

Document:-  
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**Summary record of the 528th meeting**

Topic:  
**Consular intercourse and immunities**

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and immunities and continue with *ad hoc* diplomacy, in view of the proposed Vienna conference, but the decision on the order of the agenda taken by the Commission at its eleventh session should be maintained, and consequently the seventh and eighth weeks of its session should be devoted to State responsibility.

14. Mr. BARTOŠ agreed with Mr. Ago that there were practical reasons for dealing with *ad hoc* diplomacy immediately after consular intercourse and immunities. Mr. Tunkin and Mr. Yokota had argued cogently in favour of that course in view of the proposed Vienna conference. A further reason was that the Commission had decided that the law on *ad hoc* diplomacy should be codified. A basic draft had been provided by Mr. Sandström; if the Commission produced recommendations on that basis, that would not prejudice any final decision. The other items were extremely important too, and the Commission had already settled certain basic principles, but drafting would not be finished during the present Commission's term of office, as the subjects were vast and complicated. Many divergent views had for example been expressed on the subject of state responsibility. There had been more agreement on the subject of the law of treaties, especially since the Commission had enjoyed the benefit of basic reports by a succession of special rapporteurs. The subject of *ad hoc* diplomacy would not require a great deal of time, since the Commission had already laid down certain principles in its draft on diplomatic privileges and immunities, and all that it had to do was to see whether they could be applied to *ad hoc* diplomacy, about which there seemed to be few existing principles of positive law. *Ad hoc* diplomacy was used almost daily, and a solution of the problems involved should be sought as soon as possible. The Commission should therefore decide to take the subject of consular intercourse and immunities first, and *ad hoc* diplomacy, which was organically linked with it, immediately afterwards.

15. The CHAIRMAN noted that all members agreed that the item on consular intercourse and immunities should be taken first and that *ad hoc* diplomacy should be examined immediately afterwards. The Commission might then take a decision on the ensuing items without altering the order suggested at the previous session.

16. Mr. GARCÍA AMADOR agreed.  
*The agenda (A/CN.4/123) was adopted.*

**Filling of casual vacancy in the Commission  
(Article II of the Statute) (A/CN.4/127)**

[Agenda item 1]

17. The CHAIRMAN suggested that the Commission hold a private exchange of views on item 1 of the agenda.

*It was so agreed.*

The meeting rose at 12.10 p.m.

**528th MEETING**

*Thursday, 28 April 1960, at 10.10 a.m.*

*Chairman:* Mr. Luis PADILLA NERVO

**Consular intercourse and immunities  
(A/CN.4/131, A/CN.4/L.86)**

[Agenda item 2]

**PROVISIONAL DRAFT ARTICLES (A/CN.4/L.86)**

1. The CHAIRMAN invited the Commission to begin consideration of item 2 of its agenda, and called upon the Special Rapporteur on Consular Intercourse and Immunities to introduce the provisional draft articles (A/CN.4/L.86).

2. Mr. ŽOUREK, Special Rapporteur, said that when he had prepared his first report,<sup>1</sup> he had not had all the necessary documentation, and had therefore been obliged to defer certain points for later study. The Commission had then adopted the articles on diplomatic intercourse and immunities,<sup>2</sup> and he had had to re-examine his draft on consular intercourse and immunities in order to concord it as far as possible with the Commission's draft on diplomatic intercourse. Those two factors had caused him to amend and expand his original draft. The Commission had adopted nineteen articles at its eleventh session; the remaining articles were in the 1957 report, and some additional clauses were proposed in his second report (A/CN.4/131). For the Commission's convenience, the whole set of articles had been incorporated in one document (A/CN.4/L.86).<sup>3</sup>

3. The Commission would have to consider carefully to what extent it should strive after concordance between the corresponding articles of the drafts on diplomatic and on consular intercourse and immunities. The existing international law and the international practice relating to various points should be studied — for example, whereas in practice certain immunities might be admitted both in the case of diplomats and in the case of consuls, the two types of immunity might well differ in extent. Even where the immunity was the same in every respect, the Commission was not bound to follow the language of the draft on

<sup>1</sup> *Yearbook of the International Law Commission, 1957*, vol. II (United Nations publication, Sales No. 1957.V.5, vol. II), pp. 71-103.

<sup>2</sup> *Ibid.*, 1958, vol. II (United Nations publication, Sales No. 58.V.1, vol. II), pp. 89-105.

<sup>3</sup> References to articles 1 to 18 in the present records should be interpreted as references to the text in that document.

diplomatic intercourse and immunities if it thought that it was possible to improve the working of the provisions in question.

4. At its previous session the Commission had adopted articles 1 to 18 and article 24 of the draft, although article 2, paragraph 2, had been reserved, and two variants were given for article 4.<sup>1</sup> The Commission would therefore have to return to those two articles after discussing the outstanding clauses. The Drafting Committee would undoubtedly propose some changes in the articles already adopted. The outstanding articles fell into two groups, one consisting of those corresponding to certain articles of the draft on diplomatic intercourse and immunities; there was no need to repeat the discussion of those articles *in extenso* and the main criterion for their adoption should be the question whether they had a rightful place in the draft. That summary treatment might be applied to articles 22, 23, 27, 28, 31, 36, 41, 43, 44, 45, 46 and 52, and also to articles 59 and 60, although the Commission might prefer to deal with the last two in greater detail. The normal methods of discussion would be used for the remaining group of articles.

5. In conclusion, with reference to the structure of the draft, he said that, in his view, full conformity with the draft on diplomatic intercourse and immunities could hardly be achieved, for the provisions concerning honorary consuls had no counterpart in the other draft. He had endeavoured to adapt the structure of the draft on consular intercourse and immunities to that of the draft on diplomatic intercourse and immunities; nevertheless, he would have preferred to keep his draft in its original form, under which consular intercourse in general had been dealt with in chapter I, the general question of the immunities of consular representatives in chapter II, honorary consuls in chapter III, and general provisions in chapter IV. The Commission might decide on a different structure from the one he had used; in any case, that question could be decided later. Finally, he thought that considerable time might be saved if the Special Rapporteur were to intervene more often in the debate, in order to dispel any misunderstandings as they arose.

6. Mr. BARTOŠ said he was not in favour of adhering too closely to the relevant provisions of the draft on diplomatic intercourse and immunities. Of course, if the Commission decided that a provision of that draft applied also to consular intercourse and immunities, and the extent to which it should apply it should refer the article to the Drafting Committee without lengthy debate; it should, however, endeavour to improve the wording of the articles whenever possible. In any case, he agreed with the Special Rapporteur that the question of applicability was the deciding factor of acceptance.

#### ARTICLE 19 (*Staff employed in the consulate*)

7. The CHAIRMAN invited the Special Rapporteur to introduce article 19.

8. Mr. ŽOUREK, Special Rapporteur, said that he had included the article because several members considered that not only the legal position of the head of the post, but also that of subsidiary personnel, should be precisely defined. After consulting a number of consular conventions he had drafted a text which reflected international law and practice. The receiving State's obligation to accept the requisite number of consular officials and employees followed from the act of consent to the establishment of a consulate. The right of the sending State was, however, qualified by the provisions of articles 9 and 20; article 9 provided that the consent of the receiving State was essential for the appointment of consular officials from amongst the nationals of that State, and article 20 dealt with the case of persons declared unacceptable, either before or after appointment to the post. Article 19 referred only to members of the consular staff other than the head of the post; he drew attention to the need for broadening the definitions given in article 1 by introducing a definition which would cover consular officials and employees excluding the head of post.

9. Article 10 of the draft on diplomatic intercourse and immunities contained fairly elaborate provisions concerning the size of the mission staff; but he did not believe it necessary to make similarly elaborate provision in the case of consular staff, for the latter was usually much smaller than the staff of diplomatic missions. He had drafted the article in terms of a general rule, subject to the qualifying provisos. Finally, his draft made it clear that the question of the hierarchy and legal status of consular officials was left entirely to the sending State.

10. Mr. ERIM said, with reference to the expression "requisite number", that the receiving State should have some power to decide whether the number of officials and employees at a consulate was in excess of the necessary strength.

11. Sir Gerald FITZMAURICE agreed that there were practical differences between the staff of diplomatic missions and that of consulates, but thought that the differences hardly justified such sharply contrasting treatment. It would be wrong to place undue limitations on the number of the staff; but article 19 of the consular draft went almost to the opposite extreme, in denying the receiving State any say in the matter of size of staff. Moreover, the adjective "requisite" stood by itself, undefined. It might be better to bring the article into closer conformity with article 10 of the draft on diplomatic intercourse and immunities.

12. With regard to the last phrase, he said that the expression "legal status" seemed to suggest that the sending State could determine the legal status of its consuls in a manner different from that

<sup>1</sup> Official Records of the General Assembly, Fourteenth Session, Supplement No. 9, chap. III.

set forth in the convention which would ultimately be adopted.

13. Mr. MATINE-DAFTARY agreed that the words "requisite number" were too vague. The article as it stood could provide an escape clause for States wishing to introduce their nationals into another country under the guise of consular officers: it would be tantamount to closing the door while leaving the window open. Some kind of limitation should be added to prevent malpractices; by comparison with the limitation affecting the size of the staff of diplomatic missions, the provisions of article 19 were far too liberal.

14. Mr. BARTOŠ agreed with Mr. Matine-Daftary that the article provided a dangerous escape clause. Moreover, the fact that consulates were decentralized and might be in distant parts of the receiving State made it even more dangerous to adopt a provision that would allow an unlimited number of so-called consular officials to enter the country.

15. With regard to the last phrase, he thought that the expression "condition juridique" was used inaccurately. Moreover, the provision as it stood completely disregarded the practice, widespread in many American and Anglo-Saxon countries, of delivering the exequatur, or at least letters patent, to consular officials, and not only to heads of post. Hence, the sending State could not always determine the legal status of consular officials; the receiving State in fact often exercised some control over that status, and that circumstance should not be ignored.

16. Mr. FRANÇOIS shared the doubts expressed concerning the last phrase of the article. The titles of consular officials were enumerated in article 6, and the sending State could not prescribe any new titles; it could only specify which class a particular official belonged to and, in any case, the receiving State had to be consulted on the matter. With regard to the legal status of officials, he said that their status was determined by the draft itself, and was not a matter for the sending State to decide.

17. Mr. SCALLE considered the article to be unacceptable in its present form. The sending State could not have absolute freedom to determine the number of officials to be attached to a consular post; the provision should conform more closely to the corresponding article of the draft on diplomatic intercourse and immunities. Reference should be made not only to articles 9 and 20, but also to a special article providing for limitation of numbers by the receiving State in certain exceptional cases. The last phrase, concerning titles and legal status, should be deleted and reference should be made to "a" consulate, and not to "its" consulate. He proposed that the article should be revised to read: "Subject to the provisions of articles 9 and 20 [and article . . .], the sending State is entitled to employ in a consulate the number of consular officials and employees which it considers necessary."

18. Mr. AGO said that, during the discussion of article 10 of the draft on diplomatic intercourse and immunities he had pointed out that there might be certain dangers in allowing the receiving State to limit the number of officials attached to the diplomatic mission. The interests of the receiving State had prevailed, however, and now it was only logical to enable the receiving State to limit the number of consular staff, likewise, to some extent. The practical difficulties cited as a reason for granting such powers to the receiving State were greater for consular than for diplomatic missions, and from the political point of view the effect of overstaffing distant consulate posts might be much more serious than in the case of diplomatic missions, which were under central control in the capital of the receiving State. The article should therefore be brought into line with article 10 of the draft on diplomatic intercourse.

19. Mr. YOKOTA shared the view that the size of consular missions should be subject to some limitation. He recalled the lengthy negotiations that had been conducted with regard to the size of the Soviet trade mission admitted to Japan when diplomatic relations between the two countries had been re-established. After long discussion, it had been agreed that the number of members of the mission should be limited to thirty, although the Soviet Union had wished to send more staff. Even if a trade mission differed in function from a consular mission, there was still a certain similarity between them in so far as the need for limiting their size was concerned. Accordingly, the rights of the receiving State should be taken into account in the article.

20. Mr. AMADO said that the article was wrong in not allowing the receiving State any say in the matter of the size of staff. Secondly, he considered that the question of the status of consular officials was settled in article 6. He could not accept the view that their legal status should be settled by the sending State. The article should be brought into line with article 10 of the draft on diplomatic intercourse and immunities.

21. Mr. ŽOUREK, Special Rapporteur, replying to the comments, said that his draft of article 19 had been criticized mainly on the grounds that it allowed the number of consular officials and employees to be determined by the sending State. Actually, the word "requisite" was itself a limitation. Article 10 of the draft on diplomatic intercourse was also rather vague concerning the criteria affecting the size of the mission. Essentially, the two States would have to settle by agreement what size of staff was "requisite". Besides, it would be inadvisable to frame a rigid rule, for new and unforeseeable situations might present themselves that would necessitate a departure from the rule.

22. There was a fundamental difference between the staff of diplomatic missions and the staff of consular posts. The former were not under the jurisdiction of the receiving State and had broad responsibilities. By contrast, the functions and

as a rule, the territorial competence of consulates were much more narrowly circumscribed. The position of trade missions, to which Mr. Yokota had alluded, did not really offer a parallel, for States with a centrally planned economy, such as the USSR, had commercial missions which formed part of the diplomatic mission.

23. There was one matter that he had perhaps not stressed sufficiently in introducing his draft. Article 19 dealt with subsidiary staff and not with heads of missions as defined in article 6. A comparison between the legislation of different countries and consular conventions showed great differences in the structure of such staff, which he did not suppose the Commission wished to determine.

24. With regard to the criticism concerning the expression "legal status", he said that, in order to avoid any misunderstanding, it might be advisable to add some such words as "in accordance with international law".

25. Mr. BARTOŠ had said that the exequatur was sometimes delivered not only to heads of posts but also to other consular officials. That question was provided for in article 8, paragraph 2.

26. Mr. MATINE-DAFTARY had criticized article 19 as lending itself to abuse; in practice, abuse would hardly occur, but if it was desired some suitable provision could be added to prevent abuses.

27. Mr. SCHELLE had suggested the phrase "the number . . . which it [the sending State] considers necessary" instead of "requisite number". That formula would actually be open to a broader interpretation than the text as it stood, which did not confer excessive latitude on the sending State. The fact was that the sending and receiving States had to agree. He believed that there was general agreement in the Commission on the whole question, although the phrase "legal status" might be modified or settled by the Drafting Committee.

28. Mr. PAL said that, in view of the relationship between the present draft and the draft on diplomatic intercourse adopted at the tenth session and of the desirability of bringing into harmony two texts, the subject matters of which were substantially the same, he found it difficult to accept the present article in preference to the corresponding article 10 of the other draft. The Special Rapporteur had made it clear that the present article was also concerned with the size of the staff; but no substantial reason could be advanced to explain in what respect and for what reasons there should be so wide a difference between the provisions of the two drafts on the subject. The Special Rapporteur had claimed that the qualifying word "requisite" in his draft would ensure that some limitation would be placed on the size of staffs; but that word was at best equivocal and would only give rise to controversy as to who was to decide the matter. As it stood, the article seemed to leave the decision to the sending

State; but that would be quite contrary to the idea underlying the corresponding article in the other draft. The discussion had made it clear that it was generally felt that some limitation should be imposed on the size of staffs and that the matter should not be left to the unilateral decision of any of the parties concerned, without any objective criteria having been laid down. He proposed that article 19 should be referred to the Drafting Committee with the request that its wording be brought into line with article 10 of the draft on diplomatic intercourse and immunities.

29. Mr. BARTOŠ said that he had nothing to add to Mr. Pal's proposal. So far as the question of "legal status" was concerned he thought, as the Special Rapporteur apparently did, that some change was necessary in the text, bearing in mind article 8, paragraph 2, in which the question of the exequatur had been rather left in the air, and also article 15, paragraph 4, which stated that the heads of posts had precedence. Article 19 dealt with other officials of the consular service, and in determining their legal status the article also limited the number of consular officials. He therefore proposed that the Drafting Committee, should be asked to find a formula embodying the proposals of the Special Rapporteur, but one which would not give rise to difficulties in practice.

30. Mr. HSU remarked that it was customary in international regulations to leave some questions for negotiation, but in the matter under discussion he did not think that the Commission should adopt so neutral an attitude. If the two parties could not agree, authority should be given to one of them — in his view, the receiving State.

31. Mr. AGO said that if he had correctly understood what the Special Rapporteur had said, his view was that there was not much difference between the expression "reasonable and normal" in article 10 of the draft on diplomatic intercourse and immunities and the word "requisite" in the draft of article 19. The Special Rapporteur seemed to think that each might give rise to differences of interpretation and that, that being the case, some method of peaceful solution of such differences should be found. In his own view, however, the central problem was one of primary competence. In article 10 of the draft on diplomatic intercourse and immunities, the receiving State had that competence and would have power to limit the number of officials to a "reasonable and normal" number. The sending State, if it disagreed, could then raise the matter only as an international question. On the contrary, in the draft of article 19, the sending State appeared to have the freedom to decide. He agreed with Mr. Pal that the Commission should try to reconstruct article 19 on the lines of article 10 of the draft on diplomatic intercourse and immunities, giving the receiving State primary competence in the matter.

32. Mr. EDMONDS agreed with Mr. Pal that there should be definite criteria. If it was intended to give the receiving State the right to restrict the numbers of consular officials, the article should

be drafted in that sense. He did not see any difference between the meaning of the adjectives used in the draft on diplomatic intercourse and immunities and that proposed in the draft of article 19. He asked whether the receiving State was to have the right to place precise limitations on the number of officials. He did not read "legal status" so narrowly as some of the previous speakers, but he felt that it might be changed to "titles and scope of duties", although such a phrase was probably superfluous.

33. Mr. FRANÇOIS remarked that the Special Rapporteur had told the Commission that article 19 was concerned only with subsidiary staff and their legal status. According to article 1 (h), however, the expression "consular officials", included heads of missions and he thought, accordingly, that article 19 would have to be amended.

34. Mr. SANDSTRÖM agreed with Mr. Pal's proposal. He thought the final phrase of article 19 should be deleted.

35. Mr. SCALLE asked whether the Special Rapporteur considered that disputes between the States concerning the size of consular staffs should be settled by arbitration.

36. Mr. YOKOTA said that in so far as the Special Rapporteur had intended to qualify the general principle established in article 19 by a limitation concerning the size of the consular staff, the limiting provision was too vague and insufficient. Preferably, as there were really two distinct questions, each should be dealt with in a separate provision, the limiting provision being modelled on article 10 of the draft on diplomatic intercourse and immunities.

37. Mr. PAL emphasized that, if it was decided that article 10 of the draft on diplomatic intercourse and immunities and the draft of article 19 should contain analogous provisions, the Drafting Committee should follow the phraseology of that article 10. It was desirable to avoid the use of different expressions in two drafts on similar topics, especially when they were produced by the same body.

38. Mr. ERIM said that he himself had construed the first part of article 19 as explained by the Special Rapporteur. The number of persons employed on the staff of a consulate was a matter for the two States concerned. Unfortunately, it had already become apparent that the provision as it stood was likely to give rise to difficulties of interpretation when States came to apply it. He therefore shared the view expressed by Mr. Pal that the provision should be reworded along the lines of the corresponding clause in the draft on diplomatic intercourse and immunities.

39. As to the final phrase of the article, he agreed with Mr. François that the use of the term "consular officials" seemed to make it applicable to the whole staff of a consulate, including the chief of post. In fact, the titles and legal status of consular officials would be determined by the draft

articles; if there was a gap in the draft, it should be remedied.

40. For those reasons, he thought that the final phrase of the article should not be referred to the Drafting Committee until the Special Rapporteur had supplied some additional explanations thereon.

41. The CHAIRMAN said that his main objection to the wording of article 19 was that it appeared to have been conceived in a completely different spirit from that of article 10 of the draft on diplomatic intercourse and immunities. Article 10 of that draft was based on the principle that an agreement between sending and receiving States regarding the size of a diplomatic mission was desirable. If, however, there was no agreement on that point, the receiving State could object to a mission which it regarded as excessively numerous. Negotiations would then follow on the question. The terms of article 19 of the draft on consular intercourse and immunities, on the other hand, seemed to give the sending State an unlimited faculty to send consular officials, subject only to the limitations laid down in articles 9 and 20. For his part, he agreed with Mr. Pal that the best language for the purpose of expressing the idea generally accepted by the members of the Commission was one modelled on article 10, paragraph 1, of the draft on diplomatic intercourse and immunities.

42. With regard to the last phrase of article 19, he said it was clear that the sending State was not entitled to decide what titles and what legal status its officers would have in the receiving State. Their titles and status would be governed by article 6 and the other articles of the draft. If the intention of the Special Rapporteur had been to refer to the division of functions within the consulate itself, the provision was not absolutely necessary.

43. Mr. ŽOUREK, Special Rapporteur, said that Mr. François and Mr. Erim were right in pointing out that the expression "consular officials", in accordance with the definition in article 1, included the head of post. In fact, however, article 19 was intended to apply solely to the staff employed in a consulate other than the head of the post, as he had explained when introducing the article (see paragraph 8 above). The difficulty had arisen because article 1 did not as yet include all the requisite definitions, and he agreed that the wording of article 19 would have to be amended. In the corresponding article of the draft on diplomatic intercourse and immunities, the terminology adopted did not give rise to the same difficulties.

44. If the drafting was thus improved in order to clarify the scope of article 19, he thought that a reference to the titles and legal status of the staff employed in a consulate should be retained. Those words had been included in order to make it quite clear that subordinate staff, and the legal status of such staff within the consular service, were governed by the municipal law of the sending State and not by international law. The article might, for example, provide that the sending

State would be competent to determine, in conformity with international law and the provisions of the draft articles, the titles and functions of the staff in question. If, however, the provision were deleted, it might be possible for the receiving State to object to the title conferred by the sending State on a member of its consular staff.

45. He had no objection to Mr. Yokota's suggestion that article 19 should be divided into two: one article dealing with the appointment of staff and another with the question of the limitation of the size of the staff.

46. In reply to Mr. Scelle's question on the subject of the settlement of disputes, he said that, as he had stated in the course of earlier discussion, he regarded the question of the judicial settlement of disputes as outside the scope of codifying conventions: it was an entirely separate subject. There were multilateral and bilateral conventions which dealt especially with the question of the settlement of disputes. Moreover, it was premature to discuss that question at a time when the Commission was engaged only in the first reading of the draft for the purpose of its submission to governments. The task of codification was already an arduous one, and there was no point in making it still more difficult by introducing the problem of the peaceful settlement of international disputes.

47. Mr. MATINE-DAFTARY said that he had no objection to the proposition that the sending State should indicate the title of a consular officer, but with regard to the functions and duties of such officers he agreed with the Chairman. Perhaps, however, the intention of the Special Rapporteur had been to refer to the determination by the national law of the sending State of its consuls' jurisdiction in such matters as notarial functions, marriage and divorce.

48. Mr. ŽOUREK, Special Rapporteur, said that article 19 was not intended to deal with the points mentioned by Mr. Matine-Daftary. The functions of consuls were governed by article 4 of the draft, which left some scope to the national law of the sending State; that law, however, could not regulate those functions in a manner inconsistent either with international law or with the legislation of the receiving State.

49. Sir Gerald FITZMAURICE said that the matter had not been made any clearer by the Special Rapporteur's negative reply to Mr. Matine-Daftary's question.

50. The definition of the consular function as such was clearly a matter for international law. On the other hand, the question which particular person would carry out a particular duty (on the assumption, of course, that it was part of the consular function under international law) could properly be regarded as falling to be dealt with by the law of the sending State. In that connexion, the best course appeared to be, as suggested by Mr. Edmonds, to refer to the "scope of the duties" of consular officers. If a reference of that kind were to be included, article 19, which dealt mainly

with the size of the consular staff, was not the most suitable context.

51. Accordingly, the last phrase of article 19 should be omitted and, if it were desired to retain the idea which it contained, it should be introduced at another place in the draft. Perhaps the best place was article 8, paragraph 1; after stating that the competence to appoint consuls was governed by the national law of the sending State, it could be added that that law would also govern the scope of the duties of consuls and their staff.

52. Mr. LIANG, Secretary to the Commission, thought that article 19, which dealt with the size of the consular establishment, should have been placed much earlier in the draft.

53. The meaning of the term "fonctionnaire", which was used in article 19 for the first time in the draft, was not perhaps as clear as might be desired. Secondly, the expression "condition juridique", was used in connexion with the legal position of aliens, which was essentially governed by municipal law.

54. There was no doubt that the use of the expression "condition juridique" could give rise to much difficulty and to many diverse interpretations, as the discussion in the Commission had shown. If it were intended to refer to the legal position of consuls, the scope of article 19 would cover the whole draft on consular intercourse and immunities.

55. Mr. BARTOŠ agreed with the Secretary that the use of the expression "condition juridique" in article 19 was extremely dangerous. The sending State was certainly not entitled to determine the legal position of its consuls in the receiving State. Their position was governed by international law and custom; in the absence of any rules of international law on the subject, it was governed by the law of the receiving State. The sending State could, of course, determine the internal distribution of duties within the consulate.

56. He found the expression in question altogether unacceptable, and appealed to the Special Rapporteur to withdraw it.

57. The CHAIRMAN said that the suggestions made could perhaps now be referred to the Drafting Committee.

58. Mr. AGO agreed and said, in connexion with the suggestion for the division of the article into two separate articles, that the best course was to draft one article along the lines of the first part of article 6 of the draft on diplomatic intercourse and immunities, to deal with the appointment of the staff of the consulate, and another article along the lines of article 10, paragraph 1, of that same draft, to deal with the size of staff.

59. He thought that both those provisions, as well as those in article 20 (*Persons deemed unacceptable*) and in article 21 (*Notification of arrival and departure*), should be placed earlier in the draft, in conformity with the structure of the draft on diplomatic intercourse and immunities. The new

article concerning the appointment of the staff should follow the article on competence to appoint and recognize consuls (article 8); articles 20 and 21 would follow the present article 9 and would be followed by the article on size of staff.

60. Mr. ERIM agreed with Mr. Ago. In addition, he thought that the Drafting Committee should be asked to improve the terminology used in article 19. According to article 1 (j), the expression "members of the consular staff" meant consular officials and employees. That expression should therefore be in article 19 instead of "consular officials and employees".

61. Mr. ŽOUREK, Special Rapporteur, said that he agreed with the suggestion for the division of the article. He had, however, grave doubts regarding the suggestion for the rearrangement of the articles. The earlier articles of the draft concerned heads of posts and it was therefore undesirable to place articles 20 and 21 in that context. The best course was to segregate the articles concerned exclusively with heads of posts from those which concerned the staff employed by them. In any event, the question of the order in which the articles should be placed could best be decided at the end of the discussion of the various articles.

62. The CHAIRMAN took it as the sense of the Commission that the Drafting Committee should be asked to draft article 19 more or less on the pattern of article 10, paragraph 1, of the draft on diplomatic intercourse and immunities. That committee would also consider the question of removing from article 19 the reference to titles and legal status of staff employed in the consulate and also to consider introducing that idea, as suggested by Sir Gerald Fitzmaurice and Mr. Erim, elsewhere in the draft. Lastly, the committee would consider the suggestions of Mr. Yokota and Mr. Ago regarding the division of the article. If there were no objection, he would consider that the Commission agreed to that course of action.

*It was so agreed.*

#### ARTICLE 20 (*Persons deemed unacceptable*)

63. Mr. ŽOUREK, Special Rapporteur, introduced article 20 of the draft. The provisions of the article concerned members of the consular staff other than the head of post. It corresponded to article 8 of the draft on diplomatic intercourse and immunities but, in line with commentary (5) to that article, he had used the term "unacceptable" instead of *persona non grata*, which was employed exclusively in the context of diplomatic relations. Article 20 dealt with two cases: the case where the receiving State, upon being notified of the name of a new member of the consular staff, informed the sending State that the person designated was not acceptable, and the case where the conduct of a member of the consular staff, other than the head of post, who was already in the receiving State gave serious grounds for complaint. There was no reference to the conduct of members

of the staff in the diplomatic draft because diplomatic staff enjoyed immunity from jurisdiction, and it was therefore normal to offset that by giving the receiving State the right to declare a member of the diplomatic mission *persona non grata* without giving any reasons. In contradistinction to article 8 of the draft on diplomatic intercourse and immunities, he had dealt with the two cases separately, since in his view it was illogical to speak of recall — even in the case of someone who had been declared unacceptable by the receiving State — if the person concerned had not yet arrived in that State.

64. There was also a practical reason for making the provision more restrictive in the case of consular staff. The ejection of a member of a diplomatic mission did not, as a rule, hinder the work of the mission, which usually had a large staff. In the case of consulates, however the staff was often very small and highly specialized. It was therefore desirable that the receiving State should not be able to get rid of a consular officer without good reason.

65. Members of the consular staff were, of course, amenable to the jurisdiction of the courts of the receiving State but they could, without actually violating any law, give grounds for complaint even with regard to the conduct of their private life. The receiving State could in such circumstance consider a person unacceptable.

66. The provisions of article 20, paragraph 2, were self-explanatory, and he hoped that they would not give rise to any difficulty.

The meeting rose at 1 p.m.

### 529th MEETING

Friday, 29 April 1960, at 3 p.m.

Chairman: Mr. Luis PADILLA NERVO

#### Consular intercourse and immunities (A/CN.4/131, A/CN.4/L.86) [continued]

[Agenda item 2]

#### PROVISIONAL DRAFT ARTICLES (A/CN.4/L.86) (continued)

#### ARTICLE 20 (*Persons deemed unacceptable*) (continued)

1. The CHAIRMAN invited the Commission to continue discussion of article 20 of the provisional draft articles on consular intercourse and immunities (A/CN.4/L.86).

2. Mr. FRANÇOIS asked why there was a difference in the French text between the first sentence of article 18 ("la conduite du consul donne lieu à des raisons sérieuses de se plaindre") and the corresponding passage in article 20 ("laisse gravement à désirer"), both being ren-