

Document:-  
**A/CN.4/SR.604**

**Summary record of the 604th meeting**

Topic:  
**Consular intercourse and immunities**

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

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

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

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

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 The comments of governments on the draft had been to some extent superseded by the decisions taken by a two-thirds vote at the Vienna Conference, which might consequently be regarded as reflecting a consensus of opinion.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

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

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

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

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

relating to official functions, he would put those two issues to the vote.

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

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

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

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

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

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

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

*It was so agreed.*

The meeting rose at 6 p.m.

## 604th MEETING

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

*Chairman: Mr. Grigory I. TUNKIN*

### Consular intercourse and immunities

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

*(continued)*

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

[Agenda item 2]

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

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

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

States Government (A/CN.4/136/Add.3) considered that article 51 should be reviewed in the light of the corresponding provision of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

3. The Belgian Government (A/CN.4/136/Add.6) had pointed out that the provision at the end of paragraph 1 was not in keeping with the practice followed in Belgium, where the consular privileges and immunities of a member of a consulate already in the territory started not from the time when notice of his appointment was given to the Ministry of Foreign Affairs, but from the time of his recognition by the receiving State. That government argued that, logically, the receiving State should first signify its agreement since the persons concerned were often its nationals.

4. The Belgian Government had also suggested that the first sentence of paragraph 3 should be supplemented by a provision covering the case of the cessation of privileges and immunities of persons who remained in the territory of the receiving State. The text suggested by Belgium would probably not be acceptable as drafted. It was arguable that a provision should be added stipulating that in that case consular privileges and immunities ceased on the date notified to the Ministry of Foreign Affairs, or to the appropriate authority designated by it, as marking the end of the functions of the persons concerned. That was in fact the only substantive issue to be settled by the Commission in connexion with the article.

5. The Spanish Government (A/CN.4/136/Add.8), criticizing the last sentence of paragraph 3 on the ground that it conflicted with customary law, argued that if a former member of a diplomatic mission returned to the receiving State without diplomatic status he would be liable to proceedings which during his earlier stay had been barred by his immunity. That argument was untenable; the rule stated in the last sentence of paragraph 3 was universally accepted both for diplomatic and for consular officials and was expressly stated in article 39, paragraph 2, of the Vienna Convention, though naturally the immunity extended only to acts performed in the exercise of official functions.

6. The Chilean Government (A/CN.4/136/Add.7) had suggested some drafting changes affecting the Spanish text of paragraphs 1 and 2, which should be referred to the Drafting Committee. It had further suggested the deletion of the second sentence of paragraph 3 on the grounds that discharge was a purely administrative penalty which should not be internationalized. A similar objection by the same government to article 25 (Modes of termination) had not been entertained by the Commission (594th meeting) and his view was that the same course should be followed in that instance. The second sentence of paragraph 3 did not lay down a sanction in international law but simply stated one of the causes of the cessation of consular privileges and immunities.

7. With regard to the form of paragraph 51, the Commission should adhere to the text as it stood, which was more precise than article 39 of the Vienna Convention, for it distinguished clearly between members of the

consulate and members of their families forming part of the household and private staff, whereas that Convention's article 39 made no similar distinction as between diplomatic agents and their families and private staff.

8. The CHAIRMAN suggested that the expression "persons belonging to the household" used in the English text of paragraph 2 was not an exact equivalent of the French, which was correct. The Drafting Committee should be asked to bring the two texts into line.

9. Mr. YASSEEN said that, on the whole, article 51 was acceptable, but the second sentence in paragraph 3 might well be deleted, since it was unnecessary to single out for special mention one of the ways in which the functions of a member of the consulate came to an end.

10. The CHAIRMAN said that he thought that the word "discharged" meant specifically discharged locally; he asked whether the French word *révocation* had a broader connotation.

11. Mr. MATINE-DAFTARY said that in French the word *révoquer* implied a sanction, whereas the first sentence of paragraph 3 dealt with the recall of a member of the consulate.

12. Mr. GROS confirmed that in the context, as far as the French text was concerned, *révocation* meant the severest administrative sanction — dismissal from the consular corps. The question was whether the word "discharge" was the correct equivalent of *révocation*.

13. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Yasseen's objection to the second sentence of paragraph 3, explained that the provision had been added, for the sake of greater precision, in the light of a suggestion made at the twelfth session (545th meeting, para. 70, and 546th meeting, para. 17).

14. Mr. JIMÉNEZ de ARÉCHAGA said that he did not favour the Belgian Government's amendment to paragraph 1, since it found no parallel in article 39 of the Vienna Convention.

15. With the appropriate drafting changes in the Spanish text, article 51, paragraph 2, would be acceptable.

16. In view of the terms of the corresponding clause of the Vienna Convention, paragraph 3 should not be amended to take account of the Spanish Government's comment. He was not clear whether the Special Rapporteur was in favour of the addition to that paragraph proposed by the Belgian Government.

17. He agreed that the second sentence in paragraph 3 should be retained since the reasons for its insertion still held good.

18. In conclusion, he asked whether the Special Rapporteur considered that a new paragraph should be added concerning the position of the family of a deceased member of the consulate on the lines of article 39, paragraph 3, of the Vienna Convention.

19. Mr. ŽOUREK, Special Rapporteur, said that there was no need to add an express provision in paragraph 3 concerning persons who remained in the territory of the receiving State, as suggested by the Belgian Government. No such provision appeared in article 39 of the Vienna Convention and the matter was unlikely to give rise to

difficulties between the two States concerned. If the functions of a national of the third State came to an end, the receiving State would in any case be notified. 20. Agreeing with Mr. Jiménez de Aréchaga, he said it would certainly be useful to add in article 51 a provision on the lines of that contained in article 39, paragraph 3, of the Vienna Convention.

21. Mr. LIANG, Secretary to the Commission, suggested that the word "discharge" in the second sentence of paragraph 3 could be interpreted as referring either to recall or to discharge as the terms were used in article 25. It was not a satisfactory equivalent for the French *révocation* and the meaning intended might be better rendered by the word "dismissal".

22. Mr. PAL observed that the second sentence in paragraph 3 referred to the same situation as that envisaged in article 27, paragraph 3. If so, the two texts would have to be brought into line.

23. Mr. SANDSTRÖM said that the situation dealt with in article 51 of the draft was exactly parallel to that dealt with in article 39 of the Vienna Convention and, although the text of the former was more explicit, it did create certain difficulties and therefore ought to be modelled on article 39.

24. Since the first sentence of paragraph 3 contained the word "normally", it adequately covered the ground, for it implied that other cases such as that mentioned by the Belgian Government should be regulated otherwise.

25. Mr. ERIM, referring to the second sentence of paragraph 3, remarked that the words "takes effect" might lead to difficulties if under the municipal law of the sending State an appeal could be lodged against dismissal, in which event the dismissal would not take effect until there had been a judicial decision on the appeal. It might therefore be preferable to stipulate that the privileges and immunities in that case came to an end at the time when the receiving State had been notified of the dismissal. Clearly, it was not for the receiving State to inquire when a dismissal became effective for the purposes of the regulations of the sending State.

26. He agreed with Mr. Sandström that the Commission might follow the Vienna Convention in mentioning only the termination of the functions of a member of the consulate.

27. Mr. MATINE-DAFTARY pointed out that article 43 of the Vienna Convention made no reference to the reasons for the cessation of functions, and rightly so, for the recall of the consul by the sending State was of no concern whatever to the receiving State. But, in case of recall, how would it know that the measure had become effective?

28. The CHAIRMAN, speaking as a member of the Commission, emphasized that he had been consistently in favour of modelling the draft on the Vienna Convention as closely as possible. However, in that instance, the Commission's own text was superior and should be maintained. There was a definite advantage in dealing separately (as did article 51, para. 2) with the privileges and immunities of members of the family, since that

avoided the imprecision of article 39, paragraph 1, of the Vienna Convention, which confused members of the diplomatic staff with members of their family, as the Special Rapporteur had pointed out.

29. If indeed there was no difference between recall and discharge, it would be difficult to justify the retention of the second sentence in paragraph 3, but whatever the wording chosen for article 25, it did seem necessary to make express provision for the problem dealt with in that sentence, of which no mention was made in the Vienna Convention.

30. Mr. YASSEEN recalled that the second sentence of paragraph 3 had its origin in a suggestion made at the previous session by Mr. Verdross (see para. 13 *supra*) who had said that, whereas the functions of the head of post were normally terminated by recall, other members of the staff might be suspended or dismissed in certain circumstances, such as their conviction of a criminal offence. That, however, was an extreme case, whereas paragraph 3 was a general provision. Discharge should be regarded as a disciplinary measure, which meant that the sending State no longer wanted the person concerned to remain at his post. It was very questionable, however, whether the Commission should provide for complementary disciplinary measures to be taken in the receiving State, thus allowing the authorities of that State to prevent the official concerned from enjoying his consular privileges and immunities for the few days during which he was preparing to leave the country. It should be remembered that even court decisions in criminal cases did not have much weight in other countries; accordingly, there seemed to be no need to include the sentence.

31. Mr. BARTOŠ observed that the date on which the discharge took effect, mentioned in the second sentence of paragraph 3, was determined by the municipal law of the sending State. For the purposes of article 51, the material date was that on which the consular function was terminated, or on which the sending State forbade the official to exercise consular functions. The provision of the second sentence of article 39, paragraph 2, of the Vienna Convention was much clearer. In international law, the dismissal became effective at the time when the person concerned was lawfully deprived of his functions and, moreover, comparative administrative law also differentiated between the time of the decision to relieve a person of his functions and the time when he was actually relieved of them.

32. He agreed with the Chairman that the Commission's intentions, especially so far as the dependents of a member of the consulate were concerned, should be made quite clear in article 51. The Drafting Committee should be instructed to revise the article accordingly.

33. Lastly, he stressed that a consul continued to enjoy consular privileges and immunities until the moment when he was in fact relieved of his functions. Article 51, however, was concerned not with the act of relieving a consul of his functions, but with the question of the termination of his immunities. That point was one of drafting, rather than of substance, and could be left to the Drafting Committee, which should, moreover, be recommended to bring the article as closely as possible

into line with article 39 of the Vienna Convention.

34. Mr. VERDROSS drew attention to a lacuna in article 39 of the Vienna Convention, in that the article did not regulate the position of a diplomatic agent who was discharged locally. Since local discharge was more likely to occur in the case of consular officials, it would be advisable to insert a provision governing the event.

35. Mr. PADILLA NERVO asked the Special Rapporteur whether the bilateral consular conventions and national consular legislations which he had studied expressly mentioned cases of the discharge of consular officials.

36. Sir Humphrey WALDOCK agreed that the provisions of the Vienna Convention should be followed as closely as possible, particularly since the Commission was dealing with the less important question of consular intercourse and immunities. If the two drafts had been considered in the reverse order, there might have been stronger reasons for seeking to improve the draft concerning consular intercourse. Nevertheless, the Commission had accepted that, in cases where it could improve on the Vienna Convention, it should do so. Article 50 had been approved on that basis, and he agreed with previous speakers that it would be useful to retain paragraph 2 of article 51.

37. He had serious doubts concerning the desirability of suggesting to participants in the plenipotentiary conference that a special provision should be inserted concerning the termination of the privileges and immunities of a member of the consulate who was discharged by the sending State. The only two cases at issue were, first, that in which a national of the receiving State was dismissed locally, which presented no problem; and, secondly, that in which a national of the sending State was concerned, when the matter was entirely in the hands of that State. If the sending State chose not to dismiss the consul until he had been recalled, his privileges and immunities would continue in effect, but if the State deliberately dismissed him on the spot, there would be a strong indication that it intended to waive all his privileges and immunities. It would be wise to leave the matter to be settled by the States concerned. Moreover, if the second sentence of paragraph 3 were omitted, the article would be much closer in substance to article 39 of the Vienna Convention.

38. Mr. ŽOUREK, Special Rapporteur, stressed that article 51 as it stood, like article 39 of the Vienna Convention, covered all the cases contemplated by article 25. Recall and discharge, however, had certain special effects distinct from normal cases where the consular official was dismissed locally. The misunderstanding which seemed to be prevailing in the Commission might be dispelled if it were borne in mind that the whole question depended on the final drafting of article 25. If that wording were general, it would cover all cases, and it would be unnecessary to mention recall and discharge in article 51; in the contrary case, however, that special contingency should be mentioned, and the Commission should also consider referring to local discharge.

39. In reply to Mr. Padilla Nervo, he said that, although termination was mentioned in some bilateral consular conventions, he could not recall any that contained provisions along the lines of the penultimate sentence of article 51. Such bilateral treaties usually concentrated on matters affecting the two States concerned. However, grounds for discharge and forms of terminating functions were enumerated in a number of national enactments.

40. Mr. PADILLA NERVO agreed that grounds for termination were enumerated in many national enactments. Accordingly, discharge was a matter between the sending State and the official concerned, and under the municipal law of that State it was always open to the official to appeal to a higher authority against such a decision. By contrast, however, a reference to discharge in article 51 would affect both the receiving and the sending States, and in his opinion it would be dangerous to include such a reference, for it would imply that the receiving State might request a waiver of immunity from jurisdiction if the discharge were due to an offence committed in its territory. As Mr. Yasseen had pointed out, the provision might have serious consequences for the official concerned; moreover, it did not constitute an improvement over the corresponding article of the Vienna Convention.

41. The CHAIRMAN recalled the Commission's decision (594th meeting, para. 77) to instruct the Drafting Committee to review article 25 in the light of article 43 of the Vienna Convention, with discretion to decide how far the latter provision could be followed. Since article 43 of the Vienna Convention contained no reference to recall or discharge, the general formulation of article 25, mentioned by the Special Rapporteur, would no doubt remain. For the sake of consistency, therefore, the second sentence of paragraph 3 of article 51 should be omitted.

42. He suggested that article 51 be referred to the Drafting Committee for revision in the light of the comments made and with instructions to bring the English and French texts into line.

*It was so agreed.*

#### ARTICLE 52 (Obligations of third States)

43. Mr. ŽOUREK, Special Rapporteur, introducing the article, drew attention to the Finnish Government's suggestion (A/CN.4/136) that the scope of paragraph 1 should be narrowed down substantially. The Yugoslav Government (*ibid.*) considered that the article did not apply to a consul's private visits to third States; he was sure that the Commission would agree with that interpretation. The Government of Norway (*ibid.*) had stated that it should be made clear that a third State was under a duty to grant a consular official free passage through its territory. The Government of the Netherlands (A/CN.4/136/Add.4) observed that the significance of the article was greatly reduced by paragraph (1) of the commentary and thought that the provision should be based on the corresponding article of the Vienna Convention. The Government of Spain (A/CN.4/136/Add.8) took the view that the article represented an

innovation rather than a codification and that the rule laid down in it might be premature. Finally, the Philippine Government (A/CN.4/136) stated that its observations on articles 41 and 50 applied to paragraphs 1 and 3 of article 52.

44. The only question of substance was whether or not the article should also apply to employees of the consulate. Since article 40 of the Vienna Convention provided for inviolability and other immunities for diplomatic agents only, article 52 as approved by the Commission at its twelfth session should be retained. The Commission might, however, wish to include in paragraph 1 the phrase "which has granted him a passport visa if such visa was necessary", which appeared in article 40 of the Vienna Convention. Although that proviso was implicit in the text of article 52, its addition might be useful.

45. Mr. VERDROSS agreed that the phrase "which has granted him a passport visa if such visa was necessary" should be added. However, that addition involved a more important point of substance than the Special Rapporteur believed.

46. The purpose of the phrase in the Vienna Convention was to settle the question whether a third State was under a duty to grant free passage, mentioned in commentary (2) to article 39 of the draft on diplomatic intercourse (A/3859). The Vienna Conference had answered that question in the negative by stating that a third State which did not grant the necessary visa was not under a duty to grant free passage.

47. The Commission should dispose of the same question in regard to members of the consulate by deciding whether to insert the same phrase in article 52 of the consular draft or not.

48. Mr. FRANÇOIS agreed with Mr. Verdross on the need to take a decision on that point. However, he wondered whether it had been the intention of the Vienna Conference to deny the duty of a third State to grant free passage.

49. The CHAIRMAN explained that the intention of the Vienna Conference had been to state that, where a visa was required, free passage would depend on whether the visa in question was granted or not by the third State concerned.

50. Mr. SANDSTRÖM said that the Vienna Conference could not have failed to consider the question in that light, since it had had before it commentary (2) to article 39 of the diplomatic draft.

51. Mr. ŽOUREK, Special Rapporteur, pointed out that, as explained in commentary (1) to article 52 — and also in commentary (2) to article 39 of the draft on diplomatic intercourse — it had not been the intention of the Commission to settle the question whether a third State should grant free passage. In both cases, the text adopted by the Commission had merely specified the obligations of third States during the actual passage through their territory. It dealt with the problems arising from the presence of certain persons on the territory of the third State, without going into the question of their admission into that territory.

52. Another important question arose from the comparison of article 52 with article 40 of the Vienna Convention. That article 40 contained a paragraph 4 specifying that the obligations of a third State also applied to persons and official communications and diplomatic bags whose presence in its territory was due to *force majeure*. Since the same problem could arise in connexion with members of the consulate and consular communications and consular bags, he suggested that a similar paragraph be included in article 52.

53. The CHAIRMAN asked the Special Rapporteur whether he envisaged the inclusion in paragraph 2 of a second sentence dealing with couriers and consular bags in transit, modelled on the second sentence of the corresponding paragraph 3 of article 40 of the Vienna Convention.

54. Mr. ŽOUREK, Special Rapporteur, said that he was inclined to retain the text of article 52, paragraph 2, as it stood; the particular point was covered in paragraph 4.

55. The CHAIRMAN said that it was not quite clear whether the case under reference would be covered by any of the provisions of the draft articles. The Commission had adopted provisions on the consular bag and on the right of a consulate to use diplomatic couriers. If it did not adopt any provision concerning their transit through third States, it would leave the status of such couriers and bags in doubt.

56. Mr. SANDSTRÖM remarked that, if paragraph 1 were brought into line with the corresponding provision of the Vienna Convention, there was no valid reason for not adopting the same course in respect of the other paragraphs.

57. Sir Humphrey WALDOCK also saw no reason for not adopting more or less entirely the text of article 40 of the Vienna Convention. If the Commission were to adopt a text different from the corresponding one in that Convention, persons comparing the two texts might infer that the Commission had intended to adopt a different approach as to substance. In the matter under reference, it was better to follow the pattern of the Vienna Convention unless there were some compelling reason for departing from its provisions.

58. There was an additional reason for bringing article 52 of the present draft into line with article 40 of the Vienna Convention. Some of the diplomatic bags covered by the Vienna Convention would be addressed to consuls and the reverse was also true; consular bags mentioned in the draft articles on consular intercourse could be addressed to diplomatic missions. There was therefore every reason why the provisions governing both types of bag should be identical.

59. Mr. AMADO deprecated the general trend to adopt the pattern of the Vienna Convention without due regard for the fundamental difference between diplomatic agents and consuls. The diplomatic bag was a centuries-old institution; it was governed by well-established and very clear rules of international law. In spite of the current tendency to combine diplomatic missions with consular offices, he could not see how

consulates could be equated with diplomatic missions.

60. The CHAIRMAN suggested that the Commission should refer article 52 to the Drafting Committee, with instructions to model its provisions on those of article 40 of the Vienna Convention. The Drafting Committee would thus:

(i) Add the phrase relating to the visa in paragraph 1;

(ii) Consider whether a clause along the lines of the second sentence of article 40, paragraph 3, of the Vienna Convention should be added in paragraph 2, bearing in mind the provisions of earlier articles which granted inviolability to consular bags and to the couriers carrying those bags, and draft a text suited to the position of consuls; and

(iii) Add a new paragraph similar to paragraph 4 of article 40 of the Vienna Convention.

*It was so agreed.*

ARTICLE 53 (Respect for the laws  
and regulations of the receiving State)

61. Mr. ŽOUREK, Special Rapporteur, said that the Belgian Government had suggested that paragraph 2 should be amended to provide that the consular premises "shall be used exclusively for the purposes of the exercise of the consular functions. . .".

62. He recalled that the introduction of the term "exclusively" had been proposed to the same effect in another context connected with the use of the consular premises (571st meeting, para. 54). The Commission had, however, rejected that amendment (572nd meeting, para. 1) because it might open the door to abuse by enabling the receiving State to dispute the use which was made of consular premises. He therefore urged the Commission to retain the draft as it stood.

63. The Spanish Government thought paragraph 3 was at variance with the definition of "consular premises" given in article 1 (b) and suggested that the wording of the paragraph should be revised. The Netherlands Government had suggested that paragraph 3 should be revised to bring it into line with that government's suggested definition of consular premises in article 1.

64. The Government of Yugoslavia had suggested that article 53 should include a provision to the effect that consuls had no right to provide asylum. That question was dealt with already in the last sentence of commentary (3).

65. Lastly, the Government of Indonesia (A/CN.4/136/Add.10), in the light of the development of the newly independent Asian and African countries, had reserved its right in respect of the interpretation of the "other rules of international law" envisaged in paragraph 2, which had been for the greater part determined by developments in the western world.

66. Since eighteen governments had sent their comments on the draft articles and none of them had expressed any objection to article 53, which had been adopted by the Commission in 1960 after a lengthy discussion, he suggested that its substance should be left untouched. The text could be referred to the Drafting Committee,

with instructions to examine its wording in the light of article 41 of the Vienna Convention.

67. Mr. VERDROSS drew attention to a small difference between the two texts. Article 41, paragraph 3, of the Vienna Convention referred to the rules laid down "by any special agreements in force between the sending and the receiving State". The purpose of that reference was to cover the agreements existing between certain Latin American countries on diplomatic asylum, agreements which were binding between those countries.

68. It might be useful to add a similar provision in article 53, paragraph 2, to meet the case where there existed any similar agreements or usages relating to asylum in consulates.

69. It was not necessary to include in the text itself a specific provision denying any general right of asylum in consulates. The statement in paragraph 2 that the consular premises must not be used in any manner incompatible with the consular functions under international law was sufficient. General international law did not recognize any right of asylum.

70. Mr. BARTOŠ pointed out that it was not appropriate to dispose by means of a commentary of an important question such as that raised by the Yugoslav Government. The experience of both the first and second Conferences on the Law of the Sea and of the Vienna Conference had shown that the plenipotentiaries refused to accept as authoritative the commentaries prepared by the International Law Commission. It had been repeatedly pointed out that only the text of the convention formulated by the international conference was binding on the signatory States.

71. He recalled that at the Vienna Conference it had often been proposed that a statement made in a commentary be incorporated into the text of the corresponding article. Some of those proposals had been adopted and others had been rejected. Therefore, while the commentaries were certainly useful to students, no attempt should be made to settle questions of substance by means of a commentary.

72. Mr. MATINE-DAFTARY said that the Vienna Conference had adopted the passage referred to by Mr. Verdross by reason of the existence between certain Latin American countries of a convention on the right of asylum in diplomatic missions. He had voted in favour of the inclusion of that passage — although he did not favour diplomatic asylum — because of the need to reconcile the text with the special agreements binding those Latin American countries in their reciprocal relations.

73. In the draft, the inclusion of a similar passage would only be justified if there existed some convention in force between Latin American countries on the subject of asylum in consulates. Perhaps the Latin American members could tell the Commission whether a right of asylum in consulates was recognized in their region.

74. The CHAIRMAN, speaking as a member of the Commission, pointed out that the question of the relationship between the draft articles on consular inter-

course and bilateral conventions was dealt with in article 65. Because in the Vienna Convention that relationship was not the subject of a separate provision, article 41, paragraph 3, contained the passage cited by Mr. Verdross.

75. It was not likely that the addition of the passage to article 53 of the present draft would dispose of the question of asylum. Article 53, paragraph 2, dealt exclusively with the use of the consular premises in a manner compatible with the consular functions. If it were desired to deal with the question of asylum, a specific reference would have to be made to that question.

76. Mr. ERIM agreed that the question of asylum would not be settled even if the passage suggested by Mr. Verdross were inserted. Mr. Bartoš had therefore been right in suggesting that the question should be settled in the text and not in a commentary which was not binding on future signatories.

77. There was an important difference between diplomatic missions and consulates. Under general international law it could be maintained that an embassy or legation was entitled to grant asylum to a political refugee. No such contention could possibly be made in respect of consulates.

78. If the Commission wished to express the idea that no right of asylum in consulates existed, it would have to say so in article 53. The passage suggested by Mr. Verdross would not meet the case.

79. Mr. JIMÉNEZ de ARÉCHAGA recalled that the Commission had been requested by resolution 1400 (XIV) of the General Assembly dated 21 November 1959 to undertake, as soon as the Commission considered it advisable, the codification of the principles and rules of international law relating to the right of asylum. At its twelfth session, however, the Commission had decided to defer further discussion of that question to a future session (A/4425, para. 39).

80. In the circumstances, the Commission should not touch on the question of the right of diplomatic asylum, which in some cases could extend to consular premises and warships. The Commission should not adopt a provision such as that proposed by the Yugoslav Government, for if it did so it would be implicitly prejudging the question of the existence of such asylum.

81. With regard to the text of article 53, paragraph 1, he had no objection to the inclusion of a reference to special agreements in force between the sending State and the receiving State. That reference was much wider in scope than the provision contained in article 65, which only referred to bilateral conventions; the expression "agreements in force" could cover multilateral conventions, bilateral conventions and agreements which did not take the form of conventions.

82. Mr. PADILLA NERVO pointed out that the passage under discussion had been introduced into article 40 of the draft on diplomatic intercourse (which had later become article 41 of the Vienna Convention) by the Commission itself, precisely with the purpose of safeguarding diplomatic asylum, which was recognized

by treaty provisions binding certain Latin American States exclusively.

83. In general, diplomatic asylum was not held to extend to consular premises. Many bilateral conventions specifically stated that asylum should not be granted in consulates. However, in most of those conventions, such as those concluded by the United Kingdom with Sweden, Mexico and a number of other countries, it was specified that asylum should not be granted in a consulate "to fugitives from justice", with the additional stipulation that if a consular officer refused to surrender such a fugitive on lawful demand, the local authorities could, if necessary, enter the consulate to apprehend the fugitive.<sup>1</sup>

84. Other conventions, such as that of 1912 between the United States and Mexico,<sup>2</sup> stated that a consulate must not be used as a place of asylum but did not specify that the provision referred to a "fugitive from justice", an expression which would limit the scope of the provision to ordinary criminals rather than to political asylees.

85. If the Commission should decide to include a provision denying the right of asylum in consulates, he thought that the provision should state that consular premises should not be used to give asylum to fugitives from justice who would be charged with an ordinary offence.

86. He agreed with Mr. Jiménez de Aréchaga that the passage suggested by Mr. Verdross covered a wider ground than article 65.

87. Mr. MATINE-DAFTARY noted that no reply had been given to his question whether there existed in Latin American countries any agreement or usage relating to asylum in consulates. In the absence of any such agreement or usage, a provision on the subject seemed to be superfluous in the draft.

88. Mr. ŽOUREK, Special Rapporteur, said that the position of consulates was completely different from that of diplomatic missions. There existed among certain Latin American countries agreements relating to asylum in diplomatic missions, but he knew of no such agreement in respect of consulates. The statement in article 53, paragraph 2, that the consular premises must not be used in any manner incompatible with the consular functions as specified "in the present articles or any other rules of international law" was sufficient to disallow asylum in consulates.

89. It was true, as Mr. Padilla Nervo had said, that certain bilateral conventions specifically stated that consuls were not entitled to grant asylum. Provisions of that type, however, were an inheritance of a remote past when consuls had been regarded as public ministers and as having a status similar to that of diplomatic agents. Until the end of the nineteenth century the

<sup>1</sup> Article 10(4) of the Consular Convention between the United Kingdom and Sweden of 14 March 1952, reproduced in *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations Legislative Series, vol. VII (United Nations publication, Sales No. 58.V.3), p. 471.

<sup>2</sup> United Nations *Treaty Series*, vol. 125 (1952), No. 431.



exact status of consuls had still been the subject of discussion. There were no longer any doubts regarding that status—which was totally different from that of diplomats—and it would therefore be pointless to state in the present draft that no right of asylum existed in the case of consulates.

90. With regard to the suggestion by Mr. Verdross, he pointed out that the text of article 41, paragraph 3, of the Vienna Convention referred to the “other rules of general international law”. The use of the adjective “general” made it necessary to refer also to any special agreements in force between the sending State and the receiving State. Article 53, paragraph 2, however, referred to the “other rules of international law” without the adjective “general”, with the consequence that a reference to special agreements was unnecessary.

91. In conclusion, he did not consider it necessary to adopt a provision on asylum in the context, even though in his third report he offered a draft provision on the point in case the Commission should decide to add such a provision (A/CN.4/137, *ad* article 53). He could not agree with Mr. Bartoš that the Commission’s commentaries had no force at all: they undoubtedly constituted a guide to the interpretation of the relevant provisions.

92. There was another reason for not including a provision such as that proposed by the Yugoslav Government. If the right of asylum were specifically excluded, it would be necessary to state what would happen if the rule were broken by a consulate. A question of that type could be dealt with in a bilateral convention but hardly in a multilateral convention.

93. Mr. BARTOŠ requested a vote on the Yugoslav proposal.

94. The CHAIRMAN put to the vote the proposal, as formulated by the Special Rapporteur in his third report (A/CN.4/137, *ad* article 53, sentence to be added to paragraph 2).

*The proposal was adopted by 8 votes to 5, with 5 abstentions.*

95. Mr. JIMÉNEZ de ARÉCHAGA, explaining his vote, said that he had voted against the proposal because the provision adopted could be held to imply that a consulate should never be used as an extension of a diplomatic mission for the purposes of granting asylum. He recalled the experience of diplomatic asylum during the Spanish Civil War when the representatives of various countries had provided accommodation on consular premises for persons to whom diplomatic asylum had been granted.

96. In addition, the adoption of the proposal conflicted with the Commission’s decision at its twelfth session to defer consideration of the question of asylum to a future session.

97. Mr. GARCÍA AMADOR, explaining his vote, said that he had voted against the proposal for the same reasons as Mr. Jiménez de Aréchaga. The provision adopted was at variance with the practice of Latin American countries and even with that of some European countries in certain special situations, as evidenced

by the experience of the Spanish Civil War. He therefore deplored the hasty decision of the Commission to adopt the additional sentence in question before studying a topic which had been referred to it by a resolution of the General Assembly. When the Commission came to discuss that topic at one of its future sessions, it would find that questions such as that raised by the Yugoslav proposal could not be disposed of so lightly.

98. The CHAIRMAN said that there remained no questions of substance to be decided in connexion with article 53. The Commission appeared to be agreed that the Drafting Committee should be asked to consider whether, in the light of article 65 of the present draft, it was appropriate in article 53 to draw on the language of article 41, paragraph 3, of the Vienna Convention.

99. Sir Humphrey WALDOCK recalled that when the Commission had adopted article 33 on the inviolability of the consular archives, it had been agreed that the Drafting Committee should be asked to consider the inclusion in article 53, paragraph 3, of a reference to the question of the separation of those archives from other papers and documents (596th meeting, paras. 64 and 67).

100. The CHAIRMAN suggested that article 53, as amended by the adoption of the additional sentence, be referred to the Drafting Committee, with instructions to consider the wording of paragraph 2 in the light of article 41, paragraph 3, of the Vienna Convention and also to take into account the point mentioned by Sir Humphrey Waldock.

*It was so agreed.*

The meeting rose at 1.15 p.m.

## 605th MEETING

*Wednesday, 7 June 1961, at 10 a.m.*

*Chairman: Mr. Grigory I. TUNKIN*

### Co-operation with other bodies

*(resumed from the 597th meeting)*

[Agenda item 5]

1. The CHAIRMAN, welcoming Mr. Hafez Sabek, observer for the Asian-African Legal Consultative Committee, expressed his conviction that the existing co-operation between that Committee and the Commission would be of great benefit to the latter’s work.

2. Mr. SABEK (Observer for the Asian-African Legal Consultative Committee) thanked the Commission for inviting the Committee to be represented at that session.

3. The Committee wished to express its appreciation to the Commission for sending Mr. García Amador as observer to the fourth session of the Committee held