out that if the Commission, having before it the text of article 9 of the Vienna Convention, nevertheless decided to retain for consuls the passage under discussion, it might even be inferred that it was of opinion that the recall of an ambassador could be requested on grounds that were not serious.

41. An important point was who was to be the judge of the seriousness of the grounds for complaint. But an even more important question was whether it was really in the interest of good relations between the two States concerned, and indeed in the interests of the consul himself, that the grounds for the request for his recall should always be indicated and discussed. In his opinion the passage in question could be not only unnecessary, but in some cases even dangerous. Although, therefore, the passage should be omitted and the article should be modelled on article 9 of the Vienna Convention, it was not desirable to include the words "and without having to explain its decision" which appeared in article 9, paragraph 1, of that Convention. The absence of any reference to the grounds for the request for recall or for the withdrawal of the exequatur would suffice to make the position clear.

42. Mr. MATINE-DAFTARY said that the passage under discussion was little more than an empty formula. Even if the sending State were to dispute the seriousness of the grounds on which the recall had been requested, it could not possibly impose its consul upon the receiving State. Of course, the receiving State should not request such a recall for trivial reasons; but in the last resort the decision could only be left to that State.

43. Mr. SANDSTRÖM observed that the passage

under discussion constituted a rule of conduct for the receiving State. That State should not request the consul's recall without serious grounds for complaint, but it was not bound to disclose the reasons.

44. Mr. ŽOUREK, Special Rapporteur, stressed that the passage had been introduced in order to emphasize that the request for a consul's recall should be based on the conduct of the consul himself. The recall of a consul should occur only in exceptional cases, because the interruption of consular relations was prejudicial to both the States concerned.

45. The CHAIRMAN put to the vote the question whether the words "Where the conduct of a consul gives serious grounds for complaint" should be retained.

It was decided, by 11 votes to 5, with 2 abstentions, to retain those words.

46. The CHAIRMAN said that the Commission appeared to be in agreement to merge articles 20 and 23 into a single provision modelled on article 9 of the Vienna Convention, but retaining the passage, "where the conduct . . .". Also, the intention of the Commission was to omit the words in article 9, paragraph 1, of the Vienna Convention "and without having to explain its decision".

47. Mr. ERIM asked whether, for the then purposes, the distinction established between persons holding an exequatur (article 20) and members of the consular staff (article 23) would disappear.

48. The CHAIRMAN recalled that Mr. Verdross had proposed that, in merging articles 20 and 23, all difference of treatment between the two categories should disappear for the purposes in question. If there was no objection, he would take it that the Commission agreed to instruct the Drafting Committee to prepare a single article along the lines he had described, bearing in mind the proposal by Mr. Verdross.

It was so agreed.

ARTICLE 21 (Appointment of the consular staff)

49. Mr. ŽOUREK, Special Rapporteur, pointed out that the expression "consular staff" excluded the head of post. He recalled that in connexion with article 13 (the exequatur), the Commission had decided (590th meeting, para. 79), to consider the possibility of taking into account the practice of States which for internal reasons required an exequatur for consular officials other than heads of post. The Drafting Committee had been instructed to find an appropriate wording for that provision, and the Commission might decide that the solution eventually found should be reflected in article 21.

50. He drew attention to the United States Government's comment that consular officers had some form of consular recognition and that consular employees had no such recognition and to the Belgian Government's suggestion (A/CN.4/136/Add.6) that the second phrase of the article should read "the sending State may freely appoint consuls who are not heads of post and employees of the consulate, who, on notification of their appointment, are authorized to exercise their functions". That amendment was not acceptable in the

light of the basic philosophy of the draft, for it tended to make the appointment of the employees of the consulate dependent on the authorization of the receiving State. Accordingly, he suggested that the present wording of article 21 should be retained, subject to redrafting in the light of the Drafting Committee's text for article 13; he was sure that an adequate solution could be found without abandoning the Commission's basic position.

51. Mr. ERIM drew the Special Rapporteur's attention to the discrepancy between the phrase "the necessary number of consular officials and employees of the consulate" in paragraph (1) of the commentary to article 21 and the phrase "what is reasonable and normal" in article 22 (size of the staff). There was a difference in meaning between "necessary" and "reasonable" or "normal". The same word should be used in both texts.

52. The CHAIRMAN proposed that article 21 should be referred to the Drafting Committee, which would decide upon the articles of the draft to be mentioned in the first phrase.

It was so agreed.

ARTICLE 22 (Size of the staff)

53. Mr. ŽOUREK, Special Rapporteur, drew attention to five comments from governments. The Yugoslav Government (A/CN.4/136) considered that the receiving State should decide on the number of consular staff it was willing to receive in its territory and that any dispute in the matter should be referred to arbitration. The Government of Poland (A/CN.4/136/Add.5) had criticized the article on the grounds that it would enable the authorities of the receiving State to interfere with the work of the consulate and to narrow it down at will. The Governments of the United States and Belgium had considered that the article should be deleted, the latter Government adding that the question was governed exclusively by internal law and should be settled by bilateral agreement between the two States concerned. Finally, the Netherlands Government had proposed the deletion of the words "and normal" in order to avoid an element of comparison with other posts or with the size of the same post in the past, and had suggested that the substance of paragraph (3) of the commentary should be incorporated in the article itself. The latter point seemed to be covered by the opening phrase of the article.

54. In his original draft he had not proposed such an article, which he had regarded as unnecessary in the draft on consular intercourse, but the majority of the Commission had been in favour of its inclusion (A/4425, article 22, commentary (2)). He maintained his view that the position of diplomatic missions differed materially from that of consulates in that respect, and it was pertinent that many of the governments which had commented on the article had raised objections to it.

55. Mr. MATINE-DAFTARY observed that, although it might be difficult to estimate the size of the staff needed for a diplomatic mission, there was no such difficulty in the case of consulates. The main function of the consul was to protect the nationals and the trade of the sending

State; the number of nationals in the receiving State and the volume of trade with that State could be estimated quite easily. His fear was that the omission of the article might enable the sending State to take undue advantage of the receiving State, and that the existence of article 11 of the Vienna Convention and the absence from the Commission's draft of any mention of the size of the consular staff would amount to locking the front door and leaving the back door open. Moreover, the phrase "what is reasonable and normal" implied agreement between the two States concerned, whereas under article 11 of the Vienna Convention the size of a mission was to be kept within limits considered by the receiving State to be reasonable and normal.

56. Mr. BARTOŠ observed that the Government of Yugoslavia had not merely expressed the view that, in case of dispute, the matter should be referred to arbitration, but had added that that should be done on the understanding that the decision of the receiving State should remain in force until the award. He was convinced that peaceful and friendly international relations would best be served by leaving the matter to the receiving State to decide.

57. Mr. PAL pointed out that, in accordance with paragraphs (2) and (3) of the commentary to article 22, the receiving State was in fact the final arbiter of the question. The matter seemed to be one of drafting only.

58. Mr. YASSEEN said that, preferring its objective criterion, he was in favour of retaining the article, which had considerable practical merit.

59. Mr. AMADO considered that it was impossible to lay down a criterion of what was reasonable and normal; there was no place for such an expression in a legal draft.

60. Mr. SANDSTRÖM observed that the difference between article 22 of the draft and the original draft of the provision that had become article 11 of the Vienna Convention was that the latter had provided for arbitration or recourse to the International Court of Justice in the event of disputes. Article 22 as drafted in fact left the size of the staff to the judgment of the receiving State.

61. The CHAIRMAN pointed out that by decision of the Vienna Conference the article on jurisdiction and arbitration had been deleted from the draft on diplomatic intercourse and had been made the subject of a separate protocol.

62. He suggested that article 22 should be referred to the Drafting Committee without any specific instructions.

It was so agreed.

ARTICLE 24 (Notification of the arrival and departure of members of the consulate, members of their families and members of the private staff)

63. Mr. ŽOUREK, Special Rapporteur, said that the comments on the article received from the governments of the Netherlands, the United States, and Chile (A/CN.4/136/Add.7) related mainly to drafting points. The Government of Spain had (A/CN.4/136/Add.8) con-

sidered that the term "family" should be clearly defined to avoid ambiguities of interpretation and had made a suggestion concerning the definition of that word. The Commission should try to define the term "family" in the article on definitions and in draft article 1 he would propose the inclusion of a definition of a member of the family of a member of the consulate. Article 10 of the Vienna Convention had been based on the corresponding article of the consular draft and article 24 might be referred to the Drafting Committee with instructions to redraft it along the lines of article 10 of the Vienna Convention.

64. Mr. VERDROSS, pointed out that paragraph 1 (a) of article 10 of the Vienna Convention contained the additional idea that the appointment of members of the mission should be notified to the receiving State. It would be useful to include the same idea in paragraph 1 (a) of article 24 of the draft in order to avoid the inconvenience which would arise if a person declared unacceptable by the receiving State arrived in that State or at its frontiers.

65. Mr. BARTOŠ, fully agreed with Mr. Verdross's remarks.

66. With regard to the question of defining the term "family", he would point out that all previous attempts at a satisfactory definition had failed. He appealed to the Special Rapporteur to endeavour to find wording which could be approved by the majority of the Commission and by the plenipotentiary conference.

67. Mr. AGO also endorsed Mr. Verdross's views.

68. Mr. ERIM expressed doubts whether the problems to which Mr. Verdross had referred could be solved by merely referring to notification of the appointment of members of the consulate. The persons concerned might well set out for the receiving State immediately upon their appointment and notification to the receiving State. An embarrassing situation could arise if the receiving State considered them to be unacceptable.

69. The CHAIRMAN observed that it was impossible to provide in the draft for all the eventualities of everyday life.

70. He suggested that the Drafting Committee be instructed to redraft article 24 along the lines of article 10 of the Vienna Convention.

It was so agreed.

ARTICLE 25 (Modes of termination)

71. Mr. ŽOUREK, Special Rapporteur, said that the only critical comment had been received from the Government of Norway (A/CN.4/136), which regarded the use of the expression "severance of consular relations" in paragraph 1 (c) as unfortunate, and stated that the wording of the article failed to take into account the fact that in consular relations between two States one or more consulates were often abolished while others were maintained. In his third report (A/CN.4/137) he had taken that objection into account and had redrafted the article with a new paragraph 1 (c) concerning the closure of its consulate by the sending State. The Chilean

Government (A/CN.4/136/Add.7) had suggested that the words "or discharge" in paragraph 1 (a) should be deleted, on the ground that "recall" was sufficient for international purposes, since discharge was an administrative penalty, the effects of which were governed by the internal law of each State, and there was no point in giving it international effects. The case contemplated by the Chilean Government was the rare one where the sending State severed all connexion with a consular official. However, the argument that the effects of discharge were governed by the internal law of each State might be applicable to recall also, since it marked the termination of a consul's functions at a given consulate. Finally, the Belgian Government (A/CN.4/136/Add.6) had suggested that the cause of the resignation or death of the consul should be included, although the Commission had decided against stating such obvious causes.

72. He thought that the Drafting Committee should be instructed to redraft article 25 in the light of those observations.

73. Mr. AGO considered that, by analogy with the Vienna Convention, the article should not include a separate reference to the severance of consular relations, which was a much wider topic than the termination of the functions of a specific consul.

74. Article 43 of the Vienna Convention might provide a model for a more flexible formulation than that given in the rather cumbersome language of article 25 of the draft. Once again, the Drafting Committee should give some thought to grouping together provisions dealing with heads of post and those dealing with members of the consulate. As it stood, paragraph 2 of the article was not very clear.

75. Mr. ŽOUREK, Special Rapporteur, recalled that the Commission had decided (547th meeting, paras. 45-54) not to devote a separate article to the severance of consular relations which occurred very infrequently and which was very undesirable from the point of view of international relations, but had decided to mention it as one of the possible modes of termination of consular functions. As the enumeration contained in article 25 was not exhaustive, the retention or omission of subparagraph (c) would not affect the substance.

76. Mr. AGO remarked that in the event of the severance of consular relations the system proposed in article 28 was closely analogous to that envisaged in article 45 in the Vienna Convention for the case of the severance of diplomatic relations.

77. Mr. ŽOUREK, Special Rapporteur, referring to paragraph 2 of article 25, said that there must be a difference in the treatment of consular officials holding an *exequatur* and those without.

78. The CHAIRMAN suggested that the Drafting Committee be instructed to review article 25 in the light of article 43 of the Vienna Convention, with discretion to decide how far the latter provision could be followed.

It was so agreed.

ARTICLE 26 (Maintenance of consular relations in the event of the severance of diplomatic relations)

79. Mr. ŽOUREK, Special Rapporteur, said that the Governments of Norway and the United States of America had considered article 26 unnecessary. The Commission would have to decide whether to follow the Yugoslav Government's view that the article should state explicitly that upon the severance of diplomatic relations there would be no interruption of consular relations and that the consular sections of diplomatic missions would continue to function as consulates. The Yugoslav Government had added that in such cases it was necessary to make contact possible between consulates and the representatives of the protecting Power. In his opinion that was a case in which the Commission could take a step in the direction of the progressive development of international law so as to ensure that when the diplomatic mission of the sending State exercised consular functions, in the territory of the receiving State and the receiving State maintained a consulate in the territory of the sending State, the former did not find itself at a disadvantage. If the principle were accepted it would not be difficult for the Drafting Committee to devise suitable wording and in that connexion he would refer to his redraft of the article in his third report.

80. Mr. BARTOŠ said that the Yugoslav Government's comment was not based upon a general practice, but had been put forward in the light of a procedure followed when the Federal Republic of Germany had broken off diplomatic relations with Yugoslavia. On that occasion the Federal Government had proposed that there should be no interruption in consular relations and in order to avoid having to modify existing consular districts it had been agreed between the two governments that consular sections of the diplomatic missions should continue to function. That eminently practical solution had continued for several years and was in no way contrary to the existing rules of international law: it deserved consideration by the Commission.

81. Mr. MATINE-DAFTARY said that the Yugoslav Government had drawn attention to an interesting innovation, but he doubted whether the Commission could generalize from a specific case that was unlikely to recur. The Federal Republic of Germany had decided to sever relations with Yugoslavia because that country had entered into diplomatic relations with the German Democratic Republic. That was a case of symbolic severance, for while applying its principle, the Federal Republic of Germany had wished to maintain relations with Yugoslavia in the form of consular relations. In practice, the severance of diplomatic relations was almost always accompanied by the severance of consular relations.

82. The CHAIRMAN suggested that the point raised by the Yugoslav Government was in fact covered by the wording of article 26. The example mentioned by Mr. Bartoš, however, certainly proved that the article was a useful one.

83. Mr. VERDROSS, agreeing with the Chairman, pointed out that in the event of the severance of diplo-

matic relations there was nothing to prevent the two States concerned from agreeing that consular sections of diplomatic missions should continue to function. The point made by the Yugoslav Government could be mentioned in the commentary.

84. Mr. BARTOŠ endorsed the Chairman's view that the specific case mentioned by the Yugoslav Government was implicitly covered in article 26; it could be dealt with by agreement on a bilateral basis.

85. Mr. AGO expressed the view that article 26 was necessary and as drafted was adequate. It was a necessary corollary to the principle discussed by the Commission (582nd meeting, para. 33 to 583rd meeting, para. 8) in connexion with article 2 that the establishment of diplomatic relations in the absence of opposition involved the establishment of consular relations.

86. Mr. PADILLA NERVO agreed with Mr. Ago but considered that the rule stated in article 26 properly belonged to article 2. It was a rule recognized in a number of consular conventions.

87. The CHAIRMAN proposed that article 26 be referred to the Drafting Committee with instructions to decide whether it should form a separate article or should be incorporated in article 2.

It was so agreed.

ARTICLE 27 (Right to leave the territory of the receiving State and facilitation of departure)

88. Mr. ŽOUREK, Special Rapporteur, drew attention to the comments of the Governments of Norway, the Netherlands, Poland, Chile and Spain.

89. The question of the Governments of Norway and the Netherlands concerning the meaning of the expression "discharged locally" in paragraph 3 could be answered in the commentary. The reference was to dismissal of a consular official, who thereupon became a private individual in the territory of the receiving State. The suggestion of the Government of Poland that article 27 should expressly stipulate that the provisions relating to the right to leave the territory of the receiving State did not apply to employees of the consulate who were nationals of that State should be borne in mind. The Commission might add that condition to the article or broaden the scope of article 50. The Spanish Government had made a comment much to the same effect. Perhaps a proviso might be added in article 1, which was in the nature of an introductory provision making it clear that the provisions of the articles concerning consular privileges and immunities did not apply to every member of a consular staff and that persons having consular privileges and immunities, if they were nationals of the receiving State, enjoy only such privileges and immunities as were provided in article 50. That was the more desirable since a reader who consulted just one individual article would not necessarily be aware of the structure and philosophy of the entire draft.

90. The Chilean Government suggested that paragraph 3 should be deleted, on the ground that the consular official concerned should not suffer an "international" penalty,

which might, in addition, affect members of his family. That suggestion was not acceptable.

91. The other comments submitted by governments were mainly concerned with drafting.

92. The CHAIRMAN, speaking as a member of the Commission, asked the Special Rapporteur to what extent the article could be modelled on article 44 in the Vienna Convention.

93. Mr. ŽOUREK, Special Rapporteur, said that the Commission would probably agree that article 27 could more or less follow article 44 in the Vienna Convention, provided that proper emphasis were placed on the right of consular staff to leave the territory of the receiving State.

94. Mr. VERDROSS supported the Polish Government's suggestion that it should be expressly stipulated that article 27 did not apply to nationals of the receiving State. He accordingly proposed that the words "other than nationals of the receiving State" be inserted after the words "members of the consulate" in paragraph 1. That amendment would be in line with article 44 of the Vienna Convention. The point could not be dealt with in article 50, which was concerned with immunities, an entirely different subject.

95. Mr. ERIM, with regard to the Special Rapporteur's observation, said that the reason for the dismissal of a member of the consular staff was not necessarily that he had committed an offence. There might be internal reasons for the dismissal.

The meeting rose at 6 pm.

595th MEETING

Wednesday, 24 May 1961, at 9.30 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) (*continued*)

[Agenda item 2]

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

ARTICLE 27* (Right to leave the territory of the receiving State and facilitation of departure) (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of article 27 of the draft on consular intercourse and immunities (A/4425).

2. Sir Humphrey WALDOCK said that article 27 was open to criticism as to form. The body of the article placed an obligation on the receiving State, whereas the title spoke of a right enjoyed by members of a consulate of the sending State.

* In the second sentence of the article, for "amount" read "moment."