Document:-
A/CN.4/SR.601

Summary record of the 601st meeting

Topic:
Consular intercourse and immunities

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

601st MEETING

Thursday, 1 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

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

(*continued*)

[Agenda item 2]

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

1. The CHAIRMAN, referring to the decisions taken concerning article 40 (559th meeting, paras. 53 and 75) explained that, since the Special Rapporteur's new text had been approved with certain changes, he had not put Mr. Edmond's proposal to the vote. However, there was nothing to prevent Mr. Edmonds or any other member of the Commission from re-introducing the text of article 40 as adopted at the twelfth session at the time when the Commission came to discuss the Drafting Committee's report.

2. He invited the Commission to take up article 41 of the draft on consular intercourse and immunities (A/4425).

ARTICLE 41 (Immunity from jurisdiction)

3. Mr. ŽOUREK, Special Rapporteur, drew attention to his summary of government comments in his third report (A/CN.4/137, *ad* article 41). In addition, in a comment received subsequently the Spanish Government (A/CN.4/136/Add.8) had stated that it had no objection to article 41 provided that the narrower definitions of " employee of the consulate " and " private staff " suggested in the same Government's comment on article 1 were accepted.

4. In deference to the objections of two governments to the phrase " acts performed in the exercise of their functions ", he had prepared a redraft of the article before knowing the terms of the final corresponding provisions of the Vienna Convention on Diplomatic Relations (A/CONF.20/13). As the Commission would see, article 37, paragraph 3, of that Convention contained the phrase in question and so did article 38, paragraph 1, of the Convention with the additional adjective " official ", as in article 50 of the draft on consular intercourse.

5. Since the Commission wished wherever possible to follow the wording of the Vienna Convention, he would withdraw his redraft and recommend that the Commission revert to the text of article 41 as adopted at the twelfth session, particularly since the two criticisms which had caused him to redraft the article did not concern a major issue.

6. He doubted whether the Danish Government's suggestion (A/CN.4/136/Add.1) concerning liability for damage caused by motor vehicles would be acceptable in a multilateral instrument and, as explained in his observations on that suggestion, he thought the matter would best be regulated by bilateral agreement. A number of recent consular conventions contained a clause on such liability. If the Commission so desired, he would draft an appropriate text which would probably require a separate article.

7. In his third report he had replied to the question of Indonesia and the Philippines concerning the general criterion for determining whether an act had been performed in the exercise of official functions.

8. As the Commission had indicated in paragraph (3) of the commentary, it would be extremely difficult to frame a general rule defining what acts fell within the scope of the exercise of consular functions and had pointed to the danger of in any way qualifying the immunity laid down in article 41, for such a qualification might lead to consuls being hampered in the exercise of their functions, particularly in view of the existing limitations on consular immunity.

9. Article 41 and those following of course raised very interesting theoretical issues, but he appealed to members to confine their remarks to the points raised by governments since the Commission still had numerous articles, including some new articles, to consider.

10. Mr. VERDROSS said that he regretted the Special Rapporteur's withdrawal of his redraft, for the redraft was far superior to that adopted at the previous session. As an example of the kind of difficulty to which the 1960 text of article 41 might give rise, it could be construed to mean that a consul who, provoked by some remarks made in the course of an official conversation, killed the speaker, had committed an act performed in the exercise of his functions.

11. For the purposes of article 41 there could be only one possible method of distinguishing between official and private acts: the former were attributable to the sending State and the latter to an individual. If on the grounds that similar wording had been approved by the Vienna Convention, the Commission maintained the 1960 text of article 41, he urged that it should be clearly explained in the commentary that the last phrase meant acts attributable to the sending State because performed in the exercise of consular functions.

12. Mr. MATINE-DAFTARY preferred the text of article 41 as adopted at the twelfth session, which would be perfectly intelligible to jurists since the expression " acts performed in the exercise of their functions " occurred in numerous codes and had been discussed in great detail in cases dealt with by the courts (reports of cases, e.g., in the *Recueil de Jurisprudence* by Dalloz). Of course, if there were any dispute whether a particular act came within that definition, the matter would be settled by the courts. He was not in favour of excessively detailed explanations in the commentary.

13. The Special Rapporteur's redraft of the article did not make the meaning any clearer, could cause difficulties of interpretation and might provoke questions about the Commission's reasons for departing from the 1960 version and also from the language used in the Vienna Convention.

14. Since in most countries third party liability insurance was compulsory, perhaps the point of the Danish Government should be referred to in the commentary.

15. The CHAIRMAN pointed out that the redraft of article 41 as given in the Special Rapporteur's third report was no longer before the Commission. He hoped that article 41, which was a simple one, could be disposed of quickly.

16. Mr. EDMONDS said that article 41 presented some very real difficulties. As adopted at the twelfth session, it was extremely vague and, moreover, would be unworkable in practice. He was uncertain what was meant by the words " shall not be amenable to the jurisdiction of the judicial or administrative authorities ". It might be read to mean that a consul could not be subjected to judicial or administrative proceedings, except for an act performed outside of the exercise of his functions. Only for such an act could he be brought before a court of law or before an administrative tribunal. Alternatively those words might be construed to mean that no member of a consulate could be held liable in respect of a judgment in civil or criminal proceedings for an act performed in pursuance of his functions.

17. Mr. YASSEEN supported the Special Rapporteur's arguments in favour of the text adopted at the previous session.

18. A provision on the lines suggested by the Danish Government would be appropriate with respect to members of a diplomatic mission who enjoyed immunity from civil jurisdiction, but was unnecessary in the present draft since consular officials were bound to respect the laws and regulations of the receiving State concerning the compulsory insurance of motor vehicles.

19. As to the Swedish Government's comment (A/CN.4/136/Add.1), there was a real difference in scope between the expression used in article 41 and that used in article 50, paragraph 1. The latter provision, which was necessary in the interests of the exercise of consular functions, went far enough.

20. The CHAIRMAN, speaking as a member of the Commission, agreed that Mr. Edmonds had drawn attention to a real problem, but it was one of wording rather than substance. Any dispute about whether an act was one performed in the exercise of consular functions would be adjudicated by a court.

21. He, too, preferred the text of article 41 as adopted at the twelfth session and suggested that Mr. Edmonds' criticism would be met by some such wording as " Members of the consulate shall enjoy immunity from the judicial and administrative jurisdiction of the receiving State in respect of acts performed in the exercise of their functions ". He put that wording forward for consideration by the Drafting Committee.

22. Mr. GROS said that the purport of the French text of article 41 was perfectly clear and accorded with the wording suggested by the Chairman. The provision conferred immunity from jurisdiction in respect of any act relating to the exercise of consular functions. That was no innovation, but an established rule of law. For example, an action could not be brought against a consul in the courts of the receiving State for refusal to issue a visa or for the dismissal of a national of the receiving State who was a member of the consular staff. Again, in the Dillon case between France and the United States in 1854, the refusal of a French consul at San Francisco to appear as a witness in a matter concerning the exercise of his functions had been allowed.

23. Mr. Matine-Daftary had rightly observed that the meaning of the expression " acts performed in the exercise of official functions " was well known both in municipal law and international practice, and French administrative case-law used a good criterion: an act that was separable from official acts. The matter had been ably expounded in paragraph (2) of the commentary to article 41, from which it was clear that the act committed in the example described by Mr. Verdross would not be classed as an official act. In case of any doubt whether an act was performed in the exercise of consular functions, the courts would decide. It must not be overlooked, however, that such a question might be raised by the States concerned through the diplomatic channel, thus providing a fresh safeguard of a reasonable interpretation of the phrase " acts performed in the exercise of their functions ".

24. The text of article 41 and the commentary were acceptable.

25. He was not altogether convinced by Mr. Yasseen's contention that an express provision on the lines of that suggested by the Government of Denmark was unnecessary. A member of a consulate in a State where third party insurance was compulsory might conceivably plead article 41 in order to claim that he was not required to be insured against liability for accidents which occurred during his journeys to and from the office or to and from official ceremonies; in that connexion he recalled that it had been in such circumstances that the driver of the car of the Secretary-General of the United Nations had committed a traffic offence. It seemed desirable to stipulate either in the text or very clearly in the commentary that, notwithstanding the provisions of article 41, consular officials must comply with the laws and regulations of the receiving State in respect of compulsory insurance against motor accidents, even on the occasion of official journeys.

26. Mr. SANDSTRÖM said that it was not necessary to introduce in the article itself a provision on the lines suggested by the Danish Government, for vehicles belonging to members of a consulate were obviously also used for private purposes and would therefore be automatically subject to the legislation of the receiving State, which under article 53 the member of the consulate was bound to respect.

27. Mr. YASSEEN opined that regulations concerning compulsory insurance were bound to be applicable to consular officials since nothing precluded such applicability. With regard to Mr. Gros's point, it was hardly likely that a consul would assert that his motor vehicle was used exclusively in the exercise of his consular functions.

28. Mr. LIANG, Secretary to the Commission, referring to the case involving the former Secretary-General of

the United Nations, explained that in fact it had been his chauffeur who had been summoned for exceeding the speed-limit in New York and the question had arisen whether the act had been in the performance of the Secretary-General's functions. The former Secretary-General had ordered the chauffeur to submit himself to the jurisdiction of the court without prejudice to the question whether immunity could have been claimed by virtue of the Agreement between the United Nations and the United States regarding the Headquarters of the United Nations, signed on 26 June, 1947.[1]

29. As far as a compulsory insurance was concerned, under the terms of article 53 there could be no doubt that a member of a consulate was under the same obligation as a national of the receiving State to comply with its regulations.

30. Mr. GROS said that the case cited raised, as did many others, the question under discussion whether the act of proceeding to an official ceremony was within the exercise of official functions. The point was not a theoretical one; it had happened that a diplomatic agent involved in an accident had declined to disclose the number of his insurance policy pleading the immunity of an official journey. It was extremely important to ensure that article 41 was not involved against the laws and regulations of the receiving State concerning compulsory insurance.

31. Mr. AMADO urged the Commission to consider the insertion of a provision on the lines of the Danish Government's suggestion because of the ever-increasing number of motor accidents. If no such express provision were inserted in the article itself, a statement in the strongest possible terms was needed in the commentary.

32. Mr. ŽOUREK, Special Rapporteur, assured Mr. Amado that he would insert a very explicit statement in the commentary to cover the important point raised by Mr. Gros. In view of the terms of article 53, he doubted whether the Commission could go any further.

33. In order to give satisfaction to Mr. Verdross, he would also prepare a more detailed explanation for the commentary of the meaning of " acts performed in the exercise of their functions ".

34. Mr. BARTOŠ said that in the interests of the progressive development of international law the Commission should insert in the article itself a provision on the lines of that suggested by the Danish Government. He would point out that even diplomatic officials could not import a motor vehicle or obtain licence plates in the receiving State without producing evidence of full third-party insurance. If, however, the opinion that the matter should be dealt with in the commentary prevailed, he would strongly support Mr. Amado's plea for a categorical statement on the subject.

35. Mr. PADILLA NERVO strongly supported the views expressed by Mr. Amado and Mr. Bartoš and pointed out that in New York diplomats were not given special number plates until they had taken out an insurance for their cars.

36. As to the wording of article 41, in view of the statement contained in the first sentence of paragraph (2) of the commentary, perhaps the word " official " should be inserted before the word " acts " in the text of the article itself.

37. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of the text of article 41 as adopted at the twelfth session. He suggested that it be referred to the Drafting Committee in the light of the observations made by Mr. Edmonds and Mr. Padilla Nervo, as well as his own suggestion as to wording.

38. The point raised by Mr. Gros concerning compulsory motor car insurance might be dealt with in the commentary.

It was so agreed.

ARTICLE 42 (Liability to give evidence)

39. Mr. ŽOUREK, Special Rapporteur, introducing the article, said that a number of general observations had been received from governments. Thus, the Government of Spain considered that the privilege of giving evidence at his own residence should be granted to career consuls only. The Commission had already considered similar objections and had pointed out that chapter II of the draft referred to career consuls only, while chapter III related to the privileges and immunities of honorary consuls. The Government of the Philippines (A/CN.4/136) had criticized the drafting of paragraph 1, specifying that the word " liable " was negated by the phrase " no coercive measure may be applied ". The Norwegian Government (*ibid.*) had also criticized paragraph 1, but on more substantive grounds, stating that the first sentence seemed to follow *a contrario* from other articles of the section and that the rule set forth in the second sentence was not warranted by generally accepted principles of international law or by reasonable considerations relating to the progressive development of international law. He could not agree with that government that the paragraph should be deleted, since there seemed to be a need to set forth clearly the two rules incorporated in the article at the twelfth session. The first sentence, moreover, incontestably corresponded to general practice in the matter, and the second sentence, as members of the Commission had explained at length, definitely met the needs of the smooth operation of consular relations, as well as those of the progressive development of international law.

40. The Danish Government did not consider that there was sufficient ground for including in the draft the rule formulated in the second sentence of paragraph 1. The Chilean Government (A/CN.4/136/Add.7) considered that paragraphs 1 and 2 should be deleted, since they conflicted with the principle that, except in respect of acts forming part of their functions, consular officials should be subject to the ordinary jurisdiction of the receiving State. The Yugoslav Government (A/CN.4/136) had made three suggestions: first, that a provision

[1] United Nations, *Treaty Series*, vol. II (1947), No. 147, p. 11.

should be included to the effect that the consul could submit a written declaration instead of giving evidence at his official residence; secondly, that a rule should be added stipulating that, in cases of refusal to give evidence on grounds that such evidence was connected with the exercise of consular functions, the receiving State might request the sending State to authorize the consul to give evidence; and, thirdly, that the article should provide that the consul was not obliged to testify under oath. He had slightly amended the text of paragraphs 1 and 2 to take into account the observations of the Philippine and Yugoslav Governments. In paragraph 1, he had replaced the words " are liable " by " may be called upon ", to meet the Philippine objection, and had added the words " or accept a written statement from him " at the end of paragraph 2 in order to comply with the first suggestion of the Yugoslav Government.

41. With regard to comments on paragraph 3, there was the proposal of the Netherlands Government (A/CN.4/136/Add.4) that the rule formulated in the last sentence of paragraph (3) of the commentary should be added to paragraph 3 of the article. The Commission might well adopt that suggestion particularly since the idea had received support at the twelfth session (573rd meeting, paras. 36 and 38). The Chilean Government considered that the last sentence of paragraph 3 should be deleted, on the grounds that, since the official exercised a right in declining to give evidence, he could not be penalized or subjected to coercive action by reason of his decision. Although he agreed that the comment was strictly speaking logical, it was important to include the provision in the article, particularly in view of the United States Government's comment (A/CN.4/136/Add.3) that the test of whether a function was official was whether the sending State assumed responsibility for it and that further consideration should be given to the matter of requiring a consular official to give evidence or permitting him to decline to do so; it seemed particularly important, moreover, to provide expressly that of a consular official's refusal to give evidence should no tbe regarded as contempt of court.

42. Certain drafting changes suggested by the delegation of Ghana in the Sixth Committee at the fifteenth session of the General Assembly, referred to in his third report, by the Philippine Government and the United States Government should be referred to the Drafting Committee. The Belgian Government (A/CN.4/136/Add.6) had suggested that the word " office " at the end of paragraph 2 should be replaced by " the consulate "; that would be an undoubted improvement, being in conformity with the terminology accepted by the Commission.

43. Apart from the amendments he had suggested, the Commission should retain the text that it had adopted after exhaustive discussion at the twelfth session, particularly since few governments had proposed any drastic changes.

44. Mr. BARTOŠ said that, in his personal capacity, he had been unable to agree with the drafting of the Yugoslav Government's suggestion that the consul might always be entitled to submit a written declaration instead of giving evidence at his office or residence, because that would be contrary to the principles of the *procédure contradictoire*. Nevertheless, the wording that the Special Rapporteur had found to comply with the Yugoslav Government's suggestion had dispelled his doubts and provided a happy solution.

45. A more important point, however, was that of the settlement of disputes between the consul and the courts of the receiving State. If a consul refused to give evidence, no coercive measure could be applied to him. The consul might, however, agree to give evidence, but withhold certain testimony on the grounds that it was connected with an official secret or with the exercise of his functions and, if the court disputed those grounds, the question could be settled only by the sending State. It was essential to insert a provision to that effect in the article itself or in the commentary, for there was a widespread notion that, having agreed to testify, the consul was subject to the procedures of the court where the evidence was taken. In actual fact, if that court assumed competence to settle such a dispute, it would be interfering in the public acts of the sending State; the question should be settled by that State in keeping with its own municipal law. According to information at his disposal, nearly two-thirds of all States did not allow their consular officials to give evidence in foreign courts concerning matters which came to their notice in the course of their public functions without the express permission of the home State. While that was an administrative guarantee, and not an absolute prohibition, the permission was issued at the ministerial level. A consul might decline to give evidence without pleading official secrecy, but in view of the possibility of disciplinary or judicial sanctions being imposed by the authorities of his own State if he had agreed to give evidence, he might decline to testify by pleading official secrecy or that the evidence was connected with the performance of his official functions. Accordingly, it was essential to state at least in the commentary that in such cases the receiving State might ask the sending State either to authorize the consul to give evidence or to settle the question whether or not official secrecy was involved.

46. Mr. VERDROSS said he had two questions to ask the Special Rapporteur. In the first place, could the court of the receiving State call upon members of the consulate to attend as witnesses directly? Under Austrian law, for example, such a request had to be made through the Ministry of Justice; that point might be mentioned in the commentary.

47. Secondly, if the member of the consulate concerned was a national of the receiving State, and no official functions whatsoever were involved, could no coercive measures be applied to compel him to give evidence? The Commission would surely be going too far in extending immunity to such persons.

48. Mr. AGO said he would be extremely interested to hear the Special Rapporteur's reply to Mr. Verdross's second question.

49. He observed that the passage " no coercive measure may be applied with respect to them " was open to

either a narrow or a broad interpretation. He could agree with the narrow interpretation that the consul could not be compelled to attend as a witness in judicial or administrative proceedings; where acts unconnected with official functions were concerned, however, could proceedings be instituted against the consul for failure to attend, and could he, for example, be fined for non-appearance?

50. The CHAIRMAN, speaking as a member of the Commission, said he had some doubts concerning the relationship between paragraphs 1 and 3. The Commission's intention at its twelfth session had been to indicate a consul's obligation to give evidence; he was not sure that the article as a whole conveyed that obligation. The first sentence of paragraph 1 was sufficiently categorical to be interpreted as covering all the eventualities which might arise, but the provision of the first sentence of paragraph 3 did not make it clear enough that the first sentence of paragraph 1 referred only to matters not connected with the performance of official functions. It might therefore be advisable to add at the end of the first sentence of paragraph 1 a phrase along the lines of " except in matters connected with the exercise of their functions ". The obligation to give evidence in all other cases would thus be made clear.

51. Mr. SANDSTRÖM fully endorsed the Chairman's suggestion.

52. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Verdross's first question, said that under the law of several countries transmission of the summons to the consuls in the circumstances contemplated was conducted exclusively through the Ministry of Justice, or Ministry of Foreign Affairs, a rule applicable both to diplomatic agents and to consular officials. Under many consular conventions, however, the courts could communicate with such officials direct, and would merely prohibit any threat of a penalty for non-appearance. In such cases his view was that the courts could communicate direct with consular officials, but without threatening any penalty should they not comply with the summons. The first sentence of paragraph 1 might therefore be left as it stood.

53. With regard to Mr. Verdross's second question, a consul who was a national of the receiving State should not enjoy the privilege conferred by article 42 in respect of acts which were not connected with the performance of official functions. That might be stated more clearly in the final commentary to the article. Moreover, the point seemed to be covered by article 50, paragraph 1.

54. He pointed out to Mr. Ago that the passage " no coercive measure may be applied " clearly excluded any measure that the judicial or administrative authorities might be entitled to take against a consular official in order to compel him to give evidence. Even a fine imposed for non-appearance would be a " coercive measure ". If the authorities of the receiving State questioned the grounds of the consular official's refusal, they could of course seek redress by applying to the sending State; the result of such a step would depend on whether the matters concerning which evidence was to be taken were connected with the consular official's functions.

55. He would accept the Chairman's suggested amendment, which would clarify the relationship between paragraphs 1 and 3.

56. Mr. VERDROSS said he could not agree with the Special Rapporteur's explanation that his second question was answered by article 50, paragraph 1, for that clause referred only to official acts already performed. It should be made quite clear in article 42 that exemption from coercive measures in the event of refusal to give evidence did not apply to nationals of the receiving State in respect of acts having nothing to do with official functions.

57. Mr. PAL, referring to the Chairman's suggestion with regard to paragraph 1, said that the Commission's original idea had been to follow the guidance of certain consular conventions, and especially that of article 13 (3) and article 12 (5) of the Consular Convention of 1952 between the United Kingdom and Sweden. [2] The meaning of paragraph 1 — which corresponded to article 13 (3) of the said Convention — was that, in general, members of the consulate were liable to attend as witnesses, but that, if they declined, no coercive measures should be taken to compel them to attend. Paragraph 3, on the other hand, set forth their right to claim the privilege of declining to attend. Thus, under paragraph 1, members of the consulate could decline to attend in all cases, whether or not they were entitled to claim the privilege; if they did so decline, all other consequences of such refusal would follow, except that no coercive measures could be taken against them. Under paragraph 3, however, no consequences could attach to refusal to give evidence as it would be in claim of privilege.

58. Mr. AGO fully supported the Chairman's amendment to paragraph 1. Without that amendment, the article might be interpreted as allowing the consul to avoid the general obligation to give evidence.

59. With regard to the Netherlands Government's proposal concerning the sentence to be added to paragraph 3, he said he was not sure that it would be wise to include too many detailed provisions in the article itself. A consul would not without weighty reasons decline to give evidence concerning events coming to his notice in his capacity as registrar. By laying undue stress on such details, the Commission would run the risk of weakening the immunity which article 42 was to confer. In the event of abuse, the sending State could always recall or discharge the official concerned. A multilateral convention should set forth clear general principles; the details could be left to international practice and to bilateral treaties.

60. Mr. FRANÇOIS said that he fully understood the reasons given by Mr. Ago for his hesitation in regard to the Netherlands proposal to insert a provision to the effect that a consular official should be prepared to

[2] *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3.), pp. 472 and 473.

testify to the authenticity of deeds executed by him. However, it was highly desirable to stipulate, for that case, an exception to the rule specified in article 42, paragraph 3 because in some countries a person who wished to plead a document drawn up at a consulate would need the consular official's testimony to the authenticity of that document.

61. It had been suggested that a consul would normally not refuse to give the evidence in question, but he had some doubts on that point. If, under the provisions of article 42, a consul were to have the right to decline to give evidence in all matters connected with the performance of his official duties, he might be inclined to think that the prestige of his office would suffer if he were to give such evidence. The only method of ensuring that the desired evidence was forthcoming was to supplement article 42 in the manner proposed by the Netherlands Government, making it clear, of course, that the proposed provision did not imply that the consular official was liable to give details of the background of the instruments or to divulge information which had come to his knowledge in the course of executing them.

62. Mr. AMADO drew attention to the somewhat unsatisfactory drafting of paragraph 2. In other contexts he had criticized the use of vague words like " reasonable ", which were open to subjective interpretation. In addition to using that term, paragraph 2 had the defect of adopting the cumbersome expression " shall take all reasonable steps to avoid interference with the performance of his official duties " which could be improved by using an expression such as " shall avoid interfering with ... ". Also, the expression " arrange for the taking of such testimony " could be replaced with advantage by " take such testimony ".

63. Furthermore, the use of the conjunction " and " to link the first clause of the sentence with the second, which related to the taking of testimony at the consular official's residence or office, did not give a precise indication of the procedure applicable. The position, as he understood it, was that the consular official could choose between attending as a witness in the judicial proceedings and asking for his testimony to be taken at his residence or office, where such a method was possible and permissible. In both cases, the authority requiring the evidence should avoid interfering with the performance of his official duties. The language of paragraph 2 should be improved so as to make that position clear.

64. Mr. AGO fully concurred with Mr. Amado's remarks on the drafting of paragraph 2, which would be taken into account by the Drafting Committee.

65. With regard to the point raised by Mr. Verdross concerning members of the consulate who were nationals of the receiving State, it would be better to clarify the terms of article 50, dealing with those nationals of the receiving State, rather than to specify the exception in article 42. The same problem arose in connexion with other articles, such as article 40, and it was better to cover in a single article (article 50) the question of the inapplicability of a number of privileges to persons who were nationals of the receiving State. If the exception were to be specified in connexion with one privilege and not another, that apparent contradiction could give rise to difficulties of interpretation.

66. Mr. ŽOUREK, Special Rapporteur, said that the Commission had to choose between drafting article 42 in very general terms and laying down precise rules therein. In his view, the rules in the article should be as specific as possible in order to avoid divergencies of interpretation.

67. He agreed with Mr. Ago that the proviso debarring nationals of the receiving State from the benefit of specific privileges should not appear in each of the articles concerned. Article 50, which limited the privileges and immunities enjoyed by such consular officials nationals of the receiving State to immunity from jurisdiction in respect of official acts performed in the exercise of their functions and excluded all other privileges not specifically granted to them by the receiving State, seemed sufficiently clear not to need improvement.

68. Nevertheless, there was some merit in the suggestion put forward by some governments to refer to article 50 in certain articles of the draft. A person not familiar with the whole draft would understand much better the scope of each of its provisions if, in the case where a privilege did not apply to nationals of the receiving State, that fact were clearly stated. In deference to the wishes of those governments, he suggested that a passage should be included in article 1 (Definitions) — which would have to be consulted by any reader — to the effect that members of the consulate who were nationals of the receiving State had a special status.

69. Mr. PADILLA NERVO pointed out that paragraph 1 made all members of the consulate — an expression defined as meaning both consular officials and employees of the consulate — liable to attend as witnesses, while specifying that no coercive methods could be applied to them. Paragraph 2, on the other hand, protected only consular officials from interference in the performance of their duties and seemed to exclude employees of the consulate.

70. Consular conventions appeared to adopt a somewhat different approach. Thus, article 13 (3) of the Anglo-Swedish Convention cited by Mr. Pal, which was similar to the corresponding clause in the consular conventions signed by the United Kingdom with Mexico and with a large number of other countries, stated that the authority or court requiring the testimony of a " consular officer or employee " had " to take all reasonable steps to avoid interference with the performance of his official duties ". Only the privilege of giving testimony at his office or residence (wherever permissible and possible) was restricted to " a consular officer who is not a national of the receiving State ".

71. He asked the Special Rapporteur whether he could explain the position.

72. Mr. ŽOUREK, Special Rapporteur, replied that the difference in scope as between paragraph 1 and paragraph 2 was intentional. Consular employees were not normally entrusted with the exercise of consular functions proper, and since some governments had raised objections to the text adopted at the twelfth session, the Commis-

sion's intention was to make it clear that such employees did not enjoy the privileged treatment provided under paragraph 2 of article 42.

73. It was true that certain consular conventions appeared to give to employees the privilege specified in paragraph 2, but those conventions usually gave a narrower meaning to the term " consular employee ". For example, article 2 (7) of the Anglo-Swedish Convention defined a consular employee as " any person, not being a consular officer, employed at a consulate for the performance of consular duties " and expressly excluded " drivers or any person employed solely on domestic duties at or in the upkeep of the consular premises ". By contrast, article 1 (j) of the Commission's draft defined the expression " employee of the consulate " as meaning " any person who performs administrative or technical work in a consulate or belongs to the service staff ". The expression used in the bilateral convention thus did not cover most of the persons considered as employees of the consulate by the Commission. In addition, it included persons entrusted with consular functions, who, under the Commission's draft, were " consular officials ".

74. Another reason for the difference between the terms of article 42 and the corresponding provisions of bilateral conventions was that it was easier for those conventions to grant broader privileges for reasons connected with the special relations between the two countries concerned. The draft articles drawn up by the Commission, however, in order to be acceptable to the majority of governments must necessarily be more conservative in respect of the privileges recognized.

75. The CHAIRMAN said that most of the objections put forward to article 42 concerned questions of drafting. The only question of substance, which the Commission should decide by means of a vote, was that of the Netherlands' suggestion for the addition of a provision along the lines of the last sentence of commentary (3).

76. Mr. AGO said that the Netherlands suggestion raised an important question of principle. The consul was an official of the sending State. When he performed his duties as registrar of births, marriages and deaths, the acts performed by him constituted acts of the sending State. If he produced a document relating to his official duties as registrar or gave evidence thereon, he would be acting on behalf of the sending State. Should article 42 be amended so as to impose upon him the duty to give evidence relating to such a document, the effect would be to impose an obligation upon the sending State itself. If, therefore, the law of the sending State did not permit the consul to give such evidence, a difficult position would arise. The courts of the receiving State would be in effect issuing an order to the sending State; if that order were disregarded, they might impose a fine on the consul for contempt of court when he was in fact simply obeying the laws of the sending State in a matter relating to his official duties as an official of that State.

77. Mr. BARTOŠ agreed with Mr. Ago. In the event of a controversy between the authorities of the receiving State and the consul on the question whether the testimony requested related to a matter covered by his duty of secrecy towards the sending State, the courts of the sending State were alone competent to settle the dispute.

78. Mr. MATINE-DAFTARY pointed out that, where a consul acted as registrar of a marriage, for example, he was the depository not of a State secret, but of private interests. A private person could well require the consul's evidence on the subject of a marriage solemnized by him.

79. Mr. BARTOŠ said that a clear distinction should be drawn between, on the one hand, the contents of a document drawn up by the consul in his capacity as notary or registrar and, on the other hand, any information which might have come to his knowledge in connexion with the drawing up of the document in question. The contents of the document were public, but the information was confidential.

80. For example, in the case of a declaration recognizing a child born out of wedlock, the officer or official recording the declaration might, under the legislation of some countries, have to advise those concerned on the possible legal consequences of the declaration, which frequently would give rise to a confidential discussion between the consul and the persons concerned. Even though the consul drew up a document accessible to the public, he would necessarily become the depository of confidential information. So far as that information was concerned, he was bound by professional secrecy. The actual contents of the declaration recorded by him were, of course, part of a public record and available to those concerned.

81. Mr. ŽOUREK, Special Rapporteur, pointed out that the last sentence in commentary (3) stated that the consul " should not decline " to give the evidence in question. There was therefore no intention to create an obligation; the passage merely indicated that the sending State might be asked to consider allowing the consul to give evidence in such circumstances.

82. The CHAIRMAN said that the question before the Commission was whether an actual obligation would be embodied in article 42. On that understanding, he put the Netherlands proposal to the vote.

The proposal was rejected by 10 votes to 3, with 3 abstentions.

83. Mr. AMADO, explaining his vote, said that he had voted against the Netherlands proposal because article 42, paragraph 3, stated clearly that members of the consulate could decline to give evidence concerning matters connected with the discharge of their duties. The last sentence of commentary (3) was intended merely as a recommendation to the sending State to facilitate the giving of evidence where possible.

84. Mr. BARTOŠ, explaining his vote, said that he had voted against the proposal because the last sentence of commentary (3) was much too broad in that it implied that a consul might be called upon to give evidence " concerning events which came to his notice in his capacity as registrar " and disregarded the fundamental distinction which he had mentioned between the contents of a public document and confidential information that might be given to the registrar.

85. Mr. SANDSTRÖM, explaining his vote, said that he had voted against the proposal for the same reason. He, too, found the terms of the last sentence of commentary (3) much too broad.

86. Mr. YASSEEN, explaining his adverse vote, said that he regarded the consul as acting as a notary and registrar of the sending State. In that capacity, he was not amenable to the jurisdiction of the receiving State. Any evidence that might be required in respect of acts performed by him in the course of his official duties could be obtained only through the competent authorities of the sending State.

87. The CHAIRMAN said that there remained no question of substance to be decided by the Commission so far as article 42 was concerned. He therefore suggested that the Commission should:

(1) refer article 42 to the Drafting Committee with instructions to revise paragraphs 1 and 3 in clearer terms;

(2) instruct the Drafting Committee to take into account, in paragraph 2, the drafting proposals made by Mr. Amado and by some governments; and

(3) ask the Special Rapporteur to consider the advisability of including in the commentary a reference to the distinction drawn by Mr. Bartoš.

It was so agreed.

The meeting rose at 1 p.m.

602nd MEETING

Friday, 2 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities
(A/4425; A/AC.4/136 and Add.1-11, A/CN.4/137)
(continued)

[Agenda item 2]

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

ARTICLE 43 (Exemption from obligations in the matter of registration of aliens and residence and work permits)

1. The CHAIRMAN invited debate on article 43 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that the comments received had shown that not all governments had understood the Commission's intention regarding work permits, notwithstanding the explanation given in commentary (4).

3. The Government of Finland (A/CN.4/136) had suggested that the exemption from work permits should be limited to work performed in the consulate. A similar suggestion had been made by the Netherlands Government (A/CN.4/136/Add.4), and the Norwegian Government (A/CN.4/136) had stated that the exemption should not apply to members of the consulate and their families who carried on a gainful private activity outside the consulate. The Governments of Belgium (A/CN.4/136/Add.6) and Spain (A/CN.4/136/Add.8) had expressed similar views.

4. With the object of removing all doubt regarding the Commission's intention, he had in his third report (A/CN.4/137) proposed a redraft containing the qualifying proviso " other than those who carry on a gainful private activity outside the consulate ". On reflection, however, he thought it would be preferable to revert to the 1960 text (A/4425), for he proposed to prepare a general provision dealing with the status of members of the consulate who carried on a gainful private activity outside the consulate. The problem of that status arose in connexion with a number of articles, and it was desirable that it should be settled for all purposes in a single provision.

5. The Polish Government (A/CN.4/136/Add.5) had suggested that article 43 should contain a reference to the practice of issuing special cards to members of the consulate, mentioned in commentary (2). The Drafting Committee might be asked to consider the suggestion, which was consistent with the view expressed in the Commission's own commentary.

6. The only question of substance to be decided by the Commission arose from proposals restricting the scope of application of article 43. In particular, the Governments of Norway, Belgium and Japan (A/CN.4/136/Add.9) took the view that the private staff of members of the consulate should be debarred from the benefits of article 43.

7. He urged the Commission to maintain the provision as it stood; the extension of the exemption laid down in article 43 to private staff was justified on practical grounds, as explained in commentary (3).

8. Mr. YASSEEN said that the exemption from the obligations in the matter of work permits should apply only to work performed in the consulate. The drafting of article 43 should be improved so as to show clearly that it was not intended to grant exemption in respect of a gainful private activity carried on outside the consulate.

9. According to the definitions article, the expression " members of the consulate " included the head of post. However, the head of post was granted an exequatur authorizing him to carry out his official duties. It would only be necessary to specify the exemption from work permits in the case of other members of the consulate and in respect of work done in the consulate.

10. Mr. ŽOUREK, Special Rapporteur, agreed that it was necessary to revise the text of article 43, which was so concise that it had obviously been misunderstood by governments.

11. It was clearly the Commission's intention that no work permit should be needed for work performed by a member of the private staff employed by a member of the consulate. It was equally clear that, in those countries where a work permit was needed, the members of the consulate or their families who carried on a gainful