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Summary record of the 595th meeting

Topic:
Consular intercourse and immunities

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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 implicity 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."

3. Mr. PAL urged that it should be clearly stated in the article that its provisions did not apply to nationals of the receiving State. A reference to article 50, which was concerned with immunities, would not suffice.

4. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Pal: paragraph (4) of the commentary did not solve the problem, for article 50 did not cover the situation envisaged in article 27.

5. In view of the doubts expressed by the Belgian Government (A/CN.4/136/Add. 6) concerning the phrase " as soon as they are ready to leave " in paragraph 2, the Drafting Committee might revise the provisions, perhaps on the lines of that contained in article 44 of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13) which used the words " to leave at the earliest possible moment ". Such wording allowed for a reasonable lapse of time to enable the person or persons concerned to make the necessary preparations for departure.

6. Mr. FRANÇOIS recalled that paragraph 2 had been discussed at considerable length at the twelfth session, [1] when some members had been at pains to caution the Commission against wording that might encourage governments to delay the departure until the other parties' attitude had been made clear. Clearly it was important not to condone the practice of delaying such departure, and he would urge the Drafting Committee to bear that very important consideration in mind.

7. Mr. AGO also found the wording used in paragraph 2 unsatisfactory. He pointed out that there was a discrepancy between the English and French texts of article 44 of the Vienna Convention (" at the earliest possible moment " and *dans les meilleurs délais*). He preferred the French expression which, though vague, took account both of the interests of the receiving State and of those of the individual concerned, whereas the English version seemed to be concerned only with the prompt departure of the individual in the interests of the receiving State.

8. Sir Humphrey WALDOCK agreed with the Chairman that the phrase " as soon as they are ready to leave " was an unhappy one. If the Drafting Committee were to find a formula based on either the English or the French text of article 44 in the Vienna Convention, it should specify that the receiving State must grant the necessary time and facilities for departure.

9. Mr. SANDSTRÖM pointed out that there was a significant difference between paragraph 3 in article 27, which denied the benefit of paragraph 2 to members of a consulate discharged locally, and article 44 of the Vienna Convention, which was expressly declared not to be applicable to nationals of the receiving State.

10. He asked for the reason for that difference and also for a further explanation of the meaning of the phrase " discharged locally ".

11. Mr. ŽOUREK, Special Rapporteur, said in reply that the Commission had certainly agreed that article 27 was not applicable to nationals of the receiving State (commentary (4)); as that point had evidently not been brought out sufficiently clearly, an additional clause to that effect could be added to the article.

12. A member of the consulate who was " discharged locally " might be a national of a third State or an individual appointed from the sending State. Dismissal on the spot did occur in practice in both cases and, if necessary, some more explicit wording could be found or a detailed explanation might be inserted in the commentary.[2]

13. The CHAIRMAN, speaking as a member of the Commission, agreed that there was some ambiguity in the phrase " discharged locally ", especially since article 27 did not apply to nationals of the receiving State. Did the phrase then refer to nationals of the sending State who were resident in the receiving State?

14. Speaking as Chairman, he suggested that article 27 should be referred to the Drafting Committee with instructions to add an explicit proviso stating that it did not apply to nationals of the receiving State and to consider the drafting points raised by governments and by members in the course of the discussion, particularly in connexion with the words " their departure as soon as they are ready to leave " in paragraph 2 and the words " discharged locally " in paragraph 3.

It was so agreed.

ARTICLE 28 (Protection of consular premises and archives and of the interests of the sending State)

15. Mr. ŽOUREK, Special Rapporteur, said that he would comment only on one government's comment, that of Spain (A/CN.4/136/Add.8). He could not agree with that government that the terms of article 28 were excessively broad and that the obligation of the receiving State should be confined to respect for the consular archives. The Commission could not overlook the general practice of arranging for the protection of the interests of the sending State in the event of the severance of consular relations.

16. It was his view that the two situations mentioned in paragraph 2 of the article must be provided for.

17. As no objection of principle had been raised to article 28, he believed it could be adopted and referred to the Drafting Committee.

18. Mr. SANDSTRÖM suggested that the scope of the article would be too wide if it referred in general terms to the " interests of the sending State". It should surely be restricted specifically to such interests as came within the province of consular protection.

19. The CHAIRMAN, speaking as a member of the Commission, pointed out that in the parallel provision of the Vienna Convention (article 45 (c)) the words " and those of its nationals " had been added on the ground that the phrase " interests of the sending State " might not necessarily cover the interests of that State's nationals. The Drafting Committee should be asked to consider whether a similar addition was needed in article 28.

20. Speaking as Chairman, he suggested that the article

[1] 547th meeting, para. 59, to' 548th meeting, para. 23, where discussed as article 51; *cf.* also 573rd meeting, paras. 76-78.

[2] A/CN.4/137, Special Rapporteur's observations *ad* article 27.

be referred to the Drafting Committee together with the foregoing observations.

It was so agreed.

CHAPTER II. CONSULAR PRIVILEGES AND IMMUNITIES

ARTICLE 29 (Use of the national flag and of the state coat of arms)

21. Mr. ŽOUREK, Special Rapporteur, said that the only point raised in government comments was whether there should be special mention of the consular flag in the text of the article as proposed by the Government of Norway (A/CONF.4/136). He had no precise information about the number of States which made use of the consular flag, but the right to fly the consular flag was provided in several recent consular conventions, particularly some concluded by the United Kingdom; there was therefore some justification for making an express reference to the practice in the text of the article itself rather than in the commentary. That change should satisfy the Norwegian Government. He had accordingly made the change in the redraft of article 29 proposed in his third report (A/CN.4/137).

22. He had replied to the comment of the Yugoslav Government (A/CN.4/136) with regard to the right of the acting head of post to fly the national flag on his means of transport in his report and suggested that the explanation might be embodied in paragraph (4) of the commentary.

23. The comment of the Belgian Government related purely to drafting.

24. Mr. VERDROSS said that the phrase *ses moyens de transport personnels* was vague. It should be made clear that the intention was to refer to the means of transport reserved exclusively for the use of the consulate.

25. Sir Humphrey WALDOCK agreed that some more precise wording should be found which would specify beyond all doubt that the reference was to means of transport employed strictly in the personal use of the head of post and in the discharge of the functions of the consulate.

26. Mr. MATINE-DAFTARY said that for the purpose of the clause in question the decisive test was the use, not the ownership, of the vehicle. After all, the head of post might not possess a car or he might possess one that failed to match the dignity of his position and would have to hire one for official occasions. It was not clear from the wording of paragraph 2 as it stood whether the national flag could be flown on a hired car.

27. Mr. SANDSTRÖM expressed doubts whether the national flag could be flown on a taxi. Another question was whether it could be flown on a consular car used by a member of the consulate who was not the head of post.

28. Mr. MATINE-DAFTARY said he had not spoken of taxis, but of hired cars, which he considered could certainly fly a national flag when used by a head of post on official business.

29. The CHAIRMAN, speaking as a member of the Commission, observed that the article should not be too specific. There was a close parallel between article 29 of the draft and article 20 in the Vienna Convention, and it might well be referred to the Drafting Committee for reconsideration in the light of the latter text.

It was so agreed.

ARTICLE 30 (Accommodation)

30. Mr. ŽOUREK, Special Rapporteur, said that he had replied to the Norwegian Government's comment in his third report.

31. It remained for the Commission to decide whether to add a provision on the lines of that contained in article 21, paragraph 2, of the Vienna Convention. Previously, as explained in the commentary, the Commission had not done so on the grounds that such an additional obligation might be unduly onerous for the receiving State, particularly if the number of consulates in its territory was large. If the Commission currently took the view that such an additional clause was desirable, it might wish to consider the wording suggested in his third report.

32. Mr. VERDROSS pointed out that article 30 imposed two obligations on the receiving State, viz. to permit the acquisition of premises and to assist the sending State to obtain such premises, whereas article 21 in the Vienna Convention imposed upon the receiving State an alternative obligation, either to facilitate the acquisition of premises or to assist the sending State to obtain accommodation in some other way. Article 30 should be redrafted on similar lines and an additional clause based on article 21, paragraph 2, of the Vienna Convention should be inserted.

33. Mr. AGO agreed with Mr. Verdross and found the wording of article 21 in the Vienna Convention far superior. As drafted, article 30, which seemed to be concerned with certain internal rights and obligations of States, was wholly out of place in a draft concerned with international rights and obligations.

34. The obligation placed on receiving States in paragraph 2 of article 21 in the Vienna Convention was not unduly onerous and could certainly find a place in a draft on consular relations.

35. Mr. ŽOUREK, Special Rapporteur, said that he had no objection to article 30 being redrafted on the lines of the corresponding provision in the Vienna Convention, which in effect stated the same thing though in different form.

36. The CHAIRMAN suggested that article 30 should be referred to the Drafting Committee for revision on the lines of article 21 of the Vienna Convention.

It was so agreed.

ARTICLE 31 (Inviolability of the consular premises)

37. Mr. ŽOUREK, Special Rapporteur, said that some governments, particularly those of the United States and Japan (A/CN.4/136/Add.3 and Add.9), Norway, Spain and Yugoslavia had considered the rule formulated in paragraph 1 of article 31 too categorical and had suggested various exceptions to it. Proposals of a similar character had been made at the Vienna Conference in respect of the

inviolability of the premises of a diplomatic mission, but had not been incorporated in article 22 of the Vienna Convention. His own opinion was that article 31, which was one of the cornerstones of the draft, should not be modified because any weakening of that important rule would lead to friction and dispute between States and would lead to abuses.

38. The Belgian Government's proposal for the inclusion of a provision relating to expropriation raised a problem whose solution would be more appropriate to a multilateral convention.

39. The second point raised by the Belgian Government concerning the possibility of inviolability being claimed for purposes unconnected with the exercise of consular conventions would be taken up at a later stage, in connexion with article 53 (Respect for the laws and regulations of the receiving State).

40. The proposal of the United States Government that the principle of inviolability should be held to extend to premises and archives even if located in local business premises and if the consulate was in the charge of a local business man was more pertinent to the articles concerning honorary consuls. At the twelfth session the Commission had reserved judgment on the point (article 54, commentary (5)) and it would appear from the comments of governments that for the most part they did not think that the inviolability accorded by article 31 should extend to honorary consuls.

41. Mr. GARCÍA AMADOR considered that, in the form in which the clause was worded, there was some danger of the " special duty " mentioned in paragraph 2 being misunderstood. In fact, the obligations placed on the receiving State in paragraph 1 and paragraph 2 were of the same nature. It would be preferable to use more general terms; perhaps the wording of article 22 of the Vienna Convention might provide some guidance.

42. Mr. MATINE-DAFTARY expressed the view that the meaning of the expression " consular premises " in article 31 should be clarified. As things were, the expression was defined in article 1 (b) as any building or part of a building used for the purposes of a consulate; but a consul, who dealt with commercial and cultural matters, among others, might use a hall for the purpose of showing a film about his country or exhibiting his country's products. In that case, would the premises in question be regarded as " consular premises " and as inviolable, in the same way as those of a diplomatic mission? That would be going too far.

43. Mr. FRANÇOIS said that, although he had no proposal for amending article 31, he could only regard the result of the Commission's lengthy debates on the subject and the article that had emerged from the Vienna Conference as highly unsatisfactory. The provisions concerning the inviolability of the premises of a diplomatic mission in the Vienna Convention and those concerning the inviolability of consular premises in the draft were virtually identical. Yet, in the past, a distinction had always been drawn between the extraterritoriality of diplomatic missions and the immunity of consulates. The removal of that distinction was an innovation in international law. In cases of *force majeure* it was dangerous enough to require the consent of the head of diplomatic mission before the local authorities could enter the premises, but in the case of a consulate it would obviously be still more unwise. It would be difficult to find someone qualified to give the necessary consent; moreover, consulates were often situated in one apartment of a large building. The assimilation of diplomatic missions and consulates, with the result that the whole building was endangered, had yielded impossible results. Although he would not propose an amendment, he had serious reservations with regard to the article.

44. Sir Humphrey WALDOCK said that, although the rule that the Commission had formulated might be desirable from the point of view of the progressive development of international law, it went well beyond the municipal law of many countries, including that of the United Kingdom. He agreed with Mr. Matine-Daftary that a more accurate definition of " consular premises " was essential for the purposes of the article.

45. The bilateral consular conventions concluded by the United Kingdom took a much narrower view of the inviolability of consular premises than that adopted by the Commission. The provisions of some of those conventions were reflected in a number of government observations; although most of those conventions referred generally to the principle of inviolability, they qualified it by the very serious proviso that, if the consent of the head of post could not be obtained, entry to the consulate might be gained by the ordinary processes of law, subject to an order from the Ministry of Foreign Affairs. Desirable as the general principle of inviolability might be, the article as it stood went far beyond the general concept of that principle currently held by most States. He shared Mr. François's misgivings in the matter.

46. In addition to making provision for cases of fire and other disasters mentioned by earlier speakers, many bilateral conventions provided that asylum could not be offered in a consulate to protect a fugitive from justice. The Vienna Convention contained no such provision, the matter being left to the general understandings of international law. While he had no specific proposal to make in that respect, he thought the question worth raising in order to put the Commission on guard against a possible danger.

47. Mr. SANDSTRÖM, replying to Mr. García Amador, recalled that the question of the " special " duty of States had been discussed at length in connexion with the draft on diplomatic relations (A/3859, article 20, commentary (3) when it had been explained that, while the receiving State had a general duty to take all appropriate steps to facilitate the exercise of diplomatic functions, it had a special duty to protect the premises against intrusion or damage; naturally, in a country which was at peace the obligations concerned would not be as broad as in a country which was, for example, under martial law.

48. With regard to the general question of the inviolability of diplomatic premises, he had originally taken the view that in some cases the authorities of the receiving State should be allowed entrance. He had, however, been convinced by the argument that it would be dangerous

to give the authorities of the receiving State the pretext for entering the premises of a diplomatic mission, particularly since a way of doing so could always be found in really urgent cases. He therefore thought it best, in the case of article 31 of the present draft, to adhere as far as possible to the wording of article 22 of the Vienna Convention.

49. Mr. ŽOUREK, Special Rapporteur, drew Mr. Matine-Daftary's attention to article 53, paragraph 2, which seemed to meet his difficulty. Moreover, the Commission would have an opportunity of revising the definition of the expression " consular premises " when it dealt with article 1.

50. In reply to Mr. François, he would point out that the Commission had deliberately modelled the provisions concerning the inviolability of consular premises on the corresponding provisions in the draft on diplomatic intercourse. The text which he had originally submitted (A/CN.4/108) had contained certain restrictions but, as was pointed out in paragraph (7) of the commentary, the Commission had decided that article 31 should follow *mutatis mutandis* the terms of what had become article 22 of the Vienna Convention. Moreover, the text of that article had been accepted almost unanimously at the Vienna Conference. Both the substance and form of the article should therefore be retained.

51. The CHAIRMAN, speaking as a member of the Commission, agreed with the Special Rapporteur that the Commission should follow the example of the Vienna Conference, particularly in view of the decision reflected in paragraph (7) of the commentary to article 31. Proposals along the lines of Mr. François's and Sir Humphrey Waldock's remarks had been made at Vienna, but had been rejected by the Conference; thus, the principle of complete inviolability, already approved by the majority of the Commission, had been accepted in respect of diplomatic premises and should be adopted in respect of consular premises.

52. He drew attention to the phrase " and other property thereon and the means of transport of the mission," which had been added during the conference to article 22, paragraph 3, of the Vienna Convention, and suggested that similar wording should also be incorporated in article 31, paragraph 3 of the draft under discussion.

53. Mr. BARTOŠ said that, although personally considering that consular premises should enjoy the greatest possible immunity, he had been led by a close study of the draft and consultations with other jurists to the conclusion that there was an inadmissible contradiction between article 31 as it stood and article 40 (Personal inviolability), which provided for cases of arrest or detention, pending trial, of a member of the consular staff and, consequently, for the execution of orders of arrest or detention. The provisions of article 31, paragraph 3, made it impossible to execute such orders in the consular premises. A study of the most recent bilateral consular conventions further showed that many exceptional cases were provided for, and that consular officials were subject to certain rules relating to the jurisdiction of the receiving State even in cases of imputed offences, provided that the proceedings had begun. For example, if a murder were committed on the consular premises and for some reason, the head of post refused to consent to an investigation (even if the suspect was not a member of his staff), the receiving State would be placed in a very difficult position. The relatively minor restrictions which were to be found in bilateral conventions struck the correct balance between the principle of inviolability and the principle of respect for the criminal jurisdiction of the receiving State.

54. The Commission must, of course, take the responsibility for the shortcomings of the text, since it had decided to delete the exceptions proposed by the Special Rapporteur. The intention of the majority of the Commission had been to lay down an absolutely general principle; it had now become apparent, however, that that principle did not correspond to reality. In article 22 of the Vienna Convention, the absolute personal immunity of diplomatic agents, including administrative and technical staff, was presumed, but no such personal guarantee existed in the draft on consular intercourse. Since career consuls were not assimilated to diplomatic agents, a reservation should certainly be made in respect of the inviolability of the premises.

55. The CHAIRMAN pointed out to Mr. Bartoš that the analogy with the Vienna Convention was in fact closer than it would seem from his (Mr. Bartoš's) arguments. The same problem might arise in the case of the staff of a diplomatic mission, since under article 37 of the Vienna Convention not all the members of the diplomatic staff enjoyed personal inviolability.

56. With regard to the question of asylum raised by Sir Humphrey Waldock, he observed that it was for the Commission to decide whether it wished to discuss the problem. Members should, however, remember that it had decided not to discuss the subject in connexion with the draft on diplomatic relations.

57. Mr. AGO said that he was in favour of leaving article 31 as it stood, but making the addition suggested by the Chairman and bringing it closer into conformity with article 22 of the Vienna Convention. With regard to Mr. Matine-Daftary's comments, the Commission should consider a more accurate definition of the expression " consular premises " when it reviewed article 1. As to the remarks of Mr. François, it might be mentioned in the commentary that in cases of *force majeure*, when the head of post was absent, his consent to entry of the consular premises might be presumed; in his opinion, however, it would be very dangerous to go so far as to state that limitation in the article itself. Of the two dangers of abuse of inviolability by the consul and of the breach of inviolability by the receiving State, the latter was the more serious, for the receiving State had many more possibilities of pressure at its disposal.

58. He drew Sir Humphrey Waldock's attention to paragraph (3) of the commentary to article 53, where the Commission's views on the use of consular premises as an asylum for persons prosecuted or convicted by the local authorities were clearly stated. Accordingly, there was no need to introduce in the article a limitation in connexion with the right of asylum.

59. It might be wise to indicate clearly in the commentary to article 31 that the practice in the matter of the inviolability of consular premises was usually in bilateral instruments laid down in more limited terms than it was in the article, but that it would be in the interests of the progressive development of international law to extend the application of the principle.

60. The case mentioned by Mr. Bartoš could arise even in the case of a diplomatic mission. If a consul were to be arrested for a very serious crime, the receiving State undoubtedly had means of pressure which could achieve the desired end without resorting to entrance into the consular premises; the competent authorities might make representations to the diplomatic mission of the sending State or to its Ministry of Foreign Affairs, the consul's exequatur might be withdrawn, or he might be declared *persona non grata*; but in that case also, it would be wrong to guard more against abuse by the sending State than against abuse by the authorities of the receiving State.

61. Mr. VERDROSS endorsed Mr. Ago's remarks. Moreover, he intended to propose that the final draft convention should be preceded by a preamble similar to that of the Vienna Convention, providing that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the Convention.

62. Mr. ERIM said that the Commission was repeating the debates on the article it had held at the twelfth session (530th, 545th and 571st meetings, where discussed as article 25). Moreover, at least six governments regarded the article as unduly categorical and had suggested that it should be modified. Article 53 admittedly answered many of the objections that had been made, but the outstanding question was that of entry into consular premises in cases of *force majeure* where no offence had been committed. So far as the commentary was concerned, since the draft would probably be amended, it would lose much of its importance. As it stood the article was so categorical that in the practical case of fire breaking out in a block of flats of which one floor was occupied by the consulate, it virtually debarred entry into the premises in the absence of the head of post. Such cases should be expressly provided for, particularly since governments which had not sent in their comments would probably raise objections in the General Assembly or at the plenipotentiary conference if the article did not contain such a provision.

63. Mr. BARTOŠ said that he did not consider that the Chairman's analogy with the position of the staff of diplomatic missions was accurate. Article 31 referred to the consent of the head of post himself, who, even though in charge of the consulate, did not enjoy immunity from criminal jurisdiction, and might, by withholding consent, take advantage of the situation to the detriment of the competent court. By contrast, in the case of diplomatic missions, some members of which did not enjoy immunity from criminal jurisdiction, consent to enter consular premises lay with the head of mission, who was the senior officer of the persons concerned and enjoyed immunity in respect of his person. Moreover, the sending State might have no diplomatic mission in the receiving State, in which case the head of consular post would be the senior official of the sending State in the country.

64. Nor could he agree with Mr. Verdross that the insertion of a preamble along the lines of that of the Vienna Convention — if the Commission were to accept the proposed text — would provide a solution: the inviolability of the consular premises would be governed not by customary law, but by the express and categorical provisions of article 31, since the preamble of the Vienna Convention established the principle that only those situations not regulated by the Convention would be governed by customary law. Where there was a provision in the Convention, then, according to the preamble of the said Convention, customary law would not apply.

65. In reply to Mr. Ago, he would point out that, although other articles of the draft contained provisions limiting the use of consular premises, no sanctions were provided for in the case of breach of those provisions. The breach would constitute an offence under international law, which could be dealt with through the diplomatic channel or through international judicial bodies; it would in any case be incorrect for the authorities of the receiving State to take direct action. He saw some merit of principle in Mr. Ago's argument that the dangers of abuse by the sending State were less than those of abuse by the receiving State, but in the specific case and in the conditions provided by the Convention itself the sending State would run no risk provided that the receiving State acted in accordance with the provisions of the Convention. He would therefore suggest that a phrase along the following lines might be added at the end of paragraph 3 of the article: " except in cases of violation of the rules of this convention ".

66. Mr. ŽOUREK, Special Rapporteur, stressed that the aim of article 31 of the draft was identical with that of article 22 of the Vienna Convention.

67. It would not be desirable to weaken the rule by providing exceptions for certain exceptional cases (fire, committing of a crime on the mission's premises and the like) covering all possible situations. Such emergencies could happen to a diplomatic mission, for it was quite common for such missions to occupy one floor or one apartment in a large building. And yet article 22 of the Vienna Convention had been adopted and he suggested that the similar wording used in article 31 of the consular draft should be approved.

68. Cases comparable to those provided for in article 31 (where the consular premises may not be entered for the purpose of an arrest) could likewise arise in respect of a diplomatic mission, for some of the persons working in such missions did not enjoy diplomatic immunity. In practice, all cases of that kind which had arisen in the past had been settled without much difficulty; the receiving State had in fact at its disposal powerful means of bringing pressure to bear on the foreign mission or consulate concerned in order to obtain the surrender of the person to be arrested.

69. He concurred with the view expressed by Mr. Ago that the greater danger of abuse lay in the action of the local authorities, which had the physical means of entering

the consular premises. That was true with regard to both diplomatic and consular premises. Since the aim pursued in article 31 was identical with that of the corresponding provision of the Vienna Convention, he suggested that the Commission adopt article 31.

70. Mr. PADILLA NERVO said that the Commission was faced with a clear choice between two courses. Either it could accept the principle of inviolability in the terms expressed in article 31 or it could draw up an exhaustive list of all the exceptions and limitations to the rule of inviolability. Bilateral consular conventions showed that such exceptions and limitations existed in State practice.

71. The opinion of the majority would probably be similar to that which had emerged both in the Commission itself and in the Vienna Conference in regard to the diplomatic bag. Both in the Commission and in the Conference, attempts to allow exceptions to the rule of inviolability had been rejected, the opinion of the majority being that any exception might lead to abuses and would substantially weaken the rule. He shared Mr. Ago's view that the main danger to be guarded against was that of abuse by the receiving, rather than by the sending State.

72. Commentary (8) to article 31 stated that the principle of the inviolability of the consular premises was recognized in numerous consular conventions and gave a list of such conventions, with references to the relevant provisions thereof. Those conventions generally stated that consular premises could not be entered by the local authorities except with the consent of the head of post. However, it was usually added that such consent could be tacit and that it would be assumed in the event of fire or other disaster or if the local authorities had reasonable cause to believe that a crime of violence had been, was being, or was about to be committed in the consular premises. Also, it was usually stated that if the consent of the head of post could not be obtained, the premises could be entered pursuant to an order of the competent judicial authorities and with the consent of the Ministry of Foreign Affairs of the sending State. Consuls were forbidden to afford asylum to fugitives from justice; if the head of post refused to surrender such a fugitive on the lawful demand of the local authorities, those authorities could, pursuant to an order of the judicial authorities and with the consent of the Ministry of Foreign Affairs of the sending State, enter the consular premises to apprehend the fugitive.

73. Lastly, such provisions usually stated that any entry or search of consular premises must not infringe the inviolability of the consular archives.

74. The case of the arrest or detention, pending trial, of the head of a consular post was dealt with in the last sentence of article 40, paragraph 4, which specified that, in that case, the receiving State had a duty to notify the diplomatic representative of the sending State.

75. Of the two courses open to the Commission he preferred the first: the principle of inviolability should be laid down in the terms set forth in article 31, subject to the amendment of paragraph 3 to bring it into line with the terms of the corresponding paragraph of article 22 of the Vienna Convention.

76. Mr. SANDSTRÖM recalled that Sir Humphrey Waldock had pointed out that certain bilateral conventions did not go so far as article 31 in stating the principle of inviolability. It was therefore useful to examine the appropriate provision of a typical bilateral consular convention, that of 1952 between the United Kingdom and Sweden.[3]

77. The relevant passages of article 10 of that Convention showed that it was possible to draft provisions of the type of article 31 in more flexible terms. However, he was inclined to agree with those members who thought that it might be dangerous to allow exceptions to the rule of the inviolability of consular premises and he therefore supported the text as drafted.

78. Sir Humphrey WALDOCK emphasized that he had mentioned the provisions of bilateral conventions for the purpose of demonstrating that article 31 did not constitute a codification of existing law. He would be satisfied if a reference to the provisions of existing conventions were added in the commentary. He was impressed by the arguments advanced in favour of a liberal solution, but it should be recognized that difficulties could arise if some freedom were not allowed to the authorities of the receiving State to enter the consulate premises in case of serious need, such as the fear of a burglary, where prompt action was desirable.

79. Article 53, paragraph 3, was of assistance in making it clear that the consular premises must not be used in any manner incompatible with the consular functions and that, if other activities were carried on there, the consular part must be kept separate from the part where the other activities took place. That language could usefully be incorporated into the definition of consular premises to be given in article 1. If that were done, the scope of the provisions of article 31 would become clearer and less open to objection.

80. The case where a consul committed a serious offence so that his arrest became necessary was essentially a question to be dealt with through the diplomatic channel. The receiving State had the means to bring pressure to bear on the sending State and its consulate in such cases. But what would be the position if the receiving State decided that the only appropriate action was to withdraw the exequatur of the consul and to close down the consulate? Would such action terminate the existence of the consular premises as such? For his part, he was not sure what was the answer to that question given by the texts of the relevant articles of the Commission.

81. Mr. AMADO said that all the statements made, both in support of the rule and in favour of stating exceptions, were sound. The absolute terms in which article 31 had been drafted could undoubtedly give rise to difficulties, but he agreed with Mr. Padilla Nervo that it would be dangerous to enumerate exceptions to the rule of the inviolability of consular premises.

[3] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58. V.3, pp. 467 *et seq.*

82. He had not been very much impressed by some of the arguments put forward by governments which criticized article 31 as too categorical. The Government of Norway (A/CN.4/136), for example, had suggested that the second sentence of paragraph 1 might preclude even a courtesy call to the consulate. Clearly, the terms of article 31, however categorical, must be construed reasonably. For example, the tacit consent of the head of post to enter the premises could be assumed in the event of such emergencies as fire.

83. For those reasons, he supported the text of article 31, which seemed to contain only a very small element of innovation or progressive development of international law. The rule set forth in the article was fully consistent with the basic purpose of consular relations, which were established by States in order to provide services of mutual benefit to both the receiving State and the ending State.

84. With regard to Mr. García Amador's remarks concerning the phrase " special duty ", the adjective " special " was useful in the context in order to stress that the receiving State was required to take special steps to protect consular premises from mob violence; those steps would go beyond those normally taken in the discharge of itsgeneral duty to maintain public order.

85. Mr. GARCÍA AMADOR explained that he had not disputed that a special obligation existed in the particular case, but the main provision of article 31, i.e., paragraph 1, also placed a special obligation upon the receiving State. His intention had been to point out that the expression " special duty ", which appeared in paragraph 2, was not usual, although it had been included in article 22 of the Vienna Convention. What was really meant was that the receiving State was under an obligation to extend a special protection to the consulate premises. He therefore suggested that language to that effect should be used instead of the opening words of paragraph 2.

86. Sir Humphrey WALDOCK said that, in principle, he would accept the text of article 31, provided that the commentary was expanded so as to indicate the more restrictive nature of the relevant articles of the bilateral conventions to which he had referred. In that manner, the commentary would avoid giving the impression to students of the draft that the Commission had not appreciated that its proposed text went beyond some existing practice. The Drafting Committee should take into account the discussion on article 53, paragraph 3.

87. Mr. ŽOUREK, Special Rapporteur, said that Sir Humphrey Waldock's wishes would be taken into account: the final text of the commentary would be expanded so as to describe the relevant provisions of bilateral conventions. Of course, the commentary would refer not only to those conventions which stipulated exceptions to the rule of inviolability, but also to those which set forth the principle in broader terms than did article 31. For example, certain bilateral conventions extended the principle of inviolability to the private residence of the consul.[4]

88. The CHAIRMAN, summing up the debate on article 31, said that:

(i) the majority appeared to think that article 31 should stand as drafted, subject to changes to bring the article into line with the provisions of article 22 of the Vienna Convention;

(ii) the Commission was agreed that the Special Rapporteur should be asked to expand the commentary so as to indicate the existing practice: it would thus be made clear that article 31 contained some element of progressive development and was probably not yet a generally accepted rule of international law;

(iii) the point raised by Mr. Matine-Daftary with regard to the definition of consular premises would be dealt with in connexion with article 1 (Definitions);

(iv) the point raised by Mr. Bartoš could be usefully discussed in connexion with article 53.

89. Mr. BARTOŠ asked the Chairman to request the Special Rapporteur to mention in the commentary, as was customary in such cases, the fact that there had been an expression of opinion against the provisions of article 31 as proposed.

90. The CHAIRMAN said that the point would be taken into account. If there were no objection, he would take it the Commission agreed to instruct the Drafting Committee and the Special Rapporteur as he had suggested.

It was so agreed.

ARTICLE 32 (Exemption from taxation in respect of the consular premises)

91. Mr. ŽOUREK, Special Rapporteur, recalled that, in deference to objections of governments to a similar article in the draft on diplomatic intercourse, he had prepared at the previous session a text specifying that the exemption to which the article related was an exemption *in rem* affecting the actual building acquired or leased by the sending State. However, after a discussion in the Drafting Committee, it had been agreed to retain a text similar to that of the corresponding clause in the draft on diplomatic intercourse, but to stress in paragraph (2) of the commentary that the exemption was intended to be an exemption *in rem*, with the additional comments:

> " In point of fact, if this provision was interpreted as according exemption from taxation only to the sending State and head of consular post, but not to the building as such, the owner could charge these taxes and dues to the sending State or head of post under the contract of sale or lease, and the whole purpose which this exemption sets out to achieve would in practice be defeated ".[5]

92. The Governments of Norway, Denmark (A/CN.4/136/Add.1) and the United States of America (A/CN.4/136/Add.3) had expressed objections or reservations to

[4] *Cf.* commentary (9) to the article.

[5] *Cf.* also Special Rapporteur's observations in his third report (A/CN.4/137) *ad* art. 32.

that interpretation. The United States Government had pointed out that the article, by eliminating any differentiation in treatment as between property leased by the sending State and property owned by it, established a new concept in the administration of property taxes: generally no distinction was drawn in the application of such taxes on the basis of who the lessee might be.

93. The Chilean Government (A/CN.4/136/Add.7) had proposed that, in order to bring the text of article 32 into line with commentary (2), it should be amended to read: " Consular premises owned or leased by the sending State or by the head of post shall be exempt . . ."

94. He had reserved his final opinion on the article until the results of the Vienna Conference were known, in the expectation that it would then be seen how far governments were prepared to go in granting exemption from taxation. In fact, that Conference had adopted, as article 23, paragraph 1, of the Vienna Convention a provision similar in terms to article 32 of the draft, but had added a paragraph 2 which greatly limited the scope of paragraph 1.[6] In point of fact, the operation of paragraph 2 would mean that in the great majority of cases paragraph 1 would not apply to leased premises because, in most countries, certain taxes were in fact payable by the lessor of the premises.

95. In conclusion, the Commission hardly adopt any other course than to incorporate into article 32 of the draft a second paragraph similar to article 23, paragraph 2, of the Vienna Convention. It was extremely unlikely that States would be prepared to grant a more liberal measure of tax exemption to consulates than to diplomatic missions, particularly since consulates were much more numerous than embassies. Nevertheless the Commission should endeavour in the commentary to article 32 to determine the scope of paragraph 2 of the article.

96. Mr. MATINE-DAFTARY said that, as he had pointed out during the discussion in the Vienna Conference, the insertion of paragraph 2 added nothing to the provisions of article 23 of the Vienna Convention. The owner of leased premises was subject to the local laws and was, of course, not exempt from any taxes which might be payable on the rent which he received. The fact that he rented his property to a diplomatic mission or to a diplomatic officer made no difference to his position in regard to local taxation.

97. The CHAIRMAN, speaking as a member of the Commission, admitted that, when he had taken part in the discussions at Vienna, he had been somewhat puzzled by the terms of article 23, paragraph 2.

98. The intention of those who had proposed that paragraph had been to make those taxes payable even if, under the terms of the lease, the mission had agreed to bear them. Cases had apparently occurred where a mission had subscribed to such an agreement and had subsequently sent a note to the Ministry of Foreign Affairs of the receiving State to the effect that, since diplomatic missions were exempted from taxation, it should not pay the tax in question. By stating that exemption did not apply to those taxes, paragraph 2 would have the effect of compelling a diplomatic mission to pay them if it had agreed to do so in the lease.

99. Mr. VERDROSS said that article 31 could not go further than article 23 of the Vienna Convention. He therefore proposed the addition of a paragraph 2, similar to paragraph 2 of article 23 of that Convention.

100. He pointed out that, in States where a land registry existed, certain dues were payable in respect of the registration of transactions relating to land. Those dues could be quite high and it was desirable to state in the commentary whether they constituted a tax from which the consular premises were exempt or whether they represented payment for the specific service of registering the transaction.

The meeting rose at 1 p.m.

596th MEETING

Thursday, 25 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)

[Agenda item 2]
(*continued*)

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

ARTICLE 32 (Exemption from taxation in respect of the consular premises) (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 32 of the draft on consular intercourse and immunities (A/4425).

2. Mr. JIMÉNEZ DE ARÉCHAGA agreed with Mr. Verdross (595th meeting, para. 99) that article 32 should be redrafted so as to conform with the terms of article 23 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13), since the Commission could not propose to give a greater measure of tax exemption to consular posts than that given to diplomatic missions.

3. As he understood it, paragraph 2 of article 23 of the Vienna Convention was designed to incorporate into the text of that Convention the idea expressed in commentary (2) to the corresponding article of the Commission's draft on diplomatic intercourse (A/3859, article 21). The commentary stated that the exemption did not apply to the case where the owner of leased premises specified in the lease that the taxes referred to in the

[6] Article 23, paragraph 2, of the Vienna Convention provides: "The exemption referred to in this article shall not apply to such dues and taxes payable under the law of the receiving State by persons contracting with the sending State or the head of the mission."