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Summary record of the 611th meeting

Topic:
Consular intercourse and immunities

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was clearly stated that in no event could any act or omission of the consul prejudice the rights of the absent national or be binding upon the latter in any way.

76. Mr. YASSEEN said that the formulation proposed by the Special Rapporteur represented an improvement on the 1960 text. By introducing the limitation suggested by the Government of Finland, the Special Rapporteur had confined the scope of article 4 *bis* to what was necessary — the safeguard of the rights and interests of nationals of the sending State. That formulation was equivalent to limiting the scope of the article to measures of conservation.

77. In reply to Mr. Erim, he said that the question of representation arose also in connexion with measures of conservation. Even steps of that nature normally required the person taking them to hold a power of attorney or to act as statutory proxy.

78. From the point of view of drafting, he suggested that the last sentence should be amended so as to replace the words " have appointed " by " can appoint ", and the words " have themselves assumed " by " can assume ".

79. Those amendments were necessary because the text as drafted seemed to suggest that the consul could act for a national of the sending State who, although already in a position to do so, had neither appointed an attorney nor himself assumed the defence of his rights and interests.

80. Mr. SANDSTRÖM said that in Sweden, if an interested party was absent, the court itself appointed a person to act in his interest.

81. He could accept the idea of a consul being empowered to take steps limited to measures of conservation in order to protect the interests of a national of the sending State. The text proposed by the Special Rapporteur, however, did not embody the limitation proposed by Finland. That text merely specified that the consul would have the right to appear on behalf of the national concerned " with the object of safeguarding " that national's rights and interests. That formulation did not limit the scope of the consul's action, but merely expressed the purpose of that action. He therefore suggested that the article should be redrafted to state that, in so far as necessary for the purpose of safeguarding the rights and interests of nationals of the sending State, the consul could, on their behalf, apply for measures of conservation.

82. Mr. PAL drew attention to article 22 of the Anglo-Swedish Consular Convention of 1952,[2] which contemplated various possibilities and set forth the limitations of a consul's action in representation of nationals of the sending State. He suggested that the Drafting Committee should draw upon the language of that article when formulating the final text of article 4 *bis*.

83. The CHAIRMAN suggested that the Drafting Committee be instructed to re-draft article 4 *bis* taking into consideration the government comments, the remarks of members of the Commission and article 22 of the Anglo-Swedish Convention. He further suggested that the Commission should defer its final decision until the Drafting Committee had prepared the new text.

It was so agreed.

The meeting rose at 1 p.m.

[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. 478 and 479.

611th MEETING

Thursday, 15 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*)

Agenda item 2

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

ARTICLE 52 *bis* (Members of diplomatic missions responsible for the exercise of consular functions)

1. The CHAIRMAN invited consideration of additional article 52 *bis*, proposed in the Special Rapporteur's third report (A/CN.4/137, section III) for inclusion in the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that article 52 *bis* embodied a proposal by the Soviet Union (A/CN.4/136/Add.2) and filled a gap in the draft to which attention had been drawn by a number of governments, including that of Spain (A/CN.4/136/Add.8). Its provisions were necessary to define the legal status of members of the diplomatic staff who were assigned to consular functions.

3. Under a general modern practice diplomatic missions performed consular functions within the scope of their normal duties. Many bilateral conventions, including those concluded recently by the United Kingdom and the Soviet Union with a number of other countries, contained provisions on the subject.

4. Article 52 *bis* was intended to cover two situations. First, the exercise of consular functions by the diplomatic mission itself. Secondly, the case where a diplomatic officer was assigned to direct the work of a consulate situated in the city where the diplomatic mission was situated.

5. Lastly, he pointed out that only States which became parties to the proposed multilateral convention would be able to claim the benefit of the provisions of article 52 *bis*.

6. Mr. VERDROSS agreed that article 52 *bis* would fill a gap in the draft. The idea contained in it was a sound

one and was based on a practice reflected in a number of consular conventions, including that between Austria and the Soviet Union of 28 February 1959 (article 32).

7. As he understood it, paragraph 1 meant that the diplomatic officer appointed to carry out consular functions had the same duties as a consul and therefore had to obtain an exequatur in order to deal directly with the local authorities.

8. Paragraph 2 made it clear that the rights of the diplomatic agent concerned were not affected, in that he would continue to enjoy diplomatic privileges and immunities. It was therefore only for the purpose of consular functions and obligations that his position was that of a consular official.

9. The CHAIRMAN, speaking as a member of the Commission, said that article 52 *bis* was intended to cover an existing practice. The interpretation given by Mr. Verdross was generally correct: paragraph 1 stated that, where a diplomatic officer performed consular duties, he enjoyed certain rights which were indispensable for the performance of those duties, and he was required to respect the obligations laid down in the draft articles for persons who exercised consular functions.

10. The status of the person concerned as a diplomat was not altered by his exercise of consular functions; paragraph 2 therefore expressly stated that, in accordance with the existing practice, his diplomatic privileges and immunities were not affected.

11. Mr. FRANÇOIS said that he would go further than Mr. Verdross. A diplomatic agent needed an exequatur in order to be able to act in a consular capacity and not merely in order to deal directly with the local authorities. Unless he obtained an exequatur, any action taken by him would be deemed to have been taken in his diplomatic capacity and not as a consular official.

12. Mr. VERDROSS said that Mr. François had expressed the idea which he had in mind.

13. Mr. MATINE-DAFTARY said that when the question had been raised at the Vienna Conference of the performance of consular functions by a diplomatic mission, he had obtained information on the practice followed by Iran. He had been informed that, with the exception of the Embassy in Baghdad and the delegation to the United Nations in New York, every Iranian diplomatic mission dealt with consular matters in the capital city where it was situated.

14. He had learnt that in none of those cases had an exequatur been required. If therefore the Commission intended to impose the requirement of an exequatur, it would certainly represent an innovation in existing practice.

15. Mr. ERIM asked whether the provisions of paragraph 1 were intended to apply only to a diplomatic agent responsible for the consular section of a diplomatic mission or also to a diplomatic agent assigned to the work of a consulate situated in a city other than that where the mission was situated.

16. Mr. JIMÉNEZ de ARÉCHAGA agreed to the substance of article 52 *bis*, though the provision should state that an exequatur was necessary, as indicated in bilateral conventions.

17. The Drafting Committee should be instructed to co-ordinate the provisions of article 52 *bis* with those of the other articles of the draft. For example, article 37, paragraph 2, specified that a consul could not address the Ministry of Foreign Affairs of the receiving State unless the sending State had no diplomatic mission to that State. Where the consul was himself a diplomatic agent, the application of that provision would create an awkward situation.

18. Another article to be considered was article 42, which stated that a consul was liable to attend as a witness in court; it was difficult to reconcile that provision with the immunity enjoyed by a diplomatic agent who acted as consul. It was clear that the provisions of paragraph 2 were not sufficient to correct the consequences of paragraph 1 which, by imposing certain duties, could affect the standing of diplomatic officers.

19. Sir Humphrey WALDOCK said that he was in general agreement with the proposed article 52 *bis*. Recent consular conventions concluded by the United Kingdom with a number of other countries contained a provision which in substance was close to article 52 *bis*. For example, article 8 of the Consular Convention of 1952 between the United Kingdom and Sweden specified that the sending State could assign to the work of a consulate situated at the seat of the central government of the receiving State one or more members of its diplomatic mission accredited to that State; in so far as their consular functions were concerned, the persons in question were subject to the provisions of the consular convention, without prejudice to their personal privileges and immunities as diplomatic agents.[1]

20. The same clause in the Anglo-Swedish Convention specified, however, that the consular assignment in question must take place " with the permission of the receiving State " and that it was necessary to obtain an exequatur. In addition, it limited the scope of the assignment to the seat of the central government of the receiving State.

21. Article 52 *bis* should be redrafted so as to mention not only the rights and duties of consuls, but also with the rights and duties of the receiving State, The draft articles were intended to form the basis of a multilateral convention and should therefore refer to the rights and duties of States and not only of consuls.

22. The CHAIRMAN, speaking as a member of the Commission, said that, since the article had its origin in a Soviet Union proposal, he would endeavour to clarify its intention. The proposed article reflected the existing practice and was not intended to introduce any innovation. According to the existing universal practice, diplomatic missions exercised consular functions on notification to the Ministry of Foreign Affairs of the receiving State, without any need for an exequatur. It

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

was apparent, however, that under the practice of the United Kingdom and a number of other countries an exequatur was required, in the circumstances contemplated, for the performance of certain consular functions, such as that of appearing in court. He suggested that the article be revised so as to reflect that United Kingdom practice.

23. The provisions of the article did not state clearly whether a diplomatic agent who acted in a consular capacity was entitled to address the Ministry of Foreign Affairs of the receiving State. Probably the intention was that, since in most countries the Ministry of Foreign Affairs had a consular division, the consular section of an embassy should, as a general rule, deal with that consular division.

24. Mr. GROS supported the views of Mr. Verdross, Mr. François and Sir Humphrey Waldock.

25. The text of the proposed article 52 *bis* was not consistent with the provisions of articles 2 and 3. Under its provisions, it might be open to a State to establish in effect a consulate in the territory of another by merely notifying the Ministry of Foreign Affairs of that State that its diplomatic mission was setting up a consular section; and yet that State might perhaps not wish to establish consular relations with it. In the case mentioned by Mr. Erim, the sending State in question might even open a consular office in a city other than the capital of the receiving State, again by merely notifying the Ministry of Foreign Affairs.

26. The Commission should either accept the interpretation of Mr. Verdross that the duties referred to in paragraph 1 of the article included that of obtaining an exequatur, or replace the exequatur by the acceptance of (and not merely the notification to) the Ministry of Foreign Affairs of the receiving State. The question was not one of mere drafting but one of substance. It was for the Commission to decide whether a diplomatic mission could perform consular functions without first obtaining the acceptance of the receiving State.

27. Mr. AGO said that the provisions of the article were undoubtedly necessary. Indeed, the question of the exercise of consular functions by diplomatic missions should be dealt with in perhaps more than just one article.

28. When the Commission had discussed article 2 at its 582nd and 583rd meetings, it had arrived at the conclusion that the establishment of diplomatic relations included the establishment of consular relations unless one of the two States made objection at the time when the diplomatic relations were established. The Commission had also agreed that consular functions could be performed by diplomatic missions. It was therefore necessary to specify the manner in which a diplomatic mission could perform those functions.

29. In that regard, the provisions of article 52 *bis* were insufficient. The Commission had decided that, where consular functions were performed by a consulate, the head of post required an exequatur, but the subordinate consuls did not. In pure logic, therefore, it could be argued that the head of the consular section of an embassy should also need an exequatur. He was prepared to consider any other system, but the Commission had to decide clearly which system it preferred. If the article left that point obscure, the head of the consular section of an embassy could encounter difficulties when endeavouring to carry out his duties because it would not be known whether he required a special form of acceptance or not. He was, of course, referring to specifically consular functions and not to certain consular functions which could also constitute diplomatic functions, such as the issuing of visas on passports.

30. Another point which needed to be clarified was whether a diplomatic agent assigned to consular work was entitled to address the Ministry of Foreign Affairs of the receiving State. If so, that agent would be placed in a better position than other consuls, who were not entitled to deal with the head of the consular division of the Ministry. It was obvious that the provisions of article 37, paragraph 2, would have to be examined very carefully in conjunction with those of article 52 *bis* so as to establish a uniform system.

31. He could not help thinking that the formula in paragraph 1 of article 52 *bis* over-simplified the position. The statement that the diplomatic agent concerned had the same rights and duties as a consul could give rise to serious doubts in certain instances. For example, in connexion with the liability to give evidence, would the provisions of article 42 be applicable or, on the contrary, was the person concerned covered by the appropriate immunity set forth in the Vienna Convention on Diplomatic Relations (A/CONF. 20/13)?

32. The statement in paragraph 2 that the diplomatic agent concerned retained his diplomatic immunity was correct. It was, however, inconsistent with that statement to say in paragraph 1 that the diplomatic agent had all the obligations set forth in the consular draft, for some of those obligations were incompatible with diplomatic immunity. It was therefore essential to specify in paragraph 1 which of the articles of the draft, particularly in chapter I, actually applied.

33. Lastly, he urged that the provisions of the article should be limited to the case where consular functions were exercised by the diplomatic mission itself, in other words at the seat of the central government of the receiving State. If a diplomatic agent were to be assigned to the work of a consulate situated outside the capital, he would become a consular official and would have to divest himself of his diplomatic capacity.

34. Mr. ŽOUREK, Special Rapporteur, said that to his mind the provisions of article 52 *bis* were general in scope and would apply to a diplomatic agent assigned to consular work, whether in a diplomatic mission or outside it; they should apply even to the case where the consulate which was in another city was temporarily in the charge of a member of the diplomatic staff. In Paris, no fewer than twenty-two States maintained consulates in premises outside their diplomatic missions, but in the charge of a diplomatic agent who appeared in the diplomatic list. It was by reason of that practice that the Czechoslovak Government (A/CN.4/136) had proposed that the draft should include a provision under

which a diplomatic agent assigned to a consulate retained his diplomatic privileges.

35. On the question whether an exequatur would be required by the diplomatic agent assigned to consular work, his research had revealed that only a minority of States imposed that requirement in order that a diplomatic agent assigned to consular functions could deal directly with the local authorities. Existing practices of that type would be respected. Article 52 *bis* was in no way intended to change the existing practice; its sole object was to codify the practice.

36. Mr. PADILLA NERVO said that in Mexico consular functions could only be combined with diplomatic functions if four conditions were fulfilled: first, that the duality in question was of a transitory and not of a permanent character; second, that the authorities of the receiving State gave the diplomatic agent concerned express permission to exercise consular functions, whether in the form of an exequatur or of another document to the same effect; third, that the functions were exercised in the capital city and not at any place outside the capital; and, fourth, that in all cases, the status of a diplomatic agent was higher than that of a consular official.

37. The provisions of the article tended to establish that duality of functions as a permanent institution. If the Commission intended that result, it was even more necessary to require an exequatur or similar document than where that duality represented only a temporary situation. He could not accept the idea that the formal permission of the receiving State should be replaced by a mere notification by the sending State's diplomatic mission to the Foreign Office of the receiving State.

38. Lastly, the Commission should decide that the provisions of the article covered only the case where the consular functions were performed in the capital city.

39. Mr. PAL supported the substance of article 52 *bis*, but thought that its provisions were incomplete. It was necessary to specify, in a separate article or otherwise, how the double function could be conferred. It would for that purpose be appropriate to specify whether an exequatur was needed by the diplomatic agent for the purpose of performing consular duties. He did not attach much importance to the new formalities, because the appointment of diplomats and their continuance in office were subject to the consent of the receiving State. Since the element of consent was already there, the manner in which that consent was given for the double function was not particularly material. It was, however, desirable to state the form in which that consent would be given and also to specify what particular privileges and immunities attached to the person exercising the double functions in question.

40. The CHAIRMAN, speaking as a member of the Commission, fully agreed with Mr. Ago that the case of a diplomatic agent assigned to the work of a consulate situated outside the seat of the central government of the receiving State should be left out of the discussion. Article 52 *bis* should apply only to the case where a diplomatic agent was in charge of the consular section of the diplomatic mission in the capital city.

41. In any event, under article 12 of the Vienna Convention, a diplomatic agent of the sending State could not be sent to establish a consular office in a city outside the capital without the receiving State's express prior consent.

42. Article 52 *bis* was not intended to create a new institution but to codify a universal practice. In all capital cities where the Soviet Union maintained embassies, including Mexico City, those embassies had a consular section. To the best of his knowledge, the notification to the Ministry of Foreign Affairs of the receiving State, as provided for in article 52 *bis*, paragraph 1, had been sufficient.

43. Though some States did require an exequatur for the exercise of certain consular functions by members of a diplomatic mission, it would be an innovation to frame a universally mandatory rule in that sense.

44. With regard to communication with the authorities of the receiving State, as in the cases he had mentioned the consular section formed part of the diplomatic mission, the provisions of article 41, paragraph 2, of the Vienna Convention, according to which all official business had to be conducted with or through the Ministry for Foreign Affairs, would apply. However, in order to take account of the practice of such countries as the United Kingdom, the article might stipulate in addition that consular sections could communicate with other authorities of the receiving State if the latter so permitted.

45. The question whether the article should contain cross-references to specific articles, as suggested by Mr. Ago, could be left to the Drafting Committee.

46. Mr. FRANÇOIS said that it was premature for the Commission to reach a decision before having seen the Drafting Committee's redraft of article 2.

47. If, however, the Commission wished to come to some conclusion immediately, he would support the view — which seemed to be that of the Chairman — that States should be free either to adhere to their existing practice or to choose another. If that course were followed, the Commission would not have to spend time in considering whether or not the majority of States were satisfied with a mere notification, as contemplated in article 52 *bis*, paragraph 1. Contrary to the conclusion reached by the Chairman, his impression was that States usually required a diplomatic agent to have an exequatur for the purpose of performing consular functions.

48. Since a diplomatic agent who was head of a consular section in an embassy was usually a subordinate member of the diplomatic staff, he should not enjoy the right of direct communication with the Ministry of Foreign Affairs of the receiving State.

49. Mr. ERIM presumed from the Chairman's remarks that article 52 *bis*, paragraph 1, would not apply to consular posts that did not form part of a diplomatic mission. On that understanding, he considered that paragraph 1 was desirable and filled a gap in the Commission's draft.

50. He shared the views expressed by other members concerning paragraph 2; it would be easier to decide on the article as a whole once the Drafting Committee had submitted a text.

51. Mr. BARTOŠ said that a provision was certainly necessary on the important matter under discussion, concerning which practice was extremely diverse. On that point he could not agree with the Chairman. For example, Yugoslavia maintained consular relations with some eighty countries, of which over forty either required a diplomatic agent who exercised consular functions to obtain an exequatur or insisted on formal acceptance of the notification that the agent was assigned to consular duties. In view of that diversity of practice, the Yugoslav Government had found that the only way of dealing with the matter was on a basis of reciprocity.

52. He himself would have a slight preference for the simpler procedure of mere notification, particularly as it seemed reasonable to assume that a person found acceptable in a diplomatic capacity would also be acceptable to the receiving State in a consular capacity. However, there had been cases of the receiving State objecting to members of a diplomatic mission being appointed to carry out consular functions, without regarding them as unacceptable in their capacity as members of the diplomatic mission.

53. Nor was the practice of States uniform in the matter of the consular district of an embassy's consular section; that was a point on which greater uniformity was desirable and should be fostered by the Commission. Under the general practice in Europe, by contrast with that of the United States, the district of an embassy's consular section comprised any part of the territory of the receiving State that was not covered by the exequatur of the head of another consular post. He subscribed to the theory underlying that practice and also considered that the head of the consular section of a diplomatic mission should be entitled to communicate direct with the local authorities of the receiving State. That view was not universally held. According to one doctrine, heads of such sections could only communicate with the authorities of the receiving State through the Ministry of Foreign Affairs and according to another they could address local authorities, but any replies had to be channelled through the Ministry. In his opinion, the head of a consular section duly recognized as such, even if not holding an exequatur, should not be in a less favourable position than heads of consular posts for the purpose of communications with the receiving State's authorities.

54. With regard to the question of privileges and immunities, diplomatic agents who carried out consular functions, whether holding an exequatur or not, should be regarded as entitled to diplomatic privileges and immunities. But it was not clear what should be the situation of such persons when seconded from a diplomatic mission to a consular post outside the capital or when appointed acting heads of a consular post on a strictly temporary basis.

55. As far as he could judge from the correspondence he had had occasion to examine, consular sections of embassies corresponded direct with Ministries of Foreign Affairs, mostly by *notes verbales*, and there was nothing to distinguish their correspondence from that of the diplomatic mission itself.

56. Mr. VERDROSS said that, as practice was not uniform, the article would have to be supplemented by a clause leaving States free to require an exequatur for the purpose of the exercise of some consular functions by diplomatic agents.

57. Mr. PADILLA NERVO said that the scope of the article went beyond the question of the establishment of consular sections in diplomatic missions and some of its implications would have to be thoroughly examined. In his earlier remarks he had purposely not mentioned consular sections in diplomatic missions, since it was self-evident that a diplomatic mission could set up any section it needed, whether consular, legal, commercial or any other. Communications from the consular section of an embassy would be addressed to the Ministry of Foreign Affairs of the receiving State as emanating from the diplomatic mission itself.

58. It was not clear whether the passage " the rights and duties of consuls shall extend to members of diplomatic missions who are appointed to carry out consular functions " was applicable only in the case where the consular functions were exercised in the capital of the receiving State.

59. Secondly, was that passage intended to confer upon diplomatic agents exercising consular functions greater rights than those accorded under the Vienna Convention? Furthermore, did the passage mean that diplomatic agents who exercised consular functions would enjoy only the more restricted immunities granted to consuls and would have to fulfil the same obligations, for example, in regard to personal services and customs regulations in the receiving State?

60. Lastly, would members of the diplomatic mission, who normally communicated direct with the Ministry of Foreign Affairs, also have access to the local authorities of the receiving State when exercising consular functions?

61. The Commission would have to consider whether by inserting the new provision in a multilateral convention it would be creating a new category of consular official with wider privileges and immunities, for example in regard to immunity from jurisdiction.

62. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Padilla Nervo, said that, if the article related only to the consular sections of diplomatic missions, the questions of direct communication with the Ministry of Foreign Affairs of the receiving State was automatically solved by the fact that those sections formed part of diplomatic missions which, except as otherwise agreed, had the duty to address themselves to the Ministry. It was the question of contacts whith the local authorities which should be settled by suitable redrafting, possibly along the lines suggested by Mr. Verdross.

63. Earlier in the debate, a number of members had referred to double functions. He did not believe that that expression was quite appropriate to describe the performance of consular functions by members of a diplomatic mission, in particular those working in its consular section. Those officials would carry out consular functions within the framework of the regular duties of the mission,

and any reference to double functions was not in keeping with the facts.

64. All the questions raised in the article seemed to have been exhaustively discussed and the article might be referred to the Drafting Committee for revision.

65. The CHAIRMAN observed that the majority of the Commission seemed to be in favour of including an article along the lines of that proposed in the Special Rapporteur's report, but had some doubts concerning the precise meaning and scope of the text as set forth in that document. He thought that the new text might contain four specific provisions. First, it might indicate that certain articles of the draft were applicable to the performance of consular functions by members of diplomatic missions; it would be for the Drafting Committee to decide whether such a reference was advisable. Secondly, it should state that the names of members of the diplomatic mission appointed to exercise consular functions should be notified to the Ministry of Foreign Affairs of the receiving State. Thirdly, it should provide that, in the exercise of consular functions, members of the diplomatic mission might enter into contact with the Ministry of Foreign Affairs and also with other authorities, if the law of the receiving State so permitted; that permission might, of course, be qualified by the receiving State. Finally, it should specify that the privileges and immunities of the diplomatic agents concerned would be governed by the rules of international law on diplomatic relations.

66. Mr. PADILLA NERVO said that, for the purpose of precise instructions to the Drafting Committee, two questions should be settled by the Commission. In the first place, did the article refer exclusively to the consular sections of diplomatic missions? Secondly, did it refer to the exercise of consular functions throughout the receiving State, or only in the capital of that country, where the diplomatic mission was situated?

67. The CHAIRMAN said that the intention was that the article should deal only with the consular sections of the diplomatic mission. Accordingly, consular functions could not be carried out by diplomatic agents elsewhere than at the seat of the mission, unless the receiving State agreed otherwise.

68. He suggested that article 52 *bis* be referred to the Drafting Committee with the directions he had mentioned.

It was so agreed.

69. Mr. BARTOŠ said that his approval of the Commission's decision was contingent upon the text ultimately prepared by the Drafting Committee. It was possible that that text might go beyond the principles agreed upon during the debate and might introduce other, contradictory principles.

PROPOSED ADDITIONAL ARTICLE CONCERNING MEMBERS OF DIPLOMATIC MISSIONS ASSIGNED TO A CONSULATE

70. Mr. ŽOUREK, Special Rapporteur, said that the Czechoslovak Government had proposed such an additional provision (A/CN.4/136). The question of the privileges and immunities of a member of the diplomatic mission who was assigned to a consulate of the sending State had been mentioned on several occasions during the Commission's deliberations. The practice of assigning a diplomatic agent to a consulate was fairly frequent. Two possible situations could occur. Firstly, the diplomatic agent assigned to a consulate might remain at the headquarters of the embassy and continue to act as a member of the diplomatic mission. In that case, there was no reason to refuse him the status of diplomatic agent. Secondly, a member of the diplomatic mission might be seconded away from the capital to head a consulate in another town temporarily. Owing to the transitory nature of his consular functions, he should in such exceptional circumstances likewise retain his diplomatic privileges and immunities, though he would, of course, be subject to the obligations laid down in the draft for heads of consular post. The situation if a member of the diplomatic mission were permanently assigned to a consulate was quite different, but he thought that the receiving State would never fail to query the correctness of such a procedure.

71. If the Commission agreed in principle to include such a provision in the draft, the Drafting Committee could be instructed to prepare a text on which a decision would be taken later.

72. Mr. AMADO said that, if such a provision was adopted, States would naturally avail themselves of the opportunity of sending diplomatic agents, with extensive privileges and immunities, rather than consuls, whose privileges were much more restricted, to head consular posts. While some States might not take the opportunity, the existence of the provision would provide a great temptation to any country which wished to protect its commercial and other interests with the greatest possible impunity. Accordingly, the article would leave the door open for considerable abuse.

73. Mr. ERIM shared the doubts expressed by Mr. Amado. If the provision were limited exclusively to temporary assignments, then perhaps such an article would do no harm; but if it were drafted generally, the difficulties referred to by Mr. Amado were bound to arise. He therefore thought that the Commission could not give a decision in the absence of a draft of the proposed provision. As Mr. Amado had pointed out, if the door were opened wide, many countries would see no need to send consuls at all, but would appoint diplomats to consular posts, in order that the sending State might profit by their immunities. Moreover, in the foreign service regulations of several countries no distinction was made between career diplomats and career consuls for the purpose of their assignments; they could be appointed either to a diplomatic mission or to a consulate. Only the functions of such officials determined their privileges and immunities in the receiving State.

74. The CHAIRMAN observed that there was a lack of information on the practice of States in the matter. It might be wise to obtain particulars concerning the practice.

75. Mr. VERDROSS said he had serious misgivings concerning the advisability of adopting such a new article in so far as it concerned the members of a diplomatic mission acting exclusively as heads of a consular posts. If a member of a diplomatic mission performed consular functions only and yet enjoyed diplomatic privileges and immunities, the result would be total

discrimination between that official and consuls who performed exactly the same functions. The provision would render the whole draft null and void, since it would mean a complete abolition of the consular status in favour of the diplomatic status. Such a revolutionary proposal could not be introduced indirectly into the draft; the proposal was quite unacceptable in so far as it dealt with a diplomatic agent performing exclusively consular functions.

76. Mr. YASSEEN said he was convinced that the granting of privileges and immunities was justified only by the functions performed. If diplomatic agents performed nothing but consular functions, there was no reason to give them diplomatic status. If, on the other hand, a diplomatic agent performed consular functions temporarily in addition to his diplomatic functions, he must of course retain his diplomatic privileges and immunities. He was not sure whether the practice of States conformed with the proposed article. A consul-general in Antwerp who had been brought to trial in 1959 for having killed his wife had been described as a career diplomatic agent, counsellor to the embassy, who had been latterly performing the functions of consul-general, but neither he nor his government had invoked his status as a diplomatic agent in order to question the criminal jurisdiction of the receiving State.

77. Mr. ŽOUREK, Special Rapporteur, said he wished to dispel a misunderstanding. There was as yet no text of the article suggested to be added by the Czechoslovak Government. For the time being, all the Commission had to do was to discuss the advisability of including the provision.

78. In reply to Mr. Yasseen, he pointed out that in the circumstances contemplated the consular functions formed part of the diplomatic functions. Diplomatic agents who served in consular sections of a diplomatic mission enjoyed diplomatic privileges and immunities, and their names were notified to the Ministry of Foreign Affairs as members of the mission. Accordingly, if the head of such a consular section were assigned to become the head of a consulate, with the consent of the receiving State, it seemed logical that he should continue to enjoy diplomatic privileges and immunities. Nevertheless, he agreed with the Chairman that the Commission was as yet insufficiently informed on the practice of States in the matter.

79. It was generally agreed that the sending State could assign a diplomatic agent to head a consular post on a temporary basis. Accordingly, an express provision on that subject in the draft seemed to be necessary; the status of such diplomatic agents must be established, since otherwise the door would be open for a variety of interpretations. Those cases, moreover, were known in State practice; for example, the embassy counsellor of Czechoslovakia after the second world war had acted as consul-general in London for several years.

80. Mr. BARTOŠ said that there was a practice, particularly widespread in New York, of giving consuls-general the honorary title of minister plenipotentiary. It was understood, however, that in such cases the persons concerned did not enjoy diplomatic privileges and immunities, but only certain privileges relating to precedence and etiquette. In principle, all States disliked the secondment of diplomatic agents of foreign diplomatic missions to perform consular functions away from the headquarters of the diplomatic mission; moreover, such secondment could not be effected without the consent of the authorities of the receiving State. He further agreed with Mr. Verdross that in such cases there would be discrimination against the other consuls at the post. It was inadmissible in inter-State relations that some persons exercising consular functions should enjoy diplomatic privileges and immunities, while others merely enjoyed consular privileges and immunities. Moreover, the rank of such persons in relation to other consuls was questionable.

81. The performance of consular functions by a diplomatic agent on a strictly temporary basis might be regarded as admissible. The assignment of diplomatic agents to consulates, however, was in conflict with the distinction which should be drawn between diplomatic agents and consular officials. It should be borne in mind that the purpose of granting immunities was to facilitate the performance of certain functions. The head of a consular post exercised consular functions only; otherwise, the consular post could not be maintained as such by the sending State. In short, the proposed provision conflicted with the practice of States.

82. Mr. AGO observed that the Special Rapporteur's general hypothesis that, if a diplomatic mission assigned a member of the staff of its consular section to act as consul, it would be illogical to accord him different treatment merely because he had changed his post, in fact referred back to the argument that a diplomatic agent had an unlimited right to exercise consular functions. If it were indeed illogical to prescribe different treatment for the diplomatic agents concerned, the whole system of differentiating between diplomatic agents and consular officials was illogical, and the effect of the proposal would be to assimilate diplomatic agents to consular officials. Within the limited sense of the provision, however, if the head of a consular post was temporarily prevented from exercising his functions and a diplomatic agent had to be assigned to take his place, it would be normal for the agent so assigned to retain his diplomatic privileges and immunities, since he would eventually return to his diplomatic post. In the broader case, if the sending State appointed a diplomatic agent as permanent head of a consular post, it would be excessive to grant him diplomatic privileges and immunities. As Mr. Amado and Mr. Verdross had pointed out, a large number of States would take the opportunity of appointing heads of consular post with those extensive privileges. The provision should therefore be confined exclusively to cases where a diplomatic agent retained his diplomatic status and acted temporarily as head of consular post.

83. Mr. PADILLA NERVO thought that the questions he had raised in connexion with article 52 *bis* acquired even more importance in the light of the debate on the Czechoslovak Government's proposal. If the Commission were to overrule the objection that had been raised to the article by adopting that objectionable provision in a separate article, the final result would be the complete

assimilation of career consuls to diplomatic agents so far as privileges and immunities were concerned.

84. He recalled that the Chairman had replied in the affirmative to the two questions he had asked with regard to article 52 *bis*. On the other hand, the Special Rapporteur stated in his third report (A/CN.4/137, section III, para. 6) that the case contemplated by the Czechoslovak Government's proposal was covered by article 52 *bis*. The Commission must make up its mind whether the persons concerned were diplomatic agents or consular officials. Unless the proposal were limited to temporary assignments only, it would carry the far-reaching and dangerous implications for which the Special Rapporteur's text of article 52 *bis* had been criticized.

85. Mr. ŽOUREK, Special Rapporteur, reiterated that no specific article covering the case under discussion had yet been submitted. The Commission seemed to be agreed that the provision should relate only to temporary assignments of diplomatic agents to a consulate; he would be perfectly prepared to leave the matter at that.

86. The CHAIRMAN suggested that the Drafting Committee be instructed to submit a text along the lines proposed by Mr. Ago, covering only cases where diplomatic agents were assigned to act as heads of consular post on a temporary basis.

It was so agreed.

The meeting rose at 1.5 p.m.

612th MEETING

Friday, 16 June 1961, at 10.10 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*)

[Agenda item 2]

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

ARTICLE 50 *bis* (Waiver of immunity from jurisdiction)

1. The CHAIRMAN invited consideration of the Special Rapporteur's new article 50 *bis* on waiver of immunity from jurisdiction which he had prepared in his third report (A/CN.4/137, section III, para. 9) for inclusion in the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, referring to the earlier debate (600th meeting, para. 22) and to the comments of the Governments of Norway and Yugoslavia (A/CN.4/136) on the subject of the waiver of immunity, said that the Norwegian Government considered that the immunities mentioned in articles 40 (Personal inviolability), 41 (Immunity from jurisdiction) and 42 (Liability to give evidence) should be capable of being waived, while the Yugoslav Government considered that only those mentioned in article 40 should be capable of being waived. His draft article followed approximately article 32 of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13). Paragraph 1 applied to consuls and members of the consular staff. It might be desirable to specify in that paragraph the articles mentioning the immunities that could be waived; he would suggest that articles 40, 41 and 42 should be mentioned. Paragraph 2 provided that the waiver had invariably to be express. With regard to the second sentence of the same paragraph, the immunity of consuls covered only acts performed in the course of duty; accordingly, since they were acts of the State, the sending State must be given every opportunity of satisfying itself that immunity would be waived only in cases in which such action was possible. That was why the article required that the waiver should be express. The stipulation that waivers had to be communicated through the diplomatic channel would offer a further guarantee. Paragraph 3 followed the provision of paragraph 4 of article 32 of the Vienna Convention and had provided for separate waiver of immunity from the measures of execution resulting from a judicial decision. That analogy with the Vienna Convention was reasonable. Diplomatic agents enjoyed immunity in respect of their private acts also, whereas the immunity of consuls was limited to acts performed in the exercise of their functions. The waiver, therefore, must invariably relate to functional acts. For that reason, every caution should be used and all the necessary guarantees provided.

3. The article would be particularly useful in cases where a consul was to give evidence. Under article 42, he could refuse to testify in respect of acts performed in the exercise of his official functions and could decline to produce documents relating to those functions. The sending State might, however, decide to waive his immunity and to authorize him to testify in respect of official matters; the decision always had to be made exclusively by the sending State. The terminology of the article would, of course, have to be adapted to that of the earlier provisions, particularly article 1, containing the definitions. For the time being, therefore, the Commission should consider the substance of the article, which would then be referred to the Drafting Committee. With regard to its position in the draft, the most logical place would be immediately before article 51 (Beginning and end of consular privileges and immunities).

4. Mr. EDMONDS said that he was in favour of including an article along the lines proposed, but the provision as drafted by the Special Rapporteur did not make it quite clear what immunity was involved. Jurisdiction in ordinary legal parlance meant the right of a court to determine a controversy; but the Special Rapporteur was using the expression to excuse a consul from appearing in court to give evidence, which was not strictly a jurisdictional matter.

5. The article contained another, even more serious defect. Under paragraph 3, the enforcement of a judgement would require a separate waiver. That seemed to imply that there were two immunities, first, immunity