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Summary record of the 613th meeting

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one of the most serious violations of international law at the moment was the fact that the great Chinese people was not represented in the United Nations.

65. Mr. GARCÍA AMADOR said it was most regrettable that any special rapporteur appointed by the Commission should deliberately ignore comments made by a government. As a matter of principle, such action was unjustified so long as that government was officially recognized by the General Assembly, of which the Commission was a subsidiary organ. He also wished to protest against the Chairman having taken advantage of his position to introduce a political issue that was not connected with the work of the Commission.

66. The CHAIRMAN observed that he was free to express his view as a member of the Commission and it was in that capacity that he had done so. He did not know whether or not the Special Rapporteur had taken the comments in question into account and wished simply to indicate the impropriety of raising the matter.

67. Mr. ŽOUREK, Special Rapporteur, said he was perfectly prepared to discuss which government, in the light of the rules of international law, was authorized to represent China in the United Nations. He would be able to rely on the memorandum (S/1466) prepared by the Legal Office of the Secretariat, from which it must be concluded that the Government of the People's Republic of China was the only one qualified to represent that country.

68. Mr. García Amador's remarks were wholly unjustified for the reasons he had stated. Moreover, he had not received the comments in question before completing his task.

69. Mr. HSU pointed out that, although the comments of the Government of China had been received before 1 April 1961, there was no mention of them in paragraph 4 of the introduction to the Special Rapporteur's third report. He had been greatly surprised to hear international lawyers voice the opinions just expressed. The question of the representation of China in the United Nations was outside the Commission's competence and so long as the United Nations recognized the Government of the Republic of China, the Commission must accept that fact.

70. Mr. VERDROSS stated that the Commission's task was to codify the law on consular intercourse and immunities, and the question of an optional protocol concerning the compulsory settlement of disputes lay outside the range of problems on its agenda.

71. Mr. EDMONDS said he was not quite clear what charge had been made by Mr. Hsu. Had he wished to assert that comments from an official source were entitled to consideration, or that certain comments had been forwarded to the Special Rapporteur by the Secretariat but had not been mentioned in his report?

72. The CHAIRMAN pointed out that the comments had been circulated in document A/CN.4/136/Add.1.

73. Mr. FRANÇOIS said that, although the Chinese Government's comments, together with those of other governments, had been circulated, it was very regrettable

that the Special Rapporteur had not taken that government's comments into account. He hoped, as Mr. Hsu had suggested, that they had been overlooked by inadvertence, because so long as the Chinese Government was represented in the United Nations, whatever might be the personal preferences of the Special Rapporteur, he should have mentioned that government's observations in his report.

74. With regard to Mr. Hsu's proposal, it would not be advisable to make a recommendation concerning the settlement of disputes: that issue must be decided by the conference of plenipotentiaries.

75. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. François's views concerning Mr. Hsu's proposal. The possibility of an optional protocol was not likely to be overlooked by a conference of plenipotentiaries in view of the two precedents established in that regard by the Vienna Conference and the United Nations Conference on the Law of the Sea. There was no need to make any recommendations on the subject.

76. Sir Humphrey WALDOCK said that, although he agreed in general with Mr. François, the question of the compulsory settlement of disputes was regarded as extremely important by many international lawyers, and that the Commission should indicate in its report that the matter had been discussed. He recognized that recent experience at international conferences showed that no useful purpose would be served in recommending the insertion of a provision in the text of the draft itself. The Commission should state that it had studied what had transpired on that point at the Vienna Conference and assumed that the question would also be examined at any future conference on consular intercourse and immunities.

77. The CHAIRMAN suggested that the procedure outlined by Sir Humphrey Waldock should be followed.

It was so agreed.

The meeting rose at 1 p.m.

613th MEETING

Monday, 19 June 1961, at 3.10 p.m.

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

(Resumed from the 605th meeting)

[Agenda item 5]

1. The CHAIRMAN said it had been agreed at the 581st meeting that the Commission would not at the current session discuss the topic of State responsibility; he would, however, invite Professor Louis B. Sohn, of the Harvard Law School, to introduce a revised draft

“Convention on the International Responsibility of States for Injury to Aliens”, prepared by the Harvard Law School.

2. Mr. SOHN expressed his thanks for the opportunity to present to the Commission the final draft of the “Convention on the International Responsibility of States for Injury to Aliens”, which he had prepared with Mr. Baxter as part of the programme of international legal studies of the Harvard Law School pursuant to a suggestion by Mr. Liang. The draft had been prepared with the help of a distinguished advisory committee, of which Professor Briggs and several other professors and practising lawyers had been members.

3. The draft had been prepared as a contribution to the Commission’s work of codification. It was a purely private work; neither Harvard nor the authors personally had received any special compensation from any source for the execution of a long and arduous task.

4. The original idea had been to bring up to date the Harvard Draft of 1929, but it had soon been found that, in view of changed circumstances and both theoretical and practical developments over the past thirty years, an entirely new work was necessary. Twelve drafts had been prepared in six years. Each article of the final text was accompanied by a note explaining the reasons for preferring one approach to the subject rather than another. In addition, the authors were working on a statement of existing law, which would contain with respect to each article of the draft convention as complete a survey as possible of international and national case-law, treaties, diplomatic practice and legal writings. The material to be sifted was so voluminous that it had been found necessary to employ a staff of six research assistants. More than half the work had been completed and over 1,000 pages should be ready for the printer before the end of 1961. The complete printed text of all three parts of the work should be available to the Commission in the spring of 1963.

5. One general observation might be made about the difficult problem of the relationship between codification of the law and development of the law. In dealing with State responsibility an attempt should be made to reconcile the precedents with modern needs. Precedents should of course be evaluated in the light of circumstances in which the decisions had been rendered. To the extent that circumstances had changed the rules might have to be modified. On the other hand, to the extent that the decisions of international tribunals reflected the basic principles of international law which were of permanent validity, it would be extremely undesirable to depart from them for the sake of satisfying the temporary interests of any particular group of nations. If a text could not please everybody, the interests of the developing world community should be the decisive factor governing the choice. Neither history nor temporary national interests should be permitted to impede progress, but, at the same time, the idea of progress should not automatically lead to discarding the experience of the past or logical deductions from fundamental principles of international law. In all work of codification it was necessary to weigh those factors carefully and to arrive at necessary compromises.

6. So far as the topic of State responsibility was concerned, cases in which there were important differences between various groups of States had to be distinguished from those where the interests of all coincided. Although there might be disagreement on the scope and importance of property rights, all States were interested in giving the utmost protection to individuals against personal injury, unjust arrest and unequal treatment. Thousands of young men were studying in foreign countries, thousands of technicians from many countries performed useful functions abroad and tourism had increased beyond expectation. All that growth in international co-operation and in the intermingling of citizens of many nations, regardless of their social systems, required a proper international legal system to protect them. It was the task of a convention on the international responsibility of States for injuries to aliens to provide such protection and to adapt old principles to new needs. In trying to find solutions which did not accept the extreme points of view on a subject, the authors of a draft naturally exposed themselves to attacks from both sides. Many criticisms of the draft had been received and many of them had been taken into account; others had cancelled each other out, and the authors had maintained their previous draft with some explanations as representing a reasonable compromise between those different points of view. The authors did not presume that their draft was the last word on the subject, but they did hope that at least it indicated a direction in which the work of codification should be proceeding. They also hoped that their work might be useful to the Commission as raw material from which it would shape its own approach to a difficult and challenging subject.

7. The CHAIRMAN expressed the Commission’s appreciation of the work presented. It was to be hoped that similar efforts would be undertaken in other parts of the world reflecting other points of view. That would be very useful to the Commission when it began its consideration of the subject in detail.

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 1 (Definitions)

8. The CHAIRMAN, inviting the Commission to resume consideration of the draft on consular intercourse and immunities (A/4425), said that the Drafting Committee had prepared the following re-draft for article 1 :

“ 1. For the purpose of the present draft, the following expressions shall have the meanings hereunder assigned to them:

“ (a) ‘Consulate’ or ‘consular post’ means any establishment entrusted with the exercise of consular functions, whether it be a consulate-general, a consulate, a vice-consulate or a consular agency;

“ (b) ‘Consular district’ means the area within which

the consulate has competence to exercise its functions;

“(c) ‘Head of consular post’ means any person in charge of a consulate;

“(d) ‘Consular official’ means any person, including the head of post, entrusted with the exercise of consular functions in a consulate;

“(e) ‘Consular employee’ means any person who is entrusted with administrative or technical tasks in a consulate, or belongs to its service staff;

“(f) ‘Members of the consulate’ means, collectively, the head of post, the other consular officials and the consular employees in a consulate;

“(g) ‘Members of the consular staff’ means the consular officials, other than the head of post, and the consular employees;

“(h) ‘Member of the service staff’ means any consular employee in the domestic service of the consulate;

“(i) ‘Member of the family’ of a member of the consulate means the spouse and the unmarried children not of full age, who live in his home;

“(j) ‘Member of the private staff’ means a person employed exclusively in the private service of a member of the consulate;

“(k) ‘Consular premises’ means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the consulate;

“(l) ‘Consular archives’ means all the papers, documents, correspondence books and registers of the consulate, as well as the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping;

“(m) ‘Nationals’ means both individuals and bodies corporate having the nationality of the State in question;

“(n) ‘Vessel of a State’ means any craft which is used for maritime or inland navigation and which flies the flag of the State in question or is registered there”.

9. He invited the Commission to consider the definitions one by one.

Sub-paragraph (a): Consulate, Consular post

10. Mr. ŽOUREK, Special Rapporteur, said that certain comments by governments on the definitions had been discussed in his third report (A/CN.4/137) especially those of Norway and the Philippines (A/CN.4/136) and the USSR (A/CN.4/136/Add.2). Since then, comments on article 1 had been received from other governments, in particular those of the United States of America, Netherlands, Belgium, Spain and Japan (A/CN.4/136/Add. 3, 4, 6, 8 and 9). The Drafting Committee had done its best to take those comments into account.

11. Mr. ERIM said that the word ‘Definitions’ should be inserted as a title, as in the 1960 draft.

12. In sub-paragraph (a) he doubted whether the reference to “consular post” was appropriate, as it was an expression often used in municipal law to indicate the functional post, whereas “consulate” was used in international law. The words “in foreign territory” might be added, since the consulate was always abroad. He further thought that the passage “whether it be . . .”

was unnecessary; the immediately preceding phrase would suffice.

13. Mr. LIANG, Secretary to the Commission, shared Mr. Erim’s doubts about the reference to “consular post”. Not only was the expression more generally used in municipal law, but a question of language was involved. The term “post” was more allied to the idea of the mission, whereas the “consulate” was a place. In draft article 14 the expression “consular post” certainly meant a consular mission. He therefore had very serious doubts whether the two expressions “consulate” and “consular post” were coterminous. Furthermore, the establishment did not exercise consular functions; it was the consul himself who exercised those functions. An establishment was simply the premises where the consul exercised his functions.

14. Mr. EDMONDS agreed with Mr. Liang. The “establishment” was not the consul or any consular official; it was those persons, not the “establishment” who were entrusted with the exercise of consular functions. The wording should be changed.

15. Mr. SANDSTRÖM said that the definition failed to specify one essential point—namely, that the consulate was established by one State in the territory of another.

16. Mr. AMADO averred that he would in no circumstances accept the word “establishment”.

17. Mr. YASSEEN wished to raise a point of method in connexion with the article as a whole. When a draft convention was preceded by a definitions clause, the definitions should be restricted to expressions which recurred repeatedly in that convention. In other cases, the definition of isolated expressions — if required — might be given in the particular articles in which they occurred. There was no need to define a “vessel”, “consular archives or consular premises”, for those expressions occurred but once or twice in the whole draft.

18. With regard to sub-paragraph (a), the word “entrusted” was inappropriate. As Mr. Amado had opposed the use of the word “establishment”, another term might be found — perhaps “organ” — and the words “entrusted with the exercise” might be replaced simply by “which exercises”.

19. Mr. ŽOUREK, Special Rapporteur, said that the expression “consular post” had been added by the Drafting Committee. The expression was used several times in the draft (e.g. in the expression “head of consular post”), undoubtedly as synonymous with “consulate”, and might therefore be properly placed in sub-paragraph (a). The word “consulate” could not be interpreted as meaning the place where the consular functions were exercised. For the building, the expression “consular premises” was used. The idea that “consulate” meant the four classes enumerated had met with wide acceptance. In reply to Mr. Erim’s query concerning the phrase “whether it be . . .”, he said that the enumeration corresponded to that in article 8. Some bilateral conventions used the term “consulate” and others the expression “consular post” in a generic sense. The best solution was, therefore, to use both terms as equivalents. Mr. Yasseen’s point about the excessive number of definitions in article 1

might well be dealt with as the Commission considered each sub-paragraph.

20. Mr. AGO said that he had been somewhat surprised at certain remarks about the meaning of "consulate" and "consular post". His own view was precisely the opposite of those expressed. It was odd to say that the "consulate" was a building and the "consular post" a mission. As a matter of fact, the Drafting Committee had used them as valid synonyms. Article 14 used the expression "consular post", whereas article 16 used both that and "consulate". The Commission's task was not to give final definitions applicable at all times and in all circumstances, but simply definitions for the purposes of the draft. The enumeration in the phrase "whether it be. . ." was also necessary for clear understanding; otherwise it might be asked whether the Commission intended vice-consuls to be covered by the definition or not. With regard to the word "establishment" he had been under the impression that, in the French text at least, *établissement* meant an organ established on foreign territory. Some members, however, appeared to give it a more physical meaning. That point might be made clearer. It would be perfectly possible to add the expression "in foreign territory", though it might be redundant.

21. Mr. GROS said that in French *établissement* seemed to be the best possible word. In French public law it did not signify a physical establishment, but a body corporate; *établissements publics*, for instance, were public services with a degree of autonomy. As to the word "organs", it was possible to speak of the "organ" of an international organization, but the term would not be suitable in the draft. "Establishment" would certainly be preferable.

22. Mr. EDMONDS said that the Commission was trying to express the idea that any mission in foreign territory entrusted with consular functions, whether under the direction of a consul-general, a vice-consul or any other consular official, was as a whole entrusted with the function. It was not the establishment but the mission headed by a particular person, that was entrusted with the function. The term "establishment" was misleading.

23. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Ago with regard to the use of the terms "consulate" and "consular post". It was essential to mention "consular post," as it often occurred in the draft. He would prefer the word "organ" to "establishment," but when he had suggested the term at the Vienna Conference, he had been told that it was not appropriate either in French or in English, although it appeared in many books on French constitutional theory. The substantive question, however, was whether it was possible to say that an "establishment" was entrusted with the exercise of consular functions. Two different opinions had been advanced. One, which seemed to be purely that prevalent in the United States of America, held that a certain person was entrusted with the discharge of State functions, whereas in the other view the organ of the State was entrusted with certain functions, and the person who directed the organ was simply its head. The latter view corresponded more to modern realities, whereas the other view had been widely accepted in feudal times when the personal rela-

tionship had been the basic one. The problem had been discussed at the Vienna Conference and it had finally been decided that it was really the organ of the State which was entrusted with the performance of diplomatic functions, and that was the basis of the whole philosophy of the Vienna Convention on Diplomatic Relations (A/CONF. 20/13). It would therefore be justifiable to take a consulate as the institution entrusted with certain functions. The word "entrusted" should therefore be retained, whether the term "establishment" was used or not. He might agree with Mr. Yasseen's suggestion that the phrase should read "which exercises consular functions". He was not sure that it was necessary to specify that the functions were exercised in foreign territory.

24. Mr. ERIM said that, in a further study of the draft, he had not found the expression "consular post" as such in a single article; articles 12 and 16 spoke of "heads of consular posts." "Consular post" was thus not a suitable term to use in the draft and consequently did not require definition. He was doubtful whether "consulate" and "consular post" were synonyms.

25. Mr. AMADO said that he could not accept the word *établissement* in the French text because it reminded him of the old colonial *comptoirs*. He supposed that one more impropriety would not matter greatly, but he was not open to conviction.

26. The CHAIRMAN suggested that the Drafting Committee be instructed to revise sub-paragraph (a) in the light of the comments made.

It was so agreed.

Sub-paragraph (b): Consular district.

27. Mr. ŽOUREK, Special Rapporteur, observed that the new definition of "consular district" was a simplification of the 1960 definition, which had included the phrase "in relation to the receiving State".

28. Mr. BARTOŠ pointed out that very often the consular district mentioned in the consular commission did not coincide precisely with that specified in the exequatur. So far as the sending State was concerned, the competence for the district was recognized in the consul's commission. For example, the United States of America did not specify the consular district when establishing a consulate, but merely stated that it was a certain city and its neighbourhood, leaving it to the receiving State to define the exact district in the exequatur. The 1960 definition was therefore closer to reality and should be retained.

29. The CHAIRMAN, speaking as a member of the Commission, thought that the difficulty might be avoided if the word "competence" were dropped and the phrase read instead: "within which the consulate exercises its functions." Some such phrase would to some extent meet Mr. Bartoš's point.

30. Mr. JIMÉNEZ de ARÉCHAGA observed that the definition would depend on whether the functions were exercised in fact or whether the consul was merely regarded as competent to exercise them.

31. The CHAIRMAN, speaking as a member of the

Commission, said that he thought that "exercises" covered both the actual exercise and the competence to exercise consular functions.

32. Mr. YASSEEN said that while it was true that one could hardly speak in a convention of the illicit exercise of functions, it might be better to avoid any misunderstanding by inserting a reference to the legitimate exercise.

33. The CHAIRMAN suggested that the Drafting Committee should revise sub-paragraph (b) in the light of the comments made.

It was so agreed.

Sub-paragraph (c) : Head of consular post

34. Mr. ŽOUREK, Special Rapporteur, said that the new definition of "head of consular post" was a somewhat simplified version of the 1960 definition, which had included a reference to persons appointed by the sending State. That reference had seemed to be self-evident and therefore redundant. The new simplified version should be interpreted in the light of the provisions of the convention.

35. Mr. LIANG, Secretary to the Commission, observed that classes of heads of post were enumerated in article 8 and that enumeration indicated a degree of normality, i.e. regular appointment. If, however, it was said that a head of consular post was any person in charge of a consulate, the concept was reduced to a temporary measure, and might include, for example, a diplomatic agent temporarily assigned to head a consulate. In other words, the words "in charge" indicated a degree of temporary tenure. The new definition was, as the Special Rapporteur had said, simpler than the original, but simplification was not necessarily identical with precision. Article 8 carried no connotation of temporary functions; it had been based on the corresponding article of the 1958 draft on diplomatic intercourse (A/3859, chap. III, article 13), as had the definition of "head of consular post" approved by the Commission in 1960. Moreover, a person temporarily in charge of a consular post was not in fact the head of a consular post. He therefore considered the 1960 definition to be more precise.

36. The CHAIRMAN, speaking as a member of the Commission, suggested taking the text of article 1 (a) of the Vienna Convention as a model. Although that formula might not be perfect, it had been adopted by the Vienna Conference, and the situation was practically analogous with that contemplated by sub-paragraph (c).

37. Mr. AGO said that the Drafting Committee had considered using the wording of article 1 (a) of the Vienna Convention, but had decided against that course and had adopted the simpler text of sub-paragraph (c). A person could be put in charge of a consular post, but would not become the real head of consular post without the exequatur which represented his recognition by the receiving State. It might be said that a diplomatic agent "charged by the sending State with the duty of acting" as head of the mission was likewise not the effective head until the agrément had been given; the answer to that argument could, however, be that the grant of the agrément was a less formal procedure than the grant of the exequatur.

Accordingly, the words "in charge" in the new definition implied that both States had to take whatever action was necessary before the head of a consular post could enter on his functions.

38. Mr. JIMÉNEZ de ARÉCHAGA said that he preferred both the 1960 definition and the new definition to the wording used in the Vienna Convention. Since the term "consulate" was defined as meaning also a vice-consulate or a consular agency, the head of post in a consular district might not be the person charged by the sending State to act as head of post, since he might be exercising his functions under the direction of a consul-general. It would be wise not to introduce that element of uncertainty into the definition.

39. Mr. PAL observed that, in preparing its new draft of article 1, the Drafting Committee must have taken into account the use of the terms in all the articles of the draft. Any criticism of the definition must show how and where the proposed definition did not accord with the uses of the expression in the draft. Accordingly, the definitions used in other Conventions were irrelevant; the meanings used in the draft on consular intercourse should be the only ones taken into consideration.

40. The CHAIRMAN suggested that sub-paragraph (c) be referred to the Drafting Committee for revision in the observations made.

It was so agreed.

Sub-paragraph (d) : Consular official

41. Mr. ŽOUREK, Special Rapporteur, said that the difference between the new definition of "consular official" and the 1960 definition was one of drafting only; the 1960 text defined a consular official by exclusion of members of a diplomatic mission, whereas the new text contained a positive formulation. It would be wise to accept the new version, particularly since the Government of Norway had criticized the passage "and who is not a member of the diplomatic mission".

42. The CHAIRMAN suggested that, in the absence of comments on sub-paragraph (d), it should be adopted.

It was so agreed.

Sub-paragraph (e) : Consular employee

43. Mr. ŽOUREK, Special Rapporteur, said that the new text of the definition contained some drafting changes. In particular, the expression "consular employee" had been introduced, in lieu of "employee of the consulate" in keeping with the terminology used in a number of recent consular conventions.

44. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (e), it should be adopted.

It was so agreed.

Sub-paragraph (f) : Members of the consulate

45. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had considerably revised the definition of "members of the consulate". The concordance of the English and French texts presented a difficulty.

46. Sir Humphrey WALDOCK said that in the Draft-

ing Committee he had had some doubts as to the advisability of referring to the members of the consulate collectively, as a unit. The definition should, rather, refer to the members of the consulate comprising all the persons at the consulate. He therefore suggested that the sub-paragraph should read: "Members of the consulate" means all the members of the consulate, including the head of post, the other consular officials and the consular employees".

47. The CHAIRMAN, speaking as a member of the Commission, thought that it might be advisable to follow article 1(b) of the Vienna Convention, which did not contain the words "collectively" or "including". It might be best simply to omit the word "collectively".

48. Mr. ERIM said that, according to the definition given in sub-paragraph (d), the expression "consular official" included the head of post. Accordingly, there seemed to be no reason to mention the head of post in sub-paragraph (f). It would be enough to say that the members of the consulate were all consular officials and consular employees.

49. Mr. ŽOUREK, Special Rapporteur, said that a solution along the lines suggested by Mr. Erim had been considered in the Drafting Committee, but that it had been decided, for purely technical reasons, to mention the head of post specifically in sub-paragraph (f), so that it should be unnecessary to refer to another definition to see what category of person was included in the term "consular official".

50. Mr. AGO, supported by Mr. AMADO and the CHAIRMAN, suggested that the sub-paragraph might be considerably simplified if it stated simply that "members of the consulate" meant all consular officials and employees.

51. The CHAIRMAN suggested that the sub-paragraph be referred to the Drafting Committee for revision in the light of the comments made.

It was so agreed.

Sub-paragraph (g): Members of the consular staff

52. Mr. ŽOUREK, Special Rapporteur, said that the definition of "members of the consular staff" was self-explanatory and did not differ materially from the 1960 definition.

53. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (g), it should be adopted.

It was so agreed.

Sub-paragraph (h): Members of the service staff

54. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the service staff" was new, inserted by the Drafting Committee because the Commission had excluded service staff from the benefit of several articles, in compliance with the comments of governments. The Drafting Committee had based the definition on article 1(g) of the Vienna Convention.

55. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (h), it should be adopted.

It was so agreed.

Sub-paragraph (i): Member of the family

56. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the family" was also new; it had been included because several governments had drawn attention to the need for such a definition. Moreover, some members of the Commission had raised the question during the debate on certain articles. In his opinion, the draft would be incomplete without such a definition, for without it every State would interpret the expression according to its own law. He thought that the Drafting Committee's text would satisfy the majority of governments and, if adopted by the Commission, would probably be acceptable to the plenipotentiary conference. Like all definitions, it was imperfect; for example, it did not cover the case where the sister of an unmarried consul kept house for him. But the Drafting Committee had finally decided that such cases should be left to agreement between the sending and the receiving States, for the definition could not be based on exceptional cases. The consent of the receiving State would, he was sure, always be obtained if convincing reasons were advanced for granting consular privileges and immunities to certain persons.

57. Mr. ERIM agreed that a definition was desirable, but was not sure that the text proposed by the Drafting Committee would satisfy governments or reflected existing practice. The definition of the family merely as the consul's spouse and minor children was too narrow; if the consul had his mother living with him or children who were not minors but were studying and were dependent on their parents, it seemed unjust to exclude them from the definition. The Drafting Committee should therefore be instructed to broaden the definition at least to include the parents of the consular official and his dependent children, irrespective of age.

58. Mr. VERDROSS said that, while he would have been in favour of a precise definition of "member of the family", he doubted whether a sufficiently accurate definition could be devised. The Vienna Convention contained no such definition. After all, polygamy was still legal in certain States; and presumably some consular officials had not only their mothers, but also their mothers-in-law living with them. In his opinion, the Commission should either decide, as the Vienna Conference had done, to leave the question for States to decide, or to lay down a narrow definition.

59. Mr. MATINE-DAFTARY said that he had been inclined in the Drafting Committee to take the same view as Mr. Erim and to advocate a broader definition. The argument used against his view, however, had been that members of the consulate themselves did not have very extensive privileges and that members of the family were excluded from the benefit of many articles of the draft. He still believed, however, that a broad definition would be desirable.

60. Mr. AMADO said that the phrase "unmarried children not of full age" was excessively detailed, although he realised, of course, that cases of the marriage of minor children were not unknown. A number of specific examples could be added to those mentioned by previous speakers; for instance, the unmarried female relatives

of consular officials might be most anxious to accompany them to their posts abroad. But the Commission should not set itself up as an international welfare society. The simplest solution might be to refer to the spouse and children of the consular official and other persons dependent on him who lived in his home.

61. Mr. YASSEEN said that the rules of family law differed greatly from country to country, and so did the definition of the family; some countries accepted a broader definition than others. It would therefore be difficult to establish a definition which would be acceptable to the large majority of participants in a conference of plenipotentiaries.

62. He recalled the failure of the attempt made at the Vienna Conference to draft an acceptable definition of the family for the purposes of the application of diplomatic immunities and urged the Commission to abandon the idea of incorporating such a definition in the consular draft. It would be better to leave the matter to the State practice in the application of the convention, by agreement between the parties.

63. The CHAIRMAN, speaking as a member of the Commission, said that when the Vienna Conference had discussed the problem, a number of proposals had been put forward, ranging from a restrictive to a very broad definition of the family. After considerable discussion and private consultations, it had been decided not to include any definition of the family in the Vienna Convention.

64. In view of the different concepts of the family in the various countries, he therefore doubted very much the wisdom of including such a definition in the draft on consular intercourse.

65. If an acceptable definition of the family had been found, it would have been useful in the Vienna Convention because members of the family of a diplomatic agent enjoyed the same privileges as the diplomatic agent himself. In the case of consuls, very few privileges were extended to their families and that definition was therefore less necessary.

66. If, as he suggested, the definition were omitted, the consequence would be that the meaning of "family" would be determined by the law of the receiving State, by custom or by a bilateral arrangement between the States concerned. In practice, problems rarely arose and any that did occur were generally settled to the mutual satisfaction of the States and persons concerned.

67. Sir Humphrey WALDOCK, speaking as a member of the Drafting Committee, said that the Committee had felt that it would seem somewhat strange not to include a definition of "member of the family" when other expressions which were much easier to interpret were defined in article 1.

68. It was true that the privileges enjoyed by members of the family of a member of the consulate were fewer than those enjoyed by members of the family of a diplomatic agent, but the privileges in question were important for they affected fiscal and customs matters. Some of the privileges had not in the past been given to the members of the consul's family. Accordingly,

a strict definition of "member of the family" should be adopted for the purposes of the draft, for otherwise States might be reluctant to ratify the future convention.

69. The Drafting Committee had considered the cases cited during the discussion but had found it extremely difficult to formulate a definition allowing for all possibilities.

70. He stressed that the Commission was not attempting to define the family in general, but was doing so only for the purposes of the application of the draft. For that purpose, it was necessary to have a narrow definition; he would rather that the Commission adopted no definition than that it adopted a broad definition which might impair the draft's chances of acceptance by governments.

71. Mr. MATINE-DAFTARY emphasized that, although the Vienna Conference had not adopted an actual definition of "members of the family", it had added to that expression, in particular in article 37, the words "forming part of his household". Those words introduced an element of definition, because they would cover, e.g., the widowed mother of a diplomatic agent.

72. He suggested, therefore, that the Committee might drop the definition of "member of the family" and add the words "forming part of his household" wherever reference was made to the members of the consul's family.

73. The CHAIRMAN, speaking as a member of the Commission, explained that in the Vienna Convention the purpose of the qualification "forming part of his household" had not been to broaden the scope of the term "members of the family", but rather to restrict it to those members of the family who were actually living under the same roof as the diplomatic agent. The intention had been to exclude from the benefit of diplomatic privileges persons who, though actually members of the family of a diplomatic agent, did not live with him.

74. Personally, he would have been ready to accept a definition such as that proposed by the Drafting Committee, but in view of the experience of the Vienna Conference he thought that any definition, even if adopted by the Commission, would hardly commend itself to any future conference.

75. Mr. ŽOUREK, Special Rapporteur, said that those in favour of a broad definition of the family wished it to cover exceptional cases and to include, e.g., the widowed mother or unmarried sister of the consul. In the case of diplomatic relations, the status of such persons had always been settled without any difficulty by *ad hoc* arrangements. For the purpose of a multilateral convention, however, a broad definition was clearly unacceptable; only a definition which covered the normal cases would be acceptable.

76. In reply to Mr. Amado, it was necessary to specify that the children should not only not be of full age, but also that they should be unmarried. It was not uncommon for a consul's minor daughter to get married,

in which case she would leave the family of her father and would therefore not be entitled to any privileges and immunities.

77. He agreed with Mr. Yasseen that it would be impossible to find a definition of the family which would satisfy all countries, but the definition under discussion was intended to apply solely for the purpose of the multilateral convention. It would not prejudice in any way the definition of the family for purposes of municipal law or for the purpose of other international conventions.

78. He urged the Commission to adopt a definition of "member of the family". A definition of that sort might not have been essential in the Convention on Diplomatic Relations because the members of the family of diplomatic agents had always enjoyed, by international custom, diplomatic privileges and immunities. In the case of consular officials, however, it was proposed in the draft articles to give their families a few privileges, particularly in the matter of taxation and customs, which were not based on any existing general practice. States would therefore wish to know, before ratifying the proposed convention, the exact scope of those new privileges.

79. Lastly, if no definition were adopted, controversies could arise between the sending State and the receiving State: the authorities of the latter would endeavour to apply their own definition of the family and the former might object that that definition was much narrower than the definition under its own municipal law. If the draft did not contain a definition of "members of the family" of a member of the consulate such differences of opinion would be insoluble. It was therefore essential to lay down some definition which could be applied in all cases covered by the convention being prepared by the Commission.

80. Mr. PAL agreed with the Chairman and Mr. Verdross that no attempt should be made to define the family. Even with the inclusion of the persons mentioned by Mr. Verdross, the term "member of the family" might give a normal picture of the family in Western countries but would not reflect the Eastern concept of the family and would therefore be difficult to accept for the countries of the East.

81. Mr. AMADO said that the explanations given by the Special Rapporteur had not convinced him that the word "unmarried" was necessary.

82. It was an exaggeration to suggest that States would decline to ratify a convention which embodied so many useful and important rules of consular relations merely because of the fear that some of its provisions might unduly favour a consul who wished to bring with him his unmarried daughter or his widowed mother.

83. If the proposal to drop the definition were put to the vote, he would vote for it.

84. Mr. JIMÉNEZ de ARÉCHAGA also found the proposed definition too restrictive. The expression "member of the family" should cover not only the consul's spouse and minor children, but also other dependants living under the same roof.

85. Sir Humphrey Waldock had pointed out that it was not intended to define "family" in general, but merely to define it for the strictly limited purposes of the draft, in the hope that the draft would as a consequence be more acceptable to governments. However, if the Commission were to approve a definition, there was a danger, particularly in view of the non-adoption of such a definition at the Vienna Conference, that the Commission's interpretation of "family" might be regarded as applicable much more generally than it intended.

86. For those reasons, unless the majority of the Commission were prepared to accept a broader definition, it would be better to omit the sub-paragraph altogether.

87. Sir Humphrey WALDOCK said that many countries strongly opposed the undue extension of immunities in fiscal matters; hence any definition that extended such immunities to a large circle of persons would materially affect the draft's prospects of acceptance.

88. The issue was not the different concept of the family in Western and Eastern countries. Even in Western countries, the family included other persons than those specified in sub-paragraph (i). The intention of the Drafting Committee had been simply to restrict the meaning of "family" for purposes of the grant of consular privileges and immunities.

89. If no definition of "member of the family" were to be included, there would be a lacuna in the draft. He accordingly suggested that the definition should be referred back to the Drafting Committee for redrafting in the light of the debate, although not in substantially broader terms.

90. Mr. YASSEEN said that he could not accept the distinction drawn between the "family" for purposes of the draft and the family in general. If it was admitted that certain privileges should be extended to "members of the family", those privileges could surely not be denied to persons who belonged to the consul's family. If the draft were to exclude any such person from the "family", it would thereby be stating that the person in question did not belong to the family.

91. In point of fact, the definition proposed by the Drafting Committee was the most restrictive one that could be put forward; even the countries that had adopted the most limited conception of the family included in it many more persons than those indicated in the proposed text.

92. Because in different countries the word "family" varied in the scope of its meaning, it was preferable to leave the matter to State practice. Any problems would thus be solved by specific agreements between States.

93. The CHAIRMAN said the Commission had before it the proposal that sub-paragraph (i) should be omitted, and also a proposal that the definition be referred back to the Drafting Committee together with members' comments. Since the first of those proposals was farther removed from the text, he would put it to the vote first.

The Commission decided, by 9 votes to 7, with 2 abstentions, that sub-paragraph (i) (definition of "member of the family") should be omitted.

94. Mr. MATINE-DAFTARY said that, in view of the Commission's decision, the Drafting Committee might consider his suggestion that the words "forming part of his household" should be added wherever the expression "members of the family of a member of the consulate" occurred.

95. The CHAIRMAN said that the point had been raised during the discussion of the various articles and would no doubt be taken into account by the Drafting Committee.

Sub-paragraph (j): Member of the private staff

96. Mr. ŽOUREK, Special Rapporteur, said that the definition of "member of the private staff" was identical with the 1960 definition. The expression "member of the private staff" had been retained in preference to "private servant", appearing in article 1 (h) of the Vienna Convention. The Drafting Committee regarded the expression "private servant" as unduly restrictive; it did not cover, for example, a governess brought from the sending State by the consul.

97. The CHAIRMAN suggested that, in the absence of comments on sub-paragraph (j), it should be adopted.

Sub-paragraph (j) was adopted.

Sub-paragraph (k): Consular premises

98. Mr. ŽOUREK, Special Rapporteur, said that the definition of "consular premises" had been amended so as to bring it into line with the corresponding definition in article 1 (i) of the Vienna Convention.

99. The CHAIRMAN suggested that, in the absence of comment on sub-paragraph (k), it should be adopted.

It was so agreed.

Sub-paragraph (l): Consular archives

100. Mr. ŽOUREK, Special Rapporteur, said that the Drafting Committee had amended and broadened the 1960 definition of "consular archives", in deference to government comments. The Soviet Union Government (A/CN.4/136/Add.2), for example, had proposed that the 1960 definition be replaced by broader language; the Netherlands Government (A/CN.4/136/Add.4) had made a proposal along the same lines, but going even further in the same direction.

101. The definition raised chiefly problems of language. In some countries, "archives" meant only files of settled matters. Until a matter was settled, the relevant papers were regarded as "correspondence" or "documents."

102. The Vienna Convention did not contain any definition of diplomatic archives, but that definition was perhaps not so necessary because of the status enjoyed by the premises of the diplomatic mission, the residence of diplomatic agents and the diplomatic agents themselves. The consular archives enjoyed a specific inviolability, and it was therefore important to define the term. Moreover, the definition of "consular

archives" should be as broad as possible, in order to give the sending State every possible safeguard in respect of the correspondence, documents, books, ciphers and codes at its consulate.

103. Lastly, there was the special problem of monies belonging to the sending State and held by the consulate (*cf.* Netherlands comments, A/CN.4/136/Add.4), which were hardly covered by the term "consular archives". However, there could be no doubt that, as monies belonging to a foreign State, they were inviolable in the receiving State wherever they might be, and it would therefore be desirable to add an express clause to that effect either in the article on inviolability of premises or in a separate article.

The meeting rose at 6.5 p.m.

614th MEETING

Tuesday, 20 June 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425); A/CN.4/136 and Add.1 to 11 (A/CN.4/137)

(continued)

[Agenda item 2]

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

ARTICLE 1 (Definitions) *(continued)*

Sub-paragraph (l): Consular archives (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of the Drafting Committee's redraft of article 1 (613th meeting, para. 8) of the draft on consular intercourse and immunities (A/4425).

2. Mr. YASSEEN said that the Vienna Convention on Diplomatic Relations (A/CONF. 20/13) did not contain any definition of the diplomatic archives. That was, of course, not a reason for excluding a definition of the consular archives from the draft on consular intercourse, if such a definition appeared necessary. However, article 1 should only define those terms which occurred frequently in the draft. In the case of the consular archives, which were mentioned in articles 33 and 55, it would be better to follow the example of the Vienna Convention, which defined the term "official correspondence" not in article 1, but in article 27, concerning freedom of communication.

3. He therefore suggested that, if the Commission approved the proposed definition of "consular archives", it should incorporate it in article 33, dealing with the inviolability of these archives. As to article 55, it merely constituted the adaptation of article 33 to honorary consuls and the expression "consular