

Document:-
A/CN.4/SR.612

Summary record of the 612th 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>)*

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

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

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

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

It was so agreed.

The meeting rose at 1.5 p.m.

612th MEETING

Friday, 16 June 1961, at 10.10 a.m.

Chairman: Mr. Grigory I. TUNKIN

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

(continued)

[Agenda item 2]

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

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

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

2. Mr. ŽOUREK, Special Rapporteur, referring to the earlier debate (600th meeting, para. 22) and to the comments of the Governments of Norway and Yugoslavia (A/CN.4/136) on the subject of the waiver of immunity, said that the Norwegian Government considered that the immunities mentioned in articles 40 (Personal inviolability), 41 (Immunity from jurisdiction) and 42 (Liability

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

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

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

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

from jurisdiction for the purpose of the adjudication of a controversy and, secondly, immunity from the consequences of the proceedings. Usually, in American law, certain objections to jurisdiction which rested upon the right of the court to hear and determine the controversy might be made at any time during the proceedings. But a litigant was not allowed to gamble with the outcome. A defendant could not first submit to the jurisdiction of the court and subsequently claim immunity from the enforcement of the judgement. To allow such a procedure would mean that if the sending State was not satisfied with the decision of the court, it might, by withholding the waiver of immunity from execution, prevent that decision from being enforced. Such a result would be contrary to all the fundamental principles of the administration of justice.

6. Mr. VERDROSS said that article 50 *bis* was extremely useful and filled a gap that had been left in earlier drafts. With regard to paragraph 2, however, some might query whether the waiver of immunity for the purposes of civil or administrative proceedings should be express. The Commission's 1958 draft on diplomatic intercourse (A/3859, chap. III, article 30, para. 3) had provided that the waiver of immunity in a civil action could also be implicit; that provision had, however, been altered at the Vienna Conference. In the draft under consideration, since a consul enjoyed immunities in respect of official acts only, and since those acts would in all cases be imputable to the State, it would be accurate to provide that the waiver should always be express.

7. Mr. MATINE-DAFTARY agreed with Mr. Verdross concerning the need for the article. Moreover, it was correct that it should be narrower than article 32 of the Vienna Convention, inasmuch as only consular officials enjoyed personal inviolability and as other members of the consular staff enjoyed immunity only under article 41 in respect of acts performed in the exercise of their functions.

8. He asked why article 50 *bis* did not contain a provision corresponding to paragraph 3 of article 32 of the Vienna Convention, which seemed to apply *a fortiori* to consuls who might, in the circumstances contemplated, take the initiative in obtaining a waiver of their immunity from jurisdiction.

9. Mr. JIMÉNEZ de ARÉCHAGA agreed with Mr. Verdross and Mr. Matine-Daftary that the new article would be extremely useful. There was, however, a problem of co-ordination that might arise. The Vienna Convention contained a single article, article 31, relating to immunity from jurisdiction, which dealt with criminal as well as with civil and administrative jurisdiction. In the draft on consular intercourse, however, article 40 related to personal inviolability and article 41 to immunity from jurisdiction; the former dealt in substance with immunity from criminal jurisdiction, while the latter related to immunity from civil and administrative jurisdiction. He was afraid that the new article as drafted might be held to apply to article 41 only.

10. He would be interested in the Special Rapporteur's reply to Mr. Matine-Daftary's question. It was possible that a consul might institute proceedings which might give

rise to a counter-claim, for instance, in connexion with the dismissal of an employee of the consulate.

11. Mr. ŽOUREK, Special Rapporteur, in reply to Mr. Jiménez de Aréchaga, referred to his earlier suggestion that articles 40, 41 and 42 should be mentioned specifically in paragraph 1 of the new article. He quite agreed with Mr. Verdross that the waiver should in all cases be express where consular relations were concerned.

12. With regard to Mr. Matine-Daftary's question, he said that the status of diplomatic agents differed radically from that of consular officials. Diplomatic immunities covered not only the functional acts, but also all the private activities of the diplomatic agent, and it had therefore been necessary to provide for cases where the diplomatic agent himself might institute proceedings in respect of a private act, to which the other party should be able to submit a counter-claim. By contrast, in the case of consular officials, whose immunities covered only acts performed in the course of duty, it was hard to imagine that a consul should personally submit to the local jurisdiction as a plaintiff. The only cases that would be likely to arise would be those where the sending State was asked to waive the consular officials immunity: because a national of the receiving State wishes to bring an action against that official. The question of counter-claims would not arise in any cases governed by article 40 or article 42; and so far as article 41 was concerned, the immunity from jurisdiction was restricted to acts performed in the exercise of the functions of members of the consulate. Nor did he think that the case cited by Mr. Jiménez de Aréchaga justified the inclusion of a clause concerning counter-claims, for the contractual or other relations of public officials were governed by the law of the sending State, and litigation concerning the dismissal of a consular employee would certainly not be brought in the courts of the receiving State. If a subordinate official sued the consul for wrongful dismissal, the latter's answer would be that the act in question had been performed in the exercise of his functions, and the judge would be obliged to accept the answer. If, however, the sending State agreed to waive the consul's immunity for the purpose of the action, then the case would be adjudicated in the normal way. The consul being the defendant, counter-claims could be lodged only by him; but such a case would be already covered by the original waiver. In general, because consular immunities were limited, consuls were, save for exceptions provided in international agreements, subject to local jurisdiction in respect of private acts, and a provision based on paragraph 3 of article 32 of the Vienna Convention would have no relevance.

13. Mr. PAL said that article 50 *bis* did not make it sufficiently clear whether or not the consul himself could waive his immunity. It was only if that possibility was open to the consul that a provision on the lines of paragraph 3 of article 32 of the Vienna Convention should be included in the draft.

14. Mr. AGO said he had not been convinced by the Special Rapporteur's reply to Mr. Matine-Daftary's question. If a consular official instituted a civil or administrative proceeding, he was estopped from invoking

immunity in respect of counter-claims to his suit. The Special Rapporteur had stated categorically that consular officials enjoyed immunity only in respect of acts performed in the exercise of their functions; but if, for example, a consul proceeding by motor vehicle to an official meeting was in collision with another vehicle, he would probably be immune from civil jurisdiction and could not be sued for damages. But if the consul suffered injury and sued the other party, he should not be able to plead immunity in respect of a counter-claim brought by that other party. Although it might be used less often for consular officials than for diplomatic agents, he thought it essential that a clause based on article 32, paragraph 3, of the Vienna Convention should be included in draft article 50 *bis*.

15. Sir Humphrey WALDOCK fully agreed with Mr. Ago. The dividing line between the official and the private acts of consular officials was not always clearly drawn, and the Commission was labouring under some disadvantage through its lack of knowledge of the actual practice. A consul might often have to conclude agreements and contracts—in connexion with renting premises, for example—which might concern both official and private acts. Because the private was not always distinguishable from the official capacity of consular officials, there would certainly be no harm in including a provision along the lines of paragraph 3 of article 32 of the Vienna Convention and thus safeguarding the position of such officials.

16. Mr. SANDSTRÖM endorsed the views expressed by Mr. Ago and Sir Humphrey Waldock.

17. Mr. VERDROSS observed that the Special Rapporteur himself had distinguished in certain articles of the draft between official acts and acts performed in the exercise of functions of consular officials. The latter included certain private acts; he therefore supported the views expressed by Mr. Ago and Sir Humphrey Waldock.

18. Mr. ŽOUREK, Special Rapporteur, said he had no objection in principle to including a provision modelled on article 32, paragraph 3, of the Vienna Convention, although he still could not see how it could be applied to consular officials in practice. In the case cited by Mr. Ago, if it were established that the consul was exercising his official functions at the time of the accident, he would certainly try to avoid bringing an action in the receiving State for that might place him in an awkward position.

19. Mr. YASSEEN expressed misgivings concerning the usefulness of the article as a whole, in view of the extremely limited nature of consular privileges and immunities. Since those immunities were granted only in respect of acts performed in the exercise of consular functions, their waiver would be very rare indeed. In the case of diplomatic agents who enjoyed immunity even in respect of their private acts, it was obviously necessary to add a provision on waiver of immunity by the sending State, but the proposed article might to some extent be justified in respect of the personal inviolability conferred upon the consul under article 40 and of refusal to give evidence under article 42.

20. Be that as it might, it would not be right to insert in the proposed article paragraph 3 of article 32 of the Vienna Convention concerning counter-claims. The right to waive immunity was vested in the State and the consul enjoyed immunity only in respect of acts performed in the exercise of his functions. The insertion of a paragraph along the lines of the above-mentioned paragraph 3 would be tantamount indirectly to enabling the consul himself, in instituting proceedings, to waive an immunity which was given to him solely in respect of acts performed in the exercise of his functions, i.e., acts that might be imputed to the State itself. Such a paragraph was acceptable in the case of diplomatic agents, because they enjoyed immunity even in respect of their private acts.

21. Mr. GROS said that, although Mr. Yasseen's theory might be correct, the practice of States in the matter was quite different. For example, French consuls were not authorized to initiate proceedings relating to functional acts without the permission of the Ministry of Foreign Affairs, and he believed that a similar situation obtained in other countries. Moreover, a consul could not include the costs of proceedings in his budget and would have to ask the sending State for funds before he could engage counsel. Accordingly, he could only regard Mr. Yasseen's objections to the new article as purely academic.

22. Mr. VERDROSS pointed out to Mr. Yasseen that a distinction was drawn throughout the draft between official acts and acts performed in the exercise of consular functions. The logical consequences should be drawn from that distinction.

23. The CHAIRMAN, speaking as a member of the Commission, observed that article 50 *bis* was in fact consequential. The fact that certain immunities were granted to consular officials made it necessary also to provide for the possibility of waiving those immunities. Moreover, such an article had been adopted at the Vienna Conference, and the doubts that had been raised concerning its usefulness were not, in his opinion, substantiated by practice. Nor could he agree with members who asserted that the draft under discussion accorded immunities only in respect of acts performed in the exercise of consular functions. Article 40 admittedly granted an incomplete immunity, but it gave immunity from arrest or detention pending trial in respect of all acts performed by consular officials. He therefore saw no harm in including a provision along the lines of article 32, paragraph 3, of the Vienna Convention; although such a provision might not in practice cover very important cases, it might be useful if read in connexion with other articles of the draft.

24. Mr. AMADO thought that it would be useful to include a clause based on article 32, paragraph 3, of the Vienna Convention to provide for cases where a sending State did not prohibit consular officials from initiating proceedings.

25. Mr. TSURUOKA considered that, since under the Vienna Convention the right of waiver had been granted to diplomatic missions, a like right might be granted to consular officials also. Because the questions involved would often be of little importance, and a

consular official, like a diplomatic agent, represented his country, his dignity as such should be respected by granting him the right of waiver.

26. The CHAIRMAN noted that the consensus was in favour of an article along the lines proposed by the Special Rapporteur. It had been suggested that another paragraph should be added based on article 32, paragraph 3, of the Vienna Convention, and the Special Rapporteur had raised no objection to that suggestion. The second sentence of paragraph 2 of the new article had no parallel in the Vienna Convention, and might therefore be omitted from the new article also, for a consul might receive direct instructions to waive the immunity of subordinate staff of the consulate. The Special Rapporteur had suggested that articles 40, 41 and 42 should be referred to specifically in paragraph 1; the Drafting Committee might consider whether any other articles of the draft should also be mentioned. Finally, Mr. Edmonds had raised the question whether it was advisable to provide in article 50 *bis*, paragraph 3, for a separate waiver of immunity from measures of execution resulting from a judicial decision. He would point out that a corresponding provision appeared in article 32, paragraph 4, of the Vienna Convention, and there seemed to be no reason to depart from that text.

27. He suggested that the article be referred to the Drafting Committee with instructions to take into account the points raised during the discussion.

It was so agreed.

RIGHT OF A STATE TO MAINTAIN CONSULAR RELATIONS WITH OTHER STATES.

28. Mr. ŽOUREK, Special Rapporteur, replying to the Chairman, said that he had no further additional articles to propose, but wished to give an explanation on the subject of the right of a State to maintain consular relations with other States. The question had been raised by the Czechoslovak Government, which had considered that the draft should include an article for that purpose. He had dealt with the subject in his third report (A/CN.4/137, section III, paras. 10 and 11). He recalled that, in his first report (A/CN.4/108, article 1), he had included a provision which, in deference to the objections by some members, he had later redrafted and submitted at the eleventh session, which read: "Every sovereign State is free to establish consular relations with foreign States." (496th meeting, para. 17.)

29. The late Professor Scelle had proposed another wording: "Every State has the right to establish consular relations with foreign States if they are in agreement that such consular relations shall be effected" (*ibid.*, para. 26). That formulation embodied a principle, broadly similar to the right of legation, by virtue of which all States had the right to maintain consular relations.

30. The Vienna Conference had not included an article on the right of legation in the Convention on Diplomatic Relations. He appreciated therefore that a provision on the right to maintain consular relations would not be likely to receive unanimous support in the Commission. Since, however, the question was an important one,

he had thought that he owed an explanation to the Commission on the subject.

31. Mr. YASSEEN expressed doubts on the advisability of including a provision such as that described by the Special Rapporteur. A somewhat similar provision, on the subject of the "right of legation," had been proposed at the Vienna Conference, but had not been adopted.

32. The right to maintain consular relations was not technically a "right." Under existing international law, it was open to a State to propose to another State the establishment of consular relations, but those relations could not be actually established without the consent of that other State. Besides, the "right" in question was not enforceable, for there was no counterpart obligation owed by the other State. And in any case, the provision in question would probably conflict with the terms of article 2, which stated that the establishment of consular relations took place by the "mutual consent" of the States concerned.

33. Mr. MATINE-DAFTARY agreed that, under existing international law, a State could not be said to have a right to conduct consular relations. Speaking, however, as a professor and not as an agent of the government, he found the idea contained in the Czechoslovak proposal very attractive and worthy of study by the Commission.

34. As the late Professor Scelle had maintained during the discussion of similar proposals at previous sessions, it was in the interest of the progress of international law to indicate that a State could not arbitrarily refuse to have consular relations with another. There were cases in which it would be altogether illogical and unjust for a State to refuse another's request to open consular relations for the purpose of protecting existing interests. For example, there was a constant movement of pilgrims and businessmen between his own country, Iran, and its friend and neighbour Iraq; it would be most unreasonable for one of those countries to refuse to maintain consular relations with the other and thereby deprive those travellers of necessary consular services.

35. Mr. ERIM said that the terms of article 2 of the draft, and the similar provisions contained in article 2 of the Vienna Convention, showed clearly that mutual consent was necessary for the establishment of both diplomatic and consular relations.

36. The provision under discussion could not therefore be accepted without dropping article 2. The formula proposed by the late Professor Scelle did not add anything to article 2, from the strictly legal point of view. A right which could not be exercised without the agreement of other States could hardly be described as a right at all. The only purpose of such a provision would be to give moral support to the idea that States should consider in the future whether they did not have some duty to maintain economic, commercial and cultural relations with one another.

37. Mr. GROS believed that he was faithful to the French school in observing that, apart from the stoutly-defended thesis of the late Professor Scelle, a practical approach to the question should be adopted. States

were certainly entitled to conduct consular relations, but the establishment of those relations took place in each case by the mutual consent of the two States concerned. It had been the intention of the late Professor Scelle to suggest that it might in the future be impossible for a State to withhold from another State the establishment of either diplomatic or consular relations. He was thus developing the idea that, with the growth of the international community and the development of international organizations, a time would come when the relations between States would no longer be conducted on the purely bilateral basis of diplomatic and consular relations, where the appreciation of each situation necessarily lay with the States.

38. Mr. AGO said that the term "right" could not appropriately be used in the context. Even at the time of the establishment of diplomatic relations, it was possible for one of the two States concerned to refuse to establish consular relations as well. It was therefore clear that no right to exact from another State consent to the establishment of consular relations could be said to exist.

39. Moreover, the draft made provision for the possibility of severing consular relations. If a State could thus break off consular relations, it was clear that the other State concerned could not be held to have the right to maintain them.

40. The provision in question was inadmissible because it would undermine the whole structure of the draft, which was based on the premise that consular relations were established and maintained by the mutual consent of the States concerned. It might be suggested that the Commission should urge States to increase the scope of their consular relations, but that would not justify the provision under discussion. It might be appropriate to make propaganda in favour of marriage, but every marriage nevertheless required the consent of the two interested parties.

41. Mr. MATINE-DAFTARY said the analogy was wrong: marriage was a question of inclination, whereas consular relations were maintained by States because of the material interests at stake. When a State opened its frontiers to the nationals or the goods of another State, it could no longer refuse to admit the consul of that State, whose mission it was to protect both nationals and trade. It could not therefore be said, with Mr. Ago, that it was like imposing marriage on a person, but rather denying a spouse access to the matrimonial home. The Commission might do well to reflect on the possibility of including some provision in the draft to the effect that a State could not arbitrarily refuse to conduct consular relations with other States.

42. Mr. AMADO said that the formula of the late Professor Scelle contained an element of irony: it began with the proposition that every State had the right to establish consular relations with foreign States, but went on to specify that the right in question could only be exercised if the States concerned were "in agreement that such consular relations shall be effected". The late Professor Scelle had been a visionary, but able to smile at his own dreams.

43. It was the task of the Commission to define the legal rules in force among States and applied by them — codification of international law — and also to formulate certain other rules which were already alive in the legal conscience of peoples — progressive development of international law. The proposed rule, however, was not yet in existence in State practice and he did not think that it would come to life in the near future.

44. The CHAIRMAN, speaking as a member of the Commission, said that the proposal of the Czechoslovak Government had been largely misunderstood by those members who had spoken so far. There was no doubt that, under existing international law, and even in the foreseeable future, no State could be said to owe an obligation to accept the establishment of consular relations with another.

45. In fact, the proposal of the Czechoslovak Government did not conflict in any way with the rule that mutual consent was necessary for the establishment of consular relations. The right embodied in the Czechoslovak proposal was similar to the "right of legation" which had been accepted for many centuries as one of the attributes of a sovereign State. The right of legation did not mean that a State could send a diplomatic mission to a foreign country without that country's consent. It merely meant that every sovereign State had the right to maintain diplomatic relations with foreign States.

46. In like manner, the idea embodied in the proposal was that every sovereign State had the capacity to conduct consular relations. The affirmation of that legal capacity would introduce a progressive idea into the draft articles but, since the question was largely a theoretical one, it might perhaps be expedient not to include it, in view of the practical difficulties to which it might give rise.

47. Mr. ŽOUREK, Special Rapporteur, said that the Chairman had aptly described the theory on which the proposal was based. The right of a State to conduct consular relations was of the same order as the right of legation and the right to conclude treaties. No one had suggested that, because all sovereign States had treaty-making capacity, a State was under any obligation to agree to enter into a particular type of treaty with another.

48. The right to conduct consular relations, like the right of legation, was an attribute of the sovereign State. At a time when entities other than States were increasing in number in the international scene — in the form, in particular, of intergovernmental organizations — it was of more than theoretical interest to specify that only States possessed those rights.

49. The use of the term "right" in the context was not inappropriate. It was quite common in law — and particularly in constitutional law. By virtue of the principle of the sovereign equality of States, the right of a State to maintain consular relations could, in each specific case, be exercised only with the agreement of the other State concerned.

50. The fact that the right to maintain consular relations was not backed by a sanction was not a valid argument against the proposal. Since Roman times, the concept of *lex imperfecta* had been familiar to all lawyers. That

concept was also familiar in international law, which differed radically from municipal law in so far as sanctions for enforcing that right were concerned.

51. Since the Vienna Convention did not contain any provision on the right of legation, he was prepared, solely as a matter of expediency, not to press for the inclusion of an article concerning the right to maintain consular relations, but he still believed that the idea was a sound one and that the draft without an article concerning the right to maintain consular relations would be incomplete.

52. Mr. MATINE-DAFTARY said that if a State admitted into its territory nationals of another State in large numbers, it would be most unfair for it to refuse to those aliens the consular facilities to which they were legitimately entitled.

53. He recalled that, in the course of the discussion during the eleventh session, the late Professor Scelle had pointed out (496th meeting, para. 28), that "the consular function was one of the typical examples of the organization of international law. International trade was the foundation of international law... As long as trade relations subsisted, and the interests of nationals of the sending State continued to need protection, even if the diplomatic relations were severed, consular relations should continue despite the severance of diplomatic relations... Furthermore, consular relations should be established with a sovereign or semi-sovereign State, even if in the absence of diplomatic relations."

54. At the twelfth session, the late Professor Scelle had reiterated the same views (547th meeting, para. 37) and had maintained that, under international law, a State was not absolutely free to maintain or not to maintain diplomatic and consular relations with other States: a State which recognized another was "under an obligation to maintain diplomatic and consular relations with it".

55. Sir Humphrey WALDOCK supported the suggestion that the draft should not contain any provision on the question under discussion. The fact that the Vienna Conference had not included in the Convention on Diplomatic Relations any provision on the subject of the right of legation fully justified that approach.

56. Mr. YASSEEN said that the Chairman's conception was correct. It was not a question of a right, but of capacity, capacity of enjoyment, but there was no need to say so expressly in the draft, since that principle was clearly implicit in article 2.

57. Mr. BARTOŠ agreed with Mr. Yasseen and added that that capacity could not be regarded as analogous to certain so-called constitutional rights which had been proclaimed in nineteenth century liberal constitutions of some countries, but which were not backed by any specific remedies or means of enforcement. Even those countries now stated those rights in a different form and had established constitutional remedies.

58. In the case under discussion, the Commission had no need to go further than to uphold the thesis, so cogently argued by Mr. Scelle and championed by Mr. Matine-Daftary, that States which belonged to

the international community should respect the institutions of that community, one of them being the institution of consuls as a means of protecting the rights of individuals. Mr. Scelle had even gone so far as to argue that States were not entitled to repudiate at discretion consular relations once they had been established. That extreme view had not been endorsed by the Vienna Convention, which had provided for the severance of diplomatic relations. Consular law, as it stood, also recognized the possibility of severance of consular relations. For reasons of State or out of political considerations, consular relations could be severed at any time, and in his view the question was whether the severance depended solely on the political decision of the State desiring it or whether it was conditioned as observance of the procedure laid down in the consular convention for renunciation. In practice, severance depended on the unilateral, political decision of the State.

59. Circumstances were not propitious for transforming the capacity to establish consular relations into an enforceable right, and a statement on those lines might be inserted in the commentary in order to explain why the Commission considered that a provision on the subject should not be inserted in the draft.

60. The CHAIRMAN said he would take it that the Commission did not wish to reverse the decision taken at the previous session not to include an article in the sense proposed by the Czechoslovak Government (*cf* commentary (4) to article 2).

It was so agreed.

PROPOSAL BY MR. HSU

61. Mr. HSU said that he had arrived late during the session and had been surprised to find that the Special Rapporteur's third report made no mention of the comments of the Government of China (A/CN.4/136/Add. 1). He appreciated that they might have been overlooked by inadvertence, but that was particularly unfortunate at a session during which one of the Commission's main tasks was to examine the comments by governments in order to determine whether or not they could be taken into account in the draft. Its efforts to encourage governments to submit comments would certainly not be successful if such omissions were allowed to occur.

62. At that late stage in the discussion he would not ask the Commission to review the Chinese Government's comments, but only wished to draw its attention to the last comment concerning a provision for the settlement of disputes. As such an addition might not be found acceptable, he proposed that the Commission should recommend in its report that the conference of plenipotentiaries should consider an optional protocol analogous to that adopted by the Vienna Conference concerning the compulsory settlement of disputes.

63. A provision of that kind had been inserted in other drafts prepared by the Commission.

64. The CHAIRMAN remarked that to complain that comments made by the Kuomintang Group had not been taken into account seemed strange, because

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

It was so agreed.

The meeting rose at 1 p.m.

613th MEETING

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

Chairman: Mr. Grigory I. TUNKIN

Co-operation with other bodies

(Resumed from the 605th meeting)

[Agenda item 5]

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