

Document:-
A/CN.4/SR.588

Summary record of the 588th meeting

Topic:
Consular intercourse and immunities

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

that, according to the commentary on article 6, the Commission at its twelfth session had intended paragraph 2 to apply to all the sub-divisions of paragraph 1. Moreover, article 53 provided that, without prejudice to the privileges and immunities recognized by the Convention or by other relevant international agreements, it was the duty of all persons enjoying consular privileges and immunities to respect the laws and regulations of the receiving State. The two basic ideas in article 6, on the other hand, were to set forth the right of communication and to make it clear that that right must be exercised in conformity with the laws and regulations of the receiving State. Those basic concepts could not be changed without reopening the whole debate. The Drafting Committee could probably work out a satisfactory text, in the light of the comments made by governments and members of the Commission.

81. Mr. AMADO said that all questions relating to communication and contacts between consuls and the nationals of the sending State should be examined within the framework of observance of the laws of the receiving State. Moreover, respect for the laws and regulations of the receiving State was the subject of article 53.

82. There was a serious error in the drafting of article 60. It would be seen that the only freedom mentioned in that article was the freedom of communication, dealt with in paragraph 1 (a); paragraph 1 (b) dealt with a duty of the competent authorities of the sending State, while paragraph 1 (c) was in effect an authorization. Nevertheless, paragraph 2 referred to "freedoms" in the plural. He could not agree with the Special Rapporteur that paragraph 2 applied to the whole of paragraph 1; the best course would be to relegate paragraph 2 to the commentary.

83. The CHAIRMAN, speaking as a member of the Commission, suggested to Mr. Amado that it would be unwise to eliminate from the article the proviso in the second part of paragraph 2.

84. Mr. ERIM recalled that, during the twelfth session, it had been pointed out (534th meeting, para. 27) that an examining magistrate might prohibit communication with a detained person. Paragraph 2 had been inserted to meet that objection; the last phrase of the paragraph had been included to provide against cases where the receiving State might wish to abolish all visits to detained persons. He agreed with Mr. Amado that the only freedom referred to in the article was that set forth in paragraph 1 (a); since paragraph 1 (b) referred to action by the local authorities of the receiving State, paragraph 2 obviously applied only to paragraph 1 (c), and could not be regarded as restrictive of any freedom.

85. The CHAIRMAN observed that, if the Commission wished to restrict the application of paragraph 2 to paragraph 1 (c), the first phrase of paragraph 2 should begin with the words "The authorization referred to in paragraph 1 (c) of this article . . .".

86. Mr. ŽOUREK, Special Rapporteur, maintained that it was quite clear that paragraph 2 referred to the whole of paragraph 1. If its application were restricted to paragraph 1 (c), there would be a contradiction of

other articles of the convention, particularly article 53. For example, where paragraph 1 (b) was concerned, if a national of the sending State were imprisoned and held *incomunicado* in conformity with the laws and regulations of the receiving State, the consul could not communicate with him. A number of other special circumstances and emergency regulations in the interests of the security of the receiving State might affect communications between the consul and nationals of the sending State. Accordingly, the application of paragraph 2 could not be limited to paragraph 1 (c).

87. Mr. PADILLA NERVO endorsed the views expressed by Mr. Erim and Mr. Amado. The only freedom referred to in article 6 was that of communication under paragraph 1 (a), and that was obviously subject to the provisions of article 53. Under paragraph 1 (c), however, the consul was given an express authorization, and a special reference to the laws and regulations of the receiving State therefore seemed indicated. He would support the wording suggested by the Chairman.

88. Mr. SANDSTRÖM endorsed Mr. Padilla Nervo's remarks.

89. The CHAIRMAN proposed that paragraph 2 should be referred to the Drafting Committee, which would take into account the wishes expressed by the majority of the Commission.

It was so agreed.

The meeting rose at 1 p.m.

588th MEETING

Friday, 12 May 1961, at 10 a.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10, A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 7 (Carrying out of consular functions on behalf of a third State)

1. The CHAIRMAN invited debate on article 7 of the draft on consular intercourse and immunities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that the only government which had commented on article 7 was that of the Netherlands (A/CN.4/136/Add.4). The amendment proposed by that government extended the scope of the article but did not alter its basic purpose, and accordingly the Commission might accept it. He would draw attention, however, to the Commission's

decision on the structure of the draft; the articles in the first part related only to heads of post and not to other consular officials.

3. Sir Humphrey WALDOCK said he had no comment to make on the substance of the article, but had some doubt as to its form. In the first place, it was better to use the positive, rather than the negative, form wherever possible. Moreover, the commentary to article 7, which described cases in which the carrying out of consular functions on behalf of a third State might be valuable, was drafted in positive language. Another reason for altering the form was that an analogous provision was stated positively in article 46 of the Vienna Convention on Diplomatic Relations (A/CONF.20/13).

4. Lastly, in keeping with the same article of the Vienna Convention, article 7 should specify that it was for the sending State — rather than for the consul — to obtain the prior consent of the receiving State.

5. Mr. SANDSTRÖM endorsed Sir Humphrey Wal-dock's remarks.

6. Mr. VERDROSS also agreed with Sir Humphrey Waldock, but pointed out that the Commission had unanimously adopted the present text of article 7. The Special Rapporteur should be asked whether he had any objection to the proposed amendments.

7. Mr. AGO said he had no objection to using a positive wording for the article. Nevertheless, he would point out that the analogy with article 46 of the Vienna Convention was false: article 46 dealt with temporary protection of the interests of the third State in Special situations, whereas article 7 of the consular draft related to regular and permanent exercise of functions.

8. The CHAIRMAN observed that article 6 of the Vienna Convention seemed to be more closely analogous to article 7 of the draft under consideration.

9. Sir Humphrey WALDOCK pointed out that article 7 might cover more than one situation. It could be held to refer not only to cases of the continuing representation of a third State, but to temporary protection as well; it might even relate to cases where a consul was commissioned by two separate States to act for both. In addition, a State having consular relations with another might be asked to take over consular representation of a third State which had no consular establishments in the receiving State. Finally, the article might be invoked in special cases, such as those of temporary breach of diplomatic relations. Three different situations seemed therefore to be covered in a short formula; it seemed that analogies with more than one of the articles in the Vienna Convention were involved.

10. Mr. ŽOUREK, Special Rapporteur, doubted the advisability of changing the text. In the first place, no government had objected to the form of the article. Secondly, although it was true that there were usually some advantages in adopting a positive formula, in the particular case the negative wording seemed to emphasize better the general rule. While he had no strong feelings on the subject, he thought it would be desirable not to change provisions on which no government had

commented, unless such changes became necessary in consequence of other modifications of the draft.

11. Mr. PADILLA NERVO said he did not see any danger in changing the form of article 7 from the negative to the positive, particularly in view of the positive formulation in the commentary. Moreover, it was unnecessary to follow the wording of article 46 of the Vienna Convention; the Drafting Committee might be instructed to word the article along the following lines: "With the consent of the receiving State, the consul may carry out consular functions on behalf of a third State."

12. Mr. PAL said that he had originally been inclined to agree with the two points made by Sir Humphrey Waldock. Further interventions had, however, led him to the conclusion that article 7 should be kept in its existing form. The negative form was preferable, as there would be other requisites for taking up the functions and the negative form would not affect them. He agreed with Mr. Ago that the analogy with article 46 in the Vienna Convention was not tenable, since article 7 was comprehensive enough to cover both the cases of the temporary exercising of such functions for a third State, the single person retaining his character as consul of the original sending State only, and of the permanent functioning as consul of the third State in addition to the original assignment. Moreover, if the consent of the receiving State had to be sought by the sending State, and not by the consul himself, considerable delays might occur. Since no government had commented on the article, it would be best to leave it unaltered.

13. Mr. ERIM observed that, even if article 7 were to be retained in its negative form, some modification was needed to clarify its intention. Article 46 of the Vienna Convention expressly provided that the request for the temporary protection of the interests of the third State and of its nationals should come from that State. It was theoretically possible that a consul might wish to exercise consular functions on behalf of a third State, that the receiving State might give its consent, but that the third State might know nothing of the matter; while that hypothesis was unlikely, provision should be made for it in a legal text.

14. With regard to form, he did not believe that it would make much difference whether the article was drafted in negative or in positive terms.

15. Mr. AGO said he was glad that the Chairman had drawn attention to article 6 of the Vienna Convention as presenting a closer analogy to article 7 than article 46 of that Convention. In fact, the two articles of the Convention had nothing in common; not only did article 6 refer to continuing functions and article 46 to temporary functions, but under the former article the diplomatic agent concerned acted as ambassador of two States, while under the latter he acted as the representative of one State only and in that capacity took care also of the interests of another State. Article 7 could not cover both situations, and should be brought closer into line with article 6 of the Vienna Convention. Mr. Erim's point should be taken into account and, moreover, it should be borne in mind that under that

article 6 two or more States might accredit the same person as head of mission to another State; the idea that the consent of the receiving State should be obtained by the sending State and not by the official concerned should be introduced into article 7 of the draft concerning consular intercourse.

16. Mr. SANDSTRÖM said he could not agree with the Special Rapporteur that the absence of government observations was a cogent argument for leaving the text of any article unchanged. On the other hand, he supported Mr. Ago's views that certain questions of substance were involved.

17. The CHAIRMAN, speaking as a member of the Commission, said that Mr. Ago had given a correct explanation of the different situations covered by articles 6 and 46 of the Vienna Convention. Article 7 of the draft on consular intercourse, as worded, could be construed as covering both of those situations; however, the carrying out of consular functions on behalf of two States was more closely analogous to the situation described in article 6 of the Vienna Convention than to that described in article 46, for under article 46 the diplomatic agent concerned would be acting exclusively as the representative of the sending State. The situations (viz. that of the consul of State A who, under his government's instructions, protected also the interests of State B in the receiving State; and that of one and the same person acting as consul for two States) were clearly different from the juridical point of view, and hence it might be advisable to draft separate articles to cover the different situations.

18. Mr. ŽOUREK, Special Rapporteur, considered that the pointed raised by Mr. Erim might be dealt with in the commentary.

19. It should be borne in mind that article 7 set forth a general rule which could cover both of the cases cited by Mr. Ago and the Chairman, whereas the special case of temporary protection was dealt with in article 28 of the draft on consular intercourse. It might be possible to redraft article 7 to correspond to article 6 of the Vienna Convention only; as that provision stood, however, it set forth the general rule to which special application was given in article 28.

20. Further, a positive wording of article 7 would not cover all the cases that would arise if the Netherlands amendment were accepted. If it were provided that two States might appoint the same person as consul, cases where a consular official other than the head of post was appointed to act on behalf of the third State would not be covered. He therefore reiterated his preference for the negative formulation of the article.

21. Mr. YASSEEN agreed with previous speakers that two different situations were involved. In the first place, a consul might be instructed by the sending State to carry out certain functions in the receiving State on behalf of a third State, on a temporary or on a continuing basis; in that case, the official remained the consul of the sending State. Article 7 seemed to apply to such cases, since the commentary showed that the Commission had not contemplated the possibility of one

and the same person being appointed consul by two States. That situation should be governed by a separate article; since the participants in the Vienna Conference had accepted the idea that a diplomatic agent could be a diplomatic agent of several States, it should be all the easier to envisage the idea of a consul being simultaneously consul of two or more States.

22. Mr. MATINE-DAFTARY considered that the choice between the negative and positive form of article 7 was a matter of drafting only. That applied also to Mr. Erim's logical suggestion.

23. Other members, however, had raised matters of substance. He believed that article 7 of the draft under discussion and articles 6 and 46 of the Vienna Convention all related to completely different situations. When article 6 of the Vienna Convention had been adopted, Mr. Bartos, as representative of Yugoslavia to the Conference, had pointed out that the article represented an innovation in international law, and many representatives had explained their votes in the light of that statement. It was in fact unprecedented in a number of legal systems that the same person should be capable of representing two different States. If the Commission wished to perpetuate that innovation in the draft on consular intercourse, it should do so in a separate article, since the wording of article 7 as it stood in no way resembled that of article 6 of the Vienna Convention.

24. A comparison between the present article 7 and article 46 of the Vienna Convention showed that they, too, contemplated different situations, although there was a slight similarity between them. Under article 46, a sending State might undertake the temporary protection of the interests of a third State and of its nationals; that situation usually occurred after the temporary severance of diplomatic relations between the third State and the receiving State, a case which was dealt with in article 28 of the draft under discussion, and not in article 7. Accordingly, he suggested that article 7 might be redrafted along the following lines: "With the consent of the third State and the receiving State, a consul may, provisionally or in special cases, undertake the temporary protection of the interests of a third State and of its nationals."

25. Mr. PADILLA NERVO said that he had agreed with Sir Humphrey Waldock's remarks in so far only as they related to the formulation of article 7, and not in so far as Sir Humphrey had suggested innovations on the basis of articles 6 and 46 of the Vienna Convention. After all, the draft under discussion did not deal so much with the representation of the sending State throughout the territory of the receiving State, as with consular functions exercised in clearly defined districts of that State. Article 7 therefore related mainly to cases where certain specific functions were to be carried out, at the request of a third State and with the consent of the receiving State, within certain well-defined limits, if the third State had no consular establishments which could take action in those cases. That was the meaning of the relevant provision of the Caracas Agreement of 1911 cited in paragraph (1) of the commentary to

article 7.¹ Whereas Sir Humphrey Waldock had spoken about form, Mr. Ago, the Chairman and Mr. Erim had spoken on substance. If the elements of articles 6 and 46 of the Vienna Convention were to be introduced, the entire debate on article 7 would have to be reopened. Instead, it would be better to leave article 7 as it stood, particularly since no government had objected to the negative wording.

26. Sir Humphrey WALDOCK said that one of the reasons why he had advocated a positive formulation of article 7 was the clear distinction between the different cases envisaged. As previous speakers had pointed out, the same individual might be commissioned by two States to act for them, perhaps even with two exequaturs; on the other hand, if a consul were commissioned by one State only, he was merely instructed by the sending State to make its facilities for protection available to the nationals of the third State.

27. He was not impressed by the argument that the absence of government observations on the article made it unnecessary to modify it. The fact that analogous provisions had been included in the Vienna Convention, and that the articles concerned had been formulated positively was a much stronger indication that the Commission should follow the example of the Conference. The probable reason for the absence of government observations was that there was no difference of opinion on the substance of article 7. The Drafting Committee should accordingly be instructed to prepare a new text in the light of the comments made during the debate.

28. Mr. AMADO pointed out that the basic purpose of article 7 was that the consent of the receiving State must be obtained to enable a consul to carry out consular functions on behalf of a third State. That was so obvious a proposition that the negative form merely served to emphasize it. There could be no strong objection to using the positive form; but references to articles of the Vienna Convention only complicated what was in fact a perfectly simple provision. Any attempts to elaborate the article would delay the adoption of a fundamental general rule.

29. The CHAIRMAN said that in fact three situations could arise. First, that envisaged in article 6 of the Vienna Convention of two States appointing one and the same person to represent them. Second, the situation contemplated in article 46 of the Vienna Convention, where the sending State undertook the temporary protection in the receiving State of the interests of a third State. Third, the case of the severance of relations, in which a State could entrust the protection of its interests and those of its nationals to another State acceptable to the receiving State: that case was envisaged by article 45 of the Vienna Convention. That third situation was envisaged in the draft on consular intercourse by

article 28 on the protection of consular premises and archives and of the interests of the sending State.

30. Accordingly, the Commission should concentrate on the two other situations which he had mentioned and, in that connexion, arrive at a decision on two points. First, whether it wished to make provision for both of them. Second, whether separate articles or paragraphs should be drafted or else a single formula to cover both situations.

31. Mr. GROS said that the provisions of article 7 were quite clear as they stood. The Commission, by adopting that text, had intended to cover the case, which was current in existing State practice, of one State being entrusted with the protection of the interests of another, with the concurrence of the receiving State concerned. On the substance of the question, no serious difficulty could arise: what was involved was simply the representation of the interests of one State by another. A consul was called upon to exercise his normal functions for the benefit of the nationals of a third State, and the receiving State would have with him the same relations in respect of those nationals as in respect of the nationals of the consul's sending State.

32. Such representation of the interests of a third State could be either on a temporary or on a continuing basis. From the legal point of view, there should be no special difficulty; the position with regard to causes or effects was similar in the two cases. However, in order to cover explicitly both cases, he suggested the insertion, after the words "to carry out consular functions" of the words "on a continuing or temporary basis".

33. Mr. LIANG, Secretary to the Commission, said that the legal consequences resulting from the case mentioned in article 6 of the Vienna Convention were different from those arising from the two situations covered in articles 7 and 28 of the consular draft.

34. If the Commission wished to contemplate the case where one and the same person was appointed as consul by two different States — the case similar to that covered by article 6 of the Vienna Convention — the internal law of the receiving State would come into operation. Under articles 9 and 10 of the draft on consular intercourse, the consul concerned would probably need separate recognitions under the internal law of the receiving State.

35. It would, of course, be easier for the receiving State merely to grant permission to a consul to carry out certain functions on behalf of a third State, as contemplated in article 7.

36. The commentary to article 7 mentioned the Caracas Agreement of 18 July 1911, which provided (in its article VI) that the consuls of each of Bolivia, Colombia, Ecuador, Peru and Venezuela residing in any other of those contracting Republics could exercise their functions on behalf of persons belonging to any other contracting Republic not having a consul in the particular place. The effect of that type of contractual provision seemed to be that the receiving State waived the need for separate recognition. In the absence of such an agreement, however, and on the basis of customary inter-

¹ *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*, United Nations, *Legislative Series*, vol. VII (United Nations publication, Sales No. 58.V.3), pp. 417-419.

national law, the consent of the receiving State, given under the provisions of its legislation, was necessary in every case.

37. In view of the foregoing considerations, it would be eminently useful to include in the consular draft a provision to cover, in the case of consuls, the situation dealt with for diplomatic agents in article 6 of the Vienna Convention.

38. Mr. AGO said that it would be comparatively easy to draft a provision to cover the case of temporary or continuing representation of the interests of one State by the consul of another. The appropriate place for such a provision would be immediately after article 28 which dealt with the protection of the interests of the sending State in the case of the severance of consular relations or the absence of a consulate of the third State concerned.

39. A new problem had arisen, however: should an article be included to cover the case of a single consul acting for two sending States in the same manner as one ambassador could represent two States by virtue of article 6 of the Vienna Convention? A provision of that type was most desirable and should be placed in article 7. It would not represent any great innovation because it was already the practice of certain small States to appoint a single person to act as consul for two of them. Moreover, even if it were considered as something of an innovation, it would be a much less grave one than in the case of an ambassador. And since the Vienna Conference had accepted the idea that a single ambassador might represent two sending States, there should be no difficulty in accepting the less important case of a consul acting for two sending States.

40. Mr. MATINE-DAFTARY, referring to Mr. Gros's remarks, said that the existing practice referred to the representation by one State of the interests of another. The suggestion that a single person might act for two states and thus be accredited by both of them would represent an innovation. The two situations differed in their consequences. In the case where a single person representing State A assumed protection of the interests of State B on the orders of his government, he would cease doing so if he were recalled by his government. But if he were accredited by States A and B, and one of the two States terminated his mission, he would remain at his post on behalf of the other. He agreed, however, that the innovation did not have the same importance as in the case of diplomatic agents and, since the Vienna Conference had accepted article 6 of the Vienna Convention, he saw no objection to a similar provision being included in the consular draft.

41. Mr. ŽOUREK, Special Rapporteur, replying to Mr. Erim, said that the terms of article 7 implied that the third State had requested the consul to carry out consular functions on its behalf.

42. Article 7, as drafted, referred only to the possibility of a consul carrying out consular functions, temporarily or otherwise, on behalf of a third State as envisaged, for example, in the Caracas Agreement of 1911.

43. If it were desired to cover the case where a single person might be appointed consul for two different sending States, it would be necessary to draft an explicit provision to that effect. The situation was completely different from that of the mere exercise of consular functions on behalf of a third State. He therefore suggested that the Commission should take a decision on that point and, if it were decided to include such a provision, that the Drafting Committee should be instructed to prepare a text.

44. The CHAIRMAN said that the Commission appeared to be in agreement to consider article 7 as covering a situation similar to that envisaged in article 46 of the Vienna Convention. He proposed that the Drafting Committee be instructed to prepare a text of article 7 in the light of article 46 of the Vienna Convention and to consider the proposal that its provisions be formulated in positive language.

It was so agreed.

45. The CHAIRMAN said that there appeared to be general agreement that a separate provision should be included in the consular draft to cover the case where one and the same person was appointed consul for more than one sending State. If there were no objection, he would take it as agreed that the Drafting Committee should prepare a new article along the lines of article 6 of the Vienna Convention.

It was so agreed.

ARTICLE 8 (Classes of heads of consular post)

46. Mr. ŽOUREK, Special Rapporteur, said that article 8 was an important article of the draft. None of the governments which had sent in comments had expressed any objection to its provisions. However, the United States Government (A/CN.4/136/Add.3), while not actually opposing article 8, had questioned the advisability of formulating a rule codifying the titles of heads of consular posts.

47. He recalled that, as its twelfth session, the Commission had not had at its disposal sufficient information on the class of "consular agents" and had, in commentary (4) to article 8, specifically asked governments for detailed information.

48. The information supplied by governments showed that many States still made use of the institution of consular agents. Belgium (A/CN.4/136/Add.6) had given particulars of the form of appointment of its consular agents, and the limited powers conferred upon them; they were in all cases honorary agents. Many countries, including Norway (A/CN.4/136) and Sweden (A/CN.4/136/Add.1) had indicated that they did not employ consular agents at that time. Poland (A/CN.4/136/Add.5) had indicated that the institution of consular agents or consular agencies was disappearing from its consular practice and Belgium had mentioned that the institution had begun to play in recent years a dwindling part in its consular representation abroad. The Netherlands Government (A/CN.4/136/Add.4/Annex) had given a list of consular agents from various countries

residing in the Netherlands, Surinam, and the Netherlands Antilles. Yugoslavia (A/CN.4/136) had asked whether consular agents belonged to the same class as consuls or to a special category of consular officials. Lastly, the United States Government had indicated that its consular officials were not necessarily full-time government employees and were sometimes engaged in outside business activities (A/CN.4/136/Add.3).

49. The information received showed that, despite the different modes of appointment, the class of consular agents still existed, although it appeared to be used less than formerly. In the circumstances, he could not agree with the suggestion made by the Government of Sweden (A/CN.4/136/Add.1) that the reference to consular agents should be dropped because the country concerned did not use that class of consular officer. As stated in commentary (2) to article 8, the enumeration of four classes of heads of consular posts in no way meant that States accepting it were bound to have all four classes in practice. A State might well dispense with one or other of the classes mentioned, but it was necessary to mention all four classes because two or more of them might be used by States. The situation was somewhat similar to that of ministers plenipotentiary in the case of diplomatic agents. Although fewer such ministers were being appointed, the Vienna Conference had felt it necessary to mention that category of heads of diplomatic missions in article 14 of the Convention on Diplomatic Relations.

50. Mr. YASSEEN said that he had some doubts about the wisdom of including class (4) since the practice of appointing consular agents was fast disappearing. He also doubted whether consular agents could ever be regarded as heads of post in the widest sense of that term: they usually exercised functions assigned to them by a consul and remained under his supervision.

51. There had been a considerable amount of discussion at the Vienna Conference before it had been decided to include ministers in the classification of heads of missions, but far more States still appointed ministers than consular agents. He believed it would be preferable to delete class (4) in article 8.

52. Mr. MATINE-DAFTARY agreed with Mr. Yasseen. In his own country at the time of the capitulations regime, when consuls had had much to do and their districts had been extensive, consular agents had been appointed to help them. Such agents had been subordinate officials and never heads of post. They had worked under the instructions of consuls and had not needed a separate exequatur. Currently, there was not a single consular agent in Iran, nor had the Iranian Government appointed any recently.

53. If there were any cases of consular agents being appointed heads of post and directly responsible to the sending State, they must be very rare and the reference to them in article 8 should therefore be deleted.

54. The practice of appointing consular agents in order to assist consuls in their functions could be mentioned in another article.

55. Some provisions should also be inserted in recogni-

tion of the fact that in certain consulates there was — apart from the head of post — a consul or vice-consul for whom a separate exequatur did not have to be obtained.

56. Mr. ŽOUREK, Special Rapporteur, referring the Commission to paragraph (7) of the commentary, emphasized that article 8 in no way sought to restrict the power of States to determine the titles of consular officials working under a head of post. Practice and legislation in that regard varied widely. Article 8 dealt solely with the classes of heads of posts.

57. The last point mentioned by Mr. Matine-Daftary would be discussed under article 14.

58. Mr. ERIM asked the Special Rapporteur whether at that time there were many consular agents who were heads of posts. If the answer was in the affirmative, class (4) should certainly be retained in article 8, since the codification of rules of customary international law was one of the Commission's major tasks.

59. He criticized the expression *sont partagés* in the French text of the article.

60. Mr. VERDROSS observed that at the Vienna Conference the general view had been that the practice of appointing ministers plenipotentiary was dying out, but in the instance under consideration the Commission could not overlook the fact that a number of States still appointed consular agents. He was therefore in favour of retaining the text of article 8 as it stood.

61. Mr. AMADO said that part of the difficulty over class (4) had arisen because the term "consular agents" was a generic one, frequently used in international instruments. Although his country made no use of such a category of consular officials, he recognized that since it still existed it must be mentioned in article 8.

62. The CHAIRMAN, speaking as a member of the Commission, agreed with those members who believed it necessary to maintain class (4) since consular agents still existed and, as indicated by the replies from governments, continued to be appointed heads of post. Under Soviet law such appointments could be made, but in fact none had been made for some twenty years. The fact that some States did not appoint consular agents as heads of post was certainly no reason for deleting class (4) from article 8.

63. Mr. PAL agreed with the Chairman that class (4) should be retained in article 8. In that connexion, the annex to the observations of the Government of the Netherlands was of relevance.

64. Mr. GROS also agreed with the Chairman; he mentioned that France had often appointed consular agents to be heads of post, for example in some Brazilian and African ports. The practice had a long history, and had been particularly important for some States in the coastal countries of the Mediterranean and Africa.

65. Mr. AGO, referring to paragraph (4) of the commentary and the deferment of a final decision pending the receipt of the comments of governments, said that since governments had been on the whole in favour of

retaining class (4) there was no reason why it should be deleted.

66. He agreed with Mr. Erim's criticism concerning the French text.

67. He also thought it desirable to insert a second paragraph containing a provision on the lines of that appearing in article 14, paragraph 2, of the Vienna Convention.

68. Mr. MATINE-DAFTARY said that in the light of the remarks of Mr. Gros, which showed that consular agents were still of some importance, he would withdraw his proposal for the deletion of class (4) in article 8.

69. Mr. ŽOUREK, Special Rapporteur, suggested that a statement based on paragraph (7) of the commentary might appear in the body of the article, indicating that States were entirely free to determine the titles of the consular officials and employees who worked under the direction of the head of post.

70. In reply to Mr. Erim, he remarked that consular agents were placed on the same footing as consuls-general, consuls and vice-consuls in numerous conventions; that fact was enough to justify retaining class (4) in article 8. The extent to which States still appointed consular agents was not after all the decisive consideration. There were no statistics on the matter.

71. At first sight it would seem difficult to follow Mr. Ago's suggestion and include in article 8 a provision modelled on article 14, paragraph 2, of the Vienna Convention, for article 8 covered both career and honorary consuls. He would have thought it impossible not to differentiate between those two categories.

72. Mr. AGO expressed the belief that such a provision could be inserted without risk since it would stipulate only that there should be no distinction between heads of posts by reason of their class.

73. The CHAIRMAN proposed that the Special Rapporteur be requested to consider Mr. Ago's proposal for the addition of a new paragraph and to inform the Commission of his conclusions at a later meeting. He might be also asked to draft a provision concerning precedence of the members of consular staff, taking into account the provisions of article 17 of the Vienna Convention.

74. Subject to further consideration of those two questions article 8 could be referred to the drafting committee.

It was so agreed.

Appointment of a drafting committee

75. The CHAIRMAN proposed that the Commission should appoint a Drafting Committee consisting of the following members: Mr. Ago (Chairman), Mr. Matine-Daftary (Rapporteur), Mr. Žourek (Special Rapporteur), Mr. Gros, Mr. Padilla Nervo (who, when unable to attend, would be replaced by Mr. Jiménez de Aréchaga), and Sir Humphrey Waldo.

It was so agreed.

The meeting rose at 12.55 p.m.

589th MEETING

Monday, 15 May 1961, at 3 p.m.

Chairman: Mr. Grigory I. TUNKIN

Consular intercourse and immunities (A/4425; A/CN.4/136 and Add.1-10; A/CN.4/137)

[Agenda item 2]
(continued)

DRAFT ARTICLES (A/4425) (continued)

ARTICLE 9 (Acquisition of consular status)

1. The CHAIRMAN invited discussion on article 9 of the draft on consular intercourse and communities (A/4425).

2. Mr. ŽOUREK, Special Rapporteur, said that three governments, those of Belgium, Norway and the Netherlands, had submitted comments on article 9. He could accept without great difficulty the Belgian Government's proposal (A/CN.4/136/Add.6) that the words "the State in whose territory he is to carry out his functions" should be replaced by the words "receiving State" for the sake of terminological uniformity, although in the case in question this term "receiving State" could not be used until after the consular official had been admitted by the State concerned.

3. He could not share with the Norwegian Government's view (A/CN.4/136) that article 9 was unnecessary; the article stated a fundamental rule concerning the conditions which had to be satisfied in order that a person could be considered a consul in international law. That fundamental rule was followed by others relating to the exequatur, provisional recognition and the obligation to notify the authorities of the consular district.

4. The text as it stood had been adopted with the express object that it should also cover those special cases where consuls who were not heads of post were granted a consular commission and obtained an exequatur.¹ The Netherlands Government had proposed an alternative text (A/CN.4/136/Add.4) which would restrict the application of article 9 to heads of post only. As the legal status of consular staff who were not heads of post was dealt with in articles 21 and 22, the requisite modifications could be made in those articles and the Netherlands Government proposal for article 9 could be adopted.

5. He agreed with the Netherlands Government's comment concerning the use of the word "consul" in the draft. It would probably be necessary to indicate in

¹ For earlier discussion of the provision, see A/CN.4/SER.A/1959. 508th meeting, paras. 2-19 (where it is discussed as article 4 of the then draft).