Document:-
**A/CN.4/SR.603**

# Summary record of the 603rd meeting

Topic:
**<multiple topics>**

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

activity" should be replaced by "private commercial or professional activity". The Government of Japan had suggested that the provision should be restricted to consular officials and members of the administrative or technical staff who were nationals of the sending State and not of the receiving State, and also that sub-paragraph (b) should grant exemption from estate duty in respect of movable property situated in the territory of the receiving State and held by the decedent in connexion with the exercise of his function as a member of the consulate.

83. Since, apart from the observation of the Belgian Government, there seemed to be no serious objection to the text approved by the Commission at its twelfth session, the Commission might agree to follow the general lines of the corresponding provision of the Vienna Convention (article 39, paras. 3 and 4) and to adopt the article in principle, leaving the final wording to the Drafting Committee.

84. Mr. AGO said that, since the Special Rapporteur had proposed that the general lines of the Vienna Convention should be followed, two questions called for consideration. In the first place, the situation arising on death was not the subject of a separate article in the Vienna Convention, but was dealt with in the article relating to the beginning and end of diplomatic privileges and immunities; it might be wise to adopt the same system in the draft under discussion. Secondly, the last sentence of article 39, paragraph 4, of the Vienna Convention stated that estate duty should not be levied on movable property — a provision which was less liberal than that of sub-paragraph (b) of article 47 of the draft. The Drafting Committee should be instructed to recast the sub-paragraph along the lines of that provision of the Vienna Convention, which corresponded roughly to the second suggestion of the Japanese Government.

85. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Ago, recalled the discussion of the placing of the article at the Commission's twelfth session (543rd meeting, paras. 55-62). He had explained at that time that he had submitted the provision as a separate article because it dealt with exemption from estate duty, rather than with the duration of privileges and immunities. The corresponding provision of the Vienna Convention, however, related to exemption in a special case and was closely connected with the beginning and end of diplomatic privileges and immunities.

86. The CHAIRMAN suggested that the Drafting Committee should be instructed to make the necessary changes in the article in the light of article 39, paragraph 4, of the Vienna Convention and especially of the last sentence of that article, to which Mr. Ago had drawn attention. The Drafting Committee should also decide whether the provision should be kept in a separate article or incorporated in another.

*It was so agreed.*

The meeting rose at 1 p.m.

---

## 603rd MEETING

*Monday, 5 June 1961, at 3.10 p.m.*

*Chairman:* Mr. Grigory I. TUNKIN

---

### Address of Welcome by the Assistant Director-General of the International Labour Office

1. Mr. JENKS, Assistant Director-General of the International Labour Office, said that the International Labour Organisation [ILO] was particularly happy to extend the hospitality of its premises to the International Law Commission for the remainder of its thirteenth session, while the International Labour Conference was meeting in the enlarged Assembly Hall of the Palais des Nations. The enlargement of that Hall might be regarded as symbolical of the transformation of the international community, which had added an element of urgency to the restatement and codification of international law and had therefore greatly increased the importance of the Commission's work.

2. Welcoming the success of the recent United Nations Conference on Diplomatic Intercourse and Immunities, he said that the ILO had been glad to make a modest contribution to the deliberations of that Conference with regard to social security. The ILO would always be glad to place its knowledge and experience at the disposal of the Commission and of future conferences, and would continue to follow with interest the Commission's work on consular intercourse and immunities, especially in so far as it might have a bearing on the functions of consuls in connexion with the application of international labour conventions concerning maritime labour, migration and foreign workers. When the Commission came to consider further the topic of relations between States and intergovernmental organizations under General Assembly resolution 1289 (XIII), the long and continuous experience of the ILO in the matter would be at its disposal. Its basic philosophy in that connexion was based on two simple propositions. In the first place, international immunities had a fundamental institutional significance as a device enabling international organizations to discharge their responsibilities with freedom, independence and impartiality. Secondly, those responsible for administering the immunities had an overriding obligation to do so in such a manner as to avoid any kind of abuse liable to discredit or prejudice their fundamental objective.

3. The ILO was also following with especial interest the Commission's work on the law of treaties, since the network of the treaty obligations for the administration of which it was responsible was growing annually. When welcoming the Commission at the time of its eleventh session (481st meeting, paras. 2-5), he had described that network as comprising 111 Conventions, 92 of them in force, which had received 1,892 ratifications and 1,382 declarations of application in respect of non-metropolitan territories, covering 76 countries and 94 territories. The figures had since risen to 115 Conventions, 98 of them in force, with 2,288 ratifications and

1,280 declarations of application, covering 94 countries and 84 territories. The law governing that body of obligations had certain distinctive features, especially with regard to reservations, which, he hoped, the Commission would take into account in its examination of the law of treaties. A noteworthy recent development was that no fewer than twenty-seven new States, or more than one-quarter of the total membership of the ILO, had on admission to the Organisation agreed to continue to be bound by International Labour Conventions accepted on their behalf by the States previously responsible for their international relations. The number of ratifications registered as a result of such decisions had reached 285 and was expected to reach 313 as a result of the forthcoming admission of two new Members.

4. Since the Commission had last met in the building, it had received the sad news of the death of two of its former Chairmen, who had made their mark on the constitutional and legal history of the ILO. Mr. Manley O. Hudson, the Commission's first Chairman, had been first legal adviser of the International Labour Conference and had influenced both the Conferences procedure and the final articles included in the international labour conventions; it was to that influence that the ILO owed the probably unique practice that the legal advisors of the Conference were also members of its drafting committees, a practice which had contributed greatly to the consistency and continuity of the ILO's legislative drafting. The late Mr. Georges Scelle had thirty years previously written what was still an outstanding book on the ILO, and particularly on the novel aspects of its Constitution and procedure and on the distinctive features of international labour conventions. Mr. Scelle had taken part in a number of International Labour Conferences and had for many years been a leading member of the Committee of Experts on the Application of Conventions and Recommendations.

5. In conclusion, he paid a tribute to Mr. Tunkin, Chairman of the Commission, for his contribution to the work of the codification of international law and his eminence as a scholar in his own country and abroad.

6. The CHAIRMAN thanked the Assistent Director-General of the ILO for his instructive address and for the arrangements made for the Commission's thirteenth session.

## Consular intercourse and immunities

**(A/4425; A/CN.4/136 and Add.1-11, A/CN.4/137)**

*(continued)* *

[Agenda item 2]

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

ARTICLE 48 (Exemption from personal services and contributions)

7. The CHAIRMAN invited the Commission to consider article 48 of the draft on consular intercourse and immunities (A/4425).

8. Mr. ŽOUREK, Special Rapporteur, introducing the article, said that the comments received from governments showed no opposition to the article as it stood, but that the Governments of the Netherlands (A/CN.4/136/Add.4) and Belgium (A/CN.4/136/Add.6) proposed that its scope should be restricted by the deletion of the words " and members of the private staff who are in the sole employ of the consulate ". The Government of Japan (A/CN.4/136/Add.9) proposed that the words " are nationals of the sending State and " be inserted after " private staff who ". The effect of the Japanese amendment would be to mention expressly what implicitly followed from article 50, paragraph 1. The Government of Poland (A/CN.4/136/Add.5) considered that the article should contain a stipulation exempting the consulate from any payments in kind levied by the receiving State. Finally, the Government of the United States (A/CN.4/136/Add.3) regarded article 48 as one which should be considered in light of the results of the Vienna Conference.

9. The question before the Commission therefore seemed to be to decide what persons qualified for the benefit of the exemption in question. Article 48 as it stood provided more extensive rights to members of the consulate than those granted to diplomatic agents under article 35 read together with article 37 of the Vienna Convention. The Commission's decision to extend exemption to members of the private staff had been taken after considerable thought and in deference to the argument that the liability of such staff to personal services and contributions might seriously impair the operation of the consulate. In some cases, for example, if a private chauffeur or secretary was called upon under the regulations of the receiving State to perform public services which would prevent him from carrying out his duties for several days, the work of the consulate might be hampered considerably. The Commission had also weighed the disadvantages that the exemption would cause to the receiving State against the hindrance caused to the consulate if the exemption was not granted, and had found the disadvantage to the former to be incomparably less than to the latter. Nevertheless, since the provisions concerning the private servants of members of the mission in article 37, paragraph 4, of the Vienna Convention did not include exemption from personal services, it would be difficult for the Commission to retain the exemption of members of the private staff of members of the consulate. He therefore suggested that the suggestion of the Netherlands and Belgian Governments should be followed, in order to avoid possible objections on the part of participants in the future plenipotentiary conference on the ground that the present draft was more generous than the Vienna Convention. With regard to the form of the article, he was inclined to prefer the structure of article 48 as approved by the Commission to the more concise text of article 35 of the Vienna Convention.

10. Mr. MATINE-DAFTARY agreed with the Special Rapporteur that members of the private staff should not be included in the exemption, but pointed out that, under article 1 (h) and (k), the expression " members of the consulate " included the employees of the consulate. On the other hand, article 35 of the Vienna Convention referred to diplomatic agents only, and article 37 of

* Resumed from the previous meeting.

that Convention granted limited privileges to the administrative and technical staff of a diplomatic mission. Accordingly, since the private staff of members of diplomatic missions and consulates would in any case not enjoy the exemption in question because they were usually nationals of the receiving State, it would be wiser to follow the corresponding provisions of the Vienna Convention than to retain the form of article 48 as approved by the Commission.

11. Mr. ERIM opined that it would be difficult to adapt articles 35 and 37 of the Vienna Convention to article 48 of the draft. Article 35 laid down a general rule for diplomatic agents, whereas article 37 admitted members of the staff to the benefit of certain privileges and immunities. The draft on consular intercourse should certainly not grant privileges and immunities more extensive than those granted by the Vienna Convention, but article 48 might be modified without affecting the substance simply by specifying that the privileges and immunities recognized in the Vienna Convention should not be exceeded. Moreover, if the form of the Vienna Convention were to be followed in respect of the exemption in question, provisions other than article 48 would have to be recast, in order to specify the privileges and immunities of each category of members of the consulate.

12. The CHAIRMAN said that the consensus of the Commission seemed to be that the benefit of the article should be limited to members of the consulate and their families, to the exclusion of the private staff. In his opinion the wording should follow that of the corresponding provisions of the Vienna Convention, in view of the similarity of the substance dealt with. The composite article might read along the following lines:

> " The receiving State shall exempt members of the consulate and members of their family from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting. "

13. Mr. MATINE-DAFTARY agreed that the corresponding provisions of the Vienna Convention should be followed, but, referring to the position of members of the families of members of the consulate, pointed out that article 37, paragraph 1, of that Convention specified that the privileges in question applied to members of the family only if they were not nationals of the receiving State.

14. Mr. YASSEEN observed that the expression " members of the consulate " as defined in article 1 included members of the consular staff, which in turn included employees, who were defined as persons performing administrative or technical work or belonging to the service staff. Accordingly, article 49 was much broader than the corresponding provisions of the Vienna Convention.

15. The CHAIRMAN, agreeing with Mr. Yasseen, said that the Drafting Committee should be instructed to revise the article in conformity with articles 35 and 37 of the Vienna Convention.

16. Mr. ŽOUREK, Special Rapporteur, said that, as the position of consulates differed from that of diplomatic missions, the commission should consider whether a broader provision concerning the particular exemption would not be justifiable in the draft under discussion. The staff of small consulates might well perform a great variety of functions; indeed, a consulate might consist of the head of post and one employee. Even in a larger consulate, it was conceivable that the absence (by reason of service obligations to the receiving State) of a messenger who was constantly employed in carrying documents to and from the local authorities would greatly hamper the work of the consulate. The inconvenience in the case of a diplomatic mission could hardly be said to be as great. The Commission should therefore ponder the situation carefully before deciding to follow the Vienna Convention too closely.

17. Mr. PADILLA NERVO emphasized that article 48 did not differentiate between nationals of the sending State and nationals of the receiving State. Although as pointed out by Mr. Matine-Daftary, the private staff was, in many cases, composed of nationals of the receiving State, the technical and administrative staff were often nationals of the sending State.

18. As a general rule, he agreed with the method of following in the draft, as far as possible, the terms of the corresponding articles of the Vienna Convention. In the particular instance, however, he did not know whether in discussing articles 35 and 37 the Vienna Conference had envisaged all the possibilities, including that of the employees of a mission being requested to perform military service.

19. Article 48 should be so drafted as to exempt from military service, service in the militia, or jury service — the forms of service specified in commentary (1) — all employees who were nationals of the sending State. It should be taken into account that in many countries, a national was forbidden to serve in the armed forces of another country, under penalty of loss of nationality. If, therefore, the expression " public service " were to include military service or service in the militia, the receiving State could not impose such service on nationals of the sending State, whatever their status in the service of the consulate.

20. That formulation would be consistent with the general practice of States as evidenced by numerous bilateral consular conventions, and States could hardly be expected to go beyond the terms of those conventions in the matter. In that connexion, he drew attention to the provisions of article 11 of the Consular Convention of 1952 between the United Kingdom and Sweden,[1] similar in that respect to the consular conventions concluded by the United Kingdom with a number of other countries, including Mexico.

21. Under paragraph (2) of that article 11, a consular officer or employee was exempted from all military requisitions, contributions or billeting. Under paragraph (4) a consular officer who was not a national of the

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

receiving State " and also a consular employee, provided that he complies with the conditions specified in paragraph (5) of this Article, shall enjoy exemption from military, naval, air, police, administrative or jury service of every kind ". The conditions in question were that the employee concerned: (a) should be a national of the sending State and not possess the nationality of the receiving State; (b) should not be engaged in any private gainful occupation; and (c) should not have been ordinarily resident in the receiving State at the time of his appointment.

22. Provided, therefore, that they fulfilled the conditions in question, employees who were nationals of the sending State were thus exempted from all forms of military and other public service under the terms of the bilateral conventions to which he had referred. In the circumstances, some exemption from military obligations should be considered for the benefit of all staff of the consulate who were nationals of the sending State, or at least the commentary should state that such persons were granted the exemption in question by many existing bilateral conventions.

23. Mr. AMADO recalled that the Commission's decision on article 48 had been influenced by convincing illustrations of the difficulties which might arise if the private and service staff of small consulates were required to perform personal services. [2] The Commission's opinion on the subject was very clearly stated in the second sentence of paragraph (2) of the commentary. He thought that that opinion should be taken into account.

24. Mr. YASSEEN said he had not been convinced by the Special Rapporteur's reference to small consulates. In fact, a number of small embassies or legations comprised a staff of two or three people; in such cases, the private staff was no less needed for the performance of regular diplomatic functions than was the corresponding staff of a consulate for the performance of consular functions. The Commission was therefore bound by the terms of the Vienna Convention in respect of the exemption concerned and could not exceed the scope of the provisions of that instrument.

25. Mr. SANDSTRÖM fully endorsed Mr. Yasseen's remarks. The difficulties involved could surely be solved in practice later. The participants in the Vienna Conference had been hard put to it to find a rule to cover the two fundamental considerations involved. He was therefore in favour of following the corresponding provision of the Vienna Convention.

26. Mr. BARTOŠ recalled that the paramount consideration that had led to the Commission's decision at its twelfth session had been the relatively small number of persons on a consulate's staff who would be liable to personal services and contributions. The loss of the services of two or three persons would cause no great inconvenience to the receiving State, whereas the consular work might suffer seriously by such a disruption. He had therefore at that time been in favour of granting the exemption wherever possible.

27. Since then, however, the Vienna Conference had with respect to diplomatic missions adopted more restrictive provisions concerning the exemption in question. Even in the interests of the codification and progressive development on international law, the Commission could hardly in the present draft go further than the provisions decided upon by the largest international conference yet held on such questions. For purely juridical reasons, therefore, he was in favour of conforming with the provisions of the Vienna Convention.

28. Sir Humphrey WALDOCK agreed with Mr. Yasseen and Mr. Bartoš. The relatively small privileges concerned were not yet part of existing international law, and the Commission had little hope of persuading States to accept them if they exceeded the corresponding provisions of the Vienna Convention. There was a strong disinclination to grant consuls privileges exceeding those of diplomatic agents.

29. The CHAIRMAN suggested that the Drafting Committee be instructed to revise the article in the light of article 35 of the Vienna Convention and to incorporate the relevant provisions of article 37 of that instrument.

*It was so agreed.*

ARTICLE 49 (Question of the acquisition of the nationality of the receiving State)

30. Mr. ŽOUREK, Special Rapporteur, introducing the article, observed that the text of the provision followed that of article 35 of the draft articles on diplomatic intercourse and immunities (A/3859) and was designed principally to prevent the automatic acquisition of the nationality of the receiving State by two categories of persons mentioned in paragraph (1) of the commentary to article 49. Only three comments on the article had been received from governments. The Government of Spain (A/CN.4/136/Add.8) had specified that the provision should apply only to career consuls and to employees of the consulate who were nationals of the sending State and did not carry on any gainful activity in the receiving State apart from their official duties. The Chilean Government (A/CN.4/136/Add.7) had observed that it would have to make a reservation to the effect that Chile would apply the article without prejudice to the provisions of article 3 of its Political Constitution. The United States Government considered that the provisions on nationality adopted at the Vienna Conference might not be suitable for incorporation in a convention on consular personnel because, for example, under United States law a consul's child, not being immune from United States jurisdiction, automatically acquired United States citizenship if born in that country, while the child of a diplomatic agent, being immune from jurisdiction, did not acquire such citizenship automatically.

31. It would be recalled that the Vienna Conference had decided to consign provisions concerning acquisition of nationality to an optional protocol (A/CONF.20/11), article 11 of which corresponded closely to the draft article 49. He would therefore suggest that the article be retained as drafted, and that the Commission might leave it to the plenipotentiary conference to decide whether

[2] Discussed as article 39 at the twelfth session, 543rd (paras. 1-16) and 573rd meetings (paras. 32-35).

or not the provision should be consigned to a special protocol.

32. Mr. BARTOŠ supported the retention of article 49. Aside from the question of substance, as a matter of method, the Commission should consider that the Vienna Conference had not rejected the corresponding provision (article 35) of the draft on diplomatic intercourse and immunities. The provision in question had not obtained the two-thirds majority to become part of the Convention. The proposal to delete it, on the other hand, had failed, having received even less support. In the circumstances, the Conference had fallen back on the compromise formula of adopting an optional protocol concerning acquisition of nationality.

33. The Vienna Conference had thus revealed no overwhelming body of opinion one way or the other. It had merely produced evidence of a long-standing cleavage between countries of immigration, which applied the *jus soli* principle, and countries of emigration, which applied the *jus sanguinis* system.

34. His own view was that the privilege of transmitting their nationality to their own children was essential to all officials serving their country abroad. He was therefore in favour of the provisions contained in article 49.

35. Mr. YASSEEN said that, since the Vienna Conference had adopted an optional protocol containing a provision substantially similar to article 49, that Conference could not be said to have rejected the provision.

36. The provision under discussion did not concern only the wife and children of a foreign service officer. Members of a diplomatic mission or of a consulate had the same need as their children to be exempted from the operation of the nationality laws of the receiving State. In some countries, the mere fact of prolonged residence — indeed, in some cases one year's residence — could result in the automatic imposition of the nationality of the country. It was therefore necessary to ensure that no member of a diplomatic mission or of a consulate could be deemed to be a national of the receiving State solely by the operation of that State's law. That was particularly the case with a former national of the receiving State who had lost his nationality because he had become a naturalized citizen of another country.

37. Article 49 stated in effect that persons who were in the receiving State purely by reason of their service with the sending State, and members of their families, should not acquire the nationality of the receiving State merely by the operation of its nationality laws. Even if that rule were not considered as an existing rule of customary international law so far as consuls were concerned, article 49 should be accepted as a valuable step forward in the progressive development of international law.

38. Mr. VERDROSS said that the validity of the remarks made by the United States Government could hardly be disputed. A diplomatic agent was not subject to the jurisdiction of the receiving State; a consular officer, on the other hand, was not exempt from that jurisdiction. The Commission should therefore consider whether it was possible to exempt members of the consulate from the application of the nationality laws of the receiving State.

39. The case mentioned by Mr. Yasseen could hardly arise in practice. Residence for a given period was usually one of the conditions for the voluntary acquisition of a new nationality, but he did not know of any case where a nationality was imposed merely on grounds of a person's residence.

40. Mr. YASSEEN replied that the case which he had mentioned could arise in practice. A person who became a naturalized citizen of a country usually lost his original nationality by virtue of the law of his country of origin. However, in many countries, the law also specified that if such a former citizen returned, he was automatically reinstated in his original nationality. If, therefore, such a former national were to return to his country of origin as a member of the consular service of the country of his new nationality, he could find that the nationality of the receiving State was imposed upon him by virtue of his return or of a certain period of residence. It was therefore necessary to specify that members of the consulate were not subject to the application of the nationality law of the receiving State.

41. Mr. ŽOUREK, Special Rapporteur, in reply to the remarks by Mr. Verdross on the United States comments, said that according to preponderant legal opinion the exemption from the jurisdiction of the receiving State did not imply that a diplomatic agent was not subject to the laws of the receiving State, other than those which imposed obligations obviously incompatible with diplomatic privileges and immunities. Article 41, paragraph 1, of the Vienna Convention explicitly stated that, without prejudice to their privileges and immunities, it was the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the receiving State.

42. Similarly, in the case of consuls, article 53 stated that, without prejudice to their privileges and immunities, all persons enjoying consular privileges and immunities were bound to respect the laws and regulations of the receiving State. There was thus no difference between diplomatic and consular officers so far as the duty to observe the laws of the receiving State was concerned. It was therefore necessary to specify that consular officers were not subject to the automatic operation of the nationality laws of the receiving State.

43. Even if, for the sake of argument, it was admitted that exemption from jurisdiction in the case of diplomatic agents implied the exemption from the application of the law of the receiving State, as suggested in the comments of the United States Government, then *a fortiori* the draft should contain a provision along the lines of article 49. For the members of the consulate were not exempted from the jurisdiction of the receiving State and, in order to avoid cases of double nationality, it should be specified that they and their families were exempted from the automatic application of the nationality law of that State.

44. The CHAIRMAN said that there appeared to be general agreement to refer article 49 to the Drafting

Committee, with instructions to take into account the remarks by Mr. Yasseen and the text of the Vienna optional protocol concerning acquisition of nationality. If there were no objection, he would take it that the Commission agreed to that course.

*It was so agreed.*

ARTICLE 50 (Members of the consulate and members of their families and members of the private staff who are nationals of the receiving State)

45. Mr. ŽOUREK, Special Rapporteur, said that article 50 was one of the key articles of the draft. Governments had attached much importance to its provisions and two of them — Norway (A/CN.4/136) and Spain — had even suggested that article 50 should be cited and referred to frequently in the other provisions of the draft (see also the Special Rapporteur's observations in his third report, A/CN.4/137). [3]

46. The Philippine Government's comment (A/CN.4/136) was based on a misunderstanding of the terms of article 1 (Definitions), where the expression " members of the consulate " was defined as including the head of consular post and the " members of the consular staff " (paragraph 1 (f)) and where, by virtue of paragraph 1 (k), the latter were defined as including not only consular officials, but also the employees of the consulate.

47. The Swedish Government (A/CN.4/136/Add.1, *ad* article 41) had suggested that the adjective " official " was superfluous in article 50, paragraph 1. He pointed out that that adjective was not used in article 41, although the commentary indicated that the immunity set forth in that article applied exclusively to official acts.

48. The Government of Belgium proposed that all members of the consulate should be immune from jurisdiction in respect of official acts performed in the exercise of their functions. In other words, it considered that all members of the consulate, and not only consular officials, should enjoy the immunity specified in article 50, paragraph 1. In practice, that government said, consular functions were exercised in part by subordinate employees of the consulate; in its opinion, the matter was all the more important in that the employees were often recruited locally and were therefore frequently nationals of the receiving State.

49. The Belgian and the Norwegian Governments had suggested that the immunity specified in article 50 should also exempt those concerned from giving evidence on matters connected with the exercise of their functions and from the duty to produce the relevant official correspondence and documents.

50. The suggestions of the Belgian Government for granting immunity from jurisdiction even to consular employees in the particular cases were drawn from State practice as evidenced by a number of bilateral conventions; nevertheless, he thought that States could hardly be expected to grant, in that respect, to members of the consulate privileges wider than those set forth in the Vienna Convention for members of the staff of a diplomatic mission.

51. Article 38, paragraph 1, of the Vienna Convention granted to a diplomatic agent who was a national of, or permanently resident in, the receiving State, " only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of his functions". Paragraph 2 of the same article stated that other members of the staff of the mission who were nationals of or permanently resident in the receiving State would enjoy privileges and immunities only to the extent admitted by the receiving State.

52. In conclusion, although the arguments put forward by the Belgian Government were plausible, it would be hardly possible to grant to employees of the consulate privileges greater than those granted to members of the non-diplomatic staff of a diplomatic mission.

53. Mr. VERDROSS said that in the commentary to article 41 the phrase " acts performed in the exercise of their functions " by the members of the consulate was interpreted as meaning official acts. That being so the adjective " official " was superfluous in article 50, paragraph 1, and should be deleted.

54. The second sentence of paragraph 1, and the whole of paragraph 2, should also be deleted. Their contents added nothing to the provisions of article 50. A privilege or immunity which could be granted or withheld by the receiving State in its option did not constitute a right in international law.

55. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should follow the pattern of the Vienna Convention. Article 38, paragraph 2 of that Convention contained a statement similar to that embodied in article 50, paragraph 2, of the draft, with the addition of the sentence: " However, the receiving State must exercise its jurisdiction over those persons in such a manner so as not to interfere with the functions of the mission."

56. The question was whether the Commission should strengthen the provisions of article 50, paragraph 2, by adding a sentence along those lines.

57. A further question was whether a permanent resident in the receiving State should not be placed on the same footing as a national of that State, as had been done for diplomatic agents in article 38, paragraph 1, of the Vienna Convention.

58. Mr. ERIM said that in practice it was very rare that a diplomatic agent had been a permanent resident of the receiving State prior to his appointment; hence the exception specified in article 38, paragraph 1, of the Vienna Convention, although important in theory, was not of much practical significance.

59. It was unlikely that the inclusion of a sentence along the lines of the second sentence of paragraph 2 of article 38 of the Vienna Convention would be effective in protecting members of a consulate from undue interference with the performance of their functions.

60. The remarks of the Belgian Government were well-founded. Consular functions were in fact exercised in

[3] But *cf* para. 70 below, where the Special Rapporteur states thas his redraft of article 50 is withdrawn.

part by subordinate employees; the consular officer often merely signed the documents prepared by the employees. It was therefore appropriate to amend paragraph 1 so as to cover not only consular officials, but also employees of the consulate who were nationals of the receiving State and to exempt them from the jurisdiction of the receiving State in respect of acts performed in the exercise of their functions. He therefore supported the Belgian proposal, notwithstanding the terms of article 38 of the Vienna Convention.

61. Mr. BARTOŠ said that at the Vienna Conference two groups of countries arguing from different premises had reached the same conclusion. Spokesmen from one group which received considerable numbers of immigrants had stated that in their countries persons permanently resident for a specified number of years were placed on a footing of equality with nationals so far as rights and duties were concerned. Spokesmen for the other group of countries, mainly African and Asian, maintained that permanent residents, instead of showing a sense of loyalty towards their country of residence, pleaded their nationality when it suited them. However, the two groups had united in support of the same thesis that permanent residents, regardless of nationality, should be equated with nationals of the receiving State if they had become permanent residents before starting to exercise diplomatic functions.

62. He was definitely not of that opinion, possibly because in his country the concept of permanent residence was unfamiliar and a very clear distinction was made on the basis of nationality. But although he did not associate himself with the reasoning that had led to the insertion of the reference to permanent residents in article 38 of the Vienna Convention, he would be prepared to support such a reference in article 50 of the draft if there was an overwhelming majority in favour. On the other hand, if the majority were a small one he would abstain from voting.

63. Mr. FRANÇOIS noted that the Special Rapporteur had not mentioned the comment which the Netherlands Government had made in the same sense as that of the Belgian Government concerning the giving of evidence. Surely, it would be advisable to insert a provision of the kind proposed by the Netherlands Government, since, if a member of a consulate were liable to give evidence in respect of acts performed in the exercise of his functions, his immunity would become meaningless. The Vienna Conference when discussing the parallel article 29 in the draft on diplomatic intercourse and immunities (A/3859) had probably overlooked the fact that that text was incomplete and required amplification. The omission in the Vienna Convention was a serious one but less serious than would be the same omission in the draft, for only very rarely were members of a diplomatic staff nationals of the receiving State, whereas not uncommonly members of a consulate were.

64. Furthermore, since, according to article 54, article 50 was applicable to honorary consuls, they too would be precluded from refusing to give evidence unless there were an express saving clause.

65. Although he was very willing to follow the Vienna Convention where appropriate, in that instance its failure to deal with the question of liability to give evidence must be remedied.

66. The CHAIRMAN, speaking as a member of the Commission who had been present at the Vienna Conference, explained that there had been a marked trend at the Vienna Conference towards restricting the privileges and immunities of members of a diplomatic mission who were nationals of the receiving State. The Commission would have noticed that article 8, paragraph 1, of the Vienna Convention stipulated that members of the diplomatic staff of a mission should in principle be of the nationality of the sending State. That view found its expression in article 38 which granted immunity from jurisdiction and inviolability to nationals or permanent residents of the receiving State in respect of official acts only. As would be seen from paragraph 2, other members of the staff of a mission and private servants who were nationals of the receiving State enjoyed privileges and immunities to the extent only to which that State was prepared to grant them.

67. Sir Humphrey WALDOCK said that he found some difficulty in discerning what was the difference of principle between article 50 and article 38 of the Vienna Convention. It was perhaps arguable that the number of people affected by the provisions contained in article 50 was greater than in the case of article 38; but, after all, a diplomatic mission employed secretaries and subordinate staff who had knowledge of official matters which could be of a highly confidential nature, with the consequence that the question of their immunity was of the greatest moment. The kind of business dealt with in a consulate was of quite a different order and generally concerned the affairs of individuals. He shared the doubts expressed by the Governments of Belgium and the Netherlands concerning the adequacy of the protection offered in article 50 in regard to the question of giving evidence about official matters, and would be interested to know how thoroughly the question had been discussed at Vienna and whether article 38 was in fact the outcome of careful deliberation. For better or for worse, however, that text had now been adopted and formed part of an international convention. Consequently, although it might be with some reluctance, the Commission would probably have to draft article 50 on similar lines. It would be difficult to put forward a more liberal provision for consular staff than had been adopted for diplomatic staff. Nevertheless, he hoped that the Commission would include in article 50 a sentence modelled on the last sentence in paragraph 2 of article 38, which, though not very forceful, might offer some measure of protection and would go a little way towards meeting the objection raised by the Belgian and Netherlands Governments.

68. If the Commission decided to follow article 38, it would certainly be justified in referring to the problem in the commentary, which perhaps might induce a conference of plenipotentiaries to effect some improvements in the new text as compared with article 38 in the Vienna Convention.

69. Mr. MATINE-DAFTARY emphasized that in the matter of giving evidence a clear distinction should be

drawn between the giving of evidence by members of a diplomatic mission, who were concerned with matters of State, and the giving of evidence by a consular official in matters relating to an individual. In the latter case, it would be inadmissible for a consular official to refuse to testify, for the withholding of the testimony might be prejudicial to the interests of the person concerned.

70. Mr. ŽOUREK, Special Rapporteur, referring to Mr. Verdross's proposal that the word " official " in paragraph 1 of article 50 should be deleted, explained that he had prepared his third report before knowing what the outcome of the Vienna Conference would be and had suggested new wording for both article 41 and for the first sentence of article 50. Subsequently, on perusal of articles 37 and 38 in the Vienna Convention, he had decided to withdraw both those new texts. It would be explained in the commentary why in article 41 the word " acts " was not qualified by the epithet " official".

71. From a legal point of view, he agreed with Mr. Verdross's criticism of the second sentence in paragraph 1 of article 50 and of paragraph 2. Nevertheless they served a practical purpose in emphasizing that other privileges and immunities could be granted by the receiving State. It was desirable to retain those passages, for they might encourage States to extend privileges and immunities to members of the consulate where they thought it possible and desirable.

72. Mr. JIMÉNEZ de ARÉCHAGA said that in general the Vienna Convention should be followed where possible. The comments of governments on the draft had been to some extent superseded by the decisions taken by a two-thirds vote at the Vienna Conference, which might consequently be regarded as reflecting a consensus of opinion. Nevertheless, the Commission should preserve its customary independence of judgment. In that instance, he agreed that article 50 should, like article 38 of that Convention, refer to " official acts " and contain a stipulation similar to that of the last sentence in paragraph 2 of article 38. On the other hand, permanent residents should not be mentioned in article 50, for such a reference would deprive many honorary consuls of a great part of the privileges and immunities extended to them under article 54 as it stood.

73. Some provision should be added in article 50 concerning immunity from the liability to give evidence.

74. The CHAIRMAN said that the Commission did not appear to favour a significant departure from the Vienna Convention by accepting the Belgian Government's proposal to extend the application of paragraph 1 to all members of the consulate, including service staff.

75. There seemed to be no strong objection to omitting the second sentence in paragraph 1, as had been proposed by Mr. Verdross, and adding in paragraph 2 a sentence on the lines of the last sentence in paragraph 2 of article 38.

76. As he was not able to judge what was the consensus of opinion on the question whether, in keeping with the Vienna Convention, reference should be made to permanent residents and whether provision should be made for exemption from liability to give evidence in matters relating to official functions, he would put those two issues to the vote.

*It was decided by 9 votes to 3, with 3 abstentions, to include in article 51 a reference to permanent residents of the receiving State.*

77. Mr. MATINE-DAFTARY urged the Commission to make a distinction, for the purpose of exemption from giving evidence, between evidence concerning official matters affecting the sending State and evidence concerning matters affecting individuals. He could support immunity only in the former case.

78. The CHAIRMAN pointed out that in connexion with article 4, the Commission had exhaustively discussed and rejected the possibility of demarcating consular functions on the lines implied in Mr. Matine-Daftary's proposal (583rd-586th meetings).

79. He put to the vote the question whether a provision should be inserted in article 50 allowing for immunity from liability to give evidence.

*It was decided in the affirmative by 11 votes to 2, with 4 abstentions.*

80. Mr. VERDROSS said that he would withdraw his proposal for the deletion of the word " official " in the first sentence of article 50, paragraph 1, but hoped that the Special Rapporteur would explain in the commentary why that word had not been used in article 41. He still failed to understand the distinction between the wording of the two articles.

81. The CHAIRMAN suggested that article 50 be referred to the Drafting Committee in the light of the foregoing decisions.

*It was so agreed.*

The meeting rose at 6 p.m.

---

## 604th MEETING

*Tuesday, 6 June 1961, at 10 a.m.*

*Chairman*: Mr. Grigory I. TUNKIN

---

### Consular intercourse and immunities

**(A/4425; A/CN.4/136 and Add. 1-11; A/CN.4/137)**

(*continued*)

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

[Agenda item 2]

ARTICLE 51 (Beginning and end of consular privileges and immunities)

1. The CHAIRMAN invited discussion on article 51 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, summarizing the comments by governments, said that the United